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CORRESPONDENCE**

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**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** June 15, 2017  
**TO:** Honorable Mayor and Councilmembers  
**FROM:** City Attorney  
**SUBJECT:** Proposed Initiative for the San Diego River Park and Soccer City

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**INTRODUCTION**

This memorandum supplements the Office of the City Attorney's May 23, 2017, Report to the Honorable Mayor and Members of the City Council (Report) regarding the Proposed Initiative for the San Diego River Park and Soccer City (Initiative). This memorandum provides further information and clarification about some issues addressed in the Report, and addresses other legal questions that have been raised by the Mayor's Office, City Councilmembers, and the public. The questions are organized into two categories: (1) legal issues associated with the adoption of the Initiative (either directly by the City Council or by the voters through an election); and (2) legal issues that may arise during implementation of the Initiative, if adopted. Because of the high likelihood of litigation over the Initiative, this memorandum is submitted confidentially to legally protect this Office's analysis and conclusions. Nothing contained in this memorandum should be interpreted to indicate support for or opposition to the Initiative.

**QUESTIONS PRESENTED**

1. What legal questions have been raised about the adoption of the Initiative?
2. What legal questions have been raised about the implementation of the Initiative, if it is adopted?

## SHORT ANSWER

1. Numerous legal questions have been raised about the adoption of the Initiative, including (A) when the Initiative may be placed on the ballot, (B) whether the development agreement and “legislative standards” for the proposed lease may properly be approved by citizens’ initiative, (C) whether the commitments in the letter to the Mayor from MLS SD Pursuit LLC dated May 18, 2017, are legally enforceable, (D) whether the Initiative is consistent with state laws regarding lease requirements, (E) whether the Initiative is consistent with state laws regarding specific plans, (F) what activities are permissible in relation to voter initiatives, (G) whether adoption of the Initiative could result in potential water ratepayer challenges, and (H) whether the Initiative complies with the single subject rule of the San Diego City Charter (Charter). These questions are addressed in Section I of this memorandum.

2. Numerous legal questions have been raised about the implementation of the Initiative, if it is adopted, including (A) the extent of the Mayor’s authority regarding the proposed lease, (B) whether California Environmental Quality Act (CEQA) review of future implementing actions would be required, (C) what the effect of the qualified lessee’s failure to construct the project would be, (D) what level of responsibility the City would have regarding any environmental contamination discovered during construction, (E) whether construction of the development would be subject to any timing requirements, (F) whether the qualified lessee’s construction of the River Park would be subject to any timing requirements, (G) what effect a transfer of an interest in the property would have, (H) whether the Surplus Land Act would apply, (I) whether Charter section 221 (regarding sale of 80 or more acres of property) would apply, (J) whether mandatory business interest disclosures required by Charter section 225 would be required, (K) whether the San Diego River Conservancy Act would apply, (L) whether the Specific Plan’s Permitted Use Table could be easily implemented, (M) whether language regarding permits and enforcement is impermissibly vague, (N) whether the traffic improvements in the Specific Plan would be made, (O) whether the anticipated zoning amendments would occur, and (P) how the obligations in the Initiative would be tracked. These questions are addressed in Section II of this memorandum.

## BACKGROUND

The Initiative proposes the development and use of approximately 233 acres of City-owned real property at and near Qualcomm Stadium (Existing Stadium Site), and 20 acres of City-owned real property and improvements on Murphy Canyon Road (Murphy Canyon Leased Property), which was previously the San Diego Chargers’ practice facility. The Existing Stadium Site and the Murphy Canyon Leased Property are collectively referred to as the Property. Under the Initiative, the Mayor “shall execute” a 99-year lease for the Property (Lease) with a Qualified Lessee,<sup>1</sup> if the Mayor determines that the Lease meets the requirements of the San Diego

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<sup>1</sup> A Qualified Lessee is generally defined as an entity that submitted an application and is under consideration for or has been awarded a professional soccer league franchise to be located in San Diego, as of the effective date of the Initiative. Initiative, § 7, 61.2802, p. 12. If no Qualified Lessee submits a proposed Lease meeting the requirements of the Initiative within one year after the Initiative’s effective date, a Qualified Lessee can also be an entity that has

Municipal Code (Municipal Code or SDMC) provisions that would be added by the Initiative and is otherwise consistent with the Mayor's authority, duties, and obligations under the City Charter. Initiative, § 7, 61.2805(b) and 61.2805(d), p. 30. The Initiative also includes adoption of the San Diego River Park and Soccer City Development Agreement (Development Agreement). Initiative, § 9, p. 31.

On March 2, 2017, the Initiative proponent<sup>2</sup> submitted a notice of its intent to circulate the petition to the Office of the City Clerk. On April 24, 2017, the Initiative proponent submitted the Initiative petition to the City Clerk. On May 22, 2017, the City Clerk found that the petition contained the requisite number of valid signatures. Therefore, the petition will be presented to the City Council (Council) at a hearing that has been scheduled on June 19, 2017.

## ANALYSIS

### I. LEGAL QUESTIONS ABOUT THE ADOPTION OF THE INITIATIVE

#### A. Timing for Placement of the Initiative on the Ballot

As discussed in the Report, because the City Clerk found that the Initiative petition contained the requisite number of valid signatures, the Council must either adopt or reject the Initiative as presented. Report, Introduction, p. 1; SDMC §§ 27.1034, 27.1035. On June 19, 2017, if the Council chooses not to adopt the Initiative, it must submit the Initiative to the voters at either the next citywide general election (in this case, November 2018) or earlier if the Council desires.<sup>3</sup> San Diego Charter § 23.<sup>4</sup>

While any of these election dates would be legally permissible, the Initiative states that if the Lease is executed after December 31, 2017, for any reason, "the *Qualified Lessee's* obligations to improve City land for public recreation purposes under any *Lease* and the *Specific Plan* shall

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a collegiate football program (including San Diego State University), or an entity that has been awarded the franchise for a professional sports league team in the San Diego market. Initiative, § 7, 61.2804(e), p. 28.

<sup>2</sup> The media has widely reported FS Investors to be the Initiative proponent. However, in accordance with Municipal Code sections 27.1008 and 27.1010, the proponent of the Initiative is Catherine April Boling because she signed the Statement of Reasons that was included in the Initiative petition. There is also a website, GoalSD.com, that contains information related to the Initiative. The website says that it is paid for by GOAL: San Diegans for the River Park, School Funding, Soccer and a Tax-Free Stadium - A Committee to redevelop the Qualcomm Stadium site, sponsored by MLS SD Pursuit, LLC, with financial support from Michael Stone and Peter Seidler, 7185 Navajo Rd., SD. This memorandum will refer to the "Initiative proponent."

<sup>3</sup> If the Council chooses to put the Initiative on a ballot, the Resolution will follow the Charter and state that the matter will be placed on a "Municipal Special Election consolidated with the next City-wide Municipal General Election ballot in November 2018, unless the Council decides to place the matter on the ballot of a City-wide Municipal Special Election held prior to that general election." This means that the ballot measure is to be sent to the November 2018 ballot, unless the Council later considers a separate item to approve a different date for the measure to be heard.

<sup>4</sup> Charter section 23 was amended by Measure L on the November 2016 ballot. The contention that the listed choices are inconsistent with Measure L is incorrect.

be reduced by \$20,000,000.”<sup>5</sup> Initiative, § 7, 61.2804(i), p. 29. Therefore, if the Initiative is placed on the ballot for an election that occurs after this year, a Lease would definitely not be executed by December 31, 2017, and under the Initiative the Qualified Lessee’s obligation for public recreation expenditures would be reduced by \$20,000,000.<sup>6</sup> The import of this reduction is unclear, however, because the Initiative does not specify the amount of money the Qualified Lessee must spend on improving City lands for public recreation purposes.<sup>7</sup>

**B. Adoption of Development Agreement and Lease Provisions by Citizens’ Initiative**

As you have been previously advised, the right to initiative applies to legislative rather than administrative actions. *Citizens for Jobs and the Economy v. County of Orange*, 94 Cal. App. 4th 1311, 1332 (2002); *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001). Administrative or executive acts are beyond the electorate’s power. *Dunkl*, 86 Cal. App. 4th at 399. It is uncertain whether the Municipal Code sections that the Initiative adds containing requirements for a Lease, and the adoption of a Development Agreement, are legislative acts. While amending the Municipal Code is a legislative act, if the legislative act infringes on the administrative or executive powers of the Mayor, those acts may be subject to challenge.

The Charter makes no provision for any role of the Council in the day-to-day administrative affairs of the City. This Office has previously opined that the negotiation of contracts is an administrative function within the exclusive control of the City Manager (now the Mayor). 1986 Op. City Att’y 54 (86-7; Nov. 26, 1986). Forming a contract, including leases and development agreements, typically involves negotiating the terms and conditions of the contract. The Charter also provides that the City Manager (now Mayor) shall execute all contracts for the Departments under his control. San Diego Charter § 28. The Initiative appears to usurp the Mayor’s administrative functions by essentially prohibiting the Mayor from negotiating certain terms and conditions of any future Lease, and by adopting a Development Agreement that presumably the Mayor and the Qualified Lessee must execute, without any negotiation.

The Initiative attempts to avoid this type of challenge by providing that if the Mayor determines the Initiative impermissibly invades his authority under the Charter to take “executive or administrative actions that cannot be affected or controlled by legislative enactment or standards in this Division,” then the Mayor may exercise his authority in the manner permitted by law. Initiative, § 7, 61.2805(c), p. 30. While this provision may allow the Initiative to withstand a

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<sup>5</sup> The only exception is if the Initiative is effective before August 1, 2017, and the Qualified Lessee fails to submit a complete Lease application that complies with the Initiative within 30 days of the Initiative’s effective date. Initiative, § 7, 61.2804(i), p. 29.

<sup>6</sup> It is also possible that if the Initiative was placed on a ballot in November 2017, the Lease would not be executed by the end of this year. This will be a complex lease to negotiate and draft, and the Qualified Lessee must also agree to the terms and sign before the end of this year, which the City cannot control. Also, if lawsuits are filed either before or after the Initiative is adopted, a court could issue an injunction preventing the Lease from being executed until the litigation is concluded.

<sup>7</sup> This appears to refer to a reduction in the Initiative’s \$40,000,000 expenditure limit for the permitting, grading, and construction of the River Park. Initiative § 7, 61.2805(c)(7)(C) and (D), p. 30.

challenge to the proposed Municipal Code sections containing the Lease requirements, it does not apply to the issues related to the Development Agreement.<sup>8</sup>

If a successful challenge were brought because the right to initiative applies only to legislative acts, the proposed Municipal Code sections, the resulting Lease, and the Development Agreement could be declared invalid. A court would need to evaluate the effect any invalidated documents would have on the Initiative. The City or another party could file a lawsuit on this basis at any time, including after the Council hearing on July 19, 2017, and if the Initiative is submitted to the voters, after the election occurs.

#### **C. Legal Enforceability of Commitments in May 18, 2017 Letter to the Mayor**

MLS SD Pursuit LLC (MLS SD) sent a letter to the Mayor dated May 18, 2017 (MLS SD Letter), which included numerous commitments that MLS SD stated it would agree to if the Initiative is approved and it is selected as the Qualified Lessee. While unlikely, it is possible that MLS SD would not be the Qualified Lessee, in which case, any other entity that becomes the Qualified Lessee would only be subject to the terms adopted in the Initiative. Even if MLS SD is the ultimate Qualified Lessee, the MLS SD Letter is not a legally enforceable contract.<sup>9</sup> To the extent that the City desires to incorporate MLS SD Letter's commitments into the Lease, each commitment must be analyzed to ensure that it does not conflict with or improperly amend the Initiative.<sup>10</sup> As discussed in the Report, an Initiative generally may not be amended without circulating a new petition. *See* Report, § XIII, p. 10 and Section II.A of this memorandum.

#### **D. Consistency with State Laws Regarding Lease Requirements**

Government Code section 37380 provides that a city may not lease property in excess of 55 years unless the lease "shall be subject to periodic review by the city and shall take into consideration the then current market conditions . . ." The section further grants the "legislative body" the authority to determine which provisions of the lease will be subject to periodic review

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<sup>8</sup> The legal analysis for the Development Agreement is more complex and can be explained in more detail upon request. For example, an additional concern with the Development Agreement is the adoption of the Development Agreement at the same time as the Initiative. Initiative § 9, p. 31 and Development Agreement, § 3, p. G-5. This provision is inconsistent with California Government Code (Government Code) section 65865(a), which provides that a development agreement can only be entered into with a person having a legal interest in the property at issue. The Qualified Lessee will not have a legal interest in the Property until a 99-year lease for the Property is executed.

<sup>9</sup> The MLS SD Letter also states that MLS SD expects the Lease terms to be released in advance of any election date. Even assuming that occurs, the draft Lease will not be enforceable until the Initiative is adopted, the Mayor selects a Qualified Lessee, and the Lease is executed by both parties.

<sup>10</sup> This is a complex analysis. If something is addressed in the Initiative, any additional commitments could either conflict with or improperly amend the Initiative. New commitments may be permissible, so long as there is no conflict with the Initiative. Any conflicts must be analyzed under the Initiative's provisions outlined in Section II.A of this memorandum to see if the desired changes are permissible. This Office will provide assistance with this analysis when the potential Lease terms are known. At this point, it is unclear whether MLS SD and the Mayor would be able to agree on language to include in the Lease because the "core terms" in the MLS SD Letter are general and susceptible to interpretation (e.g., "appropriate indemnification protection will be negotiated").

and the timing of those reviews. It appears the state intended this provision to apply to charter cities such as San Diego, although there are no court cases discussing its applicability.<sup>11</sup> The Initiative does not provide for any periodic review of the proposed 99-year Lease, as required.<sup>12</sup>

The MLS SD Letter states that MLS SD would be willing to agree to a term in the Lease that would "allow for periodic review." However, it is unclear whether such a Lease term could meet the requirements of the Government Code because the Initiative does not identify any terms and conditions subject to periodic review. In order to comply with the statute, the review must allow the City to take into consideration the then current market conditions. The Initiative appears to limit the City's ability to make changes to certain terms of the Lease, such as rent, based on current market conditions in the future. Given these restrictions, it is unclear that such a provision in the Lease would satisfy the Government Code requirements. *See Report, §§ II and III, pp. 5-6.*

#### **E. Consistency with State Laws Regarding Specific Plans**

The Specific Plan must comply with the state law requirements in Government Code sections 65451 through 65457. The specific plan portions of the Government Code are not applicable to charter cities except to the extent the City has adopted them. Cal. Gov't Code § 65700. The Municipal Code adopts the requirements of Government Code section 65451 for the preparation of the City's specific plans (requiring texts and diagrams specifying the development, standards and criteria by which the development will proceed, and a program of implementation measures). SDMC § 122.0107. Despite allegations that the Specific Plan does not contain enough specific information, there are no obvious inconsistencies between the Specific Plan and state law. While there also have been broad public statements that the Initiative is inconsistent with the City's General Plan, this Office cannot analyze the statements because no specific inconsistency has been identified.

#### **F. Laws Regarding Permissible Activities in Relation to Voter Initiatives**

Although this Office has no information that City officials and employees have engaged in impermissible activities, such allegations can always be made. As you have been informed, City resources cannot be used to expressly advocate for a voter initiative. Otherwise, a court may consider the initiative a "City initiative." Express advocacy with public resources can also lead to civil and criminal penalties for misuse of public funds. If a court determines that a voter initiative

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<sup>11</sup> The statute provides that additional provisions of the section do not apply to charter cities, thus implying that the state intended the quoted provision to apply to a charter city. However, the ultimate determination of applicability to charter cities would be decided by a court.

<sup>12</sup> Although Government Code section 37396 allows a City to lease property for a stadium, park, or recreational purposes for up to 99 years, it is unclear whether this type of lease would be subject to the general requirement that leases beyond 55 years must be periodically reviewed. However, because the Lease contemplated by the Initiative will allow uses beyond the stated purposes in Government Code section 37396, the City likely would still be required to comply with Government Code section 37380.

should be treated like a City measure, then procedural requirements that generally do not apply to voter initiatives and only apply to actions of a local government could be triggered (e.g., CEQA review). However, to date no court has invalidated a voter initiative on that basis. *See* City Att’y MS 2017-6 (Mar. 21, 2017) and confidential memorandum from City Attorney to Honorable Mayor (May 11, 2017) (on file with the Office of the City Attorney).

#### **G. Potential Challenges from a Water Ratepayer Perspective**

The Property covered by the Initiative includes assets of the City’s Water Fund (areas on and adjacent to the Existing Stadium Site) and Sewer Fund (areas south of the river, adjacent to Camino Del Rio North). Portions of these areas are identified as locations of future water and sewer facilities in the Pure Water Program Environmental Impact Report. The location of these water and sewer facilities are inconsistent with the park use identified in the Initiative for the same location. Arguments could be raised that ratepayer assets cannot legally be designated for non-ratepayer uses by citizens’ initiative, although there is no law in this area.

Additionally, under the Pure Water Program, the City has committed to producing 83 million gallons per day of potable water from recycled wastewater. If the Initiative is approved, the water utility would have to identify other property near the aquifer for Pure Water facilities, move that portion of the Pure Water Program to another area of the City, or cancel that phase of the Pure Water Program. This Office defers to City staff on its plans for proceeding.

#### **H. Compliance with the Single Subject Rule**

The Charter and the California Constitution both require that all initiative measures be limited to a single subject.<sup>13</sup> San Diego Charter § 275(b), Cal. Const. art. II, § 8(d). Because the Initiative’s components are reasonably germane to a common theme, purpose, or subject (one development plan), a court would likely conclude that they relate to a single subject.

### **II. LEGAL QUESTIONS ABOUT THE IMPLEMENTATION OF THE INITIATIVE**

#### **A. Extent of Mayor’s Authority Regarding the Lease**

##### **1. Can the Mayor Negotiate or Add Terms to the Lease?**

This is a complex analysis. *See* note 10. The Mayor can negotiate and add terms to the Lease, so long as they do not conflict with the Initiative, or are otherwise permitted by the Initiative.<sup>14</sup>

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<sup>13</sup> This Office recently released two memoranda including a legal analysis of the single subject rule. *See* City Att’y MOL No. 2017-5 (May 19, 2017) and City Att’y MOL No. 2017-6 (June 7, 2017). *See also* City Att’y Report 2016-5 (Apr. 11, 2016).

<sup>14</sup> The statements in the Latham and Watkins letter dated June 1, 2017 (Latham Letter) responding to the Report suggest that the majority of “questions, ambiguities or concerns” with the Initiative can be remedied in the Lease. The resolution is not that straightforward because of the number of ambiguities and contradictions in the Initiative, and the reality that all issues cannot be anticipated before a Lease is executed. Also, the Lease terms cannot

Initiative, § 7, 61.2805(a), p. 30. If the terms conflict with the Initiative, the Mayor can still add terms if they are within the Mayor's administrative authority pursuant to the Charter or if the Qualified Lessee requests the changes.<sup>15</sup> Initiative, § 7, 61.2803(c)(26), p. 17 and 61.2805(c), p. 30. This Office can suggest additional terms that should be added to protect the City during lease negotiations. Pursuant to the Initiative, the Mayor has the authority to sign the Lease without Council approval. Initiative, § 7, 61.2805(e), p. 30.

## **2. Must the Mayor Execute the Lease?**

Under the Initiative, the Mayor "shall execute" a 99-year lease for the Property with a Qualified Lessee if the Mayor determines the Lease meets the requirements of the Municipal Code provisions to be added by the Initiative and is otherwise consistent with the Mayor's authority, duties, and obligations under the Charter. Initiative, § 7, 61.2803(b) and 61.2803(d), p. 30. If the Mayor determines that any requirements of the Initiative's Municipal Code provisions impermissibly invade his authority under the Charter to take any executive or administrative actions that cannot be affected or controlled by a legislative enactment, then the Mayor may exercise his executive or administrative authority to determine the terms of the Lease and decide whether or not to execute the Lease. Initiative, § 7, 61.2805(c), p. 30.

## **3. What Happens if the City and Qualified Lessee Disagree over the Terms of the Lease Beyond the Requirements of the New Municipal Code Provisions Added by the Initiative?**

It is unclear how a disagreement between the City and the Qualified Lessee regarding terms of the Lease beyond the requirements of the new Municipal Code provisions would be resolved. The Initiative provides that any Lease is null and void if the Qualified Lessee does not execute and return the Lease to the City within 10 business days after the Lease has been executed or approved for execution by the City. Initiative, § 7, 61.2805(f), p. 30. Ultimately, if the Qualified Lessee did not agree to the additional Lease terms proposed by the City, the issue would likely be litigated in court. If a judge determined that the additional Lease terms were within the Mayor's authority to add, the terms would stand.<sup>16</sup> If a judge determined that the additional Lease terms were not within the Mayor's authority to add, the terms would be removed, and the Mayor would have to reevaluate the Lease without the additional terms to determine whether the Initiative required him to execute the Lease. The Initiative does not provide a standard of review for the Mayor's determinations, and it is unclear what level of deference the Mayor's determinations would be given by a court. However, even if a judge determined that the

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contradict or change the Initiative, except as set forth in Section II.A of this memorandum. This memorandum addresses several of the statements in the Latham Letter, to resolve any confusion.

<sup>15</sup> Departure from the new provisions to be included in the Municipal Code at the request of the Qualified Lessee is allowed "to satisfy the requirements of an applicable professional sports league or otherwise facilitate the development of the *Property* in accordance with the *Specific Plan*." Initiative, § 7, 61.2803(c)(26), p. 17.

<sup>16</sup> Any determination regarding the ability to add other terms will implicate other legal issues, such as whether the execution of the Lease is a legislative act appropriate for an initiative and whether applicable CEQA requirements were met.



additional Lease terms were permissible, the Qualified Lessee need not accept the terms and execute the Lease. Even if no Lease was executed, the Initiative and all of its terms and conditions would still be in effect, and would control the use of the Property and the terms of any future lease.<sup>17</sup>

#### **B. CEQA Review of Future Implementing Actions in the Initiative**

Adoption of the Initiative, either directly by the Council or by the voters, is not subject to CEQA review because it is a citizens' initiative. *Tuolumne Jobs & Small Bus. Alliance v. Superior Court*, 59 Cal. 4th 1029, 1040-42 (2014). However, implementation of the Initiative would require future actions. If any of those actions are discretionary, CEQA review would be required. For example, decisions whether to grant approvals other than ministerial development permits (e.g., subdivision approvals, easement vacations, and conditional use permits) may be subject to additional CEQA review.

The Initiative states that approval of the Lease is ministerial, meaning the Lease must be granted to a Qualified Lessee if specified conditions are met. Initiative § 7, 61.2805(d), p. 30. The courts have been clear that merely stating something is ministerial does not make it so. The Lease contains several provisions that give the City discretion. Some of these provisions include the Mayor's determination of the fair market value of the Property, the Mayor's ability to add terms to the Lease, the Mayor's ability to determine which entity to select as the Qualified Lessee, the City's ability to establish the requirements for a professional football team, and, most significantly the Mayor's ability to determine whether or not to execute the Lease at all. (Initiative, § 7, 61.2803, 61.2804, and 61.2805, pp. 17, 18, 21, 28-29, 30). The inclusion of discretionary provisions related to the Lease could form the basis of a future lawsuit alleging a CEQA violation if the City executes the Lease without first conducting environmental review in accordance with CEQA. The type of necessary CEQA review would need to be evaluated based on the specific discretionary decision involved and its physical impact on the environment.

#### **C. Effect of Qualified Lessee's Failure to Construct Project**

If the Initiative is adopted, a Qualified Lessee would be awarded a 99-year Lease. If the Qualified Lessee either failed to begin construction or began, and then decided not to proceed with the development, the City would have limited remedies. Under the Initiative, the City has limited rights to declare the Qualified Lessee in default of the Lease. The only basis for a default of the Lease provided for in the Initiative is if a new Sports Stadium is not built within seven years; however, even that basis for default is subject to any non-disturbance agreements with any sublessee of any portion of the Property other than the portion on which a Sports Stadium will be constructed. *See Report*, § V, p. 7.

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<sup>17</sup> The City's remedies are also unclear if the Qualified Lessee does not comply with the terms of the Initiative that are not included in the Lease. The City would probably be required to bring a lawsuit against the Qualified Lessee, seeking court enforcement of the Initiative's terms.

Therefore, if the Qualified Lessee either failed to begin construction, or began but later did not proceed, the Property could sit vacant for at least seven years before a default of the Lease may be possible. Even if there is a default of the Lease, there may not be another Qualified Lessee. The Initiative provides that if a Qualified Lessee does not submit a Lease meeting the requirements of the Initiative within one year after the Initiative's effective date, then the Mayor may offer the Lease to a collegiate football program (including San Diego State University), or an entity that has been awarded a franchise for a professional sports league team in the San Diego market. Initiative, § 7, 61.2804(e), p. 28. Assuming MLS SD is selected as a Qualified Lessee within one year of the Initiative's effective date, an entity with a collegiate football program such as San Diego State University would no longer be eligible for a Lease of the Property. If there was no Qualified Lessee, the Property would sit vacant for the remaining 99-year Lease term, unless the Initiative was amended by a public vote, or until 2033, when the City generally may amend the Initiative without a vote. Initiative, § 14(A), p. 33.

The MLS SD Letter states that MLS SD would agree to a Lease term providing that if it is not awarded a major league soccer franchise, "the lease will terminate, [they] will not proceed with any development of the site, and the site would remain with the City of San Diego." Such a term would not allow the City to develop the Property. Based on the wording of the Initiative, the new lease provisions in the Municipal Code would remain in effect. The City would be required to lease all the Property to a Qualified Lessee for 99 years. If no entity met the definition of a Qualified Lessee, the City would not be able to use the Property, and the Property would remain vacant until a Qualified Lessee came forward, the Lease term ended, or the Initiative was amended.<sup>18</sup>

#### **D. Environmental Contamination Discovered During Construction**

As discussed in the Report at pages 11-12, it is unknown at this time whether additional contamination will be discovered on the Existing Stadium Site during construction, and if so, whether the City would be required to fund any remediation. With respect to potential contamination, the Initiative refers to existing agreements between the City and third parties to clean up, rehabilitate, redevelop, and remediate the contamination that exists on the Existing Stadium Site. Initiative, § 7, 61.2803(j)(3)(B), p. 26. Such references appear to be to a Settlement Agreement and General Release that the City entered into with Kinder Morgan in June 2016 related to soil and groundwater contamination on the Existing Stadium Site from Kinder Morgan's Mission Valley Terminal, an aboveground tank farm facility located adjacent to the Existing Stadium Site. Settlement Agreement and General Release (June 30, 2016) (Kinder Morgan Agreement).

The Initiative states that the Kinder Morgan Agreement remains in effect, and implies that it obligates Kinder Morgan to fund any remediation costs caused by environmental contamination

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<sup>18</sup> If a new Qualified Lessee later existed, a new 99-year Lease would be awarded, based on the same March 2, 2017 date of value, and the rent would not include any increases in the Property's value caused by the Initiative's passage.

discovered during development.<sup>19</sup> Contrary to the implication of the Initiative, the Kinder Morgan Agreement does not guarantee that Kinder Morgan funds any necessary remediation costs. Pursuant to the Initiative, any remediation costs not covered by the Kinder Morgan Agreement are the City's responsibility. Initiative, § 7, 61.2803(j)(3)(B) and (D), p. 26. The developers of the property would not be liable for remediation costs caused by any existing contamination. Initiative, § 7, 61.2803(j)(3), p. 26, Development Agreement, ¶ 9, p. G-7.

The responsibility for remediation costs is unclear because the indemnification requirement in the Kinder Morgan Agreement is specific to the City, and contemplates the redevelopment of the property by the City, not a third party. Moreover, there are several qualifiers to the City's recovery: only certain costs are included,<sup>20</sup> the costs must be actually incurred *by the City*, the City must give 60 days' advance notice of an activity that would trigger additional costs, and the notice must include a redevelopment plan and scope of work, including a written estimate of the costs. Kinder Morgan Agreement, § 3. Most significantly, the indemnification requirements are specific to the City's development of the property, and *the City may not assign or transfer the right to recovery to a third party*. Kinder Morgan Agreement, §§ 3, 3.1(a) and 5.2.

If environmental contamination is discovered during development, determining the party financially responsible for remediation would be a complex process, would result in construction delays, and must be analyzed further, based on the facts. Should contamination be discovered, the City should expect a high risk of future litigation and potentially significant costs.

#### **E. Timing of Development Construction**

As discussed in the Report, the Initiative makes several contradictory statements about the timing of the construction of the proposed development. Report, note 14, p. 4. The Latham Letter highlights the sentence in the Initiative that "The River Park/Community Park and Active Sports Fields shall commence construction not later than the date of the completion of the Sports Stadium." Initiative, Exhibit F, § 8.3.1, p. F-129. However, there are at least three other provisions in the Initiative that contradict this statement: (1) "This Specific Plan does not require that the development occur in any particular order" (Initiative, Exhibit F, § 8.3.1, p. F-129); (2) "the Developer shall have the right (without the obligation) to develop the Property in such order and at such rate and at such time as the Developer deems appropriate within the exercise of its business judgment . . . ." (Development Agreement, ¶ 15, p. G-9); and (3) "nothing in this Agreement shall be deemed to obligate the Developer to initiate or complete development of the Property as contemplated in the Specific Plan, or any portion thereof, within any time period of time [sic] or at all or to develop the Property or any portion thereof to the full size or density

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<sup>19</sup> The Initiative also forbids the City and Kinder Morgan from modifying the Kinder Morgan Agreement. Initiative, § 61.2803(j)(1), p. 25. Although this Office has not yet analyzed whether such a prohibition in a citizens' initiative is legally permissible, if it is, the Kinder Morgan Agreement may only be modified the same way as the Initiative – by a majority vote of the people until 2033. Initiative, § 14(A), p. 33.

<sup>20</sup> The Kinder Morgan Agreement addresses "Additional Redevelopment Costs" which include "additional, incremental costs that (1) are actually incurred by the City related to the Redevelopment of the Qualcomm Stadium Property, and (2) would not have been incurred but for Historical Releases." Kinder Morgan Agreement, § 3.1(a).

allowed in the Specific Plan” (Development Agreement, ¶ 8, p. G-6). It is unclear how these provisions would be reconciled.

#### **F. Timing of River Park Construction**

The Latham Letter states that the Specific Plan is clear that the Qualified Lessee must begin construction on the River Park no later than the date of the completion of the Sports Stadium, and that the City can enforce that provision. That is not the case. As discussed in Section II.E of this memorandum, there are several contradictory provisions in the Initiative about the timing of development. If regional, state, or federal permits are required, no parks or facilities would be required to be built at all. Initiative, Exhibit F, § 4.4, p. F-77. At best, the Initiative’s language about the construction of the River Park is unclear. *See* Report, § VI, p. 7. This could result in litigation over the interpretation of the language.

The MLS SD Letter states that MLS SD would build the River Park in all circumstances and maintain it throughout the term of the Lease. If this commitment is ultimately desired to be included in the Lease, this Office would need to analyze whether the commitment would be permissible under the Initiative’s provisions outlined in Section II.A of this memorandum. At this point, as discussed in Section I.C of this memorandum, the commitment is not legally enforceable and does not amend the Initiative.

#### **G. Effect of Transfer of Interest in Property**

Questions have arisen about what development obligations would be enforceable if the Qualified Lessee transferred its interests in the Property. As discussed in the Report, the Qualified Lessee may transfer all or a portion of its interest in the Property, by assignment, subletting, or sale (for any property acquired under the Option right). *See* Report, § XVI, p. 12. If that happened, the City would have the right to enforce the Lease obligations, including the affordable housing requirements and construction obligations related to a Sports Stadium and the parks, against the new assignee(s), sublessee(s), or owner(s). If a parcel was sold, the City could record a covenant running with the land that obligated the purchaser and subsequent owners to comply with the Environmental Mitigation Measures, for the duration of the Lease term. Report, Attachment 2, p. 4, citing Initiative, § 7, 61.2803(g)(6), p. 23.

#### **H. Application of Surplus Land Act**

Because the Initiative requires that the City provide an option to sell up to 79.9 acres of property, some have stated that the Surplus Land Act requires the land to be offered to entities designated in Government Code sections 54220 through 54233 (e.g., for affordable housing) before it can be sold. This argument would likely fail because the City did not determine that the subject land was not necessary for the City’s use. Also, Government Code section 54226 states that the Surplus Land Act shall not be interpreted to limit the power to sell property at fair market value, and no provision of the Surplus Land Act shall be applied if it conflicts with other statutory law (e.g., the citizens’ initiative rights).

**I. Application of Charter Section 221 (Sale of 80 or More Acres of Property)**

The Initiative allows a Qualified Lessee to purchase up to 79.9 acres of the Existing Stadium Site. The Charter requires a public vote for the sale of 80 or more contiguous acres of City property. San Diego Charter § 221. Because the option to purchase does not include 80 or more acres of property, Charter section 221 would not be triggered. Also, the Initiative requires a public vote before an additional 16 acres of property could be sold to construct a football stadium. Initiative, § 7, 61.2803(d)(2), p. 18.

**J. Mandatory Disclosure of Business Interests (Charter section 225)**

Charter section 225 mandates the disclosure of certain information from those applying for and transacting business with the City. Failure to disclose the required information is grounds for denying any application, proposed transaction, or transfer of interest in City property, and could result in the forfeiture of any rights and privileges granted.<sup>21</sup> San Diego Charter § 225. The language mandated by the Initiative allowing assignments (including assignments of the option to purchase), sales, and subletting appears to violate Charter section 225 because there is no mechanism in the Initiative requiring the City's approval, or even review, of the persons directly or indirectly involved with any assignments, sales, and subleases. Therefore, the City would not have the opportunity to review the required disclosure of the names, identities, and nature of all interests in the transaction of the persons involved in the proposed applications, transactions or transfers. Initiative, § 7, 61.2803(i), pp. 24-25. This deficiency likely could be remedied by adding a Lease term that required the Qualified Lessee to provide the information required by Charter section 225 to the City, and to have received the City's consent, prior to assigning, selling or subletting its rights in the Property. *See* section II.A of this memorandum.

**K. Application of San Diego River Conservancy Act**

State law provides that the San Diego River Conservancy "has the first right of refusal to acquire any public lands that are suitable for park and open space within the conservancy's jurisdiction [basically, within one-half mile on either side of the San Diego River] *when those lands become available.*" Cal. Pub. Res. Code § 32646 (emphasis added), *see also* Cal. Pub. Res. Code § 32632(g). The Initiative covers land near the San Diego River. However, it is unlikely that the Initiative would trigger this law because the lands are not "available" from the City; rather, the City is required to lease the lands pursuant to a citizens' initiative.

**L. Implementation of Permitted Use Table in Specific Plan**

The Permitted Use Table in the Initiative's Specific Plan (Initiative, Exhibit F, § 3.4.3, Table 3.1, pp. F-44 to F-52) is similar to the zoning use tables in the Municipal Code. The Municipal Code use tables apply citywide and are often amended to include new uses and changes. The amendment provision of Section 14 in the Initiative is very restrictive – no amendments are allowed until January 1, 2033, without a majority vote of the electorate (with few exceptions).

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<sup>21</sup> Only the City can enforce Charter section 225. *See* City Atty MOL No. 2016-15 (Oct. 12, 2016).

The inability to amend the use table could result in potential issues in the future. For example, as new zoning uses are identified (such as marijuana outlets), such uses could not readily be incorporated into the Specific Plan Permitted Use Table applicable to the Property. Additionally, the Specific Plan Permitted Use Table currently contains blank spaces and uses that are internally inconsistent. Also, certain uses that require a conditional use permit under the Specific Plan are not defined (e.g., alcoholic beverage outlets and automobile service stations).

#### **M. Vague Language Regarding Permits and Enforcement**

In many places, the Initiative's language regarding permits and enforcement is vague and potentially unenforceable. Three examples of unclear provisions include the "nuisance" provisions (Initiative, Exhibit F, § 3.6.13.1, pp. F-62 to F-63), the temporary use permit requirements required for outdoor activities (Initiative, Exhibit F, § 3.8.4, p. F-69), and sign requirements (Initiative, Exhibit F, § 3.7, pp. F-63 to F-67). Unclear provisions may not be enforceable based on the failure to provide due process of law.<sup>22</sup>

#### **N. Implementation of Traffic Improvements in Specific Plan**

The Specific Plan's provisions regarding traffic improvements are confusing, vague, and contradictory in places. The result is that the referenced improvements may not be constructed in time to serve the proposed development's needs. One example is the requirement that either the City or the developer assure that all improvements are in place prior to the completion of the relevant plan area. Initiative, Exhibit F, § 5.4.5, p. F-83. This raises the question of which entity is ultimately the one responsible for compliance, and whether one entity could force the other to complete the improvements. Another example is the schedule for the improvements, which requires either the payment for or the construction of the improvements. Initiative, Exhibit F, § 5.5, Table 5.2, p. F-94. A payment for the construction of the improvements would not necessarily result in the construction of those improvements in time to serve the corresponding development, and in fact "[d]evelopment may proceed, despite delays from this schedule, provided the developer has worked closely with the City to develop a schedule and deposited all funds in advance as required by the City, so long as the City determines there will be no dangerous or unsafe condition for motorists or pedestrians." Initiative, Exhibit F, § 5.5, p. F-93. In addition, improvements are required to interchanges that may be within CalTrans' jurisdiction, in which case the City could not issue any permits or approvals. Initiative, Exhibit F, § 5.5, Table 5.2, p. F-97.

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<sup>22</sup> "Due process" is a constitutional principle that requires a statute forbidding or requiring any act to be set forth in such terms that people of common intelligence do not need to guess at its meaning, or differ as to its application. 58 Cal. Jur. 3d, *Statutes* § 21 (2017). Such a standard not only provides law-abiding citizens with the guidelines they need to follow, it also prevents enforcement on a subjective, ad-hoc basis. 13 Cal. Jur. 3d, *Constitutional Law* § 334 (2017).

**O. Anticipated Zoning Amendments**

The Initiative proposes to rezone the Property to allow the land uses proposed in the Initiative. *See* Report, note 12, p. 4. To accomplish the rezoning, the Initiative includes an amendment to the City's zoning map. However, the official zoning map is an exhibit accompanying the ordinance that the Council approves for any zoning or rezoning action. An amendment to the zoning map alone does not actually rezone the Property. SDMC § 131.0103(a). For a property to be rezoned, the property must be identified, along with the new zone. This is probably not a fatal flaw, because the Initiative's language contains enough other information to rezone the Property (e.g., legal descriptions). The only exception may be the rezoning for the defined Existing-Adjacent Property<sup>23</sup> because that is not precisely identified. Also, because the Initiative exempts the area covered by the Specific Plan from the Mission Valley Planned District Ordinance (PDO), the Existing-Adjacent Property may also not be included in the PDO. It is unclear what effect the exclusion from rezoning of the Existing-Adjacent Property would have on the Initiative's development plan, because the intended uses at that location may already be allowed under the current zoning.

**P. Tracking of Obligations in Initiative**

There are numerous obligations in the Initiative for both the City and the Qualified Lessee. If the Initiative is adopted, this Office recommends that City staff prepare a list of the obligations to make sure they are being fulfilled (any immediate obligations upon passage of the Initiative should be identified now). For example, City staff must administer the Specific Plan to ensure compliance with the regulations and procedures. Initiative, Exhibit F, § 8.8.1, p. F-133. Also, if a new Sports Stadium has not been constructed within seven years (subject to tolling, as described in the Report, section V), the City must give the Qualified Lessee written notice of the reverter date between 90 and 150 days before it occurs. Initiative, § 7, 61.2803(h)(1)(C), p. 24. Failure to fulfill the Initiative's obligations could cause the City to waive important rights.

**CONCLUSION**

This memorandum supplements the prior City Attorney Report regarding the Initiative. This memorandum provides further information and clarification about some issues raised in the Report, and addresses other legal questions raised by the Mayor's Office, City Councilmembers, and the public after the Report was issued. The legal questions received involve adoption of the

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<sup>23</sup> The Initiative defines the Existing-Adjacent Property as the 3-acre parcel located immediately north of Friar's Road from the Existing Stadium Site, but there is no legal description or Assessor's Parcel Number to identify the site.

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Initiative and implementation of the Initiative, if adopted. Many of these issues involve complex legal analysis, and cannot be evaluated further until additional facts become known.

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