FREDRIC D. WOOCHER (Bar No. 96689)
MICHAEL J. STRUMWASSER (Bar No. 58413)
ELLEN Y. YANG (Bar No. 223143)
STRUMWASSER & WOOCHER LLP
100 Wilshire Boulevard, Suite 1900
Santa Monica, California 90401
Telephone: (310) 576-1233
Facsimile: (310) 319-0156

Attorneys for Petitioners and Plaintiffs
PASADENA FIRST and KENNETH FARLEY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NORTHEAST DISTRICT

PASADENA FIRST; and KENNETH A. FARLEY,

Petitioners and Plaintiffs,

v.

JANE L. RODRIGUEZ, in her capacity as CITY CLERK OF THE CITY OF PASADENA; CITY COUNCIL OF THE CITY OF PASADENA; CITY OF PASADENA; and DOES I-X,

Respondents and Defendants.

CHRIS HOLDEN; JOYCE STREATOR; and PAUL LITTLE,

Real Parties in Interest.

CASE NO. GS009023

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: July 28, 2006
Time: 8:30 a.m.
Dept.: R (Hon. C. Edward Simpson)

06/26/2006
7.B.15.

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INTRODUCTION

This motion seeks to prevent the wasteful expenditure of hundreds of thousands of taxpayer dollars for a special election in the City of Pasadena on a blatantly unconstitutional and unenforceable initiative that has been proposed for the November 2006 ballot. In June 2005, the Pasadena City Council, responding to overwhelming community sentiment, rejected a proposal to renovate and lease the historic Rose Bowl Stadium to the National Football League for use by one of its member teams. Unwilling to accept defeat, Real Parties in Interest Holden, Streator, and Little — the three councilmembers on the losing side of the Council's vote — sought to overturn the Council's action by circulating an initiative, entitled "Proposal for the National Football League Renovation of the Rose Bowl Stadium for Professional Football Use" (the "NFL Initiative"), that would force the City to offer the NFL a lease and operating agreement that is virtually identical to the proposal that the City Council had just rejected.

The problem confronting Real Parties, however, is that negotiating and entering into a lease or any other type of contract is an ***administrative*** act, not a ***legislative*** action, and it is thus not a proper subject for a local initiative. Real Parties therefore sought to recast the terms of their NFL lease proposal as a "development agreement" — a special species of contract that was created by the state Legislature in order to permit a developer to obtain a "vested right" to proceed with a development project by following certain statutorily specified procedures to enter into a binding agreement with a city or county. Yet far from curing the fundamental problem with their proposed initiative, Real Parties' effort to portray their measure as a "development agreement" only compounds its invalidity: Not only does the NFL Initiative not satisfy the most basic criteria to qualify as a statutory development agreement, but even if it did, the local electorate has no right in any event to enact a development agreement by an initiative. Furthermore, by prescribing lease terms that give broad powers and assign multiple functions to the NFL and its member teams, as well as to other specific corporations, the NFL Initiative flagrantly violates article II, section 12, of the California Constitution, which prohibits submitting to the voters or giving effect to any initiative that "names or identifies any private corporation to perform any function or to have any power or duty."

On February 21, 2006, after taking six months to gather the necessary signatures, Real Parties

in Interest filed their proposed NFL Initiative petition with Respondent Pasadena City Clerk Jane Rodriguez. On April 10, 2006, Respondent Rodriguez certified to the City Council that the petitions just barely contained a sufficient number of signatures to qualify for a special election. (City Clerk 4/10/06 Agenda Report [Plaintiffs' Request for Judicial Notice ("RJN"), Ex. 2].) Pursuant to Elections Code sections 9212 and 9214, upon receiving the Clerk's certification, the Council directed the City Attorney to present a public report within 30 days addressing the legal issues relating to the initiative's validity. An independent law firm with election law expertise, Bell, McAndrews & Hiltachk, LLP, was retained to prepare the report, which was received and considered by the Council at its May 8, 2006, meeting. (Outside Counsel Report [RJN, Ex. 3].) Although the report concluded that "the NFL initiative contains a number of legal problems that raise grave doubts about its legality" (*id.*, p. 16 [RJN, Ex. 2].) — including that its "offer" or "agreement" with respect to the NFL and the Rose Bowl "is not a proper subject of an initiative and is therefore beyond the power of the electorate" and that the 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" (*id.*, p. 2 [RJN, Ex. 2].) — the report advised the City Council that it nevertheless had a ministerial duty to place the measure on the ballot, after which "the City Council or any other party may seek declaratory and injunctive relief to determine whether the measure should be presented to the electorate." (*Id.*, p. 16 [RJN, Ex. 2]; see *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149 ["What should a local government do 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."]).

Following its counsel's advice, the City Council on May 8, 2006, adopted Resolution No. 8587, calling for a special election to be held on the NFL Initiative on November 7, 2006, at a cost to the City's taxpayers of $156,000 to $262,000. (City Clerk 5/8/06 Agenda Report, pp. 6-7 [RJN, Ex. 4].) As suggested by the Court of Appeal in *Save Stanislaus, supra*, Petitioners now bring this motion for a preliminary injunction to prevent a costly, divisive, and ultimately meaningless election on the unconstitutional and invalid NFL Initiative.

ARGUMENT

I. PRE-ELECTION REVIEW OF THE NFL INITIATIVE'S VALIDITY IS NOT ONLY APPROPRIATE IN THIS ACTION, BUT IS COMPELLED BY THE TERMS OF THE STATE CONSTITUTION

"It is well accepted that preelection review of ballot measures is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign." (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 389 ("*Dunkl*") [affirming pre-election writ of mandate invalidating proposed initiative because it attempted to take administrative action that was beyond the power of the voters to enact]). As the Supreme Court just recently reiterated in *Independent Energy Producers Ass'n v. McPherson* (June 19, 2006) ___ Cal.4th ___, 2006 WL 1667961, "preelection review of an initiative measure may be appropriate when the challenge is not based on a claim that the substantive provisions of the measure are unconstitutional, but rests instead on a contention that the measure is not one that properly may be enacted *by initiative*." (*Id.*, *5 [emphasis in original]; accord, *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 6 (Mosk, J., concurring) ["If it is determined that the electorate does not have the power to adopt the proposal in the first instance . . . , the measure must be excluded from the ballot."]; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 665-67 [same].)[1]

The reasons why judicial review should not be deferred in a case like this were aptly summarized by the Court in *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697:

> "Although real party in interest recites the principles of popular sovereignty which led to the establishment of the initiative and referendum in California, those principles do not disclose any value in putting before the people a measure which

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[1]The Supreme Court in *Independent Energy Producers Ass'n* emphasized that it was issuing an opinion in that case specifically in order "to provide guidance for the future" on the issue of "the circumstances under which preelection review is warranted for the type of challenge to an initiative measure that is presented in this case." (2006 WL 1667961, *2.) The Court then explained that "the general rule set forth in *Brosnahan v. Eu, supra*, 31 Cal.3d 1 (*Brosnahan I*) — recognizing a strong presumption against preelection resolution of a challenge to an initiative measure — is *inapplicable* to the challenge raised here, because the challenge is not based on the alleged unconstitutionality of the substance of the initiative measure but rather on the contention that the measure in question is not the *type of measure* that may be adopted through the initiative process." (*Ibid.* [emphasis in original].) That is precisely the nature of the challenge to the NFL Initiative in the present case.

> they have no power to enact. The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure."

Indeed, in the case of a proposed measure like the NFL Initiative, which impermissibly "names or identifies any private corporation to perform any function or to have any power or duty," article II, section 12, of the state Constitution makes clear that "preelection relief not only is permissible but is *expressly contemplated*." (*Senate v. Jones* (1999) 21 Cal.4th 1142, 1153 [emphasis added].) Like the single-subject provision at issue in *Senate v. Jones*, article II, section 12 explicitly states that no such initiative "may be submitted to the electors." As the Court held in *Senate v. Jones*:

> "In view of the explicit language of the single-subject provision of the Constitution, which (to reiterate) specifies that an initiative embracing more than one subject 'may not be submitted to the electors' (art. II, § 8(d)), we conclude that when a court determines that the challengers to an initiative measure have demonstrated that there is a strong likelihood that the initiative violates the single-subject rule, it is appropriate to resolve the single-subject challenge prior to the election.... Under such circumstances, deferring a decision until after the election not only will defeat the constitutionally contemplated procedure reflected in the language of article II, section 8(d), but may contribute to an increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process." (21 Cal.4th at p. 1154 [citations omitted].)

An election on the NFL Initiative will cost the taxpayers of the City of Pasadena as much as a quarter of a million dollars and will likely open divisive rifts among different factions in the community. Although the case law holds that the city council has a ministerial obligation to call for an election on a qualified initiative no matter how unlawful it appears to be, those same cases recognize that "there is no constitutional right to place an invalid initiative on the ballot" (*Dunkl*, 86 Cal.App.4th at p. 389), and that "if an initiative ordinance is invalid, no purpose is served by submitting it to the voters." (*Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1023.) "Accordingly, where the issue has been placed before the court of whether a proposal is lawful and may be placed on the ballot for the voters' consideration, the courts have the power *and the duty* to order that the measure is not qualified for the ballot if the measure is found to be beyond the power of the voters to enact." (*Dunkl*, 86 Cal.App.4th at p. 397 [emphasis added].) As is established below, the NFL Initiative is just such a measure that is beyond the power of

Pasadena's voters to enact, and this Court therefore has the duty to order its removal from the ballot.[2]

II. A PRELIMINARY INJUNCTION SHOULD ISSUE BECAUSE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AND WOULD SUFFER IRREPARABLE HARM IF THE INJUNCTION WERE DENIED

In deciding whether to issue a preliminary injunction, a court must evaluate two interrelated factors. First, the court considers whether the party seeking the injunction is likely to prevail on the merits. (*Youngblood* v. *Wilcox* (1989) 207 Cal.App.3d 1368, 1372.) Second, the court weighs the interim harm to the plaintiffs if the injunction were denied against the harm to the defendants if the injunction were to issue. (*Ibid.*) Both factors strongly militate in favor of granting the requested preliminary injunction in this case.

A. PLAINTIFFS WILL PREVAIL IN THIS ACTION BECAUSE THE NFL INITIATIVE IS BEYOND THE POWER OF THE ELECTORATE TO ENACT, PURPORTS TO ADOPT AN INVALID DEVELOPMENT AGREEMENT, AND VIOLATES ARTICLE II, SECTION 12, OF THE CALIFORNIA CONSTITUTION

1. The NFL Initiative Seeks to Compel Administrative Acts that Are an Improper Subject Matter for an Initiative and Are Beyond the Power of the Electorate to Adopt

Perhaps the most fundamental principle of initiative law is that "the electorate has the power to initiate legislative acts, but not administrative ones." (*Dunkl*, 86 Cal.App.4th at p. 399.) As the Supreme Court emphasized in *American Federation of Labor v. Eu, supra*, "the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under article II, to the adoption or rejection of 'statutes.'" (36 Cal.3d at p. 708; cf. *id.* at p. 696 ["[Petitioners] further contend that the proposed initiative is not legislative in character, a well established ground for barring an initiative measure from the ballot."].) Moreover, "[i]n determining whether an initiative measure enacts a law, it is the substance, not the form that controls." (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509; accord,

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[2]It would be all the more futile and wasteful to hold an election on the NFL Initiative because, as the Court is presumably aware from local press accounts, during the time it has taken Real Parties to gather the necessary signatures on their petition, the NFL itself has dropped Pasadena and the Rose Bowl from consideration as a potential site for a Los Angeles-based team. By the date of the November election, it is quite possible that the NFL will already have signed an agreement to locate a team either in the Los Angeles Coliseum or, less likely, in Anaheim. What a complete waste of $250,000 the meaningless election would be in that event.

American Federation of Labor v. Eu, supra, 36 Cal.3d at p. 710 ["it is the substance, not the label, that controls"].)

Regardless of the label Real Parties may attempt to give it, the "substance" of the NFL Initiative does not enact any law or statute. Rather, the essence of the NFL Initiative is the adoption of a *lease* or *contract* between the City of Pasadena and the NFL (or one of its member teams) for the renovation and use of the Rose Bowl Stadium. As the initiative itself declares, "[t]he Agreement shall constitute a lease between the NFL and the City/RBOC [Rose Bowl Operating Company] for the renovation and use of the Rose Bowl Stadium by the NFL in accordance with the terms set forth herein." (Resolution 8587, NFL Initiative ("NFL Initiative"), § 3, p. 13 [RJN, Ex. 5].) The initiative then specifies — in exacting detail — all of the commitments and obligations of the parties under that contractual agreement, including: the design and architectural plans for the proposed renovation (including scores of "mitigation measures" intended to address the significant adverse environmental impacts created by the project); the number of events permitted at the Rose Bowl; the division of revenues from those events; the assignment of "naming rights" to the field and plaza areas; the terms of a management agreement for operation of the Stadium; restrictions on parking surcharges imposed by the City; designation of signage rights; and rules regarding the sale of "personal seat licenses." (*Id.*, § 3(1)-(27), pp. 14-25 [RJN, Ex. 5].)

It is beyond dispute, however, that leases and contracts are ***administrative*** acts that are not proper subject matters of an initiative or referendum. As the Court of Appeal recently elaborated in *Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 1132: "A governmental entity legislates when it unilaterally regulates, or in addition to declaring a public purpose, makes provisions for the 'ways and means of its accomplishment.' When an action requires the consent of the governmental entity and another party, the action is contractual or administrative. The give and take involved when a government entity negotiates an agreement with [another party] is not legislation, but is a process requiring the consent of both contracting parties." (*Id.* at p. 1143 [holding that resolution adopting memorandum of understanding addressing mitigation of potential impacts of future casino project is not subject to referendum] [citations omitted]; see also *Simpson v. Hite* (1950) 36 Cal.2d 125, 130 [board of supervisors' "making of the architectural and

construction contracts" for courthouse is an "administrative function" that is not "within the reach of the initiative"].)

Indeed, a closer look at the NFL Initiative reveals that it is not even a contract; instead, it is merely an ***offer*** to contract with the NFL. As its very title implies, the initiative actually constitutes only a "*Proposal* for the National Football League Renovation of the Rose Bowl Stadium for Professional Football Use." (City Attorney 8/25/05 Impartial Analysis, p. 1 [RJN, Ex. 1].) [emphasis added]; see *ibid.*, ¶ 1 ["The NFL would still need to accept the Proposal, approve various agreements, and take actions consistent with the Initiative before the Proposal could be implemented."].) The text of the initiative admits that there is no guarantee that the NFL will accept this offer. (See, e.g., NFL Initiative, § 2(8)(J), p. 8 [RJN, Ex. 5] ["Given the *possible* investment by the NFL . . ."]; *id.*, § 2(13), p. 13 [RJN, Ex. 5] ["While we *cannot guarantee* that the NFL will ultimately award an NFL franchise to the City of Pasadena . . ."]; *id.*, § 5(2), p. 29 [RJN, Ex. 5] ["in the event that the NFL should *fail to execute* the Rose Bowl Renovation Development Agreement as set forth in Section 3 herein . . ."].) As the law firm hired by the City to analyze the initiative's validity noted, a mere offer "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." (Outside Counsel Report, p. 5 [RJN, Ex. 3].)

In sum, the NFL Initiative is beyond the electorate's initiative power because it does not, even by its own terms, purport to enact any law or legislation.[3] Instead, it merely offers to commit the City of Pasadena to a set of "deal points" with the NFL, which the NFL remains free to accept

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[3]Section 4 of the NFL Initiative proposes to amend Chapter 3.32 of the Pasadena Municipal Code, and to that limited extent, the initiative does purport to enact "legislation." But these minor legislative amendments are intended solely to conform the Municipal Code to the terms of the Rose Bowl Renovation Development Agreement and are plainly not severable from the invalid administrative provisions that are the central component of the NFL Initiative, even if severance were permissible in this preelection context. (See, e.g., *Citizens for Responsible Behavior v. Superior Court, supra*, 1 Cal.App.4th at p. 1035 [on preelection review, severance cannot cure initiative's legal defect].) Indeed, Section 5, subdivision (2), of the initiative provides that if the NFL does not timely enter into the proposed development agreement, "those provisions of the Pasadena Municipal Code amended in Section 4 . . . may be amended or repealed as the City Council of the City of Pasadena may choose."

or reject. As the Court of Appeal emphasized in *Worthington*, "[w]hen an action requires the consent of the governmental entity and another party, the action is contractual or administrative." (130 Cal.App.4th at p. 1143.) Because the electorate has the power to initiate only legislative acts, not administrative ones, the NFL Initiative is an improper exercise of the initiative power and is not entitled to be presented to the voters.

2. Real Parties' Attempt to Characterize the NFL Initiative as a Development Agreement Does Not Bring the Measure Within the Proper Scope of the Local Initiative Power

As noted above, Real Parties have attempted to overcome the manifestly administrative nature of the contractual agreement proposed by the NFL Initiative by labeling the proposal a "development agreement." (See NFL Initiative, § 3, p. 13 [RJN, Ex. 5].) This effort is unavailing, however, for at least two basic reasons: First, the NFL Initiative manifestly does ***not*** enact a development agreement under California law; second, development agreements cannot in any event be enacted in the first instance by an initiative.

a. The NFL Initiative's Proposed Agreement Between the NFL and the City of Pasadena Does Not Satisfy the Most Fundamental Statutory Prerequisites for a Valid "Development Agreement" Under California Law

As the Court of Appeal recounted in *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1213:

> "Development agreements are creatures of legislation intended to provide developers with an assurance of their right to carry a project to completion and for which they may need to make initial commitments. The legislation was enacted in 1979 in response to the decision in *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, which restated the traditional late vesting rule with respect to when a developer acquires a vested right to complete a project in accordance with a permit. In effect, the legislation allows 'a builder to acquire by contract the equivalent of a vested right at an early stage of the project.'"

Because a development agreement effectively contracts away the government's police power by insulating developers from the application of new laws to already-approved projects, the state legislation authorizing cities and counties to enter into development agreements contains a number of substantive and procedural safeguards designed to ensure that the agreement nevertheless constitutes a lawful *present* exercise of the police power. (See generally *DeLucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814, 823-824 ["A government 'may not contract away its right

to exercise the police power in the future.'].) "Under the governing statute . . . , numerous procedural and substantive limitations attend the making and performance of such a 'development agreement.'" (*Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 182.) If those procedural and substantive limitations are not adhered to, the purported "development agreement" is invalid and does not constitute a lawful exercise of the police power. (*Ibid.*)

The "development agreement" proposed to be enacted by the NFL Initiative does not comply with the most basic substantive and procedural statutory prerequisites. For example, Government Code section 65865, subdivision (a), stipulates that a city or county may only 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." (Emphasis added.) Yet it is undisputed that neither the NFL nor any individual NFL team possesses any legal or equitable interest in the Rose Bowl Stadium. To the contrary, the whole purpose of the NFL Initiative is to ***create*** an equitable interest in the Rose Bowl for the NFL or one of its teams by having the City and the RBOC enter into a lease with that party for the use of the Stadium. The development agreement statute, however, requires that the developer ***must already possess*** a legal or equitable interest in the property; it is not a vehicle for creating that interest in the first instance. (See generally *National Parks and Conservation Assoc. v. County of Riverside* (1996) 42 Cal.App.4th 1505 [developer must have acquired legal or equitable interest in the property in order to make development agreement effective under Gov. Code § 65865(a)].)

Similarly, the development agreement statute states that its purpose is to provide certainty to developers "upon approval of the project" (Gov. Code, § 65864(b)), not *in advance* of approval. In order to constitute a constitutional *present* exercise of the police power, the development agreement must constitute a binding contractual agreement between the developer and the governmental authority. The NFL Initiative, however, does not and cannot purport to constitute a binding agreement, even upon its passage, because the NFL has never committed to agree to its terms. Rather, as discussed above, the NFL Initiative merely proposes to ***offer*** certain lease terms to the NFL or one of its teams. A mere ***proposal*** to enter into an agreement is not a valid development agreement under California's statutory scheme.

Finally, the state legislation mandates that "a public hearing on an application for a development agreement *shall be held* by the planning agency and by the legislative body" prior to adoption of the agreement (Gov. Code, § 65867 [emphasis added]) and that "[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" (*id.*, § 65867.5(b) [emphasis added]). Neither of these provisions were or could be complied with under the NFL Initiative's proposed agreement, because Pasadena's "legislative body" — i.e., the City Council — did not hold the required hearing and specifically *refused* to find that the agreement was consistent with the general plan. Despite Real Parties' attempt to give it that label, the agreement proposed by the NFL Initiative is simply not a "development agreement" under California law, and the initiative therefore does not constitute a lawful exercise of the electorate's reserved *legislative* power.

b. The Authority to Negotiate and Enact Development Agreements Has Been Delegated By the Legislature Exclusively to the Local Governing Body, Precluding Enactment of a Development Agreement By Initiative

Even if the lease proposal contained in the NFL Initiative met the statutory requirements for a development agreement, the measure would still be beyond the local electorate's initiative power because state law grants the authority to negotiate and enact a development agreement in the first instance exclusively to the local governing body, thereby precluding the adoption of a development agreement by initiative. It is well-established that when the Legislature grants local entities a power that they did not previously possess, it may lawfully impose procedural restrictions that it deems necessary for the effective and judicious exercise of that power, including a prohibition against the exercise of the power by initiative. (See, e.g., *Committee of Seven Thousand v. Superior Ct.* (1988) 45 Cal.3d 491, 511 ["*COST*"]); *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 779-83.)

In authorizing cities and counties to grant certain development projects "vested rights" through the mechanism of a development agreement, the Legislature did just that, authorizing the local "legislative body" — not the electorate through the exercise of the initiative — to negotiate and enter into agreements with developers. As noted above, the state legislation specifically mandates

that the "legislative body" must hold hearings on and make findings in support of the approval of any proposed development agreement. (See Gov. Code, §§ 65867 & 65867.5(b).) As the Court noted in *COST*, a statutory reference granting authority to a "legislative body" supports an inference that the Legislature intended to preclude the exercise of the local initiative and referendum. (See 45 Cal.3d at p. 501.)[4]

In the instant case, however, the Legislature's intent to prohibit enactment of a development agreement by initiative is expressed even more clearly in the statutory language. Government Code section 65867.5, subdivision (a), states: "A development agreement is a legislative act that shall be approved by ordinance and *is subject to referendum.*" (Emphasis added.) That the Legislature purposefully chose to make a development agreement subject to a local referendum, ***but not to an initiative***, strongly indicates its intent to preclude the exercise of the local initiative power as a means of ***enacting*** development agreements in the first instance. Likewise, that the Legislature deemed it necessary to state explicitly that a development agreement was subject to referendum strongly indicates that such an agreement would not ***otherwise*** be proper subjects for an initiative or referendum. (See *Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250, 1254 [language in Cal. Const., art. XI, § 1(b), stating that ordinance setting compensation for elected county officers shall be subject to referendum "could not be clearer" in authorizing voters to challenge supervisors' salaries by

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[4]The other factor considered by the Court in *COST* — whether the subject at issue was a matter of "statewide concern" or a "municipal affair," with the former indicating a greater probability of intent to bar initiative and referendum (see 45 Cal.3d at 501, 505-507) — likewise supports the inference that the Legislature intended to preempt local initiatives. As the legislative findings indicate, the Legislature created the development agreement mechanism in response to the Supreme Court's decision in *Avco* and in order to address the statewide concern that "[t]he lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public." (Gov. Code, § 65864(a).) While decisions with respect to each *individual* development agreement were to be made by the "legislative body" at the local level, the availability of the development agreement as a mechanism to provide the certainty necessary in order to encourage major development projects addressed an issue of statewide concern, and in the absence of the state legislation authorizing enactment of such agreements in accordance with the specified statutory conditions, local governments would have no authority to contractually invest these developments with vested rights.

referendum, but not to set them in the first instance by initiative].)

Lastly, the Legislature's intent to preclude enactment of development agreements by initiative can be inferred from the very nature of the give-and-take negotiating process that is critical to the establishment of any such agreement. (Cf. *Voters for Responsible Retirement v. Board of Supervisors, supra*, 8 Cal.4th at pp. 782-83 [Legislature's refusal to permit referendum on board of supervisors' approval of MOU with county employees supported by need to have same body both *negotiate* and *approve* collective bargaining agreement].) There can be no meaningful negotiation of the terms of a development agreement that is adopted through the initiative process. To the contrary, as the present case vividly demonstrates, the initiative process could instead readily be captured by wealthy development interests to unilaterally ***dictate*** the terms that the local governing body must offer them in the proposed agreement. This would be very far from the process contemplated by the Legislature in creating the development agreement mechanism.

In sum, the statutory scheme permits the voters of a city like Pasadena to exercise their right of referendum to approve or disapprove a development agreement that has been negotiated and proposed by the city council, but it does not permit them to create and enact such an agreement in the first instance by an initiative. Because the NFL Initiative purports to do just that, it is beyond the power of the local electorate and must be removed from the ballot.

3. The NFL Initiative Is Unconstitutional and May Not Be Submitted to the Voters Because It Violates Article II, Section 12, of the California Constitution

Article II, section 12, of the state Constitution mandates that "no statute proposed to the electors by the Legislature or by initiative, that . . . names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." As the Supreme Court explained in *Calfarm Insurance Co. v. Deukmejian* (1989) 48 Cal.3d 805, 832, article II, section 12 "is an amalgam of two constitutional provisions enacted to prevent the initiative from being used to confer special privilege or advantage on specific persons or organizations." The Court in *Calfarm* held that the explicit terms of this section invalidated Proposition 103's well-intentioned effort to establish an independent, non-profit corporation to represent the interests of insurance consumers. The Court found that the consumer-advocacy

provision in Proposition 103 "identified" a particular private corporation and assigned the corporation to perform a "function" — i.e., to "advocate the interests of insurance consumers in any forum." (*Id.* at p. 832.) The Court specifically rejected the argument that article II, section 12 "should be construed to prohibit identifying a corporation only if the initiative describes that corporation as performing a *public* function," finding "no such limiting language in the constitutional provision itself." (*Id.* at p. 834 (emphasis in original).)[5]

The constitutional violation in the present case is even more evident and more egregious than it was in *Calfarm*. Indeed, the NFL Initiative exemplifies the precise evil that article II, section 12 seeks to prevent: The NFL, which is "name[d] and identifie[d]" no less than 102 times in the initiative, is a clear beneficiary of the favorable lease terms set forth in the development agreement.[6] In flagrant disregard of the constitutional proscription, the NFL and whichever NFL franchise team is selected as the home team for the Rose Bowl Stadium are given broad powers and are assigned multiple functions under the terms of the initiative. For example, the NFL Initiative grants the NFL (or an assignee member club) a license for parking, an "exclusive" renovation license, rights to use the Rose Bowl Stadium for a specified number of events, and the right to sell naming and signage rights at the Stadium; the initiative likewise assigns to the NFL the functions and duties of renovating the Stadium and managing and operating the facility on a day-to-day basis. (NFL Initiative, § 3(7), (15), pp. 16-20 [RJN, Ex. 5].) It can thus hardly be disputed that the NFL Initiative names the NFL "to perform any function or to have any power or duty" in violation of Article II, section 12. (See *Pala Band of Mission Indians, supra*, 54 Cal.App.4th at p. 584 [initiative violates Constitution by providing an identified private corporation with the responsibility of preparing and

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[5]While *Calfarm* applied article II, section 12 to a statewide initiative, the constitutional prohibition applies equally to local initiatives. (E.g., *Pala Band of Mission Indians v. Board of Supervisors of the County of San Diego* (1997) 54 Cal. App. 4th 565.)

[6]The lease terms include a long-term 25-year Rose Bowl tenancy, with the potential to renew for up to 30 years, permission to renovate the Rose Bowl according to NFL standards, including naming rights, and retention of "all revenues from all NFL events including without limitation, broadcast and media revenues, ticket sales, luxury suite sale, concession and catering revenues, merchandise revenues, sponsorship revenues, licensing revenues, and advertising revenue." (NFL Initiative, § 3, pp. 16-18 [RJN, Ex. 5].)

submitting a site plan that will define the nature of the project created by the measure and by imposing on that corporation numerous duties and powers related to the operation of the facility].) The NFL plays an explicit central role in the NFL Initiative — far more explicit and central than the role of the private corporation in the initiative invalidated in *Pala Band of Mission Indians* — in clear violation of the Constitution's prohibition.

But the NFL and its designated member teams are not the only private entities named to perform a function or duty in the NFL Initiative. The measure also identifies the Rose Bowl Operating Company ("RBOC"), a "private corporation," no fewer than *33 times* and likewise assigns it various functions, duties, and powers.[7] (See, e.g., NFL Initiative, § 3(14) [RJN, Ex. 5] [designating RBOC to enter into management agreement with NFL establishing standards for facility maintenance and operations]; *id.*, § 3(18) [RJN, Ex. 5] [granting RBOC the right to use Rose Bowl Stadium under specified conditions].) For this reason, as well, the NFL Initiative plainly violates article II, section 12 of the California Constitution and consequently may not "be submitted to the electors or have any effect."

III. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM TO THE CITIZENS OF PASADENA THROUGH THE WASTEFUL EXPENDITURE OF HUNDREDS OF THOUSANDS OF DOLLARS ON A FUTILE, INVALID INITIATIVE

In balancing the respective harms to the parties under the second prong of the preliminary injunction analysis, the scale tips sharply in Plaintiffs' favor. To include an initiative on the November ballot whose unconstitutionality and invalidity are beyond dispute would force the initiative's proponents and opponents, including Plaintiffs, to needlessly expend substantial amounts of time and money and would waste scarce taxpayer resources for an election on a measure that would only be invalidated immediately following the election. As the Court of Appeal admonished

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[7]The RBOC is a private corporation that manages the Rose Bowl. It receives its revenues "through operation of [the stadium] and a professional quality golf course complex," as opposed to being supported by any public funds appropriated in the Pasadena city budget by the City Council. (See RBOC Adopted Operating Budget Fiscal Year 2006 <http://cityofpasadena.net/finance/pdf/RoseBowlOperatingCompany.pdf> [as of June 21, 2006]; cf. *Keller v. State Bar of Calif.* (1990) 496 U.S. 1, 11, 13 [distinguishing "business" from "government agency" based upon source of funding and role in "general government of the State"].)

in *Citizens for Responsible Behavior v. Superior Court, supra*, "[t]he costs of an election — and of preparing the ballot materials necessary for each measure — are far from insignificant. Proponents and opponents of a measure may both expend large sums of money during the election campaign. . . . That the people's right to directly legislate through the initiative process is to be respected and cherished does not require the useless expenditure of money . . . concerning a measure which is for any reason legally invalid." (1 Cal.App.4th at p. 1023.) Moreover, the time, money, and energy expended on a meaningless and illegal election can never be recaptured, and it would divert those resources and the voters' attention from the other important — and lawful — measures and candidates that will appear on the November ballot, undermining the integrity of the election.

CONCLUSION

Because Plaintiffs have established a strong likelihood of success on the merits and would suffer irreparable harm if the preliminary injunction were not granted, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin Defendants from taking any further action to place the NFL Initiative on the November 2006 ballot.

Dated: June 21, 2006

STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Michael J. Strumwasser
Ellen Y. Yang

By Fredric D. Woocher EYY
Fredric D. Woocher

Attorneys for Petitioners and Plaintiffs Pasadena First and Kenneth A. Farley

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Re: *Pasadena First, et al. v. Jane L. Rodriguez, et al.* — No. GS009023

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 100 Wilshire Boulevard, Suite 1900, Santa Monica, California 90401.

On June 21, 2006, I served the foregoing document(s) described as: **Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction** on all appropriate parties in this action by the method stated.

Paul T. Gough, Esq.
Bell McAndrews & Hiltachk LLP
12925 Riverside Drive, Fl 2
Sherman Oaks CA 91423
Telephone (818) 971-3660
Facsimile (818) 986-2581
Attorney for City Respondents and Defendants
via fax and overnight

Ann Hayes Higginbotham, Esq.
76 S Grand Avenue
Pasadena, CA 91105
Telephone (626) 792-6741
Facsimile (626) 792-9339
Attorney for Real Parties in Interest
via overnight

☒ If fax service is indicated, by facsimile transmission this date to the fax number stated, to the attention of the person named, pursuant to Code of Civil Procedure section 1013(f).

☐ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

☒ If overnight service is indicated, by placing this date for collection by sending true copies in sealed envelopes, addressed to each person as indicated, pursuant to Code of Civil Procedure, section 1013(d). I am readily familiar with this firm's practice of collecting and processing correspondence. Under that practice, it would be deposited with an overnight service in Los Angeles County on that same day with an active account number shown for payment, in the ordinary course of business.

Executed on June 21, 2006, at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Paula M. Klein

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

NORTHEAST DISTRICT

PASADENA FIRST; and KENNETH A. FARLEY,

Petitioners and Plaintiffs,

v.

JANE L. RODRIGUEZ, in her capacity as CITY CLERK OF THE CITY OF PASADENA; CITY COUNCIL OF THE CITY OF PASADENA; CITY OF PASADENA; and DOES I-X,

Respondents and Defendants.

CHRIS HOLDEN; JOYCE STREATOR; and PAUL LITTLE,

Real Parties in Interest.

CASE NO. GS009023

[PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Upon reading the Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief herein, the Notice of Motion and Motion for Preliminary Injunction, the supporting documents on file in this action, and any opposition thereto, and after considering argument of counsel, and it appearing therefrom that there is good cause therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that, pending a trial on the merits of the Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, Respondents and Defendants Jane L. Rodriguez, City Council of the City of Pasadena, and the City of Pasadena (collectively "Defendants"), together with their officers, agents, and employees, shall and are hereby restrained and enjoined from implementing Resolution No.8587 and from taking any other action to submit the initiative entitled "Proposal for the National Football League Renovation of the Rose Bowl Stadium for Professional Football Use" ("NFL Initiative") to the voters of the City of Pasadena at the November 7, 2006, election.

Dated: _____

_____
Honorable Edward C. Simpson
Judge of the Superior Court

Submitted on June 21, 2006, by:

STRUMWASSER & WOOCHER LLP

By: Fredric D. Woocher
Fredric D. Woocher

Attorneys for Plaintiffs and Petitioners Pasadena First and Kenneth A. Farley

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Re: *Pasadena First, et al. v. Jane L. Rodriguez, et al.* — No. GS009023

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 100 Wilshire Boulevard, Suite 1900, Santa Monica, California 90401.

On June 21, 2006, I served the foregoing document(s) described as: **[Proposed] Order Granting Preliminary Injunction** on all appropriate parties in this action by the method stated.

Paul T. Gough, Esq.
Bell McAndrews & Hiltachk LLP
12925 Riverside Drive, Fl 2
Sherman Oaks CA 91423
Telephone (818) 971-3660
Facsimile (818) 986-2581
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Executed on June 21, 2006, at Santa Monica, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Paula M. Klein