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The Park at Cross Creek, LLC, et al.  
v. City of Malibu, BS 155299

Statement of Decision on Declaratory Relief  
DEC 14 2015

Claims: granted in large part  
Shawn R. Carter, Executive Officer/Clerk  
By Annette Fajardo Deputy  
Annette Fajardo

Petitioners The Park at Cross Creek (“PCC”) and Malibu Bay Company (“MBC”) seek declaratory relief against Respondent City of Malibu (“City”) that Measure R is invalid and an injunction preventing the City from enforcing Measure R.

The court has read and considered the moving papers, oppositions, and replies, verified that the issues are purely legal, treated the briefs as if they had been presented at trial, heard argument, granted the City’s motion for judgment on the pleadings as to the mandamus claims, and taken the declaratory relief claims under submission. The court now renders the following statement of decision.

**A. Statement of the Case**

**1. The Petitioners**

Petitioners are property developers who have invested millions of dollars and spent several years acquiring, planning, designing, engineering, conducting environmental studies in support of and entitling commercial development projects affected by Measure R. Pet. ¶1.

PCC is the owner of a 5.88-acre property located at 23401 Civic Center Way, Malibu, California 90265. Pet. ¶13. Since 2009, PCC has invested more than \$11.4 million in acquisition, planning, design, architectural, engineering, environmental studies, consultant and professional fees and City fees to entitle and develop a project on this property. Id. The project is known as “Whole Foods and the Park” (the “Whole Foods Project” or the “Project”). Id. The Whole Foods Project is slated to include a 38,424 square foot neighborhood shopping center anchored by a 24,549 square foot Whole Foods. Id.

PCC and Whole Foods have entered into a signed lease agreement in connection with the Whole Foods Project. Id. The Whole Foods Project is also expected to include four small-scale retail spaces totaling 13,875 square feet, outdoor dining, a central surface parking area, green walls, 80 new sycamore trees, landscaped islands, walkways, benches, and other pedestrian and open space amenities, Shane’s Park (a park and playground for children, including children with special needs), a community education garden, and a public gathering space in the case of a wildfire. Id.

In 2009, PCC began the process of preparing the project plans, reports and studies necessary to develop the Whole Foods Project consistent with the requirements of the City’s General Plan and Local Coastal Program. Pet. ¶14. In May 2010, PCC (under its previous name, DB Malibu Holdco, Inc.) formally applied to the City to develop the Whole Foods Project. Id. After review by various City departments, the application was deemed complete, and in September 2011, the City Council selected a consultant to prepare an Environmental Impact Report (“EIR”) for the Whole Foods Project. Pet. ¶15. In April 2012, the City issued a Notice of Preparation for the EIR. Id. The City’s consultant prepared a draft EIR, which the City’s planning staff reviewed. Id. In February 2015, PCC released the EIR. Id. The EIR received public comment and now awaits further public hearings before the City’s Planning Commission and City Council. Id.

Petitioner MBC is the owner of an approximately 9.2-acre property located at 23575 Civic

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Center Way in Malibu, California. Pet. ¶20. Since 2012, MBC has invested approximately \$66 million on acquisition, architectural, engineering, environmental and planning studies, and consultant and City fees to entitle and develop a project on the property. Id. The project is known as “Malibu Sycamore Village” (the “Sycamore Village Project”). Id. The Sycamore Village Project proposes two development alternatives ranging from 60,000 to 80,970 square feet. Id. Both plans call for a mixed-use commercial project that will include office, retail and restaurant uses, and community gathering spaces and children’s play area, all in a pedestrian-oriented village setting. Id. The larger alternative will also include a 5,000 square foot urgent care medical facility. Id.

In 2012, MBC began the process of preparing the project plans, reports and studies necessary to develop the Sycamore Village Project consistent with the requirements of the City’s General Plan and Local Coastal Program. Pet. ¶21.

## 2. Measure R

On November 4, 2014, City voters approved ballot initiative Measure R. Pet. ¶7. 8. The stated goals of Measure R are, among other things, to “[p]reserve our community’s unique small-town, rural character and protect natural resources...”; to “[r]equire preparation and voter approval of specific plans for certain large commercial or mixed use projects”; and to “[l]imit chain stores in our City.” Pet. ¶8, Ex. A §3.

As its first component, Measure R contains a set of restrictions designed to limit the development of “formula retail” establishments in Malibu. Pet. ¶10. Measure R defines a “formula retail” business as any business for which there are ten or more locations worldwide that share two or more specified criteria, such as common merchandise or menus, color scheme, décor, façade, layout, signage or trademarks, and uniforms. Id., Ex. A §6. Measure R (i) prohibits any new formula retail tenant larger than 2,500 square feet, (ii) requires all formula retail tenants to obtain a conditional use permit (“CUP”), and (iii) prohibits a shopping center from leasing more than 30% of its square footage, or 30% of its leasable retail spaces, to formula retail tenants. Id. Certain categories of formula retail, such as grocery stores, gas stations, banks, movie theaters and medical offices, are exempt from Measure R’s size and CUP restrictions. Id. Such stores still count toward Measure R’s 30% cap. Id.

As its second component, Measure R requires voter approval of every new proposed commercial project over 20,000 square feet. Pet. ¶11, Ex. A §4. Whenever a landowner or developer proposes a commercial project larger than 20,000 square feet, Measure R requires the City Council to prepare and adopt a “specific plan” for the project. Id. The City Council must prepare a specific plan even if the project otherwise complies with all the rules and regulations governing land development in Malibu. Id. But for Measure R, such projects would require only administrative approval from the City. Id.

Once prepared, a project’s specific plan is placed on the ballot for approval by the Malibu electorate. Id. The electorate may approve or reject a project’s specific plan for any reason and without any explanation. Id. Petitioners contend that neither Measure R nor any other local or state law provides any policy goals, objectives, or other guidance for the electorate’s vote on a specific plan. Id. Whether the electorate approves or rejects a project’s specific plan, the electorate does not provide any written findings or analysis supporting its decision. Id.

The City Council may not exercise its administrative authority to grant final approval to

any project over 20,000 square feet unless and until the project's specific plan has been approved by the electorate. Id. After the electorate approves a specific plan for a project, the City may not exercise its administrative authority to grant any discretionary or non-discretionary approval for the project unless it is consistent with the specific plan and the City makes a written finding to that effect. Id.

### **3. The Impact of Measure R**

PCC and the Whole Foods Project are directly and negatively affected by Measure R. pet. ¶16. Measure R's formula retail restrictions impose significant limitations on the type and size of retail tenants to which PCC can lease. Pet. ¶17. Because the Whole Foods store is scheduled to occupy more than 30% of the square footage of the Whole Foods Project, Measure R effectively prohibits PCC from leasing any space at the Whole Foods Project to any non-exempt formula retail tenant. Id. Formula retail tenants are considered to be especially desirable tenants, because they tend to be creditworthy and reliable. Id.

Measure R requires voter approval of a specific plan for the Whole Food Project. Pet. ¶18. But for Measure R, the Project would require only administrative approval by the City. Id. The voter approval requirement creates great cost and uncertainty regarding the feasibility of the Whole Foods Project. Id. Measure R's restrictions, limitations, and requirements place the viability of the Whole Foods Project in jeopardy. Pet. ¶19.

MBC and the Sycamore Village Project are directly and negatively impacted by Measure R. Pet. ¶22. Measure's R's formula retail restrictions impose significant limitations on the type and size of retail tenants to which MBC can lease. Pet. ¶23. Measure R's specific plan provision requires voter approval of a specific plan for the Sycamore Village Project that was previously unnecessary. Pet. ¶24. The voter approval requirement creates great cost and uncertainty regarding the feasibility of the Sycamore Village Project. Id. Measure R's restrictions, limitations and requirements place the viability of the Sycamore Village Project in jeopardy. Pet. ¶25.

### **4. The Petition**

On January 5, 2015, Petitioners filed an action against the City in the United States District Court for the Central District of California, Case No. 13-cv-0003 3-JAK (the "Federal Action") asserting a facial challenge to Measure R. Pet. ¶26. In the Federal Action, Petitioners sought a declaration that Measure R is invalid and an injunction to enjoin the City from enforcing Measure R. Pet. ¶27. On April 10, 2015, the district court (Hon. John A. Kronstadt) abstained from deciding the Federal Action pursuant to the federal Pullman doctrine. Pet. ¶28. The district court dismissed Petitioners' state law claims so that Petitioners pursue them in state court. Id. The district court stayed Petitioners' federal law claims pending resolution of the state law claims. Id.

The Petition's first cause of action alleges that Measure R violates the single subject matter rule found in California Constitution, Article II, §8(d). Pet. ¶33. By its terms, Measure R includes two separate components that embrace distinct subjects. Pet. ¶34. The stated disparate subjects and goals of Measure R include (i) protecting natural resources and natural habitat, (ii) limiting increased traffic and congestion, (iii) limiting chain store development, (iv) preserving Malibu's alleged "small town, rural character," (v) avoiding a "sense of familiarity or sameness," (vi) creating a diverse commercial retail base, (vii) addressing impacts on police and fire protection, (viii) addressing inadequate wastewater treatment facilities, (ix) avoiding suburban sprawl, and (x)

maintaining view corridors and vistas. Pet. ¶34, Ex. A, §§ 2-4. Measure R's two components are not reasonably germane to one another. Pet. ¶35. Each component amends independent, unrelated sections of the City's zoning code and general plan, has separate and distinct compliance standards, code requirements and restrictions, and enforcement of each component is independent of the other. Id.

The second cause of action alleges that Measure R exceeds the scope of referendum authority by subjecting administrative acts to public vote. Pet. ¶45. Measure R's "specific plan" requirement withdraws the City's power to grant administrative approval to commercial projects over 20,000 square feet. Pet. ¶46. Under Measure R, the City may not grant final approval except after the electorate approves the project by public vote. Id. This provision improperly lodges the City's administrative power to grant such approval in the electorate. Id. By subjecting non-legislative acts to public vote, Measure R unlawfully withdraws the City's administrative and adjudicative functions and exceeds the scope of initiative power under California law. Pet. ¶47.

Petitioners' third cause of action alleges that Measure R creates an illegal conditional use permit ("CUP"). Pet. ¶¶ 51-52. Measure R provides that "[a CUP] ... shall be required for all new formula retail establishments." Pet. ¶52, Ex. A §6. Measure R further provides that "each approved [CUP] shall run solely with the operation of the formula retail establishment for which it was approved." Id. By creating a CUP that does not run with the land and that attaches to a particular establishment, Measure R violates well-established common law and conflicts with Gov't Code section 65909. Pet. ¶53.

The fourth cause of action alleges that Measure R violates Petitioners and others' substantive due process rights. Pet. ¶57. Measure R's requirement of a specific plan for projects over 20,000 square feet creates an additional requirement of voter approval for projects that comply with the City's zoning standards and land use policies. Pet. ¶58. This requirement serves no legitimate government purpose. Id. Measure R's specific plan requirement contains no substantive policy or development standards. Pet. ¶59. The specific plan requirement does not advance Measure R's goal of protecting Malibu's "rural" or "small town" character, nor does it advance any other substantive goal. Id. Developments of over 20,000 square feet are subject to no new zoning standards or regulations to advance any claimed goal of Measure R. Id. The City's electorate can approve or reject Measure R for any reason or no reason. Id. The results of Measure R's specific plan requirement are inherently arbitrary. Pet. ¶61. Given that the electorate may reject all projects over 20,000 square feet, Measure R further creates an illusory entitlement process, with no certainty as to any particular result and no reasonably predictable timeframe for commercial development in Malibu. Pet. ¶63.

Petitioners' fifth, sixth, seventh, and eighth causes of action restate the previous causes of action, but seeking declaratory relief instead of a writ of mandate. Pet. ¶¶ 67-82.

Petitioners seek a peremptory writ of mandate declaring Measure R invalid and ordering the City to cease any and all enforcement of Measure R. Pet. ¶83.1. Petitioners additionally seek declaratory relief and an injunction preventing the City from enforcing Measure R. Pet. ¶83.2-3.

### **B. Standard of Review**

A facial attack on the overall constitutionality of a statute or regulation may be made by an action for declaratory relief. A facial challenge to a statute or ordinance "considers only the text of the measure itself, not its application to the particular circumstances of an individual." Sturgeon

v. Bratton, (“Sturgeon”) (2009) 174 Cal.App.4th 1407, 1418 (citation omitted). The petitioner cannot prevail by suggesting that in some future hypothetical situation problems may possibly arise as to the particular application of the statute. Rather, he or she must demonstrate that the law’s provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions (or other law). Tobe v. City of Santa Ana, (“Tobe”) (1995) 9 Cal.4th 1069, 1084. Under a facial challenge, the fact that the statute or ordinance “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid....” Sanchez v. City of Modesto, (2006) 145 Cal.App.4th 660, 679.<sup>1</sup>

In considering the constitutionality of a legislative act the court presumes it to be valid and resolves all doubt in its favor. California Housing Finance Agency v. Ellion, (1976) 17 Cal.3d 575, 594. “As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible... We review challenges to the exercise of such power deferentially.” California Building Industry Association v., City of San Jose, (2015) 61 Cal.4th 435, 456. Where possible, the enactment must be construed to preserve its constitutional validity. Save Our Sunol, Inc. v. Mission Valley Rock Co., 2004) 124 Cal.App.4th 276, 284.

### **C. Analysis<sup>2</sup>**

Petitioners PCC and MBC<sup>3</sup> seek declaratory relief against Respondent City declaring Measure R invalid. Petitioners contend that Measure R (1) violates the single-subject matter rule, (2) exceeds the scope of referendum authority by subjecting administrative acts to public vote, (3) creates an illegal CUP, and (4) violates their substantive due process rights.

#### **1. The Single Subject Rule (Fifth Cause of Action)**

Petitioners’ fifth cause of action alleges that Measure R violates the California Constitution’s single-subject matter rule.

On November 4, 2014, Malibu voters enacted Measure R. The stated goals of Measure R are, among other things, to “[p]reserve our community’s unique small-town, rural character and protect natural resources ...,” to “[require preparation and voter approval of specific plans for

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<sup>1</sup> Conversely, a court considering a facial challenge to a procedural scheme must balance the competing interests and may not ignore the procedural scheme’s actual standards and uphold the law simply because a hypothetical situation might lead to a permissible result. California Teachers Assn. v. State of California, (1999) 20 Cal.4th 327, 347.

<sup>2</sup> The City asks the court to judicially notice the commercial uses portion (§1.4.4 JU Goal 4) of its general plan. The request is granted. Evid. Code §452(b). In reply, the City asks the court to judicially notice the Official Title and Summary of Measure R. The request is granted. Id.

<sup>3</sup> Petitioner PCC owns a 5.88-acre property located at 23401 Civic Center Way in Malibu, California. Petitioner MBC owns an approximately 9.2-acre property located at 23575 Civic Center Way in Malibu, California. Petitioners contend they are negatively impacted by Measure R, which imposes chain store restrictions on the retail tenants to which they can lease and requires voter approval of specific plans for projects on their properties.

certain large commercial or mixed use projects,” and to “[l]imit chain stores in our City.” §3.

Article II, Section 8 of the California Constitution, also known as the “single-subject rule,” provides that “[a]n initiative embracing more than one subject may not be submitted to the electors or have any effect.” The single-subject rule as applied to an initiative has a dual purpose of avoiding voter confusion and logrolling – combining several proposals so that a majority of votes can be obtained for a measure that would not otherwise be approved. Harbor v. Deukmejian, (1987) 43 Cal.3d 1078, 1096, 1098. The rule applies to local as well as state initiatives. Shea Homes Ltd. Partnership v. County of Alameda, (“Shea Homes”) (2003) 110 Cal.App.4<sup>th</sup> 1246, 1255.

The California Supreme Court has emphasized that “the initiative process occupies an important and favored status in the California constitutional scheme and ... the single-subject requirement should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform in a particular area of public concern.” Senate of State of Cal. v. Jones, (“Jones”) (1999) 21 Cal.4<sup>th</sup> 1142, 1157. An “initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are “reasonably germane” to each other and to the general objects of the initiative, or they are “functionally related in furtherance of a common underlying purpose.” Harbor v. Deukmejian, *supra*, 43 Cal.3d at 1098-99. Under the functionally related test, each of the provisions need not effectively interlock in a functional relationship. It is enough that they are reasonably related to a common theme or purpose. Jones, *supra*, 21 Cal.4<sup>th</sup> at 1157. In applying these tests, a subject that is too general violates the intent of the single-subject rule. Harbor v. Deukmejian, *supra*, 43 Cal.3d at 1000 (subject of “fiscal affairs” was too general to save a statute concerning many varied subjects with no apparent relationship). Although article II, section 8 does not expressly require that the subject of an initiative be stated in the initiative title, the singleness of an initiative may be determined by the extent to which its provisions are germane to the general subject expressed in the title and the field of legislation suggested by it. California Trial Lawyers Assn., Inc. v. Eu, (“California Trial Lawyers”) (1988) 200 Cal.App.3d 351, 358 (citation omitted).

An example of an initiative that failed to satisfy the single-subject requirement occurred when a lengthy initiative to control insurance costs through no fault insurance had buried in the middle a provision exempting insurance companies from campaign contribution limits and preventing elected officials receiving such contributions from being disqualified from acting in matters affecting the insurance company donors’ interests. California Trial Lawyers, *supra* 200 Cal.App.3d at 359. The hidden provision was a paradigm of the potentially deceptive combinations of unrelated provisions to which the single-subject rule was aimed. *Id.* at 360.

Additionally, where a statute, which is evaluated under the single-subject rule in the same manner as an initiative, included 71 disparate provisions modifying numerous codes, the provisions were not reasonably germane to any object and the subject of “fiscal affairs” was too general to save it. Harbor v. Deukmejian, *supra*, 43 Cal.3d at 1100. *See also Jones*, *supra*, 21 Cal.4<sup>th</sup> at 1142 (initiative violated single-subject rule where it concerned both transfer of reapportionment power from the Legislature to the Supreme Court and compensation of state legislators and officials).

On the other hand, an initiative amending a county’s local coastal program (“LCP”) by identifying 37 existing LCP policies and requiring any further amendment to those policies would

require voter approval after submission by a four-fifths majority of the board of supervisors did not violate the single subject rule. The plaintiffs contended the initiative embraced two distinct subjects: (1) a change in coastal land use policies and (2) off-shore drilling and refineries. *Id.* at 553-54. The court held both provisions were reasonably germane to each other because the dealt with the planning and regulation of coastal zone development to protect coastal resources. *Id.* at 554. San Mateo County Coastal Landowners' Assn. v. County of San Mateo, ("San Mateo") (1995) 38 Cal.App.4th 523, 553-54. An initiative amending a county's general plan to impose restrictions on new housing developments in certain areas and its directives regarding landfills and promoting garbage management programs and policies were not distinct subjects, but rather related to the initiative's purpose of preserving open space and agricultural land. Shea Homes, *supra*, 110 Cal.App.4th at 1256-58.

Petitioners assert that Measure R fails the "functionally related or reasonably germane" test. Its two distinct components—(1) the requirement of a voter-approved specific plan and (2) the formula retail (chain store) restrictions—serve two distinct goals, and those components are not "reasonably germane" to one another. *See Jones*, *supra*, 21 Cal. 4th at 1158. While both components concern land use and commercial development, these subjects are too broad – "a virtually unlimited array of provisions could be considered germane" to them. *Id.* at 1162. A single subject broad enough to encompass both of Measure R's components would affect virtually any aspect of commercial real estate development in Malibu. *See Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1101 (invalidating legislative bill's provisions as germane to "fiscal affairs"). Additionally, Petitioners argue that Measure R's title may convey the voter approval component but fails to convey the general subject of Measure R's chain store restrictions, and therefore does not provide reasonable notice of its contents. Pet. Op. Br. at 14.

The general purpose of Measure R is not as broad as the "regulation of commercial development."<sup>4</sup> Instead, as the City argues (Opp. at 11-12), Measure R's purpose is to regulate planning controls over commercial development in order to preserve the City's "rural, small-town character." Measure R identifies large commercial developments as having the potential to alter the character of an area, and the scale of that potential impact warrants additional planning. §3. Likewise the proliferation of chain stores threatens to overwhelm an area with generic commercial development, diluting the unique community character that Measure R seeks to preserve. *Id.* Both components are therefore aimed at keeping businesses consistent with the self-described "small town, rural character" of the City. Each contested provision is germane to that purpose because limiting ubiquitous chain stores and requiring voter approved planning for large commercial developments aids Malibu's effort not to become "AnyTown, USA". Large commercial projects and formula retail stores both significantly affect the character of a city. The two components of Measure R work together to limit the size and type of commercial development within the City in order to preserve the City's character. Thus, both are reasonably germane to the stated general purpose of preserving the City's small town, rural character.

Petitioners' argument that Measure R's title fails to convey the general subject of Measure R is not well taken. Although article II, section 8 does not expressly require that the subject be

<sup>4</sup> Petitioners also contend that preserving the City's "community character" is so vague as to mean anything. Reply at 9. Measure R's purpose is to preserve the City's "rural, small-town character", which is not vague at all.

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stated in the initiative title, the singleness of an initiative may be determined by the extent to which its provisions are germane to the general subject expressed in the title. California Trial Lawyers, *supra*, 200 Cal.App.3d at 358. Petitioners base their arguments on the short title for Measure R, which was “Your Malibu, Your Decision.” Yet, the short title of an initiative is provided by its authors. The official title of the initiative was “AN ORDINANCE (1) REQUIRING A VOTER-APPROVED SPECIFIC PLAN FOR CERTAIN COMMERCIAL AND MIXED-USE PROJECTS; AND (2) PROHIBITING FORMULA RETAIL BUSINESSES OVER 2500 SQUARE FEET AND LIMITING THE NUMBER OF SMALLER FORMULA RETAIL BUSINESSES IN SHOPPING CENTERS.” This title clearly conveys both contested features of Measure R. Unlike the initiative in California Trial Lawyers, Measure R’s voter approval requirement for large commercial development planning as well as its chain store restrictions are reflected in the title and the text and not hidden, and there is no prospect of voter confusion or log-rolling.

Last, Petitioners argue that Measure R’s purpose is misleading because while it claims to be designed to preserve the City’s small town, rural character, there is no substantive policy or standards to govern the electorate’s voting, and voters may just as easily vote to destroy the City’s character as preserve it. Op. Br. at 14. The restrictions on chains stores also fail because they restrict new chains stores in new developments but not additional chain stores in existing developments. Reply at 9. These are arguments concern the effectiveness of Measure R, not its single-subject and not a basis for challenge.

Measure R does not violate the single-subject rule.

## **2. Scope of Referendum Authority (Sixth Cause of Action)**

Petitioners’ sixth cause of action alleges that Measure R exceeds the scope of referendum authority by subjecting administrative acts to public vote.

### **a. General and Specific Plans**

The legislative body of each city and county must adopt a general plan for development. Govt. Code §65300. The general plan must contain policies setting forth objectives, principles, standards, and plan proposals for development. Govt. Code §65302. The general plan must have at least the following seven elements: land use, traffic circulation, housing, conservation, open space, noise, and safety. Govt. Code §§ 65300.5; 65302; 65303; Dana Point, *supra*, 52 Cal.App.4<sup>th</sup> at 481.

After adopting a general plan, a city or county may also adopt a specific plan “for the systematic implementation of the general plan for all or part of the area covered by the general plan.” Govt. Code §65450. Among other things, a specific plan must contain standards and criteria by which development will proceed, and a program of implementation including regulations, programs. Dana Point, *supra*, 52 Cal.App.4<sup>th</sup> at 481. The elements of a specific plan are similar to those in general plans – the siting of buildings, uses and roadways, height, size, and setback limitations, building densities, and open space allocation. Yost, *supra*, 36 Cal.3d at 570; Govt. Code §65451. The statutory procedure for the adoption and amendment of specific plans is the same as that for general plans. Dana Point, *supra*, 52 Cal.App.4<sup>th</sup> at 481 (citing Govt. Code §§6530 *et seq.*, 65453(a)).

**b. Legislative Versus Adjudicative Acts**

In California, the power of referendum may be invoked only with respect to matters which are legislative in character. City of San Diego v. Dunkl, (“Dunkl”) (2001) 86 Cal.App.4th 384, 399. Administrative or executive acts are not within the reach of the referendum process. Id. The cases draw a careful distinction between legislative and administrative acts. Lincoln Prop. Co. No. 41 Inc. v. Law, (1975) 45 Cal.App.3d 230, 234. An act “is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted.” Id. The reason for the distinction between legislative and administrative actions is the need to balance the ideal of direct legislation by the people against the practical necessity for municipal governments to be free from time consuming and costly referenda on merely administrative matters. W. W. Dean & Assocs. v. City of San Francisco, (“W.W. Dean”) (1987) 190 Cal.App.3d 1368, 1374. Under this distinction, zoning ordinances, and general plans and their amendments are legislative actions insofar as they prescribe a new policy or plan. Id. at 1374-75. Approval of a specific plan is a legislative act within the scope of the voters’ initiative and referendum authority. Yost v. Thomas, (“Yost”) (1984) 36 Cal.3d 561, 570-71. The approval of variances, conditional use permits, and tentative subdivision maps, which involve the application of pre-established standards and conditions to particular land uses, is administrative. W.W. Dean, supra, 190 Cal.App.3d at 1375.<sup>5</sup> The label used is not determinative; the purpose and impact of the matter must be analyzed to decide if it is legislative or administrative. Id. (concluding that while habitat conservation plan was legislative, an amendment which did not change the land use proposed by the plan and which was necessary to enable the project to go forward was administrative and not subject to referendum).

**c. Pertinent Case Law**

In Yost, the plaintiffs challenged through referendum election an amendment to a general plan, specific plan, and zoning amendment for a 32-acre undeveloped property of coastal land referred to as the “Southern Pacific property” on which the real party proposed to develop a hotel and conference center. 36 Cal.3d at 565. The California Supreme Court addressed the issue whether the Coastal Act precludes a referendum on a land use measure in the coastal zone which has been approved by a city council and the Coastal Commission. Id. at 564. The court concluded that the Coastal Act does not provide blanket immunity from a referendum. A specific plan is a legislative act subject to voter referendum, and this legislative act did not become administrative by virtue of the Coastal Act’s pervasive system of regulation. Id. at 570-71.

In Dana Point, the plaintiffs owned approximately 120 acres of undeveloped land along the coast known as the Headlands. 52 Cal.App.4<sup>th</sup> at 479. The city’s general plan contemplated mixed use development of the Headlands and required a specific plan for development of that area. The plaintiffs proposed, and the city council adopted, a special plan (and general plan amendment) for

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<sup>5</sup> In addition, where a city implements a comprehensive system of state regulations affecting a matter of statewide or national concern, its actions are legislative and not subject to local referendum. W.W. Dean, supra, 190 Cal.App.3d at 1375-76. *See also* DeVita v. County of Napa, (“DeVita”) (1995) 9 Cal.4<sup>th</sup> 763, 780-81 (only in matters that transcend local concerns can the Legislature have intended to convert the city and county governing bodies into its exclusive agents for the achievement of a ‘legislative purpose of statewide import.’”)

the Headlands which provided for a maximum of 370 residential units, a hotel, and 66.3 acres of recreation/open space/conservation area. *Id.* at 480. The specific plan and general plan amendment were challenged and defeated in a city election. *Id.* at 480, 483.<sup>6</sup> The plaintiffs contended that the voters' failure to approve the plans violated their due process rights and constituted a taking under the Fifth Amendment. *Id.* at 480. The court disagreed, noting that the general plan contemplated development of the Headlands and the electorate's failure to approve the specific plan did not alter this fact. *Id.* at 483. The electorate's action would not constitute a taking unless an unreasonable delay were shown. *Id.* The court added that "at some point, the city's interest in the orderly development of the Headlands must give way to plaintiffs' right to use their property for some economically viable purpose....unnecessary delays in approving a proposed development or repetitive denials of specific plans complying with the city's general plan will amount to a taking...." *Id.*

Citizens for Jobs concerned an initiative ((Measure F) which placed spending and procedural restrictions regarding the planning and implementation of the conversion of former El Toro Marine Corps Air Station ("El Toro") to civilian use. 94 Cal.App.4<sup>th</sup> at 1316. Measure F required the approval by a 2/3 vote of the electorate for any legislative act concerning certain land use projects on the El Toro property, including an expanded jail, hazardous waste landfill, and the most important project, a proposed commercial airport. *Id.* at 1319.

The court noted that both zoning ordinances and general plans are subject to amendment by initiative, and initiatives "are not to be stricken down lightly." *Id.* at 1324, 1326. The court stressed that Measure F is a hybrid initiative/referendum<sup>7</sup> measure because it was an initiative compelling the exercise of referendum power for voter approval of county actions before they became effective, and that the distinction between initiative and referendum were not dispositive as the substance, not technical nature, of the voter approval and spending restrictions was at issue. *Id.* at 1328.

The court noted that pursuant to a previous initiative, Measure A, the county had been performing land use planning for El Toro, including an airport master plan, transition plan, airport layout plan for the FAA, and environmental studies. *Id.* at 1328-29. Measure F placed numerous roadblocks on the planning process, such as requiring a public hearing in each of the 34 cities potentially affected by a project. As such, the Citizens for Jobs court distinguished the initiative measure amending the general plan approved by the California Supreme Court in DeVita, supra, 9 Cal.4<sup>th</sup> at 763, because "it is not an act that directly amends the general plan or provides other substantive policy. Rather, it essentially imposes procedural hurdles upon the planning process." 94 Cal.App.4<sup>th</sup> at 1330. For the same reason, the Citizens for Jobs court distinguished the initiative measures that made substantive amendments to a general plan or its equivalent in order to implement affirmative policy statements, including Pala Band of Mission Indians v. Board of

<sup>6</sup> Under the Elections Code, the electorate may challenge any city ordinance by compelling an election through a petition signed by 10% of the voters. Elec. Code §9237. If not approved in the election, the ordinance is not effective and the city council may not adopt the same ordinance for another year. Elec. Code §9241.

<sup>7</sup> An initiative is the power of the electors to propose legislation. Article 2, §8(a). A "referendum" is the electorate's power to approve or reject legislation passed by a legislative body. Article 2, §9(a).

Supervisors, (1997) 54 Cal.App.4<sup>th</sup> 565 and San Mateo County Coastal Landowners' Assn. v. County of San Mateo, (1995) 38 Cal.App.4<sup>th</sup> at 523. Measure F did not make a substantive amendment, but rather sought to impose procedural restrictions on otherwise authorized planning activities. It therefore restricted the county from carrying out an already approved legislative policy in Measure A. Taken together with the overbreadth of the impediments and spending restrictions for planning a project, Measure F impermissibly intruded into the board of supervisors' prerogatives in carrying out public policy declared in Measure A and its duties as prescribed by its own police power. As such, Measure F did not have a proper subject matter. Id. at 1330-31.

Citizens for Jobs also concluded that Measure F impermissibly interfered with the board's essential government functions in performing administrative acts. Measure F did not change the land use policy in Measure A, but rather changed the procedure and substance of implementing it by adding layers of voter approval and hearing requirements to the decisions anticipated by Measure A to be made by the board. The manner in which Measure F restricted the board's administrative discretion with voter approval requirements placed it "firmly within the administrative category of voter enactments, which are not permitted." Id. at 1333-34. Moreover, Measure F failed the test set forth in DeVita for an initiative that may properly circumscribe the power of future governing bodies. By requiring voter approval and imposing spending restrictions, the initiative interfered with the board's ability to carry out already established policy that the airport project should be fully investigated. Id. at 1334.

In sum, pursuant to Yost and Dana Point, a specific plan supporting a particular development project is a legislative act that may be challenged by the electorate. Citizens for Jobs stands for the proposition that where an initiative imposes overbroad and difficult procedural hurdles and spending restrictions for planning a project, it impermissibly intrudes into the legislative body's prerogatives in carrying out public policy declared in other ordinances or duties prescribed by its own police power and, as such, does not have a proper subject matter. For similar reasons, at least where there was a pre-existing land use policy (Measure A), such an initiative imposing voter approval and hearing requirements crosses the line into administrative, not legislative, function.

#### **d. The Parties' Positions**

Petitioners note that the City Council and City Planning Commission, in evaluating a large commercial project, must decide whether it complies with the "preestablished standards and conditions" contained in the City's general plan and LCP. These standards and conditions govern, *inter alia*, the project's setback, height, square footage, view preservation, and parking, as well as governing whether to issue coastal development permits, CUPs, variances, or other land use permits. *See, e.g.*, Malibu Local Coastal Program Local Implementation Plan § 3.8(A), 3.14.3.

Measure R requires voter approval of all development proposals larger than 20,000 square feet, and prevents the City Council from taking any final action on administrative approvals such as coastal development permits, CUPs, variances, or other land use permits without voter approval. §17.02.045(c)(A). The City Council may grant final and discretionary approval only if it is consistent with the voter-approved specific plan. §17.02.045(c)(A).

Petitioners contend that Measure R effectively delegates to the referendum process matters that are not "strictly legislative in character" by requiring voters to approve any development project larger than 20,000 square feet (in its entirety) before the City Council may grant final

approval. The City Council may grant final and discretionary approval of a project only if it is consistent with the voter-approved specific plan, and this places Measure R “firmly within the administrative category of voter enactments, which [is] not permitted.” Citizens for Jobs, *supra*, 94 Cal. App. 4th at 1334. Pet. Mot. at 6-7.

Petitioners further contend that Measure R attempts to hide its intrusion into the administrative arena by requiring only that the voters approve a specific plan, which is a legislative matter subject to voter approval under Yost. But in determining whether an act is legislative or administrative, “[t]he name given it is of no consequence.” Hopping v. City of Richmond, (1915) 170 Cal. 605, 611. The specific plans referred to in Measure R are administrative, not legislative, in nature. Unlike the specific plans in Yost, Dana Point, and Citizens for Planning Responsibility v. City of San Luis Obispo, (“Citizens for Planning”) (2009) 176 Cal.App.4th 357, 364<sup>8</sup> – all of which prescribed new policy for land use regarding large-scale developments -- Measure R’s specific plans do not prescribe any new policy or plan. Measure R requires voters to approve a specific plan for all projects larger than 20,000 square feet irrespective of whether the project prescribes any legislative policy at all. Measure R requires a specific plan even for projects that require only administrative approvals, such as CUPs, variances, or land use permits. Even for projects that contemplate some legislative act, such as a general plan amendment, Measure R requires the entire project to be put before the voters for approval, including elements such as square footage and gross floor area without regard to whether those elements require any legislative change. §17.02.045(c)(C)(1)-(9), (d). These project-specific details must be assessed against preestablished standards, are administrative in nature, and do not prescribe a new policy or plan. Measure R’s specific plans are therefore a hollow charade, designed to impose a citywide up or down vote on all final project approvals. Under Wiltshire and Citizens for Jobs, this is beyond the power of referendum. Pet. Mot. at 9-10.

The City argues that it has a right to require specific plans for any area covered by a general plan. Gov’t Code § 65450. Thus, the City has the power to require specific plans for areas where developments larger than 20,000 square feet. The City is a relatively small city where large commercial developments can have disproportionate impact, and a requirement of a specific plan for such areas adds a layer of planning to assure community goals are met. In passing Measure R, the City’s voters have determined that commercial projects of 20,000 square feet or more require more detailed planning. City Opp. at 4.

The City contends that Petitioners are conflating permitting with planning. When planning, the City considers whether a proposal is desirable. Requiring planning before permitting is standard procedure in land use regulation. City Reply at 1-2. When permitting, the City compares a proposed application to established criteria. Under Measure R, the City Council is vested with permitting authority and the electorate retains planning authority to approve specific plans. Measure R does not subject an administrative act to referendum; it subjects only the legislative act of a specific plan to such review.

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<sup>8</sup> In Citizens for Planning, the court upheld an initiative amending a county’s general plan and zoning regulations permitting a 131-acre mixed use development near an airport. The zoning amendment contained standards for development, including densities, building heights, floor area ratios, parking requirements, building sizes and configurations, setbacks and permitted uses. Id. at 641.

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While Petitioners warn that circumstances could develop where the specific plan would constitute only administrative matters and be a specific plan “in name only”, it is unclear that circumstance is even possible given that a specific plan establishes the planning requirements of an area and its required contents are set forth in state law. *See* Govt. Code §65451.<sup>9</sup> In any event, the City argues that the court need not reach Petitioners’ hypothetical question. Petitioners are arguing that in some circumstances the specific plan required by Measure R would not be legislative in nature. Even if correct, a hypothetical possibility is insufficient to sustain a facial challenge which considers only the text of the ordinance and does not examine how the ordinance is applied to a particular or hypothetical set of circumstances. *See Tobe v. City of Santa Ana*, (1995) 9 Cal.4th 1069, 1084. City Opp. at 3-4. Should such circumstance develop, Petitioners may bring an as-applied challenge. Thus, Petitioners’ facial challenge must fail. City Opp. at 5.

The City distinguishes Citizens for Jobs on the basis that Measure F sought to restrict administrative permitting and land use decisions, stating “No act by the County of Orange to approve any new or expanded jail, hazardous waste landfill, or civilian airport project shall be valid and effective unless also subsequently ratified by a two-thirds vote of the voters voting at a County General Election.” 94 Cal.App.4th at 1321. As such, Measure F did not deal with a specific plan but rather impermissibly interfered with the issuance of permits and land use approvals. City Opp. at 6.

The City contends that Yost, Dana Point, and Citizens for Planning are controlling because the specific plans that will be submitted to the City’s voters will “prescribe a new policy or plan for community land use” just like those cases. Sections 17.02.045(c)(C)(1)-(9) do not somehow transform the specific plan into voter approval of land use permits and entitlements and merely state information that is to be included in the report to the City Council when it is developing the specific plan. The City Council must approve a specific plan before it is submitted to the electorate, and the possibility of an inappropriate specific plan being submitted to voters is diminished by this fact and the savings clause in Measure R. In the unlikely event their fears are realized, Petitioners could raise an as-applied challenge. City Opp. at 7.

**e. Merits**

Resolution of the issue requires examination of Measure R’s specific plan requirement. Measure R requires voter approval of every new proposed commercial project larger than 20,000 square feet. §17.02.045(a)(A). This includes several steps:

- (1) For any proposed commercial project larger than 20,000 square feet, the City Council must prepare and adopt a specific plan. §17.02.045(c)(A). One specific plan may be prepared covering more than one project or a separate plan may be prepared for each project.

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<sup>9</sup> The City argues that Measure R does not necessarily require project-by-project review. Instead, Measure R requires a specific plan for areas zoned for large commercial projects. Once a specific plan is approved, large projects within the specific plan area may be permitted without additional voter-approved specific plan. Thus, the City could adopt a specific plan for the entire civic center area and, once approved by the voters, alleviate individual developers of any obligation under Measure R to obtain additional voter-approval. City Reply at 2.

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(2) In developing the specific plan, the City Council must prepare a report for public notice and hearing which addresses (a) the proposed floor area, (b) requirements to ensure the retention of retail businesses, (c) preservation of view corridors, analysis of project traffic impacts, (d) the adequacy of public facilities and services for the project, individually and cumulatively with other projects, and the public cost for such facilities and services; (e) the project's provision of open space; (f) the adequacy of parking for the project and the visual impact of any proposed parking structures; (g) the extent to which the Commercial Area (defined term) has been enlarged by rezoning for the project; and (h) any geological, hydroelectric, or wastewater impacts from the project.

(3) The specific plan prepared by the City Council must comply with Government Code section 65450 *et seq.* and be consistent with the City's general plan and LCP. §17.02.045(a)(C). The specific plan must be prepared to minimize delay to the developer and in a manner that can be easily understood by voters. Each ballot measure shall identify and accurately describe the project, including the proposed square footage, the mix of commercial and residential use. §17.02.045(d).

(4) The specific plan must be placed on the ballot for approval by the electorate. §17.02.045(c)(A). The City shall take no action on any discretionary entitlement for the project until the specific plan for the development has been approved by the voters. §17.02.045(e).

(5) If the electorate approves a specific plan for a project, the City may not grant any discretionary or non-discretionary approval for the project unless such approval is consistent with the specific plan and the City makes a written finding to that effect. §17.02.045(f).

(6) If the electorate rejects a specific plan for a project, the City Council may prepare and present to the voters a subsequent specific plan. 17.02.045(h).

The parties agree that a facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself. *See Sturgeon, supra*, 174 Cal.App.4th at 1418. The construction of county ordinances is subject to the same standards applied to the judicial review of statutory enactments. Department of Health Services of County of Los Angeles v. Civil Service Commission, (1993) 17 Cal.App.4th 487, 494. In construing a legislative enactment, a court must ascertain the intent of the legislative body which enacted it so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724.

The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The various parts of a statute must be harmonized by considering each particular clause or section in the context of the statutory framework as a whole. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735. Where there is no ambiguity in the language of a statute, courts "construe the words according to their ordinary meaning without reference to other indicia of the voters' intent. Outfitter Props., LLC v. Wildlife Conservation Bd., (2012) 207 Cal. App. 4th 237, 244-45.

The plain meaning of Measure R does not support the City's position that the voter approval requirements simply require "that the commercial areas in the City be planned using the state law tool of a specific plan," and not that the voters must engage in "project-by-project review. The term "project" is used throughout Measure R. The purpose of Measure R is to require "preparation and voter approval of specific plans for large commercial or mixed-use projects...." §3 (emphasis added). The voter approval provisions expressly require that "[a] specific plan or plans shall be prepared for every development project subject to this measure," and forbid the City from granting any final administrative approvals "until the specific plan for that development project has been approved by the voters." §17.02.045(c)(A), (e) (emphases added). A "development project subject to this measure" is defined as "any project [larger than 20,000 square feet] for which a discretionary approval is sought," and "discretionary approval" includes "any discretionary land use entitlement or permit of any type...." §17.02.045(b)(B), (E) (emphasis added). Measure R further requires the voter ballot measure to clearly identify and describe the project to avoid "misleading the voters" about what they are being asked to approve. §17.02.045(d). A report must be prepared by the City and subject to public hearing for "each specific plan" which must address project-specific details such as the projected traffic, public services, open space, and parking impacts of "the development project subject to this measure." §17.02.045(c)(C) (emphasis added). Additionally, the ballot measures prepared for the voters must include project-specific detail -- such as the square footage of the gross floor area of the proposed structure—for the purpose of not confusing or misleading the voters. §17.02.045(d).

Thus, the plain language of Measure R focuses on larger commercial projects, requires project-specific voter approval for those projects, and prevents the City from granting final administrative approvals until the voters have approved the specific plan for that project.

The plain language of Measure R also rebuts the City's contention that a facial challenge is improper, and an as-applied challenge would be necessary to challenge Measure R, because it provides for situations in which a specific plan would be unnecessary for a large commercial project. According to the City, Measure R only requires a specific plan for areas zoned for large commercial projects; once a specific plan is approved then multiple large projects within that area could be permitted without additional voter-approval. City Opp. at 5.

Yet, Measure R requires voter approval for "every development project subject to this measure," and the City is prohibited from granting final administrative approvals to "any project subject to this measure until the specific plan for that development project has been approved by the voters." §17.02.045(c)(A), (e)(emphasis added). Measure R does permit a specific plan to cover more than one project (§17.02.045(c)(C)), but still requires a specific plan to be approved for each project. Thus, a specific plan for two projects could be submitted, but there is no suggestion that a specific plan can be adopted for a particular areas such as the civic center that subsequently would apply to all commercial projects at that location. See Pet. Reply at 4, n.1. Measure R is categorical in requiring a voter-approved specific plan for each new large-scale commercial development.

The mere fact that Measure R requires a specific plan for each commercial project is not dispositive. Yost, Dana Point, and Citizens for Planning all addressed initiatives concerning specific plans for single projects. The question is whether Measure R's requirement that a project-specific specific plan be submitted to voters and other procedures are a procedural hurdle that interferes with the City's administrative duties under Citizens for Jobs.

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In this regard, the fact that Measure R refers to a "specific plan" is not dispositive. In determining whether an act is legislative or administrative, the name given to it is of no consequence. See Hopping v. City of Richmond, (1915) 170 Cal. 605, 611. In order to be legislative, "a specific plan must contain standards and criteria by which development will proceed, and a program of implementation including regulations, programs, public works projects, and financing measures." Dana Point, *supra*, 52 Cal.App.4<sup>th</sup> at 481. At the hearing, the City relied on the fact that Govt. Code section 65451 provides the elements of a specific plan -- the distribution, location, and uses of land, distribution, location, and extent of roadways and public transportation, height, size, and standards for setback limitations, building densities, and open space allocation -- and contended that is all Measure R requires. See Yost, *supra*, 36 Cal.3d at 570. However, Petitioners counsel responding by pointing out that Govt. Code section 65451 calls for standards and planned criteria, it does not call for application and approval of those standards/criteria to a particular project. Measure R's "specific plan" must describe the project and show its precise location, the square footage of the proposed structure, the mix of commercial versus residential use, the density of use, the landscaping and open space, and the traffic and safety mitigations for the project. §17.02.045(d), (f). This is not the language of planning or setting standards, and invades the City's discretionary administrative function.

Assuming *arguendo* that Measure R does call for a specific plan as defined in Govt. Code section 65451, Citizens for Jobs shows that where an initiative imposes overbroad and difficult procedural hurdles and spending restrictions for planning a project, it impermissibly intrudes into the legislative body's prerogatives in carrying out public policy declared in other ordinances or its duties prescribed by its own police power and, as such, does not have a proper subject matter. Unlike Measure F in Citizens for Jobs, the City does not have a pre-existing specific plan for its civic center area. Measure R also does not impose fiscal restraints. But the City does have both a general plan and a LCP which set that policy. The City Council also has police power and the authority and duties conferred by that police power.

Given the City's existing policies, power, and authority, Measure R's procedural hurdles of a report, public hearing, and voter approval of a specific plan for each project is an impermissible interference with the City Council's functions in managing its affairs and in carrying out the public policy set forth in its general plan and LCP. Measure R changed the procedure and substance of implementing the City's land use policy by adding specific plan report, public hearing, and voter approval requirements to the City's project decisions. It is one thing for voters to challenge a specific plan by petition and referendum (Yost, Dana Point), or for voters to approve a general plan amendment by initiative which is then challenged by mandamus (Citizens for Planning), but it is another for voters to pass an initiative to compel a city to submit each commercial project for voter approval by means of a specific plan. The former are permissible, but the latter restricts the City's administrative discretion and places it firmly within the category of voter enactments of administrative matters, which are not permitted. While "initiative measures are not to be stricken down lightly" (Citizens for Jobs, *supra*, 94 Cal.App.4<sup>th</sup> at 1324), Measure R's voter approval and hearing requirements cross the line into administrative, not legislative, function.

Measure R also is overbroad in that it intrudes into the City's administrative acts by requiring the submission of project-specific information that is not proper for legislative decision-making. Even if some of the information required for the Measure R "specific plan" is proper

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under Govt. Code section 65451, not all of it is. The project's details concerning square footage of the structure, the mix of commercial versus residential use, the density of use, the landscaping and open space, and the traffic and safety mitigations are not proper subjects of planning or criteria for a specific plan.

Finally, Measure R fails the test set forth in DeVita for an initiative that may properly circumscribe the power of future governing bodies. In DeVita, the California Supreme Court considered an initiative amending a county general plan that prohibited any change to its land use designations for 30 years except by voter approval. The DeVita court held that where an initiative broadly limits the power of future legislative bodies to carry out their duties pursuant to charter or police power are not ordinances, but instead attempted constitutional amendments to the city's charter or, in the case of a general law city, an improper attempt to create a charter-like provision. On the other hand, where the electorate enacts a legislative measure that the governing body could have enacted, then the measure may circumscribe the power of future governing bodies to change it. Since Elections Code section 9125 provides that an initiative cannot be repealed except by a vote of the people, the initiative's limitation was proper. 9 Cal.4<sup>th</sup> at 796-99.

Unlike DeVita, Measure R imposes a limitation on future City action that is the equivalent of a constitutional charter amendment.<sup>10</sup> By requiring voter approval and other procedural hurdles for any commercial project, the initiative interfered with the City's ability to carry out already established policy in its general plan and LCP, and its powers and duties pursuant to its police power to exercise discretion for the permitting of projects. Measure R's effort to prevent the City from performing its future permitting duties without voter approval and compliance with other procedural requirements was not the equivalent of an ordinance; it was effectively an improper constitutional attempt at a charter amendment, and therefore invalid.<sup>11</sup>

In sum, as Petitioners argue (Pet. Reply at 5-6), Measure R creates a situation in which the City has been stripped of its administrative authority to issue permits and other discretionary approvals pending voter consideration of a "specific plan." This subject of administrative power to voter consent was held unconstitutional in Wiltshire and Citizens for Jobs because the initiative "impermissibly interfere[d] with the issuance of permits and land use approvals." Measure R does the same by preventing the City from issuing any final approval to any large commercial development without voter consent. This is beyond the initiative power reserved to the people under the California Constitution.

Measure R is invalid because it unlawfully interferes with the City's administrative power, is overbroad by requiring submission to voters of project-specific information that is administrative in nature, and unlawfully attempts to circumscribe future City discretionary

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<sup>10</sup> Neither party indicated whether the City is a charter city or general law city, but the court understands it to be the latter. Even if it were a charter city, Measure R is a zoning initiative and not a purported amendment to a city charter. See Govt. Code §34450 *et seq.*; Elections Code § 9255.

<sup>11</sup> Measure R includes a "savings clause" which states that "[t]his initiative shall not be interpreted to apply to any development, land, or use that, under state or federal law, is beyond the power of the local voters to affect by the initiative power reserved to the people via the California Constitution." §9(B). This savings clause has no effect; the entire specific plan portion of Measure R is invalid.

decisions.

### **3. Substantive Due Process (Eighth Cause of Action)**

Petitioners' eighth cause of action allege that Measure R violates Petitioners and others' substantive due process rights. At hearing, Petitioners acknowledged that their due process claim was related to the scope of authority issue, but the two were not congruent.

A land use regulation is invalid under California's substantive due process clause if its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Terminal Plaza Corp. v. City & Cnty. of S.F., (1986) 177 Cal. App. 3d 892, 908. A regulation also violates due process if it is not "reasonably related to the accomplishment of a legitimate governmental interest." Dana Point, *supra*, 52 Cal. App. 4th at 482.

The California due process standard is broader than its federal counterpart, and focuses on the claimant's "interest to be free from arbitrary adjudicative procedures." Ryan v. California Interscholastic Fed'n-San Diego Section, (2001) 94 Cal. App. 4th 1048, 1069. To that end, a plaintiff may state a due process claim so long as he or she has a "statutorily conferred benefit or interest." Schultz v. Regents of Univ. of California, (1984) 160 Cal. App. 3d 768, 782. A plaintiff "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." Personal Watercraft Coalition v. Bd. of Supervisor (2002) 100 Cal.App.4th 129, 137-38. A plaintiff can only be successful on a facial challenge if it "demonstrates that the law is [unconstitutional] under any and all circumstances..." Id.

Petitioners contend that Measure R's voter approval requirement for a specific plan is clearly arbitrary and unreasonable. Petitioners note that Measure R requires a proposed project to pass through the preexisting entitlement process, ensuring that it "meets all applicable goals, objectives, policies, and requirements of the Malibu General Plan and the Malibu Local Coastal Program" before a specific plan for the project is submitted to the electorate. §17.02.045(c)(C). Final approval of the project is then left to the electorate's sole decision, and the voters may either reject or approve the project in its entirety. The electorate's rationale is unknowable because it will lack findings, and it is inherently arbitrary and unpredictable because it is not guided by any written policy or objectives. Petitioners rely by analogy on the court's analysis of to show that Measure R's procedures are arbitrary. Measure R delegates approval of development projects to the electorate without substantive policy guidelines, safeguards against capricious results, justification of results, or opportunity for review. Such a process is arbitrary and serves no legitimate government purpose. Pet. Op. Br. at 10-11.

As the City points out, procedural due process does not apply to legislative acts such as approval of a specific plan. City Opp. at 9. The City also argues that, even if administrative rights are involved, the denial of discretionary entitlements is not a property interest for purposes of procedural due process. Las Lomas Land Co., LLC v. City of Los Angeles, (2009) 177 Cal.App.4th 837, 854 (denial of specific plan and entitlements is not deprivation of property for procedural due process). The City is correct. Procedural due process does not apply to Petitioners' facial challenge, and they do not argue otherwise.

With respect to substantive due process, the court has found Measure R to be overbroad in that it requires submission to the voters of clearly administrative issues in the guise of a specific

plan. The City concedes that this violates substantive due process. City Opp. at 7 (“If specific plans were administrative in nature, it would be illegal to submit them to voters....”). Nonetheless, the City argues that Petitioners do not have a substantive due process claim because they cannot show any deprivation of a protected property interest -- they simply have no unfettered right to build. See Breneric Assoc. v. City of Del Mar, (“Breneric”) (1998) 69 Cal.App.4th 166, 181-82. City Opp. at 8.

Petitioners properly distinguish Breneric as a federal due process, not California due process, case. They rely on the broader nature of California’s due process and Schultz v. Regents of University of California, (“Schultz”) (1984) 160 Cal.App.3d 768, 781-82 and the federal case of Action Apartment Assn. v. Santa Monica Rent Control Board, (“Action Apartment”) (9th Cir. 2005) 509 F.3d 1020, 1026. Pet. Reply at 7.

In Schultz, the court noted that some California courts have permitted procedural due process claims under the California Constitution for “freedom from arbitrary adjudicative procedures” as part of a person’s liberty interest even though there was no proof of protected property interest. 160 Cal.App.3d at 782. Nonetheless, it declined to permit the plaintiff, a public employee who was reclassified, to raise a due process claim because he had no protected property or statutory interest. Id. at 783. Schultz does concern California due process, but the claim was for procedural, not substantive, due process. Petitioners have no liberty interest claim in freedom from arbitrary procedures and are not aided by Schultz.

In Action Apartment, the Ninth Circuit adopted the Supreme Court holding of Lingle v. Chevron U.S.A., Inc., (2005) 544 U.S. 528, 542, that an arbitrary and irrational deprivation of real property that does not amount to a taking may still violate substantive federal due process. 509 F.3d at 1026. Assuming that this same view would apply to Petitioners’ California substantive due process claim, it provides a basis for Petitioners to claim that the deprivation of their projects through voter decision violates substantive due process. Under the federal test, Petitioners must show that Measure R is not rationally related to any legitimate government purpose. Id.

To the extent that the specific plan required to be submitted to voters by Measure R is an administrative matter, it violates substantive due process. Measure R is overbroad in requiring voter approval for both planning and administrative issues in the guise of a specific plan, and the administrative portion of the submission serves no legitimate purpose and violates substantive due process. The City is correct in arguing that the voters may require a specific plan for large commercial developments, and that a true specific plan is legislative in character. City Mot. at 9. The City also is correct that Petitioners cannot prevail on their facial claim based on some future hypothetical situation, and that Measure R enjoys a strong presumption of validity. City Opp. at 8. However, Measure R requires, in addition to planning information, the submission to voters of project details in every case. These project details include the square footage of the project structure, its mix of commercial versus residential use, the density of use, landscaping, open space, and traffic and safety mitigations. These discretionary project details are not proper subjects of planning or criteria for a specific plan. See Govt. Code §65451. Measure R violates substantive due process by requiring their submission of discretionary administrative matter to voters for approval.

The remainder of Measure R does not violate substantive due process as standardless, unreviewable, or lacking a government purpose. As the City points out (City Reply at 6), the mere fact that the specific plan for each project must be submitted to voters does not make it unrelated

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to a legitimate government purpose. As a threshold matter, the specific plans submitted to voters under Measure R must be consistent with the City's general plan. The voters then make a legislative choice in lieu of the City Council. It is settled law that approval of a specific plan is subject to referendum. *Id.* at 481; *Yost, supra*, 36 Cal. 3d at 570. The resulting vote is held to the same standard as that of the City Council, and any approved specific plan must be consistent with the general plan and LCP. As such, there is a legitimate government purpose in ensuring that all specific plans in the City are approved by the voters as a matter of course. Even if Measure R did not exist, the voters could still exercise their referendum power to defeat a specific plan.

Dana Point is dispositive of this issue. There, the developers contended that the voters' failure to approve the plans violated their substantive due process rights and constituted a taking under the Fifth Amendment. 52 Cal.App.4<sup>th</sup> at 480. The court disagreed, noting that the general plan contemplated development of the Headlands and the electorate's failure to approve the specific plan did not alter this fact. *Id.* at 483. The electorate's action would not constitute a taking unless an unreasonable delay were shown. *Id.* The court added that "at some point, the city's interest in the orderly development of the Headlands must give way to plaintiffs' right to use their property for some economically viable purpose....unnecessary delays in approving a proposed development or repetitive denials of specific plans complying with the city's general plan will amount to a taking...." *Id.*

The court stated that:

Simply because the city council acted reasonably in approving the proposed development plan does not invalidate the electorate's subsequent rejection of the referendums. The applicability of the power of referendum to the adoption of a specific plan implies the electorate may reject the proposed plan. A rule declaring the voters cannot reject a proposed specific plan falling within the parameters of the city's general plan would render the exercise of the power of referendum meaningless. *Id.*

As in Dana Point, Measure R permits the voters to approve or reject a specific plan that has been proposed by the City. While it is possible that the continued rejection by voters under Measure R would at some point violate Petitioners' substantive due process rights, Petitioners cannot meet their burden here of demonstrating that no set of circumstances exists under which Measure R would be valid. Personal Watercraft Coalition v. Bd. of Supervisor (2002) 100 Cal.App.4<sup>th</sup> 129, 137-38.

In sum, Measure R's overbreadth violates substantive due process by requiring the submission administrative matter for voter approval, but the requirement of voter approval does not otherwise violate due process as standardless, unreviewable, or lacking a government purpose.

#### **4. Illegal CUP (Seventh Cause of Action)**

Petitioners' seventh cause of action alleges that Measure R creates an illegal CUP.

Measure R contains a set of restrictions designed to limit the development of "formula retail" establishments in the City. §17.66130(a). Measure R defines "formula retail" (hereinafter, "chain stores") as any business for which there are ten or more locations worldwide that share two or more specified criteria, including common merchandise or menus, color scheme, decor, façade,

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layout, signage or trademarks, or uniforms. §17.66.130(e)(1). In lieu of the findings required by Malibu Municipal Code (“MMC”) section 17.66.080 (concerning the “proposed use” of a property) before issuing a CUP to a chain store the City Planning Commission is required to make findings that the proposed chain store will not adversely affect the City’s small town character and will promote a diverse commercial base. §17.66.130(b)(2)(3). Measure R also prohibits any new chain stores larger than 2,500 square feet, and prohibits a shopping center from leasing more than 30% of its square footage, or 30% of its leasable retail spaces, to chain store tenants. §17.66.130(b)(5), (c). Certain types of businesses, including grocery stores, gas stations, banks, movie theaters and medical offices, are exempt from the size and CUP requirements, but not the 30% cap. *Id.* A chain store CUP does not run with the land, but rather with the chain store for which it was approved (§17.66.130(d)), and a new CUP is required upon any change in ownership (§17.66.130(c)).

Petitioners argue that Measure R imposes an unlawful condition in two ways. First, Measure R changes the basis on which a CUP can be issued. In lieu of the findings required by Malibu Municipal Code section 17.66.080, which concerns the “proposed use” of a property, Measure R requires the City Planning Commission to make findings concerning the particular proposed chain store before a CUP may be issued. §17.66.130(b). This establishment-specific inquiry is prohibited by California law. *Anza, supra*, 195 Cal. App. 3d at 858; see also *Malibu Mountains Recreation, Inc. v. County of Los Angeles*, (1998) 67 Cal.App.4th 359, 367-68. Second, Measure R expressly provides that a chain store CUP does not run with the land (§6(d), and that a new CUP is required upon any change in ownership (§6(c)). As Measure R’s chain store provisions depend on these two illegal conditions, they are invalid. Pet. Op. Br. at 12-13.

State law provides: “No local governmental body, or any agency thereof, may condition the issuance of any ... [CUP on] the dedication of land for any purpose not reasonably related to the use of the property for which the ... [CUP] is requested.” Govt. Code §65909.

In *Anza Parking Corp. v. City of Burlingame*, (“*Anza*”) (1987) 195 Cal. App. 3d 855, the owner of land leased property to an affiliate, which obtained a CUP from the City of Burlingame to operate a parking lot. The CUP was expressly non-transferable. The tenant subleased the parking lot to a third party, and the owner demanded that the city enforce the non-transferable condition of the CUP. When the city failed to do so, the property owner sued. *Id.* at 857-58.

The *Anza* court noted the applicable law that all property is freely transferable unless expressly prohibited by law, and it is widely held that CUPs run with the land, not with the permittee. *Id.* at 858. A city or county has no power to go behind the privileges conferred by a CUP, which are available to “any subsequent owner.” *Id.* (citations omitted). Zoning restrictions are constitutional to the extent that they are not unreasonable or arbitrary, and a variance for the use of property could not be limited by the person rather than the land because zoning restrictions are designed to regulate the land itself and not the person who operates the premises. *Id.* at 859 (citation omitted). Thus, a CUP may not lawfully, and possibly not constitutionally, be condition upon the permittee holding it. Such a condition is beyond the power of the zoning authority and void. *Id.*

The City argues that Measure R explicitly allows a chain store CUP to run with the land because it remains effective so long as the same chain store is in place, no matter who owns it. Thus, Measure R contains an express accommodation for the transfer of property ownership and the CUP stays with the commercial property (“runs with the land”) so long as the chain store

continues to operate. See §17.66.130(d). Measure R only requires a new CUP upon transfer to a different chain store, which is newly evaluated against the ordinance's criteria. The City explains that this limitation is necessary to implement the purpose of Measure R to avoid the "AnyMall, USA" effect through the proliferation of chain stores. The City argues that this is consistent with Anza's holding that a CUP must run with the land, and Govt. Code section 65909 does not apply because Measure R does not require the chain store applicant to dedicate any land. City Opp. at 9-10.

The court has sympathy for Measure R's goals. The City's citizens wanted to preserve the community's unique small-town and rural character, and the CUP limitation of chains stores seems relevant to this goal. Aesthetics are important, and a city reasonably may want to encourage mom-and-pop stores at the expense of big box or chain stores in order to maintain the city's character. Nonetheless, Measure R is not a legitimate means of doing so. Measure R runs afoul of the law because a CUP cannot be conditioned on who owns the property; it can only be conditioned on that property's use. "It is not appropriate to condition the issuance of a [CUP] on the nature of the applicant, as opposed to the use of the property." Sounhein v. City of San Dimas, ("Sounhein") (1996) 47 Cal.App.4<sup>th</sup> 1181, 1187.<sup>12</sup>

The City cannot cavil with the fact that Measure R conditions chain store CUPs on the nature of the owner of the property, and prevents that chain store from transferring its CUP to another chain store, even one for the same use. Although the City's counsel argued at hearing that Measure R defined a chain store as a use, it does not. Measure R makes no effort to condition the CUP on a particular chain store's use of its property, but rather focuses on the CUP holder's status as a chain store, including formulaic color scheme, menu, array of merchandise, décor, façade, servicemark, trademark, and uniforms. §17.66.130(e). This is illegal. Moreover, while Measure R permits a chain store to transfer a CUP when the chain store is sold to a new owner, this is a distinction between a business and its ownership, not a distinction based on property use. A fast food use by McDonald's is the same as a Burger King, and a coffee shop use by Starbuck's is the same as Peete's, but Measure R would prevent a CUP transfer between such chain stores. This, too, is unlawful.

Measure R's restrictions are a condition based on the nature of the owner, not on use of the property, and they are unlawful.

### **E. Conclusion**

Declaratory relief is granted. The court will issue a declaratory judgment that Measure R is invalid and an injunction preventing the City from enforcing Measure R. Petitioners' counsel

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<sup>12</sup> The City characterizes Sounhein's quote as *dictum*. City Reply at 8. Perhaps so, but Sounhein's dicta discussed what it characterized as well-established principles. Sounhein held that Govt. Code section 65852.2 permitted an owner occupancy condition for a CUP, and supported this holding by noting that issuance of a CUP that conditioned owner occupancy only to the original CUP holder "would violate well-established principles concerning" CUPs. 47 Cal.App.4<sup>th</sup> at 1191. "Thus, the issuance of a permit may be conditioned on the character of the property as owner-occupied, but not on the character of an applicant as an owner-occupant. The condition of owner-occupied runs with the land is correctly imposed on all subsequent owners." Id.

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is ordered to prepare a proposed judgment, serve it on the City's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for January 28, 2016 at 9:30 a.m.

Dated: December 14, 2015

  
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Superior Court Judge  
**JAMES C. CHALFANT**

12/15/2015