OFFICE OF THE CITY ATTORNEY

TO: **Mayor Bogaard and Members of the City Council**

FROM: for **Michele Beal Bagneris**
City Attorney (Rodriguez)

DATE: **May 4, 2006**

RE: **NFL Initiative**

At its meeting on April 10, 2006, the City Council directed the City Attorney to present a public report on the four substantive legal issues referenced in the City Clerk's agenda report certifying the initiative petition and federal Voting Rights Act litigation. This memorandum and the attached memo prepared by the law firm of Bell, McAndrews and Hiltachk serve as the report from the City Attorney. The memo analyzes each of the claims raised in the *Pasadena First* litigation regarding the validity of the NFL Initiative, and how the Voting Rights Act applies to circulation of the NFL Initiative. Outside counsel who authored the memo will be present at the City Council meeting on May 8, 2006.

The report concludes that, since the NFL Initiative received the requisite number of qualified signatures, the City may not unilaterally refuse to place it on the ballot. This is true despite the likelihood that some substantive aspects of the NFL Initiative may be found invalid by a court. While a development agreement which has been agreed to by the other party might be the proper subject for an initiative, the NFL Initiative is only an offer. Further, the Initiative names a private corporation (NFL) to perform a function, potentially in violation of the California Constitution. These facts suggest substantive deficiencies beyond the power of the electorate. Finally, legal authority for application of the Voting Rights Act's requirements regarding publication in languages other than English to any initiative has been withdrawn by the Ninth Circuit Court of Appeals. As such, this argument related to the Voting Rights Act is not a basis to invalidate the Initiative at this time.

Even assuming there are substantive deficiencies in this or any initiative, given the tendency of courts to favor placing measures with enough signatures before the voters, there is a reasonable likelihood that a court would determine that the alleged substantive defects are not clear enough to keep the matter off the ballot. For instance, as discussed in the attached memo, the California Supreme Court recently ordered that initiative measures in those instances remain

215 North Marengo Avenue, Suite 100 · P.O. Box 7115 · Pasadena, CA 91101-7215
(626) 744-4141 · Fax (626) 744-4190

on the ballot, finding that the violations were not clear enough to keep the question from the voters. Conversely, a court could rule that the potential defects clearly and convincingly fail to meet constitutional requirements and hold that the NFL Initiative should not go before the voters. As the attached memo concludes, in view of the current flux in pre-election challenge law, it is not possible to determine whether a court would invalidate the NFL Initiative before it goes to the ballot.

Attachment

BELL, McANDREWS & HILTACHK, LLP
Attorneys and Counselors at Law

455 CAPITOL MALL, SUITE 801
SACRAMENTO, CA 95814

(916) 442-7757
FAX (916) 442-7759

CHARLES H. BELL, JR.
COLLEEN C. McANDREWS
THOMAS W. HILTACHK
JIMMIE E. JOHNSON
ASHLEE N. TITUS

PAUL T. GOUGH
OF COUNSEL

1321 SEVENTH STREET, SUITE 205
SANTA MONICA CA 90401
(310) 458-1405
FAX (310) 260-2666
www.bmhlaw.com

MEMORANDUM

May 1, 2006

TO: Michele Beal Bagneris
City Attorney, City of Pasadena

FROM: Charles H. Bell, Jr.
Colleen C. McAndrews

RE: Legal Analysis of NFL Rose Bowl Ballot Measure

Pursuant to the direction of the City Council at its April 10, 2006, meeting, the City Attorney has been asked to advise on the substantive legal claims advanced by the Petitioners in *Pasadena First et al. vs. Jane L. Rodriguez, City Clerk and City of Pasadena*, Los Angeles Superior Court Case No. CS09923 [Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief - Original filed October 21, 2005] and issues related to the letters to the City Clerk by the attorneys for Pasadena First which address the Federal Voting Rights Act and its application to municipal initiative petitions.[1]

Pasadena First contends the initiative violates five provisions of the California Constitution and statutes relative to initiatives and asks the court to disqualify the measure from the ballot. The five legal contentions are (1) the measure violates Article II, Section 12 of the California Constitution which prohibits an initiative from naming a private corporation to perform a function or duty; (2) the measure is beyond the local electorate's power because it forces the City Council to enter into a lease with the NFL; (3) the NFL measure does not enact legislation; (4) since the NFL does not have a legal or equitable interest in the Rose Bowl, it cannot enter into an agreement to develop the Rose Bowl; and (5) the measure does not comply

---

[1] The City Council specifically asked for legal analysis of "(3) ...issues related to federal Voting Rights Act litigation in other jurisdictions, as well as the four substantive legal issues referenced in the City Clerk's agenda report certifying the initiative petition. (Motion unanimously carried)."

with the "full text" requirement of Elections Code section 9201, because the measure does not include copies of all documents referenced in the initiative which are necessary to understand it.

You have asked this law firm to advise you on the strengths and weaknesses of the legal claims advanced in the lawsuit and the application of the Voting Rights Act minority language requirements to the initiative petitions. This Memorandum contains our evaluation of the strengths and weaknesses of the measure and our opinion as to the likelihood a court would act to remove the measure from the ballot.

CONCLUSIONS

1. The City Council has a duty to place a qualified ballot measure on the ballot, even if the measure has legal infirmities or the City Council entertains doubts about its validity.

2. The NFL Initiative is more akin to an "offer" than an "agreement" with respect to the NFL and the Rose Bowl. Under general contract law, there must be at least two parties to an agreement and a meeting of the minds. The Initiative has neither. However, whether an offer, an agreement or a development agreement, popular adoption of an offer by initiative is not a proper subject of an initiative and therefore is beyond the power of the electorate.

3. The NFL Initiative appears to violate Article II, section 12 of the California Constitution because it names a private corporation to perform a public function or duty.

4. The NFL Initiative may not actually comply with the full text requirement of Elections Code section 9201 (not 9238(b) as erroneously identified in the complaint) but may nevertheless "substantially comply" with that requirement.

5. Whether a court is likely to entertain a pre-election challenge in this matter cannot be predicted with certainty.

6. The Federal Voting Rights issue is no longer relevant because the Ninth Circuit Court of Appeals granted en banc review of the panel decision in *Padilla v. Lever* (9th Cir. November 23, 2005) 429 F.3d 910, and withdrew that opinion as precedent. None of the other federal district court decisions in recent weeks that relied solely on the *Padilla v. Lever* decision has weight as precedent that Pasadena must follow in this matter.

ANALYSIS

1. THE CITY COUNCIL HAS A DUTY TO PLACE A QUALIFIED BALLOT MEASURE ON THE BALLOT, EVEN IF THE MEASURE HAS LEGAL INFIRMITIES OR THE COUNCIL ENTERTAINS DOUBTS ABOUT ITS VALIDITY.

In the context of submitted ballot measure petitions, the duty of the City Council was summarized in *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 148-149 ("*Save Stanislaus*"):

> The courts have uniformly condemned local governments when these legislative bodies have refused to place duly qualified initiatives on the ballot. (See *Farley v. Healey* (1967) 67 Cal.2d 325, 327 []; *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 []; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1021; *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1209 []; *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 561 []; *Gayle v. Hamm* (1972) 25 Cal.App.3d 250 [].) "Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot unless he is directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the initiative power." (*Farley v. Healey, supra,* 67 Cal.2d at p. 327).

A local government is not empowered to refuse to place a duly certified initiative on the ballot. (*Id.*) The court in *Save Stanislaus, supra*, clearly stated the obligation of a local government if it believes an initiative measure is unlawful and should not be presented to the voters:

> A governmental body, or any person or entity with standing, may file a petition for writ of mandate, seeking a court order removing the initiative measure from the ballot. (See *Farley v. Healey, supra*, 67 Cal.2d at p. 327.) But such entity or person may not unilaterally decide to prevent a duly qualified initiative from being presented to the electorate. (*Id.*)

Similarly, the City Clerk as the election official "is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met." (***Alliance for a Better Downtown Millbrae v. Wade*** (2003) 108 Cal.App.4th 123, 133 [quoting *Farley v. Healey, supra,* 67 Cal.2d at p. 327].) A ministerial duty is an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists. (See *Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752.) Elections Code section 9216 provides the City with three ministerial duties with respect to a measure that has qualified for the ballot: (a) adopt it without alteration; (b) submit the

ordinance without alteration to the voters; or (c) order a report, and when the report is presented, adopt the ordinance within 10 days or submit it to the voters without alteration.

The complaint filed by Pasadena First only alleges one procedural violation, the failure to include the full text of the measure within the petition. (See discussion *infra.*) All of the other allegations regard the substance of the proposed measure.

However, Pasadena First's full text allegation focuses exclusively upon the failure of the NFL Initiative petition to include the current texts of various Municipal Code sections the initiative proposes to amend. (The petition only includes the text of how these targeted sections will read if the measure is approved by the voters.) (See discussion *infra.*) Thus, the City Clerk is prohibited from refusing to qualify the measure pursuant to this allegation for two reasons: (1) the only way for the City Clerk to know how the targeted municipal code sections currently read, and that what is included upon the petition is not an exact copy of the current text, is for the City Clerk to use extrinsic evidence – namely a copy of the City of Pasadena Municipal Code; and (2) the failure to include the current texts of the targeted municipal code sections within the petition may not necessarily invalidate the petition. (See discussion *infra*).

Therefore, we conclude that regardless of the strength of any of the allegations leveled in Pasadena First's civil complaint regarding the NFL Initiative, neither the City Clerk nor the City Council may refuse to certify or place the measure on the ballot.

2. WHETHER THE NFL INITIATIVE IS AN OFFER OR PROPOSED DEVELOPMENT AGREEMENT, THE ADOPTION OF AN OFFER BY INITIATIVE IS NOT A PROPER SUBJECT OF AN INITIATIVE AND THEREFORE IS BEYOND THE POWER OF THE ELECTORATE.

An initiative may only propose legislative acts, not administrative acts. (See *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 708.) A contract is an administrative act not subject to local initiative powers. (See *Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 132, 1143.) A development agreement is a type of contract. (See *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th at p. 1213 ["In effect, [development agreements] allow[] 'a builder to acquire by contract the equivalent of a vested right at an early stage of the project.'" [quoting Sigg, *California's Development Agreement Statute* (1985) 15 Sw.U.L.Rev. 695, 707]].)

As discussed *infra*, the NFL Initiative is likely not a "development agreement," as the initiative itself asserts, but rather either an "offer" or proposed contract between the local legislative body and a private corporation. Moreover, because the NFL does not own nor have an equitable interest in the Rose Bowl, the NFL measure may not be a development agreement at

all.[2] For this reason, the adoption of the measure would be either an improper administrative exercise of initiative power (to adopt a contract) or would be ineffectual because it is not a "contract" or agreement at all, and therefore would not be a development agreement.

If the initiative is a mere offer, it would be ineffectual as an agreement even if it could be adopted by the people, since it lacks the traditional elements of a completed contract. However, a court would not need to decide whether the measure is an "offer" or merely a proposed agreement to invoke the rule prohibiting the people from adopting measures beyond their direct power to legislate. (*Id.*)

Moreover, a court need not decide whether the people have a right to enact a development agreement,[3] because that is probably prohibited as a subset of administrative actions such as entering into contracts that case law clearly indicates to be beyond the power of the people to enact. However, our review of the Government Code provisions governing development agreements does not indicate any clear language which precludes the adoption of development agreements by initiative such as by commitment of the subject solely to the legislative body of a jurisdiction. Whether state law intends to occupy the field and limit local legislation only to that enacted by the local legislative body, as opposed to local initiative measures, is largely deduced from analysis of the language of the applicable state law. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.) Specifically, courts review state law to discover whether the authority uses the term "governing body" or "legislative body" to commit local decision-making to a governing body of the jurisdiction and prohibit popular legislating by initiative. (*Id.*)

A review of state development agreement law (Government Code sections 65864 *et seq.*) reveals, however, that the State Legislature employed the general terms "county," "city," and "city and county," in its language and did not use the terms "legislative body" except in a more restricted area described below. (See Gov't. Code § 65865 ["(a) Any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property as provided in this article."]; Gov't. Code § 65865.3 ["(b) The city may modify or suspend the provisions of the development

---

[2] The proposed agreement could be considered a form of lease, and case law is clear that a development agreement may be entered into between a governmental agency and a lessor of real property. (See Citizens for Responsible Government v. City of Albany (1997) 56 Cal.App. 4th 1199.)

[3] Only one case appears to address the subject at all, and that case is distinguishable. See discussion below at section 3. *Citizens for Responsible Government v. City of Albany, supra.*

agreement if the city determines that the failure of the city to do so would place the residents of the territory subject to the development agreement, or the residents of the city, or both, in a condition dangerous to their health or safety, or both."].)

Only in two provisions of state development law is the term "legislative body" employed. (See Gov't. Code § 65867 ["A public hearing on an application for a development agreement shall be held by the planning agency and by the legislative body"]; Gov't. Code 65867.5 ["(b) A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan"].) Nevertheless, a court could conclude that section 65867 which authorizes a public hearing does not constitute the commitment of development agreement authority solely to the City Council, or the court could allow the local right of initiative as the ultimate public hearing.

Nevertheless, in our opinion, the general prohibition of taking administrative action by initiative would likely apply to the NFL initiative, even though the initiative is couched as a development agreement ordinance.

3. THE NFL INITIATIVE APPEARS TO VIOLATE CALIFORNIA CONSTITUTION, ARTICLE II, SECTION 12

Article II, section 12 of the California Constitution provides:

> No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.

Despite the fact that the provision is couched in terms of state ballot measures, Article II, section 12 is also applicable to local initiatives. (See *Pala Band of Mission Indians v. Board of Supervisors* (App. 4 Dist. 1997) 63 Cal.Rptr.2d 148.)

Several provisions of the NFL Initiative would explicitly empower the NFL to perform governmental functions, in the stead of the Rose Bowl owner, the City of Pasadena:

> "NFL shall have the right to market or sell all luxury suites in the Rose Bowl Stadium and to receive all revenues from the marketing of sale of luxury suites." Section 3.10.
>
> "NFL shall operate and maintain the Rose Bowl Stadium in a manner comparable to other NFL stadiums." Section 3.15

"Prior to the commencement of each lease year, NFL and City/RBOC shall meet and confer to establish staffing and budget level for police and traffic control." Section 3.19.

"City/RBOC hereby appoints NFL as its agent, and NFL shall act as City/RBOC agent, in marketing and selling permanent seat licenses and naming rights." Section 3.21.

Other provisions of the NFL Initiative would explicitly provide other powers to the NFL:

"NFL shall have the exclusive right, as agent for the City, to sell naming rights to the Stadium field, the entrance gates and the plaza areas..." Section 3.9.

"City grants to NFL an exclusive license during the period of renovation of the Rose Bowl Stadium by the NFL to those certain adjacent areas set forth in Paragraph 2 herein under the control of the City/RBOC for construction staging and storage..." Section 3.13.

"NFL shall be permitted to use the Rose Bowl Stadium for 25 displacement events ..." Section 3.16.

"NFL shall have priority over use of the Stadium by the City/RBOC." Section 3.18.

"City/RBOC grants to NFL the exclusive right to all permanent fixed signage in the interior and on the exterior of the renovated Rose Bowl Stadium.... NFL shall have the right to retain all revenues from permanent advertising in interior and on the exterior of the renovated Rose Bowl Stadium." Section 3.20.

As these provisions explicitly name the NFL, a private corporation, to perform governmental functions, as well as provide it other powers, it is our opinion that the NFL Initiative appears to violate Article II, section 12 of the California Constitution. (See *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 584-585.)

Nevertheless, in *Citizens for Responsible Government v. City of Albany*, *supra*, an appellate court held that a local ballot measure which approved a development agreement between the city and lessors of land, which specifically named the lessors in the redevelopment agreement, did not violate Article II, section 12. In this particular instance, the city of Albany is a charter city. Albany had previously enacted a law requiring voter approval of any future zoning

amendment, change in its general plan, or development agreement which impacted a particular area, Golden Gate Fields. Subsequently, the City and the lessors of Golden Gate Fields came to an agreement on a development project for the area. In order to effectuate the agreement, the City placed the development agreement on the ballot for public approval.

The court found that the ballot measure did not violate Article II, section 12 of the California Constitution because it was not initiative, but rather the exercise of charter city home rule powers, in which the people reserved for themselves the power to approve any new development agreement. (See id. at p. 1230.)

Similarly, at least one superior court judge has found that a ballot measure which authorizes the local legislative body to enter into a "Memorandum of Understanding" ("MOU") with a named private corporation for a redevelopment project did not violate Article II, section 12. (See *Mailhot v. Abdelnour* (Super. Ct. San Diego County, 1998, No. GIC723318).)

Therefore, it appears that so long as a ballot measure only seeks approval for a previously negotiated agreement between a local legislative body and a named private corporation pursuant to a charter city requirement for voter approval of land use changes, the ballot measure would not violate the prohibitions of Article II, section 12.

As we discuss *supra*, there is no case that squarely holds that a development agreement is not subject to initiative. Since a development agreement of necessity identifies a private party or corporation, however, that does not resolve the issue. Moreover, some of the powers and duties provided for in the NFL initiative would be akin to those that could be provided for in a lease or operating agreement between the City as the owner of the Rose Bowl and a lessor.

Since the Constitutional provision supersedes conflicting statutes, it is possible that Article II, section 12 naming a private corporation or entity could be sufficient authority to prohibit any development agreement by way of initiative. (See *supra*, see also *Pala Band of Mission Indians v. Board of Supervisors*, supra, 54 Cal.App.4th at pp. 583-584 [finding that Article II, section 12 creates exception to general rule that power of voters by initiative and referendum is coextensive with legislative power of governing body].)

While Article II, Section 12, provides that an initiative measure that violates this provision shall not be "submitted to the voters," the courts have not uniformly applied this injunction. In a recent Superior Court case, the court declined to strike a challenged measure from the ballot. Whether an appellate court would have concurred was not tested by appeal.

However, as also discussed *supra*, enactment of an "offer," "agreement" or lease by initiative is beyond the power of the people and would not be the proper subject of an initiative.

Therefore, in our opinion as discussed at section 2 above, a court need not reach this issue to determine the validity of the NFL initiative.

4. THE NFL INITIATIVE PETITION MAY NOT ACTUALLY COMPLY WITH FULL TEXT REQUIREMENT, BUT MAY SUBSTANTIALLY COMPLY WITH THAT REQUIREMENT

Elections Code section 9201 requires any city initiative petition to include the full text of the proposed measure. (See *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 99.)

Section 4 of the NFL Initiative proposes to amend multiple provisions of the Pasadena Municipal Code, including sections 3.32.260, 3.32.270, and 3.32.360. However, the petition only provides how these sections will read if the proposed initiative measure is approved by voters. Although at the end of the text, the petition notes by asterisk that change text is denoted by italics, the petition does not make clear how these sections currently read and what changes are made by the proposed measure. Most particularly, for example, Section 4.5 reads:

> **5. Amend Section 3.32.270 Rose Bowl Area - Number of Permitted Events - to read as follows:**
>
> A. No displacement of recreational programs and accessibility to Arroyo Seco facilities shall be allowed more than *25* times in any calendar year without permission of the City Council, who must find that each additional permitted event meets all of the following requirements...

However, that section does not identify to the reader that the number amended by the italicized provision of the proposed text (in this case, the number "25") is the number "12."

In fact, a review of the three amended sections shows that other than the example provided above (i.e., the number 25 replacing the number 12), no other parts of the original sections are deleted or modified except for typographical purposes (i.e., a capitalized letter being changed for a lower case letter due to the word no longer being the first word of the sentence). Moreover, although elsewhere the petition tells the potential signer that the number of displacement games will be increased from 12 to 25. (See Section 3.1), the amended section which replaces 12 with 25 without notation by strikeout and underline still does not inform the potential signer of how this section currently reads. The other changes involve adding two exceptions at the beginning of a sentence that modify its meaning.

We cannot find any published case determining whether the full text requirement is satisfied simply by printing in the petition how the text of amended sections will look if the

measure is adopted. Nevertheless, "the purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion." (*Mervyn's v. Reyes*, supra, 69 Cal.App.4th at p. 99.)

In *Myers v. Stringham* (1925) 195 Cal. 672, at pages 673-674, an initiative measure sought to amend a zoning ordinance only by adding a new paragraph to a particular provision. As such, the proponents only included the text of the new paragraph in the petition. The California Supreme Court held that failure to include the rest of the provision did not fully inform the voters of how the current provision would be changed, and thus invalidated the petition.

The NFL Initiative does include all parts of the provisions it proposes to amend. Nevertheless, we believe that a court could find that that the petition fails to fully satisfy the full text requirement, either by not including within the petition the text the current language of the sections (in strikeout type for example) or by underlining additions to indicate clearly that the language constitutes an amendment. However, on the other hand, because two of the three missing corrections are typographical, not substantive (and the other substituting without identification the number "25" for "12" in section 3.32.270 as previously explained in the petition), the court may find that the proponents substantially complied with the requirement, and that this defect alone is not enough to invalidate the petition. (See *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1012-1025.)

5. WHETHER A COURT IS LIKELY TO ENTERTAIN A PRE-ELECTION CHALLENGE IN THIS MATTER CANNOT BE PREDICTED WITH CERTAINTY

The case law on pre-election review of initiative measures is in flux, and therefore it is difficult to predict with certainty that a court would entertain pre-election review and strike a measure from the ballot. There is substantial case law history to support pre-election review and invalidation of ballot measures for procedural and "clear" substantive constitutional problems. See discussion *infra*. However, recently in *Costa v. Superior Court* (2006) 37 Cal.4th 986, the California Supreme Court recited the general rule that "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (*Id.* [quoting *Brosnahan v. Eu* (1982) 31 Cal.3d 1.) In *Costa* and in *Independent Energy Producers Assn. v. McPherson (Finkelstein)* (2005) 31 Cal.Rptr.3d 852, cases in which the Supreme Court granted review and restored measures to the ballot that had been stricken on pre-election substantive review by an appellate court, the Supreme Court's actions cast doubt on when pre-election challenges on substantive grounds is appropriate.

A. Pre-Election Procedural Challenges

Nevertheless, the *Costa* court also found that the general rule only applies to those claims regarding the "substance" of a ballot measure, as opposed to claims challenging the "procedural" process followed by proponents in qualifying the initiative for the ballot.

> Past cases establish that, at least as a general matter, this type of procedural challenge--that is, a challenge based upon an allegation that a proposed initiative measure has failed to comply with the essential procedural requirements necessary to qualify an initiative measure for the ballot ... may be brought and resolved prior to an election. ... As these ...cases implicitly recognize, because the question at issue in such a case is whether the initiative measure has satisfied the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot, it is logical and appropriate for a court to consider such a claim prior to the election, because if the threshold procedural prerequisites have not been satisfied the measure is not entitled to be submitted to the voters. Unlike a challenge to the substantive validity of a proposed measure, it cannot properly be suggested that it would be premature to consider such a claim prior to the election, because the focus of the issue is solely upon whether the measure has qualified for the ballot, and not upon the validity or invalidity of the measure were it to be approved by the voters.

"Procedural" claims that courts have entertained in pre-election challenges include: (1) considering the effect of differences in the text of a measure circulated in the petition compared to the text of the measure submitted to the Attorney General's office for issuance of official title and summary (see, e.g., *Costa v. Superior Court*, supra, 37 Cal.4th at p. 986); (2) considering the effect of the difference in the text of a measure printed in a petition compared to the text of the actually enacted measure that was the subject of the referendum (see e.g., *Assembly v. Deukmejian* (1982) 30 Cal.3d 638); (3) considering a challenge to an initiative measure contesting the completeness and accuracy of the Attorney General's summary of the measure set forth in the circulated petition (see e.g., *Epperson v. Jordan* (1938) 12 Cal.2d 61); (4) considering a challenge to a proposed initiative measure on the ground that the "short title" as set forth in the circulated petitions violated the statutory requirement that such a title accurately describe the subject to which the petition relates (see e.g., *Clark v. Jordan* (1936) 7 Cal.2d 248); (5) considering the claim that a petition was not supported by the required number of signatures (see, e.g., id.); and (6) considering a challenge to a proposed initiative based on the grounds that the short title was misleading (see e.g., *Boyd v. Jordan* (1934) 1 Cal.2d 468).

In the underlying complaint, only the claim that the NFL Initiative violates the full-text requirement of Elections Code section 9201 would be considered a "procedural" challenge to the

initiative and is not sufficient, in our opinion, to warrant the City not to place the measure on the ballot.

B. Substantive Pre-Election Challenges

Additionally, despite the general rule espoused in *Costa*, some "substantive" pre-election claims are not precluded from challenge. Rather, if the "substance" of a ballot measure violates the constitutionally-set boundaries of the people's right of initiative, a claim alleging such a violation may be entertained by a court in a pre-election challenge. As the *Costa* court noted:

> [I]n *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 90 Cal.Rptr.2d 810, 988 P.2d 1089 (*Senate v. Jones*), we noted that decisions after *Brosnahan I* "have explained that this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and that the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters...."

Substantive pre-election challenges that courts have entertained include: 1) considering whether a measure is not legislative in character, but rather intrudes upon the administrative functions of government (see e.g., *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687); 2) considering whether a measure amounts to a constitutional revision rather than an amendment (see e.g., *McFadden v. Jordan* (1948) 32 Cal.2d 330); 3) considering whether a measure embraces more than one subject matter (see e.g., *Senate of the State of Cal. v. Jones*, supra, 21 Cal.4th at p. 1142; see also Cal. Const. Art II, section 8, subdivision (d)); and 4) considering whether a measure names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty (see e.g., *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565.)

In the underlying complaint, the claims that the NFL Initiative violates Article II, section 12 of the California Constitution, that the initiative is pre-empted by state development agreement law, and that the initiative in an improper administrative exercise of the initiative power would be considered substantive pre-election challenges to the initiative.

The general standard used by California courts to measure whether a substantive pre-election challenge will prevail is that the court has found a violation of the Constitution "clearly, positively, and unmistakably appears." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.)

However, despite prior authority holding that procedural and substantive allegations may be heard by a court in pre-election challenges, the California Supreme Court may have

implicitly, though not explicitly, undermined these authorities in *Costa* and *Independent Energy Producers Assn.*.

In, *Independent Energy Producers Assn.*, the state high court reviewed the issuance of a writ of mandamus by an appellate court ordering the removal of a state proposition from the 2005 statewide special election. The primary purpose of the ballot measure at issue was to confer additional authority and jurisdiction on the PUC with respect to the electricity market in our state by way of an initiative statute. However, Article XII, Section 5 of the California Constitution specifically prohibits the expansion of PUC authority except by way of a statute passed by the State Legislature.

The allegation in *Independent Energy Producers Assn.* was an example of a substantive violation allegation of Article XII, Section 5, because the only purpose of the provision is to prohibit the exercise of the initiative power to expand the jurisdiction of the PUC. Nevertheless, despite the substantive character of the complaint, the California Supreme Court ordered the initiative back on to the ballot, finding the violation was not "clear" enough for pre-election review. (See *id.*)

Similarly, in *Costa,* rendered soon after *Independent Energy Producers Assn.*, the California Supreme Court reviewed a pre-election challenge alleging that a ballot measure failed to comply with the full-text requirement of Elections Code section 9014. Despite the fact that the allegation involved a procedural claim, and despite the fact that the California Supreme Court itself after the election acknowledged that such procedural claims were ripe for pre-election review (see *Costa v. Superior Court*, supra, 37 Cal.4th at p. 1006), the court refused to entertain the pre-election challenge and ordered the proposition back on to the ballot, again finding the violation was not clear enough and held the hearing on the merits after the election.

Therefore, based upon *Independent Energy Producers Assn.* and *Costa*, a court may determine that even though the underlying complaint raises both procedural and substantive allegations, that the alleged violations are not clear enough to justify pre-election review. On the other hand, a court may follow the litany of other cases in which the California Supreme Court and several appellate courts entertained pre-election challenges on procedural and substantive allegations, and entertain such a challenge in this case.

In conclusion, due to the current flux in pre-election challenge law, we are unable to firmly predict whether a court would invalidate this measure before it goes to the ballot.

6. MINORITY LANGUAGE REQUIREMENTS

A. Summary of Recent Development

There has been much recent turmoil with respect to the law of initiative, referenda, and recall in California based on several federal court rulings under the Voting Rights Act ("VRA"), 42 U.S.C. section 1973aa-1a, section 203 (*Padilla v. Lever*, 429 F3d 910 [9th Cir. Nov. 23, 2005) [en banc appeal granted]; *In re County of Monterey Initiative Matter* (N.D. Cal 2006) CV 06-01407 JW, CV 06-01730 JW; *Imperial v. Castruita* (C.D. Cal 2006) --- F.Supp.2d ----, 2006 WL 566791; *Chinchay v. Verjil* (C.D. Cal 2006) CV 06-1637 ABC (JWJx)), requiring translated election materials for language minority groups. In particular, counsel for the opponents of the petition proposing renovation of the Rose Bowl for professional football use have urged rejection of the initiative petition by the City of Pasadena based on the fact the petition was not circulated in the minority languages required in Los Angeles County under section 203 of the VRA.

On April 20, 2006, the Ninth Circuit granted an en banc rehearing of the primary case, *Padilla v. Lever*, *supra*, and ordered that the three-judge panel opinion in *Padilla* should not be cited as precedent by or to this court or any district court of the Ninth Circuit except to the extent adopted by the en banc court.

While the en banc rehearing is pending (argument was set for June 22, 2006, before the Ninth Circuit en banc in San Francisco), it is unlikely that a district court would hold that initiative petitions must be in multiple languages since there is no citable appellate court precedent and two cases from other circuits reach contrary conclusions. However, a Ninth Circuit district court judge is not entirely precluded from a holding similar to *Padilla* based on its own reading and interpretation of the VRA. At the very least, lower court judges have been signaled that a number of Ninth Circuit judges have serious questions about *Padilla* and the other related cases and the city would have no basis on its own to reject the NFL Initiative under the *Padilla* line of cases.

B. Analysis

The turmoil arises under the following legal analyses of the VRA. In *Padilla v. Lever*, *supra*, a three judge panel of the Ninth Circuit Court of Appeals held that a recall petition in the State of California must be printed in multiple languages as provided by Section 1973aa-1a, section 203. *Padilla* specifically held that "section [1973aa-1a] applies to recall petitions circulated pursuant to California law." (*Id.* at p. 924.) In doing so, the court determined that recall petitions were "other materials or information relating to the electoral process" and were "provided by" the political subdivision even though the petitions were entirely prepared by

private persons (*Id.* at pp. 919-924.), both factors cited in the VRA requiring voting materials be provided in minority languages.

The *Padilla* decision is based upon two judicial findings. First, the court determined that the recall petitions were "other materials or information relating to the electoral process." (*Id.* at pp. 919-922.) The court concluded that the "election itself is merely the culmination of the electoral process" and that recall petitions "clearly have some 'bearing or concern' and are 'connected with' an election. Indeed recall petitions serve no other purpose than to trigger an election." (*Id.*) Additionally, the *Padilla* court noted that the U.S. Department of Justice's regulations implementing Section 1973aa-1a define "written materials" to include petitions. (*Id.*)

Second, *Padilla* concluded that the recall petitions were "provided by" the political subdivision because the California Elections Code went beyond "imposing mere ministerial duties upon elections officials." (*Id.* at pp. 922-924.) The court noted that with respect to recall petitions, the Registrar of Voters "has the authority and the obligation to authorize and approve the form and content of proposed recall petitions, verifying collected signatures and setting election dates. [citation omitted] . . . No signature may be collected on a recall petition unless and until the Orange County Elections Department notifies the petition proponents that the form and wording of the proposed petition comply with the Elections Code." (*Id.* (citing Cal. Elec. Code § 11042).) The court also noted that the form of the petition was subject to regulation. (*Id.*)

Whereas the first prong of the *Padilla* decision would apply equally to initiative petitions as it does recall petitions (i.e., they are materials relating to an election), the second prong of the *Padilla* decision is a different matter (i.e., are they provided by a political subdivision?). Initiative petitions differ from recall petitions in that the elections officer in the initiative petition context is not tasked with reviewing the form and content of initiative petitions until after circulation among the voters is completed. Furthermore, unlike recall petitions, an initiative petition does not have to be provided to the elections official prior to circulation among the voters. Nor is the elections officer authorized to order substantive changes to an initiative petition's content.

However, following *Padilla*, a Ninth Circuit Northern District Court, San Jose Division, held in *In re Monterey Initiative Matter*, *supra*, that the *Padilla* reasoning applied to initiatives in that both recall and initiative petitions must be placed on statutorily-mandated forms (Cal. Elec. Code §§ 9020, 9022), with statutorily-mandated wording (Cal. Elec. Code §§ 100, 101, 104). A Notice of Intention is also required (Elec. Code § 9103). Moreover, the Elections Code does require that the city attorney, county counsel or Attorney General prepare an impartial ballot title and summary to be included (e.g. provided) on any initiative petition. Following submission, the

city has ministerial duties regarding Elections Code format rules and if they are not met, the city has a duty to reject the initiative.

Therefore, under the *Padilla* reasoning, there was doubt cast upon any initiative petition circulated in California that was not circulated in required VRA minority languages and the opponents challenged the NFL petition under the state of the law prior to April 20, 2006. However, that reasoning has now been signaled by the Ninth Circuit to be in doubt and until the en banc court issues its ruling, the NFL petition cannot be rejected based on its failure to be circulated in minority languages.

7. CONCLUSION

Therefore, although we conclude that the NFL initiative contains a number of legal problems that raise grave doubts about its legality, case law is clear that the City Council has a ministerial duty to place the measure on the ballot. After placement on the ballot, the City Council or any other party may seek declaratory and injunctive relief to determine whether the measure should be presented to the electorate.

In this case, Pasadena First already has filed litigation. Presumably such litigation would not have been ripe for adjudication until after it had been placed on the ballot. However, once placed on the ballot, it is likely the plaintiffs will pursue their remedies, or the City may seek declaratory relief to avoid the costs of an election for a measure that is invalid. In this case, a legal vehicle exists to resolve the issues discussed in this Memorandum.

We hope the above memorandum addresses the City Council's questions. If you have any further questions on the matter, please contact us.

CHB/CCM/JEJ