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MEMORANDUM

TO: Randolph Hom, City Attorney

FROM: Robert "Perl" Perlmutter

DATE: May 3, 2016

RE: Requests to revisit the amended Ballot Question for CCSGI

As directed, this memorandum responds to the April 29, 2016, email from Mr. Luke Lang, which poses several questions regarding the CCSGI ballot question (also referred to as the "ballot label") and asks the City Council to reconsider the amended ballot question it adopted on April 5, 2016. This memorandum also addresses similar concerns raised by other correspondence the City has received since the April 5th meeting. In our view, the City Council acted well within its statutory obligations and discretion both when it adopted the original CCSGI ballot question on March 31, 2016, and when it amended that ballot question on April 5. Both questions accurately "state the nature" of CCSGI as required under the applicable statutes and case law.

BACKGROUND

At a special meeting held on March 31, 2016, the City Council received the Elections Code section 9212 Report for the CCSGI Initiative and considered whether to adopt that Initiative or place it on the November 8, 2016, ballot. During the Council meeting, the initiative proponents, concerned residents, and members of the Council spent considerable time commenting on and discussing the provision of the Initiative that—the 9212 Report concluded—would increase maximum building heights for nearly three-quarters of the City by fifty percent, from 30 feet to 45 feet.

The significance of this aspect of the Initiative was not specifically addressed in the official title and summary, which the City Attorney had only fifteen days to prepare after the notice of intent to circulate the Initiative was first submitted. However, this aspect of the Initiative was thoroughly documented in the report that the Council directed City staff to prepare pursuant to Elections Code Section 9212. A "9212 Report" is the mechanism that the Legislature authorized cities to use to study the likely impacts of an initiative prior to making a decision whether to adopt the measure or place

it on the ballot. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1041 (explaining that "section 9212[ ] represents the Legislature's attempt to balance the right of initiative with the goal of informing voters and local officials about the potential consequences of an initiative's enactment"). The 9212 Report for the CCSGI Initiative described this 50% height increase as "[p]erhaps the most significant of the Initiative's amendments regarding [development and building] standards." *See* 9212 Report at 24.

Towards the end of the March 31, 2016, meeting, after Council members had indicated that they were inclined to place the measure on the ballot—rather than adopt it on their own—the City Council considered the form of the ballot question (sometimes referred to as the "ballot label") to be included in the official resolution placing the measure on the ballot. The ballot question proposed in the revised draft resolution prepared by City staff reads as follows:[1]

> Shall an initiative ordinance be adopted amending Cupertino's General Plan to limit redevelopment of the Vallco Shopping District, limit building heights along major mixed-use corridors, ***establish a 45 feet maximum building height in the Neighborhoods***, limit lot coverages for large projects, establish new setbacks and building planes on major thoroughfares, and require voter approval for any changes to these provisions? (emphasis added).

The Council discussed whether, in light of the conclusions in the 9212 Report, the bolded language should be modified to state that the Initiative would actually increase the maximum building height allowed by the General Plan in the Neighborhoods from 30 feet to 45 feet. Our office opined that either formulation would be lawful and would comport with the requirements of the Elections Code and applicable case law. The Council ultimately voted to place the Initiative on the ballot in the form of the revised ballot question proposed by staff. *See* Resolution Nos. 16-028 and 16-029.

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[1] The ballot question originally proposed by staff had included language indicating that the initiative would "limit building heights and lot coverages throughout the City." On March 31, the City received a four-page letter from the Nielsen Merksamer law firm arguing that—in light of the conclusions in the 9212 Report—this proposed ballot question did not comply with the Elections Code and would be invalidated by a court. In response, City staff prepared a revised proposed resolution and ballot question that was distributed (along with the letter from Nielsen Merksamer) at the start of the March 31 Council meeting.

On April 5, 2016, the Council held another special meeting to consider whether to modify the ballot question "to clarify the nature of the Initiative, including that it will 'increase' heights in the Neighborhoods." At the conclusion of the April 5 meeting, the Council adopted Resolution No. 16-032, which amended Resolution Nos. 16-028 and 16-029 to make the changes shown in redline here:

> Shall an initiative ordinance be adopted amending Cupertino's General Plan to limit redevelopment of the Vallco Shopping District, limit building heights along major mixed-use corridors, ~~establish a~~ ***increase to*** 45 feet ***the*** maximum building height in the Neighborhoods, limit lot coverages for large projects, establish new setbacks and building planes on major thoroughfares, and require voter approval for any changes to these provisions?

Following the Council's adoption of Resolution No. 16-032, the City has received a number of communications asserting that the Council's actions were unauthorized and unlawful. These communications rely primarily on Elections Code Section 9051(b), which provides that the "ballot label" for statewide initiative measures "shall be a condensed version of the ballot title and summary" prepared by the Attorney General. These communications then essentially assert that because the City Attorney's title and summary did not expressly state that the Initiative would increase height limits in the Neighborhoods, it is improper for the ballot question to mention this aspect of the Initiative.

The City has also received a number of communications arguing that the conclusions in the 9212 Report regarding maximum building heights in the City's "Neighborhoods" are erroneous.

DISCUSSION

I. The 9212 Report correctly concluded that the CCSGI Initiative would amend the City's General Plan to increase maximum building heights in the City's "Neighborhoods" by 50%, from the existing maximum height of 30 feet to a new maximum building height of 45 feet.

As detailed in the 9212 Report, the CCSGI Initiative would increase by 15 feet the maximum building heights in the three-quarters of the City that the General Plan designates as "Neighborhoods." *See* 9212 Report at pp. 24-26, and Appendix 2 at page 7. The City has received extensive comments disagreeing with this conclusion, characterizing it as erroneous, mere opinion, or a misreading of the Initiative.

The City's attorneys have already responded to the bulk of those concerns elsewhere, including at the Council meeting on March 31 and in an April 5, 2016, letter from our office to Stuart M. Flashman, one of the attorneys for the Initiative proponents. This memorandum will not repeat that response here, other than to highlight three indisputable facts:

1. The City's existing General Plan contains a full chapter (Chapter 2) explaining that the entire land area of the City is divided into two categories: (a) "Special Areas"—which are located along the City's four major mixed use corridors and comprise approximately one quarter of the City; and (b) "Neighborhoods," which comprise the remaining three quarters of the City. *See* General Plan at PA-3 to PA-4; *id.* at PA-3 to PA-42; 9212 Report at 24-26;

2. The existing General Plan establishes "30 feet" as the "Maximum Height" for the Neighborhoods. General Plan, Figure LU-1, Neighborhoods Text Box; and

3. CCSGI would amend the General Plan to establish 45 feet as the maximum building height for all areas of the City that are "outside of Special Areas" (i.e., for the Neighborhoods). *See* CCSGI at 5, proposed new Policy LU-3.0 ("Outside of the Special Areas shown in Figure LU-1, building heights may not exceed 45 feet.").

The City Council has considerable leeway and deference in interpreting the meaning of its General Plan, including General Plan amendments adopted via Initiative. *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 514-16. Under the applicable legal standards, however, it is our view that the only legally permissible interpretation of the foregoing General Plan and CCSGI provision is that the Initiative would amend the City's General Plan to increase the maximum permissible building heights in the Neighborhoods by fifty percent, from 30 feet to 45 feet.[2] A detailed discussion of these legal standards is contained in the attached April 5, 2016, letter from our office to Stuart M. Flashman.

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[2] As explained in the 9212 Report and at the March 31 Council meeting, this conclusion does not mean—with one possible exception—that the City ***must*** amend its Zoning Code to increase building heights in the Neighborhoods or must approve any particular development application seeking higher building heights. *See, e.g.,* 9212 Report at 25. After all, the 30 foot maximum building height that the Zoning Code establishes for most zoning districts in the Neighborhoods is consistent with CCSGI's (footnote continued)

We understand that many of CCSGI supporters appear to sincerely believe that the initiative proponents did not intend to increase building heights in the Neighborhoods. However, under California law, the subjective intent of individual initiative supporters—including the official initiative proponents—is not legally relevant. *See, e.g., Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.* (1990) 51 Cal.3d 744, 765 n.10 ("The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent."); *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 335-36 ("[T]he intent and purpose of the proponents [of an initiative] are immaterial").

Rather, it is the intent of the voters (in the event that CCSGI is adopted) that controls. And the courts have repeatedly held that the voters' intent must be determined from the actual text of the initiative. That is particularly true where, as here, the plain text of the measure is unambiguous. *See, e.g*., *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 543 ("Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure.")

Mr. Lang's April 29, 2016, email raises one additional contention regarding the maximum building height issue. Specifically, he contends that "CCSGI does not need to be read with the General Plan" and that "[i]t is a serious legal error to inject [the General Plan's] definition of Neighborhoods and Special Areas into CCSGI." These assertions are incorrect, both factually and legally. As a factual matter, the plain text of CCSGI requires that its terms be read in conjunction with the General Plan. In fact, the bulk of CCSGI consists of amendments ***to*** the existing General Plan, and the disputed passage from proposed new Policy LU-3-0 is inserted into Chapter 3 of the General Plan and refers to the existing figure LU-1, which is a central feature of the existing General Plan.

Regardless, as a matter of law, CCSGI ***must*** be "read with" the rest of the General Plan. Indeed, one of the cornerstones of the State Planning and Zoning Law is that the General Plan must be read a whole and must constitute an internally consistent statement of policies. Gov't Code § 65300.5 ("[T]he general plan and elements and parts thereof [must] constitute comprise an integrated, internally consistent and compatible statement of policies"); *Concerned Citizens of Calaveras County v. Board of Supervisors*

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provision that "building heights may not exceed 45 feet" in such areas. However, it does mean that CCSGI would increase the maximum building height that the City Council could allow under the General Plan.

(1985) 166 Cal.App.3d 90, 97 ("[A] general plan must be reasonably consistent and integrated on its face."). Moreover, to the extent Mr. Lang is suggesting that CCSGI be interpreted as something other than an amendment to the City's General Plan, then CCSGI would be void as a matter of law. *See Lesher,* 52 Cal.3d at 541, 544-47 (holding that an initiative ordinance limiting development did not constitute a general plan amendment and therefore was "void *ab initio*" because it conflicted with the general plan's "growth oriented" policies).

II. The City Council's amended ballot question—like the ballot question it adopted on March 31st—properly "states the nature" of the CCSGI Initiative and falls well within the Council's discretion under the applicable case law.

Pursuant to the Elections Code, whenever a city places an initiative measure on the ballot, the "governing board" of that city (i.e., the city council) must adopt a resolution setting forth "the exact form of the question [or] proposition . . . to be voted upon at the election, as it is to appear on the ballot." Elec. Code § 10403(a)(2). "The question or proposition to appear on the ballot shall conform to the provisions of this code governing the wording of propositions submitted to the voters at a statewide election." *Id.* In our view, the City Council acted well within its statutory obligations and discretion both when it adopted the original CCSGI ballot question on March 31, 2016, and when it amended that ballot question on April 5.

A. Courts construing challenges to a ballot question focus on whether the question accurately informs the voters about the initiative's "nature" (i.e., its purpose and effect).

The most relevant provisions of the Elections Code "governing the wording of propositions submitted to the voters" are Section 9051, quoted above, and section 13119. Section 13119 mandates that ballot question must take the following form: "Shall the ordinance (stating the nature thereof) be adopted?"

These statutory directives must be construed in light of the applicable case law, which holds that the purpose of the ballot question is to "reasonably inform the voters of the character and purpose of the proposed measure" and "to avoid misleading the public with inaccurate information." *Yes on 25, Citizens for an On-Time Budget v. Superior Court* (2010) 189 Cal. App. 4th 1445, 1452; *see also Boyd v. Jordan* (1934) 1 Cal.2d 468, 472-74 (holding that a statutory requirement to "state the nature" of a ballot measure requires that the voters be provided with sufficient information about the "character of the proposed legislation" to understand what the measure in fact contemplates).

The City Council is granted "considerable latitude" and leeway in determining the precise wording that best comports with these requirements. *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1174. Its decision must be upheld unless it is clearly improper or biased. *Yes on 25,* 189 Cal.App.4th 1452. Thus, the ballot question "need not be the 'most accurate,' 'most comprehensive,' or 'fairest' that a skilled wordsmith might imagine." *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248 (citations omitted). On the other hand, a ballot question that fails to reveal a central objective or effect of an initiative would likely be held invalid. *See McDonough,* 204 Cal.App.4th at 1175-76 (invalidating ballot question that failed to do so); *Boyd,* 1 Cal.2d at 472-73 (holding that the "short title" for a ballot measure that failed to state an essential feature of the measure and what it "provided for" did not comply with the statutory requirement to "state the nature" of that measure).

The contention that the revised ballot question adopted by the City Council is improper seems to be based largely on the fact that the ballot title and summary circulated with the Initiative did not expressly state that the Initiative would increase height limits for three quarters of the City. In our view, however, the subsequent disclosure in the 9212 Report that this height increase would be a "significant" feature of the Initiative provides an ample basis for the Council to inform the voters of this aspect of the Initiative.

The *Martinez* decision, discussed above, is closely on point. It makes clear that the City Council had the discretion to use ***either*** the formulation of the ballot question originally adopted by the Council in Resolution Nos. 16-028 and 16-029 or the revised formulation adopted by the Council in Resolution No. 16-032. *Martinez* involved a ballot measure that proposed to amend a city charter to increase councilmember term limits from two to three terms. The Los Angeles City Council adopted a ballot question in the following form: "Shall the Charter be amended and ordinance adopted to: ***change*** Councilmember term limits to three terms. . . ." *Martinez,* 142 Cal.App.4th at 1247 (emphasis added).

The trial court found that this language was not sufficiently "specific" and, accordingly, it ordered that the word "***change***" be replaced with the word "***lengthened***," which it found to be more accurate. *Id.* The court of appeal reversed, explaining:

> The question could be more complete, and thus more informative, by noting that the measure increased the number of terms a council member could serve from two to three; we presume that is the effect the respondent court was trying to reach by inserting what it described as "more specific" language. But the completeness of a ballot question is not the test; the test is whether it is partial (or false or misleading.) . . . .

> To comply with the election statutes, the ballot title need not be the "most accurate," "most comprehensive," or "fairest" that a skilled wordsmith might imagine. The title need only contain words that are neither false, misleading, nor partial. The title adopted by the city council meets that standard, and the judiciary is not free to substitute its judgment given its deferential standard of review.

Id. at 1248.[3]

The same is true here. The original language adopted by the City Council—"establish a 45 feet maximum building height in the Neighborhoods"—is very similar to the original language adopted by the Los Angeles City Council. The revised language adopted by the Council is "more complete, and thus more informative." *Id.* However, *Martinez* makes clear that either formulation falls well within the Council's discretion to select. It also establishes that a court would "not [be] free to substitute its judgment given its deferential standard of review." *Id.*

B. A ballot question may properly consider an initiative's actual impacts, not just the proponents' stated purpose in the initiative.

Mr. Lang asserts that it is improper for a ballot question to address the impact and effect of measure and that the ballot question must instead be limited to the proposed initiative's stated purpose and intent. This is not how the courts have interpreted the law. In *Yes on 25,* for instance, the trial court held that it was improper for the Attorney General to include the words "Retains two-thirds vote requirement for taxes" in the ballot label for a statewide measure.

The court of appeal reversed, holding that it was proper for the Attorney General to include this language based on his determination that this would be the actual effect of the initiative:

> Stated succinctly, the Attorney General reasonably concluded that stating Proposition 25 retains the two-thirds majority for raising taxes ***is necessary***

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[3] Some of the cases discussed in this memorandum have addressed other analogous ballot materials rather than the "ballot question" itself. The courts have made clear that this same standard applies to all such pre-election materials, whether they be described as a "ballot question," "ballot label," "ballot digest", "ballot statement," "ballot title," or "short title." *See Yes on 25,* 189 Cal.App.4th at 1152-53 (citing cases).

> ***to provide voters with an understanding of the potential impact of the measure***. Given the substantial deference that must be afforded to the Attorney General's ballot materials (*Epperson*, 12 Cal.2d at pp. 66, 70), respondent court erred when it balanced the deference owed the Attorney General's ballot materials with the court's own "common sense" interpretation of the challenged language . . . .

Yes on 25, 189 Cal.App.4th at 1454 (emphasis added).

This conclusion is consistent with purpose of official ballot materials to provide accurate information about the measure to the voters. *See id.* at 1452-53. If the ballot question was limited to stating what the initiative proponents ***stated*** the initiative does—rather than what it actually does—the drafters of the ballot question could be precluded from providing voters with accurate and impartial information.

C. Election Code Section 9051's requirement that the "ballot label" for statewide measures be a "condensed version" of the Attorney General's post-certification "ballot title and summary" does not supersede the well-established case law governing local ballot questions.

None of the correspondence regarding the amended ballot question provided to us addresses the requirements of Elections Code section 13119 or the case law discussed above. Instead, this correspondence focuses almost exclusively on the requirement—in Elections Code section 9051(c)—that the "ballot label" for statewide measures "shall not contain more than 75 words and ***shall be a condensed version*** of the ballot title and summary [prepared by the Attorney General] including the financial impact summary prepared pursuant to Section 9087 of this code and Section 88083 of the Government Code." Elec. Code § 9051(b) (emphasis added).

1. No court has ever construed or applied the "condensed version" provisions of section 9051 to the ballot question for a local measure.

We believe it is significant that none of the numerous court cases considering the validity of local ballot questions have ever construed or applied section

9051's "condensed version" language—or similar predecessor statutory language—in reaching their decision.[4]

Instead, as detailed above, the courts have uniformly focused on the accuracy and fairness of the ballot question in light of the language of the particular initiative. Additional court cases that determined the validity of the ballot question for local measures without citing or discussing this "condensed version" or similar statutory provisions include: *Horneff v. City and County of San Francisco* (2003) 110 Cal. App. 4th 814, 820 fn. 4 (interpreting San Francisco's "ballot digest" which is that city's analog for the ballot question); *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1225–1228; and *Brennan v. Board of Supervisors* (1981) 125 Cal.App.3d 87, 92-93 (ballot digest).

2. Section 9051's "condensed version" language applies to the Attorney General's second, post-qualification, title and summary, but no such document is provided for local ballot measures.

We also believe it is significant that section 9051 appears in the article of the Elections Code governing statewide ballot measures and, by its terms, applies only to the Attorney General. The provisions governing local ballot measures appear in a later article, commencing with Section 9200.

This is important because, unlike for local ballot measures, the Attorney General prepares two official ballot titles and summaries for any statewide initiative petition that qualifies for the ballot—at two very different points in time. The first ballot title and summary, known as the "circulating title and summary," is prepared prior to circulation of the proposed initiative for signature gathering and must set forth "the chief purposes and points of the proposed measure." Elec. Code § 9004. This first title and summary is very similar in structure, role, and requirements to the official title and

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[4] Section 9051 was amended in 2009 to add the "condensed version" language to the requirements for the Attorney General. Prior to this amendment, Elections Code section 13247 contained similar language: "The statement of all measures submitted to the voters shall be abbreviated on the ballot. The statement shall contain not more than 75 words of each measure to be voted on, followed by the words, 'Yes' and 'No.' Abbreviation of ***measures to be voted on throughout the state*** shall be composed by the Attorney General and shall be a ***condensed statement*** of the ballot title prepared by him or her." Elec. Code § 13237 (emphasis added).

summary that the City Attorney was required to prepare here within 15 days of the CCSGI proponents' submission of their notice of intent to circulate the initiative. *See* Elec. Code § 9203.

However—***after a proposed statewide initiative measure qualifies for the ballot***—the Attorney General must prepare a ***second*** official title and summary for publication in the official ballot pamphlet along with the ballot label. Elec. Code § 9050; *see also* Elec. Code §§ 9086(a)(1)(B). It is this second ballot title and summary—prepared with the benefit of much more time to consider the initiative's effects including the Legislative Analyst's impartial and fiscal analyses (*see* Elec. Code § 9087)—that serves as the basis for the Attorney General's condensed ballot label pursuant to Section 9051(c). This second, post-analysis ballot title and summary can differ significantly from original "circulating title and summary." *See* Elec. Code § 9051(a)(1) ("The ballot title and summary may differ from the legislative, circulating, or other title and summary of the measure and shall not exceed 100 words, not including the fiscal impact").

Crucially, for local ballot measures, there is no second title and summary prepared by the city attorney. Thus, for local ballot measures, the post-qualification "ballot title and summary" to which section 9051(c)'s "condensed version" requirement refers ***simply does not exist.*** Moreover, unlike for the Attorney General's ballot title and summary prepared pursuant to section 9051(a), the city attorney's title and summary is never published in the ballot pamphlet or in any other official ballot materials. Instead, after a local ballot measure qualifies for the ballot, the local "governing board" (i.e., the City Council here) adopts a resolution setting forth the ballot question, and this question appears in the ballot pamphlet. Elec. Code § 10403. As detailed above, this ballot question must take the form prescribed by section 13119 ("Shall the ordinance (stating the nature thereof) be adopted?"). The City Council has "considerable latitude" concerning the precise wording of the ballot question. *McDonough,* 204 Cal.App.4th at 1174.

In our view, it is also significant that the Legislature directed city councils to receive any 9212 report prior to considering whether to adopt a resolution placing an initiative on the ballot and setting forth the ballot question. *See* Elec. Code §§ 9212(b); 9214(c); 9215(c). This timing allows city councils to consider the analysis in the 9212 report in drafting the ballot question, in much the same way as the Attorney General is directed to take the Legislative Analyst's fiscal analysis into account when he or she

prepares the second ballot title and summary and then condenses that second ballot title and summary into the ballot label. *See* Elec. Code §§ 9051(b); 9087.[5]

This interpretation comports with the courts' emphasis on the importance of the ballot question in providing the voters with accurate and impartial information about a measure's impacts. Particularly where an initiative is lengthy or complex, the detailed analyses authorized by sections 9087 (for statewide measures) and 9212 (for city measures) may reveal critical information that the drafters of the ballot question deem essential to provide to the voters.

The significant differences between the ballot titles and summaries prepared for statewide and local ballot measures may explain why no court has ever construed or applied section 9051's "condensed version" or similar predecessor language to a local ballot question. It should be noted that a separate section of the Elections Code provides that "[t]he statement of ***all measures*** submitted to the voters shall be abbreviated on the ballot in a ballot label as provided for in Section 9051." Elec. Code § 13247 (emphasis added). However, this requirement does not resolve the issue because the reference to "abbreviated" could be interpreted to refer simply to the requirement that the ballot label include no more than 75 words.

Regardless, we believe that interpreting section 9051 to prohibit the City Council from using any language in the ballot question that was not expressly included in the city attorney's title and summary would conflict with section 13119's requirement that the ballot question must "state the nature" of the subject initiative and with the case law interpreting both provisions. *See, e.g., Boyd,* 1 Cal.2d at 472-73 (interpreting a similar "state the nature" requirement applicable to "short titles"); *McDonough,* 204 Cal.App.4th at 1175-76; *Martinez,* 142 Cal.App.4th at 1248. Because the ballot question's statement that the Initiative would increase maximum height limits in the Neighborhoods to 45 feet is accurate—and neither biased nor misleading—we believe the Council acted well within its discretion in amending the ballot question to so state.

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[5] The Elections Code also authorizes city councils to request that the city attorney prepare an "impartial analysis" of an initiative, which appears in the ballot pamphlet. Elec. Code § 9280. However, this impartial analysis is not prepared until ***after*** the city council places a measure on the ballot, and thus the city council does not have the benefit of this information at the time that it drafts the ballot question.