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**MEMORANDUM**

To: Members of the Board of Supervisors

Date: February 29, 2008

From: John P. Doering *[Signature]*  
 Assistant County Counsel

Subject: Effect of Measure E on the Salida Area Planning Initiative

We understand that some proponents of the 30-Year Land Use Restriction Initiative ("Measure E") assert that the voter approval requirements of that initiative affect development in the Salida area in accordance with the previously adopted Salida Area Planning, Road Improvement, Economic Development and Farmland Protection Initiative (the "Salida Area Planning Initiative"). (See attached letter from Dennis Jackman.) This memorandum discusses the effect of Measure E on the Salida Area Planning Initiative. As outlined below, we conclude that Measure E does not affect the Salida Area Planning Initiative.

Measure E was passed by the voters of Stanislaus County on February 5, 2007, and becomes effective 10-days after the Board of Supervisors declares the results of that election. Laws and ordinances (including initiatives) normally operate prospectively from the date of passage. An initiative ordinance will operate retrospectively only when the words used in the initiative are so clear, strong and imperative that no other meaning can be given them. In this case, Measure E contains provisions that purport to give the initiative retroactive application. However, the Office of County Counsel previously opined in the impact analysis of Measure E that the language of the initiative does not provide a clear intent that it should be applied retroactively. (Copy attached.) The retroactivity issue was also identified in County Counsel's Impartial Analysis of Measure E. (Copy attached.) We concluded that the retroactive application of Measure E is subject to different interpretations, and the courts may have to make a final determination on the issue.

The Salida Area Planning Initiative qualified for the ballot on July 10, 2007, and after consideration of an impact analysis of that initiative, on August 7, 2007, the Board of Supervisors adopted the initiative ordinance in lieu of placing it on the ballot. The

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Salida Area Planning Initiative was proposed and adopted after the Measure E petition was circulated and before Measure E was approved by the voters. Thus, the Salida Area Planning Initiative falls within the purported period of the retroactive provisions of Measure E.

Even assuming that the Measure E retroactivity provision is valid, the Salida Area Planning Initiative most likely is not affected by Measure E for several reasons. First, and most importantly, Measure E specifically provides that it does not apply to any development project that obtained a vested right prior to the effective date of the measure. The Salida Area Planning Initiative approved a Development Agreement in addition to rezoning the land use designations. A development agreement vests rights to develop the property in accordance with the then existing law, and protects the development from future changes in the General Plan and zoning regulations. The Salida area development agreement vested development rights and insulated development from the effect of Measure E.

Second, Measure E applies to "land designated for agriculture or open space use on the Land Use Map of the County's General Plan as of the effective date of this policy." (Measure E, Section II, Policy Twenty-five, Paragraph B.) By law, the effective date of Measure E is 10-days after the Board declares the vote on Measure E, and the General Plan land use designations in the Salida planning area were designated non-agricultural before the effective date.

Finally, it could be argued that the Salida Area Planning Initiative is a separate mandate of the voters that has equivalent status of Measure E, and that the Salida project has the effect of an approved initiative.

JPD:

cc: Michael H. Krausnick, County Counsel  
Rick Robinson, Chief Executive Officer  
Ron Freitas, Director of Planning and Community Development

## **IMPARTIAL ANALYSIS BY COUNTY COUNSEL COUNTY MEASURE E**

This Initiative is intended to amend the Land Use Element of Stanislaus County's General Plan by adding Goal 6 and Policy 25 to restrict for a period of thirty (30) years the Board of Supervisors of Stanislaus County from approving the redesignation or rezoning of land in the unincorporated area of the County from an agricultural or open space use to a residential use without the approval of a majority of voters of the County.

This Initiative provides that a majority vote requirement of County voters at a General or Special Election shall be in effect until December 31, 2036, for decisions by the Board of Supervisors affecting land that is designated for agricultural or open space use and is proposed to be changed to residential use on the Land use map of the County General Plan as of April 17, 2006. A legal question exists as to whether the April 17, 2006, date is valid and enforceable.

This Initiative has no effect on growth and General Plans of the nine cities in Stanislaus County and will not affect requests by cities to expand their sphere of influence or annexations for residential development. The intended measure will not limit residential development by cities within existing or amended spheres of influence of cities, or preclude cities from annexing additional areas for residential development.

These General Plan changes affect agricultural or open space land that lies outside the present and future city limits.

This Initiative provides that once a majority of County voters have approved a land use map designation or land use entitlement for a property then additional voter approval is not required for subsequent entitlement requests that are consistent with the overall approved development project or land use designation and zoning or any requested modification to a land use or zoning designation that does not decrease the number of permitted dwellings as specified in the exhibits and plans approved by the voters.

This Initiative exempt from the voter approval requirements:

- (1) Not more than ten acres per year for residential housing to meet the County's Fair Housing requirement imposed by State law.
- (2) Additional acreage to meet the County Legal Fair Share Obligations based on maximum multi-family densities to accommodate moderate, low and very low income housing.
- (3) Any development project that has obtained a vested right pursuant to State law prior to April 17, 2006.

In the case of the proposed Initiative, its language does not provide a clear intent that it should be applied retroactively. One provision provides that "after the effective date but before the date of election," amendments to the General Plan that are inconsistent with the Initiative are automatically null and void. (Initiative, Section III E.) There could not be any amendments that occur after the effective date but before the date of election. Also, that same provision further states that the intent of the provision is to ensure that the Board of Supervisors "does not amend the General Plan after the effective date so as to create an internal inconsistency in the General Plan as of the date the voters approve this Goal and Policy." (*Id.*, emphasis added.) The language of the Initiative appears to affect only decisions to amend the General Plan after the effective date of the Initiative.

Another provision of the Initiative discusses interim amendments to the General Plan between the date the Initiative was submitted to the County and the effective date of the Initiative. (Initiative, Section III B.) That section provides that in order to ensure consistency in the General Plan, interim amendments that are inconsistent with the Initiative should be amended to ensure consistency. So, for example, if the Board amends the General Plan to say that a majority vote is not required for rezoning agricultural land to residential use, the Initiative would require that inconsistency to be eliminated. It is questionable whether this provision affects interim amendments that rezone agricultural land for residential use since the Initiative itself provides that it applies to "land designated for agriculture or open space use on the Land Use Map of the County's General Plan as of the effective date of this policy . . ." (Initiative, Section II, Policy Twenty-five, Paragraph B, emphasis added.) The retroactive application of the Initiative is subject to different interpretations, and the courts may have to make a final determination on the issue.

#### **Does the Initiative Create Any Liability for the County?**

- **Does the initiative constitute the "taking" of property?**

The risk of liability to the County is most likely related to a claim for inverse condemnation after a project is rejected by the electorate. The Initiative protects development rights that are vested prior to the effective date of the Initiative. (Initiative, Policy Twenty-five, Section E.3.) Residential development proposals that have not obtained vested rights prior to the effective date could be subject to the voter requirement of the Initiative if the Initiative applies retroactively. If a development project is rejected by the electorate, the developer/landowner may file a claim for inverse condemnation.

One court suggested that repeated use of the referendum power on proposals to develop the same property could result in an unconstitutional taking requiring payment of compensation. (*Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 484.) A referendum is "the power of the electors to approve or reject statutes or parts of statutes . . ." (Cal. Const., art. II, § 9(a).) The Initiative requirement for voter approval is essentially a referendum on an ordinance adopted by the County to approve a residential project. (*Lee v. City of Monterey Park* (1985) 173 Cal.App.3d 798, 811.) Continued voter rejection of a development proposal might result in a significant exposure to liability for the County and its citizens.

#### **Does the Initiative Comply with the Voters' Rights Act?**

An issue has been raised as to whether the proponents of the Initiative complied with the provisions of the 1965 Voting Rights Act. Currently, there is litigation in the United States Court of Appeals for the Ninth Circuit regarding whether initiative petitions shall be made available in

projects. (Ballot Box Planning and Growth Management, Local Government Commission, 6/28/05) These assumptions may be incorrect.

For example, the Roddy Ranch project proposed a new 700 home subdivision on 850 acres of land in Antioch, California, which was vigorously opposed by certain special interest groups. The development project was approved by nearly 60 percent of the voters in a recent initiative, which amended the City's general plan and approved a development agreement – all without environmental review under CEQA since electorate sponsored initiatives are exempt from CEQA (Cal. Code Regs., tit. 14, § 15378 (b)(3); *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458.) A copy of the Roddy Ranch initiative is attached to this report. [Appendix A]

The proposed Initiative in this case could result in an unintended consequence similar to the Roddy Ranch project. Developers may opt to have projects approved by initiative without environmental review under CEQA since the Initiative would require voter approval of residential development in the unincorporated areas of the County anyway. "[O]nce the voter requirement has been instituted, it is a virtual guarantee that future issues will be decided at the ballot box." (Ballot Box Planning and Growth Management, Local Government Commission, 6/29/05.) Implementation of ballot box planning that would result if the Initiative is adopted could lead to development occurring outside of the Planning and Zoning Law and without environmental analysis under CEQA. In that sense, ballot box planning is not consistent with the Subdivision Map Act or CEQA.

#### **When Would the Initiative Take Effect?**

- **When is the effective date of the initiative if it is approved?**

The Initiative specifies that the majority voting requirement shall apply to decisions "affecting land that is designated for agriculture or open space use on the Land Use Map of the County's General Plan as of the effective date of this policy . . ." (Initiative, Section II, Policy Twenty-five, Paragraph B.) The Initiative further provides that the "effective date" means the effective date as established by the California Elections Code. (Initiative, Section II, Policy Twenty-five, Paragraph F.4.) Elections Code section 9122 provides that if a majority of the voters approve the initiative, "[t]he ordinance shall be considered as adopted the date the vote is declared by the board of supervisors, and shall go into effect 10 days after that date."

- **Does the Initiative apply retroactively?**

The construction of an initiative is governed by the same rules as those governing the construction of statutes. (*C-Y Development Co. v. City of Redlands* (1982) 137 Cal.App.3d 926, 929.) "A statute affecting a substantive right will, if possible, be construed prospectively to avoid a declaration of unconstitutionality." (7 Witkin, *Summary of Cal. Law* (10th ed. 2005) Constitutional Law, § 633, p. 1031.) "Even a procedural statute that may validly be given a retroactive operation will ordinarily, for reasons of fairness, be construed as prospective unless the legislative intent to make it retroactive clearly appears." (7 Witkin, *supra*, p. 1032.) The courts look to the intent of voters where an initiative is involved. (7 Witkin, *supra*, § 634, p. 1034.) In order to determine the intent of the electorate, it is best to look at the initiative itself. (*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 980.) Generally, there is a very strong presumption that a statute or initiative was not meant to operate retrospectively unless the words used are so clear, strong and imperative that no other meaning can be given them. (*Yoshioka, supra*, at p. 980, citing *U.S. Fidelity Co. v. Struthers Wells Co.* (1908) 209 U.S. 306.) (*Id.*)