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By E-Mail & Overnight Delivery

February 10, 2006

Hon. Charles J. McKee
County Counsel
Monterey County
168 West Alisal Street, 3rd Floor
Salinas, CA 93901

Re: Monterey County Quality of Life, Affordable Housing, and Voter Control Initiative

Dear Mr. McKee:

I write to you on behalf of the proponents of the Monterey County Quality of Life, Affordable Housing, and Voter Control Initiative (hereinafter, the "General Plan Initiative" or the "Initiative"). We were recently forwarded a copy of a letter addressed to you, dated January 25, 2006, from John A. Ramirez at Rutan & Tucker on behalf of a supposed "consortium" of unidentified Monterey County "landowners, voters, and civil rights groups." Mr. Ramirez's letter sets forth his clients' "concerns" regarding a number of supposed "legal deficiencies" in the General Plan Initiative and urges the County not to place the measure on the ballot. We will not here bother to respond to Mr. Ramirez's frivolous legal arguments, one of which has been derided as "ludicrous" even by a colleague in his own law firm. We do wish to remind you, however, of the liability that the Board of Supervisors and the County would face if the Board were to violate the voting rights of the more than 15,000 Monterey County voters who signed the Initiative petitions by taking Mr. Ramirez up on his misguided request to "cease from taking any further action to process the Initiative" and to "refrain from setting an election in response to the Initiative."

As you are surely aware, once the Board of Supervisors has received the certification from the County's elections official that an initiative petition has been signed by a sufficient number of registered voters, the Board has a *mandatory and ministerial duty* either to adopt the proposed measure without change or to submit it to a vote of the people. Elections Code section 9116 provides that if the initiative petition has been signed by the requisite number of voters and contains a request that the measure be submitted immediately to a vote of the people at a special election, "the board of supervisors *shall* do one of the following:"

> "(a) Adopt the ordinance without alteration either at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.

> "(b) Immediately call a special election pursuant to subdivision (a) of Section 1405, at which the ordinance, without alteration, shall be submitted to a vote of the voters of the county.
>
> "(c) Order a report pursuant to Section 9111 at the regular meeting at which the certification of the petition is presented. When the report is presented to the board of supervisors, it shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b)." (Elec. Code, § 9116 [emphasis added].)

The Elections Code thus does not provide the Board of Supervisors with the authority to do anything other than to adopt the measure without alteration or to place it on the ballot for a vote of the people. In particular, the Board of Supervisors is not authorized to make its own determination that the initiative suffers from some "legal deficiency" that may render it unsuitable for the ballot. Only the county elections official has the authority to determine the sufficiency of an initiative petition. Because Monterey County Registrar Tony Anchundo has duly — and rightly — certified the sufficiency of the General Plan Initiative, the Board of Supervisors now must either adopt the measure as submitted or *immediately* call for a special election on the Initiative.

Any conceivable doubts that the Elections Code imposes a *mandatory duty* on the Board of Supervisors to place a duly certified initiative on the ballot notwithstanding any purported "concerns" that might be raised about the initiative's validity were laid to rest in *Save Stanislaus Area Farm Economy v. Board of Supervisors* ("*Save Stanislaus*") (1993) 13 Cal.App.4th 141. In that case, the proponents of an initiative proposing to amend the County General Plan had gathered a sufficient number of signatures to qualify their measure for the ballot, but the Board of Supervisors refused to call an election on the initiative, contending that it was legally invalid. The initiative proponents filed a petition for writ of mandate, and the trial court — finding that the Board had not made "a compelling showing that the initiative was clearly invalid as a matter of law" (*id.*, at p. 146) — ordered the measure placed on the ballot.

Opponents of the initiative (Family Farm Alliance, or FFA) appealed, and although the case had technically become moot because the initiative was defeated by a wide margin in the intervening election, the Court of Appeal insisted upon deciding the case and issuing an opinion under the public-interest/likelihood-of-repetition exception to the mootness doctrine, explaining:

> "In the present case, the primary issue is whether the Board illegally usurped a judicial function in refusing to place the initiative on the ballot. Such action by local government could be timed in such a way as to render the government's conduct unreviewable . . . . Since initiative and referendum matters frequently follow in response to unpopular action or inaction by the local government, the potential for misuse of power by a governmental body strongly influences our exercise of discretion to review this case on the merits." (*Id.*, at p. 148.)

Turning to the merits, the Court of Appeal then *emphatically rejected* any suggestion that the Board of Supervisors had the power to review the initiative's validity and determine whether to place the matter on the ballot:

> "FFA and the Board fail to cite a single authority which stands for the proposition that local governments are empowered to exercise discretion in deciding whether to place a duly certified initiative on the ballot. Such a contention is contrary to established case law. As courts have stated repeatedly and clearly, *local governments have the purely ministerial duty to place duly certified initiatives on the ballot.*
>
> "The courts have uniformly condemned local governments when these legislative bodies have refused to place duly qualified initiatives on the ballot. '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.'
>
> ". . . .
>
> "FFA and the Board assert that because courts in [some] cases in fact have gone forward with an analysis of the initiatives after condemning the local government's actions, there is now a judicial recognition that legislative review is permissible, and judicial review is merely used to determine whether the local government is right or wrong.
>
> "*Not so. The law is clear: A local government is not empowered to refuse to place a duly certified initiative on the ballot.*" (*Id.*, at pp. 148-49 [emphasis added] [citations omitted].)[1]

The holding of the Court of Appeal in *Save Stanislaus* could thus not have been more forceful, nor its application to the present circumstances more on point: The Monterey County Board of Supervisors has no authority to refuse to place the duly certified General Plan Initiative on the ballot, thereby denying the thousands of registered voters who have signed the Initiative petition

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[1]Accord, *Farley v. Healey* (1967) 67 Cal.2d 325, 327 ["The right to propose initiative measures cannot properly be impeded by a decision of a ministerial officer, even if supported by the advice of the city attorney, that the subject is not appropriate for submission to the voters."]; *Citizens Against a New Jail v. Board of Supervisors* (1977) 63 Cal.App.3d 559, 561 ["This duty to submit the issue [to the voters] is mandatory and ministerial."].

their constitutional rights. As noted above, the Court of Appeal in *Save Stanislaus* issued its published opinion specifically in order to provide guidance once and for all to governmental bodies that might be tempted, as Mr. Ramirez invites the Board to do here, to "misuse their power" by refusing to place a qualified initiative on the ballot.

As the Court in *Save Stanislaus* emphasized, the only body that is authorized to keep a duly certified initiative off the ballot is a court of law, and even courts are extremely loathe to interfere with the people's exercise of the initiative power by preventing a vote on a qualified measure. In case after case, the California Supreme Court and the courts of appeal have held that all doubts must be resolved in favor of the exercise of the people's initiative power:

> "The exercise of initiative and referendum is one of the most precious rights of our democratic process. Since under our theory of government all the power of government resides in the people, the power of initiative is commonly referred to as a 'reserve' power and it has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right be not improperly annulled. *If doubts can reasonably be resolved in favor of the use of this reserve power, our courts will preserve it.*" (*Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563-64 [citations omitted; emphasis added].)

Thus, whenever an initiative is challenged, "it is the duty of the courts to jealously guard this right of the people and prevent any action which would improperly annul that right." (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.) The courts "*are required to resolve any reasonable doubts in favor of the exercise of this precious right.*" (*Brosnahan v. Brown* (1986) 32 Cal.3d 236, 241 [emphasis in original].) In litigation challenging these reserved powers, the courts must preserve both their spirit and letter: "The right of initiative is precious to the people and is one which the courts are zealous to preserve *to the fullest tenable measure of spirit as well as letter.*" (*Perry v. Jordan* (1949) 34 Cal.2d 87, 90-91 [emphasis added] [quoting *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332].)

Indeed, just last summer, the California Supreme Court *twice* re-affirmed that courts should not engage in pre-election review of qualified initiatives except in the most extraordinary of circumstances. In *Independent Energy Producers Association v. McPherson* (2005) 31 Cal.Rptr.3d 852), the Supreme Court rejected a lower court's decision to review the validity of Proposition 80 prior to the November 2005 special election. The Court of Appeal had concluded that the proposition was so clearly invalid that it should be removed from the ballot, finding that under the California Constitution, only the Legislature — not the people by initiative — could "confer additional authority and jurisdiction" on the Public Utilities Commission, as Proposition 80 sought to do. Pre-election review was therefore appropriate, the Court of Appeal held, because the challenge to the initiative questioned whether the electorate had the power to adopt the proposal in the first instance.

Just five days after the Court of Appeal issued its decision, the Supreme Court unanimously reversed, granting the petition for review and ordering Proposition 80 to be placed back on the ballot. (31 Cal.Rptr.3d 852.) The Supreme Court emphasized 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 people's franchise," and concluded that "the validity of Proposition 80 ***need not and should not*** be determined prior to the November 8, 2005 election." (*Ibid.* [emphasis added].)

Barely two weeks later, in *Costa v. Superior Court*, No. S136294, the Supreme Court *again* rejected the Court of Appeal's justification for engaging in pre-election review of a statewide proposition. In *Costa*, the Court of Appeal reasoned that pre-election review of Proposition 77 was appropriate because the challenge did not concern the *substantive* validity of the measure, but rested on a claim that the initiative petitions did not comply with the technical and procedural requirements of the Elections Code: It was alleged that the version of the initiative submitted to the Attorney General, which was used to prepare the ballot title and summary, differed in several respects from the version of the petition that was circulated among the voters. Over the objection of dissenting Justice Scotland, who protested that "[w]hen the California Supreme Court speaks, I listen," the Court of Appeal held that these discrepancies required the proposition's removal from the ballot.

It did not take long for the Supreme Court to speak again. Three days later, the Court reversed the appellate court and ordered Proposition 77 to be placed on the ballot, again ruling that pre-election review was improper: "In the absence of a showing that the discrepancies . . . were likely to have misled the persons who signed the initiative petition," the Court's order explained, "we conclude that it would not be appropriate to deny the electorate the opportunity to vote on Proposition 77 . . . ." (*Ibid.*)[2]

The courts of this state have thus spoken loud and clear on this issue, and they have delivered a message that any elected official or governmental body disregards at its peril. In light of these precedents, any action by the Board of Supervisors to postpone or to prevent a special election on the duly qualified and certified General Plan Initiative would be illegal and would subject the County of Monterey, as well as the members of the Board of Supervisors, to liability for violating the constitutional rights of the thousands of Monterey County voters who have signed the Initiative petitions demanding an election on the measure.

The "concerns" set forth by Mr. Ramirez in his letter are therefore not only unfounded, but they are irrelevant to the matter before the Board. We urge you to advise the Board of its ministerial

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[2]Available at **http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=385696** (last updated Feb. 10, 2006).

duty to place the General Plan Initiative on the June 6, 2006, primary election ballot, without any further undue and unauthorized delay.

Sincerely,

Fredric D. Woocher