

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: July 17, 20066
Date Prepared: July 11, 2006

SUBJECT: Elections Code §9212 Report on the Albany Shoreline Specific Plan Initiative

REPORT BY: Beth Pollard, City Administrator
Robert Zweben, City Attorney
Ann Chaney, Community Development Director
Jeff Bond, Planning Manager

STAFF RECOMMENDATION

The Election Code requires the Council to place this initiative on the ballot or to adopt it without change. Some jurisdictions have taken no action, recognizing that a lawsuit would be filed challenging a 'no motion' decision.

Measure C would appear to apply to and supercede the Election Code's option to allow the City Council to adopt the initiative as presented. Staff, even if Measure C did not preclude the Council from adopting the initiative, would recommend that the Council should not adopt the initiative, but should place it before the voters at the November election.

Therefore, staff recommends that Council adopt Resolution #06-47 - *A Resolution of the Albany City Council Submitting to the Voters a Citizen Initiative Measure Enacting Waterfront General Plan Policies and Conservation and Recreation Element Policies and Requiring the Formation of a Special Task Force to Create a Specific Plan for Development and Open Space at the Waterfront.*

BACKGROUND

On April 3, 2006 the Council authorized staff to prepare an Election Code 9212 Report. The statute provides wide latitude for determining what is included in any such report. At the April 3, 2006 meeting, Council members expressed an interest in fiscal and legal consideration. Due to time and budget limitations, qualified economic/planning consultants were not retained for preparation of the report. Outside legal counsel, however, was consulted to assist in the preparation of the analysis.

METHODOLOGY FOR PREPARATION OF THE 9212 REPORT

This report consists of two components. Mr. Fred Woocher, a partner in the Santa Monica firm of Strumwasser and Woocher, prepared a legal analysis of the initiative. Mr. Jeff Bond, the Planning Manager, addressed various planning and fiscal issues related to the implementation of the initiative. Mr. Bond conferred with some technical experts to obtain information related to the costs and scope of work that economists, fiscal experts, planning consultants, and attorneys may have to undertake should the initiative be approved by the voters. Mr. Tom Brown, a former city attorney now in private practice with the firm of Hanson and Bridgett, assisted Mr. Bond. The City Attorney conferred with Mr. Woocher and with Misters Bond and Brown during the preparation of the two reports.

The City Attorney selected Mr. Woocher to prepare the legal analysis for the 9212 Report. After the City Council authorized staff to proceed to prepare a report, the City Attorney sought letters of interest from attorneys who were conversant with initiatives and related law. The following firms/attorneys sent letters indicating their interest and availability:

1. Joseph Pannone, Esq. – Kane, Ballmer, & Berkman
2. Wayne Brechtel, Esq. – Worden Williams, APC
3. Douglas P. Haubert, Esq. – Aleshire & Wynder, LLP
4. John Ramirez, Esq. – Rutan & Tucker, LLP
5. Thomas Brown, Esq. – Hanson Bridgett
6. Fredric D. Woocher, Esq. – Strumvasser & Woocher

These letters are attached to the staff report. The City Attorney selected Mr. Woocher after reviewing the letters, talking to the attorneys, and in some cases reviewing prior work products of the attorneys.

Mr. Woocher is a well respected attorney who has extensive experience in the field of initiative and election laws. His firm has represented numerous citizen groups and environmental organizations. He and members of his firm are actively engaged in election law and initiative litigation matters. His report is a public document and was not designed as an argument in support of or against the validity of any particular issue that was addressed in the report.

The City Attorney provided Mr. Woocher with City Charter and Municipal Code provisions that were thought relevant to the analysis of the legal issues. The City Attorney had also asked the proponents of the initiative, the property owner, and Caruso Affiliated representatives if they wished to provide any legal memoranda or information about the initiative. Although it was apparent that both the property owner and Caruso Affiliated had authorized their attorneys to undertake an analysis of the initiative, they respectfully declined to share any of their views with the City. The City Attorney has the impression that the initiative proponents did not undertake a comprehensive legal analysis prior to or during their drafting of the initiative. When drafting the initiative, the proponents apparently solicited feedback or obtained assistance from at least several attorneys (Mr. Stuart Flashman, Mr. Bob Gerrard, and Mr. Norman LaForce). Nevertheless, it does not appear that any of these gentlemen prepared a legal memo discussing the status of case law pertaining to the various provisions in the initiative.

The purpose of the planning component of the 9212 analysis is to provide the Council and members of the public an examination of the planning framework that would be created by the proposed initiative if it were to be adopted. This analysis is not intended to prejudice or predict the outcome of the planning process. Rather, it is a summary of the key considerations for decision makers at the start of the process.

SUMMARY OF MR. WOOCHEER'S LEGAL ANALYSIS

1. Although this initiative as a whole appears to constitute a valid exercise of the electorate's reserved initiative power, there are substantial questions regarding the validity of specific provisions.
2. Several of the specific provisions are novel and have not previously been addressed by the courts, and it is difficult to predict with any certainty how a court might rule.
3. It is quite likely that litigation will ensue if the initiative is adopted, with a possibility of a pre election challenge.

The planning report prepared by Mr. Bond also contains legal comments. Some of these comments may express a different view of the law than what Mr. Woocher has provided. The difference of views only illustrates that the law may not be clear and it is susceptible to different interpretations.

FISCAL IMPACT

A review and discussion of fiscal issues associated with the initiative is contained in the attached report from Mr. Bond.

If the voters approve this initiative, litigation is likely. The cost to litigate challenges to the initiative post election will be substantial.

If a Court determines that either all provisions are valid or the invalid provisions can be severed, there will be substantial expenditures incurred to implement the initiative.

The incremental election cost to place the initiative on the ballot for the regular municipal election of November 7, 2006 is estimated to be less than \$1,000.