

JENKINS & HOGIN, LLP  
A LAW PARTNERSHIP

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MEMORANDUM

TO: MEMBERS OF THE CITY COUNCIL

CC: STEVE BURRELL

FROM: MICHAEL JENKINS

DATE: NOVEMBER 23, 2004

RE: BEACH AND GREENBELT OPEN ZONE INITIATIVE

This memorandum is submitted at your direction pursuant to Election Code Section 9212 in order to report on the implications of the above-referenced initiative measure. As reported to you by the City Clerk at your November 9, 2004 regular meeting, the initiative has qualified for placement on the ballot at the general municipal election in November, 2005. Upon receipt of this report, you have the option of adopting the initiative measure without alteration or placing it on the ballot in November 2005.

The initiative measure states that its intent is to prevent the construction of new parking areas on the Greenbelt and a bike path on the beach, and to treat the two areas uniformly as open space. The initiative does two things:

1. It amends one provision in the chapter of the zoning ordinance governing the O-S-1 zone to limit the replacement or repair of existing improvements in that zone to "their footprint existing on the date of adoption of this ordinance;" and
2. It places the beach into the O-S-1 zone, which currently only applies to the Greenbelt.

As discussed in greater detail below, these changes have far greater implications than merely preventing construction of more parking areas on the Greenbelt and a bike path on the beach.

Members of the City Council  
November 23, 2004  
Page 2

### Current law

The O-S-1 zone is established in Chapter 17.32 of the Municipal Code. Currently, the only property in the City designated O-S-1 is the Greenbelt. While Section 17.32.020 purports to allow in the O-S-1 zone all uses as are permitted in the O-S zone,<sup>1</sup> it goes on to say that “no structure, building or improvement shall be developed, constructed or erected unless specifically authorized as a permitted improvement herein.” Section 17.32.030, entitled “Permitted Improvements,” narrowly restricts improvements in the O-S-1 zone to the following:

1. Only non-building improvements are allowed, solely for landscaping, beautification, erosion control, irrigation or anti-seawater intrusion, in order to maintain the open space. (§17.32.030.A)
2. Improvements to two existing parking areas located within the Greenbelt across from City Hall and from Clark Stadium as necessary to maintain the existing parking spaces, as long as they do not expand the parking areas. (§17.32.030.B)

### Change in the law proposed by the initiative

The change proposed by the initiative measure to Section 17.32.030.B<sup>2</sup> would delete entirely the existing references to the two parking areas on the Greenbelt, and replace those references with a general restriction on replacement and repairs to existing improvements in the O-S-1 zone, limiting such replacement and repairs to the existing footprint of those improvements.

The change proposed by the initiative measure to 17.32.040 would designate and zone the beach, in addition to the Greenbelt, as O-S-1 zoned property. This would mean that:

- No new buildings or structures may be constructed on the beach. The only new improvements that could be constructed on the beach would be those related to landscaping, beautification, erosion control, irrigation and anti-seawater intrusion.
- Existing improvements could be repaired and replaced, but only within the confines of their existing footprints.

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<sup>1</sup> Permitted uses in the OS zone are parks, educational buildings and playgrounds, recreation centers, public utility structures, trails, public governmental buildings, historic monuments, public malls and plazas, the ocean, transit uses and landscaping.

<sup>2</sup> No change is proposed to Section 17.32.030.A.

Members of the City Council  
November 23, 2004  
Page 3

The zoning ordinance defines the word “structure,” but does not include a definition of the word “improvements.” As broadly as the word “structure” is defined in Section 17.04.040 (“anything constructed or erected which requires location on the ground or attached to something having a location on the ground”), the term “improvement” is arguably broader, as it refers in Chapter 17.32 to such objects as landscaping and beautification (neither of which is necessarily a “structure”). It appears that the word “improvements” was used in Chapter 17.32 as a reference to the specific facilities and objects that exist on the Greenbelt; hence, it is difficult and problematical to apply the term to the broader array of facilities and objects that exist, or might be placed, on the beach.

#### Responses to City Council’s specific questions

At your November 9, 2004 regular meeting, several Councilmembers raised questions as to the effect of treating the Greenbelt and the beach uniformly under a single set of regulations as is proposed by the initiative. In my view, the initiative would not have a significant effect on the existing regulations as they apply to the Greenbelt. However, adoption of the initiative has broader implications for the beach, some of which are clear and some of which cannot be ascertained with certainty. For example:

- 1) Existing buildings (i.e. bathrooms) and structures (i.e. drainage devices) on the beach may be repaired or replaced, but could not be relocated outside their existing footprint.
- 2) No new bathrooms or other structures could be constructed on the beach.
- 3) No new fiber optic cable of the kind laid by Tyco under the beach would be allowed.
- 4) New utility facilities would not be allowed unless necessary for irrigation, erosion control or anti-seawater intrusion. It is not clear whether a storm water facility would be considered a form of “erosion control.”
- 5) New volleyball posts would not be allowed; existing posts could be repaired or replaced in their existing locations only.
- 6) Because they are not fixed in the sand, it is unclear whether lifeguard stands are “improvements” within the meaning of the initiative. Since lifeguard stands are located on the ground, they are arguably “structures” within the meaning of the zoning ordinance. If the term “improvements” is broader than the term “structure,” it is arguable that lifeguard stands could not be moved, and new stands could not be positioned on the beach.
- 7) It is not clear whether the restriction on “improvements” is limited to those that are permanent in nature, or whether the initiative is intended to cover improvements and facilities connected with a temporary event, such as bleachers or a bandstand. The language in Section 17.32.020 broadly prohibits the “erection” of any improvement or structure except as expressly permitted in Section 17.32.030.A. Arguably, the “erection” of temporary structures is prohibited.

Members of the City Council  
November 23, 2004  
Page 4

Because the stated intent of the drafters of the initiative is limited to preventing more parking areas on the Greenbelt and a bike path on the beach, and to preserve these areas in a uniform manner as open space, there is no indication in the language of the initiative as to how to ascertain the answers to the questions noted above as being ambiguous or unclear.

Consistency with General Plan

The initiative is not inconsistent with the General Plan, which contemplates that the Greenbelt and the beach be maintained as open space.

If adopted, the newly enacted provisions could not be amended except by another vote of the people.

Consistency with State law

As is the case with any municipal ordinance, it is possible that the ordinance could in some circumstances be preempted if in conflict with State law. For example, if State law (or the City's NPDES permit) required the construction of a facility on the beach to prevent pollution of ocean waters, it is possible that such a law would supersede the proposed initiative. That determination would have to be made on a case-by-case basis.