

**CALL AND NOTICE OF
SPECIAL MEETING
AT 6:00 PM
OF THE VALLEJO CITY COUNCIL
VIA TELECONFERENCE
SEPTEMBER 1, 2020**

PUBLIC COMMENT: Links to make a public comment open **at 4:00 p.m. on the day of the Council meeting.** Each agenda item has a unique link. You must find the item you wish to comment on in the agenda and use that link. The links will close at the conclusion of each agenda item. To learn more about how to place a public comment, visit: <https://vimeo.com/430097790>

VIEW THE MEETING:

There are three different ways you can view this public meeting:

- Watch Vallejo local channel 28
- Stream from the City website: www.cityofvallejo.net/Streaming
- Join the Zoom webinar: <https://zoom.us/j/91400750676>

TO THE MEMBERS OF THE VALLEJO CITY COUNCIL:

You are hereby notified that I do hereby call the Vallejo City Council in special session to consider only the matters stated on the agenda listed below.

NOTICE: Due to the current Shelter at Home Order and in conformance with the Governor's Executive Order N-29-30, the City of Vallejo has opted to hold City Council meetings via teleconference. Any interested members of the public desiring to communicate with the City Council concerning any item listed on the agenda before or during consideration of that item must do so by either clicking on the hyperlinks contained in the meeting agenda or type the link into an internet browser. You will be taken to the internet platform where the meeting is held. There will be no public access to City Hall for any City Council meetings until further notice.

- 1. CALL TO ORDER**
- 2. PLEDGE OF ALLEGIANCE**
- 3. ROLL CALL**
- 4. ACTION CALENDAR**

NOTICE: Due to the current Shelter at Home Order and in conformance with the Governor's Executive Order N-29-30, the City of Vallejo has opted to hold City Council meetings via teleconference. Any interested members of the public desiring to communicate with the City Council as part of the Action Calendar must do so by accessing the link at the conclusion of each of the Action Calendar items. There will be no public access to City Hall for any City Council meetings until further notice.

A. **REVIEW AND ACCEPT THE SECTION 9212 REPORT (“REPORT”) PREPARED BY STANTEC CONSULTING SERVICES, INC., THE LEGAL MEMORANDUM PREPARED BY MICHAEL COLANTUONO, AND VOTE ON NEXT STEP FOR THE CITY OF VALLEJO PARKS, RECREATION, AND OPEN SPACE PROTECTION INITIATIVE (“INITIATIVE”)**

Recommendation: Review and accept the Section 9212 report (“Report”) prepared by Stantec Consulting Services, Inc., the legal memorandum prepared by Michael Colantuono, and vote to place the City of Vallejo Parks, Recreation, and Open Space Protection Initiative (“Initiative”) on the November 2022 ballot.

Contact: Randy Risner, Interim City Attorney (707) 648-4545

Randy.Risner@cityofvallejo.net

Meera Bhatt, Assistant City Attorney (707) 648-4545

Meera.Bhatt@cityofvallejo.net

Public Comment for Action 8B may be submitted by accessing the following link:

<https://www.opentownhall.com/9599>

B. **EXTENSION OF AGREEMENT WITH LEW EDWARDS GROUP**

Recommendation: Authorize the City Manager to execute the extension to the agreement with the Lew Edwards Group (LEG).

Contact: Anne Cardwell, Assistant City Manager (707) 648-4579

anne.cardwell@cityofvallejo.net

Public Comment for Action 8A may be submitted by accessing the following link:

<https://www.opentownhall.com/9610>

5. **ADJOURNMENT**

Dated: Monday, August 31, 2020

A handwritten signature in blue ink that reads "Dawn E. Abrahamson for". The signature is written in a cursive, flowing style.

Bob Sampayan, Mayor

I, Dawn Abrahamson, City Clerk, do hereby certify that I have caused a true copy of the above notice and agenda to be delivered to each of the members of the Vallejo City Council, at the time and in the manner prescribed by law and that this agenda was posted at City Hall, 555 Santa Clara Street, CA at 5:00 p.m., Monday, August 31, 2020.

Dated: Monday, August 31, 2020

A handwritten signature in blue ink, reading "Dawn G. Abrahamson". The signature is fluid and cursive, with the first name "Dawn" and last name "Abrahamson" clearly legible. The middle initial "G." is smaller and less distinct. The signature is written on a white background.

Dawn G. Abrahamson, City Clerk



DATE: September 1, 2020
TO: Mayor and Members of the City Council
FROM: Randy Risner, Interim City Attorney
Meera Bhatt, Assistant City Attorney
SUBJECT: REVIEW AND ACCEPT THE SECTION 9212 REPORT ("REPORT") PREPARED BY STANTEC CONSULTING SERVICES, INC., THE LEGAL MEMORANDUM PREPARED BY MICHAEL COLANTUONO, AND VOTE ON NEXT STEP FOR THE CITY OF VALLEJO PARKS, RECREATION, AND OPEN SPACE PROTECTION INITIATIVE ("INITIATIVE")

RECOMMENDATION

Review and accept the Section 9212 report ("Report") prepared by Stantec Consulting Services, Inc., the legal memorandum prepared by Michael Colantuono, and vote to place the City of Vallejo Parks, Recreation, and Open Space Protection Initiative ("Initiative") on the November 2022 ballot.

REASONS FOR RECOMMENDATION

The City Attorney, outside counsel, and City staff recommend Option two (i.e., that Council place the measure on the general election ballot for November 2022) for the following reasons:

1. Adopting the measure (i.e., Option one) poses significant risk of litigation. For example, the measure burdens owners of parcels designated for open space use, while benefitting some property owners (i.e., owners who benefit from the use of others' open space parcels where the parcels serve as "buffers" between their land and other land) without a legal justification. The burdened property owners are likely to sue the City. For example, they may attack the measure as arbitrary and discriminatory and claim that the measure's exemptions for some but not other parcels lack a rational basis. Burdened property owners may also claim the measure impairs government functions by extending to administrative/executive acts and that it appears uncertain and vague, among other claims. For the reasons above, option one is not recommended.
2. Placing the measure on the November 2022 ballot fulfills the City's responsibilities under the Elections Code and Charter, while still allowing time for staff to negotiate with the measure's proponents. In the course of negotiations, proponents may agree to withdraw the measure. This also allows current projects within the pipeline to attain entitlements before a vote on the measure in 2022. This may be a "win-win," as the City benefits by avoiding the need to bring a lawsuit or defend itself against a lawsuit. Both the City and the measure's proponents may benefit from further dialog. For these reasons, option two is recommended.
3. A special election will cost between \$10.00 to \$15.00 per registered voter (i.e., \$10.00 per registered voter who votes by mail and \$15.00 per registered voter voting at the poll). Currently, the City has 66,675 registered voters. Given the City's financial challenges in the wake of COVID-19, the City may not want to expend these funds. The City is not legally required to conduct a special election. For these reasons, option three is not recommended. However, if the City wishes to consider a special

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election, the City may consider requesting the proponents to bear the cost of the special election or agree to share costs.

4. While the City may file suit with the Court seeking declaratory relief, Courts remain reluctant to review a measure’s legality before an election. The City would need to show that the measure is invalid beyond doubt. This approach will also require the City to expend time and money to file suit.

For these reasons and given the reasons supporting option two (i.e., placing the measure on the November 2020 ballot), option four is not recommended.

BACKGROUND AND DISCUSSION

On February 19, 2020, the City received a notice of intent to circulate the “City of Vallejo Parks, Recreation, and Open Space Protection Initiative.” The Initiative proposes to amend the General Plan to require voter approval before the City can change the land use designation for any parcels designated “Parks, Recreation or Open Space” as of February 19, 2020. At the special meeting on August 3, 2020, Council requested a thirty-day report analyzing the legal and land use implications of the Initiative pursuant to Elections Code section 9212. A copy of the staff report from the August 3, 2020 meeting is attached.

The Report for Council's review may be accessed on the City's website at <https://www.cityofvallejo.net/cms/One.aspx?portalId=13506&pageId=16332474>. The Report reflects input from outside consultant Stantec Consulting Services, Inc., City staff, the City Attorney’s Office, and outside legal counsel, Colantuono, Highsmith, & Whatley.

The Report identified 801 acres of non-exempt parks, recreation, and open space lands that will be directly impacted from the Initiative. The Report analyzed how the Initiative would impact:

- The City’s 2040 General Plan, in particular the General Plan’s Housing Element;
- Current and future developments;
- Infrastructure services and funding (schools, parks, utilities, transportation, and police and fire services); and
- The City fiscally.

The Report concluded that the Initiative would reduce the potential development of 4,654 additional units in the City, inhibit developer’s desire to enter into development agreements within the non-exempt location, and will burden the fiscal state of the City.

Additionally, outside counsel has prepared a memo analyzing the Initiative’s legal implications, which has been provided to Council and the Mayor.

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Council has four options:

1. Adopt the measure after two readings, such that the measure will be effective thirty days after the second reading.
2. Place the measure on the general election ballot for November 2022.
3. Call a special election so the measure can be presented to the voters before the November 2022 general election. A special election must occur on a date that is at least eighty-eight days but not more than one hundred three days after the Council acts.
4. Direct the City Attorney’s Office to file suit in superior court to obtain declaratory relief that the measure is facially invalid/illegal. Thus, the City is not required to take any of the above actions.

FISCAL IMPACT

The fiscal impact will be determined based on the option Council chooses. As shown above, a the cost of a special election will be significant. Specifically, it will cost between \$10.00 to \$15.00 per registered voter (depending on the method of voting) and there are 66,675 registered voters.

ENVIRONMENTAL REVIEW

This item is exempt from CEQA review as it is not considered a project pursuant to section 15378(b)(3). CEQA does not apply to voter sponsored initiatives.

ATTACHMENTS

1.	Staff Report August 3 2020
2.	Legal Analysis Memo

CONTACT

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Meera Bhatt, Assistant City Attorney (707) 648-4545

Meera.Bhatt@cityofvallejo.net

Public Comment for Action 8B may be submitted by accessing the following link:

<https://www.opentownhall.com/9599>



DATE: August 3, 2020
TO: Mayor and Members of the City Council
FROM: Dawn G. Abrahamson, City Clerk
SUBJECT: **ACCEPT REPORT OF CITY CLERK CERTIFYING SUFFICIENCY OF INITIATIVE PETITION AND RECOMMENDING COUNCIL REQUEST A REPORT ON LEGAL AND LAND USE ASPECTS PRIOR TO PLACING MEASURE ON BALLOT**

RECOMMENDATION

Accept the report of the City Clerk declaring the sufficiency of the initiative petition, and request a report pursuant to California Elections Code section 9212 to be presented at a special council meeting no later than September 2, 2020 regarding legal and land use aspects of the initiative. As required by California Elections Code section 9215, when the report is presented to the council, the Council will consider whether to adopt the ordinance within 10 days, order an election by placing the measure on the regular November 2022 ballot or rejecting the ordinance in its entirety because it is illegal on its face.

REASONS FOR RECOMMENDATION

On February 19, 2020, proponent Steven B. Ray filed in the City Clerk's Office a Notice of Intent to Circulate a City of Vallejo Parks, Recreation, and Open Space Protection Initiative Petition for the purpose of amending the General Plan to require voter approval for certain changes to the General Plan. The purpose of the initiative would amend the City's General Plan to require approval by the City's voters in order to change the land use designation or allowable uses of certain lands designated in the General Plan as "Parks, Recreation and Open Space" within the City limits, (Attachment 1). The proponent submitted a request for preparation and received the ballot title and summary by the City Attorney.

The City Attorney prepared the ballot title to read "City of Vallejo Voter Requirement for General Plan Amendment" (Attachment 2).

On June 25, 2020, the petitions were received for filing in the City Clerk's Office. As required by elections law, the City Clerk determined that the number of signatures, prima facie (on its face), sufficed the amount required for a regular general municipal election. The Registrar of Voters was contracted to verify the sufficiency of signatures. As of the time of this Agenda's publication, the County Registrar of Voters has not yet completed its full review, but anticipates review will be completed over this upcoming weekend (i.e., by August 3, 2020).

The issue for City Council consideration this evening is acceptance of the City Clerk's report on the examination of signatures on the initiative petition to "City of Vallejo Voter Requirement for General Plan Amendment Initiative" and, while staff recommends the third option, the council is free to choose from among three options:

1. Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition

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- is presented, (tonight) or within 10 days after it is presented (special meeting); or
2. Submit the ordinance, without alteration, to the voters at the City's next General Municipal Election, or
 3. Order a report pursuant to Elections Code section 9212 prior to either adopting the ordinance or submitting the ordinance to the voters.

Council may also find that the proposed ordinance is illegal on its face and decline to adopt it or place it on the ballot.

Staff recommends the report in order to create a record and educate the stakeholders, public, and officials as to provide written detail on the legal issues which the proposed ordinance contains, and the land use impacts on the city's neighborhoods prior to the council's decision.

BACKGROUND AND DISCUSSION

The City Charter Section 1002 provides that "all elections shall be held in accordance with the provisions of the Elections Code of the State of California" for municipal elections unless the City Charter has a provision that conflicts with state law. General municipal elections are in November of each even-numbered year, pursuant to Charter Section 1000. All other municipal elections are special elections, pursuant to Charter Section 1001.

An initiative may be brought to the voters at a regular municipal election if the proponent submits signatures of at least 10 percent of registered voters. The initiative proponent filed the petition on June 25, 2020. The County Registrar of Voters conducted a random sampling signature review for the 10 percent threshold required under state law for the measure to qualify for a regular general municipal election. The review concluded that while the petition was statistically sufficient to 106.95% for a random sampling of signatures, it did not meet the requirements of Elections Code section 9309(b), and required a full review of all signatures within 60 days of receipt. The County Registrar next calculated whether the 10 percent threshold was met, and concluded there are sufficient signatures (Attachment 3). As of the time of this Agenda's publication, the County Registrar of Voters has not yet completed its full review, but anticipates review will be completed over this upcoming weekend (i.e., by August 3, 2020).

Given that the petition contains signatures representing at least 10 percent of the registered voters of the city, the Elections Official is required to certify the sufficiency of the petition to the City Council who shall do one of the following:

1. Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.
2. Submit the ordinance, without alteration, to the voters pursuant to subdivision (b) of Elections Code section 1405.
3. Order a report pursuant to Elections Code section 9212 prior to either adopting the ordinance or submitting the ordinance to the voters.

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With regard to the third option, Elections Code section 9212 states that the report may contain any or all of the following:

1. Its fiscal impact.
2. Its effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.
3. Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs.
4. Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.
5. Its impact on the community's ability to attract and retain business and employment.
6. Its impact on the uses of vacant parcels of land.
7. Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.
8. Any other matters the legislative body requests to be in the report.

The report is to be presented to the Council no later than 30 days after the elections official certifies to the legislative body the sufficiency of the petition. If the Council orders the report, the last date the City Council could consider the matter within the prescribed 30 days is September 2, 2020. When the report is presented, the City Council must either adopt the ordinance within ten days or order an election.

Staff recommends that Council request a report on three aspects: the legality of the provisions in the initiative, including whether it would violate the California Constitution or state law; the consistency between planning and zoning; and its impact on the community's ability to attract and retain business and employment.

FISCAL IMPACT

Fiscal impact will be determined when the measure is placed on the ballot and addressed during the Fiscal Year 2022-23 budget process.

ENVIRONMENTAL REVIEW

This action is exempt from the California Environmental Quality Act (CEQA) because it is not a project which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, pursuant to CEQA Guideline section 15378. A legislative body is not required to undertake CEQA review of a qualified initiative whether it places the measure on the ballot or adopts it.

ATTACHMENTS

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1.	COV Parks, Recreation and Open Space Protection District_Notice of Intent 021920
2.	ballot measure summary 2_CAO Final
3.	ROV Sampling Results

CONTACT

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Public Comment for Action 4A may be submitted by accessing the following link:

<https://www.opentownhall.com/9450>

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COLANTUONO
HIGHSMITH
WHATLEY, PC

Michael G. Colantuono
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MColantuono@chwlaw.us

MEMORANDUM

TO: Honorable Mayor Sampayan and Councilmembers of the City of Vallejo
FROM: Michael G. Colantuono, Special Counsel
Aleks R. Giragosian, Special Counsel
CC: Greg Nyhoff, City Manager
Randy J. Risner, Interim City Attorney
Gillian Hayes, Planning & Development Services Director
RE: City of Vallejo Parks, Recreation, and Open Space Protection Initiative" — Election Code Section 9212 Legal Analysis

FILE NO: 52003.0004
DATE: August 28, 2020

EXECUTIVE SUMMARY

On February 19, 2020, the City received a notice of intent to circulate the "City of Vallejo Parks, Recreation, and Open Space Protection Initiative." The Initiative proposes to amend the General Plan to require voter approval before the City can change the land use designation for some parcels designated "Parks, Recreation or Open Space" as of February 19, 2020. On August 3, 2020, the City Council requested a report under Elections Code section 9212 analyzing the Initiative's legal and land use implication.

We conclude the Initiative may be unlawful because:

- (1) requiring voter approval before any changes to land use designations involves administrative acts, which are not proper subjects of an initiative;
- (2) a charter amendment is required to achieve the objective of the Initiative, and this was proposed as ordinary municipal legislation; and
- (3) the complex inclusion and exclusion of open space parcels from the Initiative appears to violate equal protection because no rationale is apparent that can explain how the benefited and burdened property owners were chosen.

Even if the Initiative is lawful, it cannot not take effect until the earlier of the City Council's adoption or voters' approval. It does not apply retroactively. Therefore, the City may amend the General Plan without voter approval any time before the November 2022 General Election (or an earlier, special election on the Initiative). If approved, the Initiative would restore the General Plan designations as they existed in February 2020. However, that will not be lawful as to any private property owner who achieves a vested right to develop his or her property for other uses in the meantime. This may create a race to obtain land use approvals before the Initiative election.

THE RIGHT OF INITIATIVE

The Elections Code provides a procedure for voters of general law cities to petition to place an initiative on the ballot. Vallejo is a charter city. The statutory schemes for initiative and referendum "do not apply to cities having a charter adopted under Section 3 of Article XI of the California Constitution, and having in their charters any provision for the direct initiation of ordinances by the voters." (Elec. Code, § 9247.) However, Section 1003 of Article X of Vallejo's Charter applies the Elections Code procedures to the City, as many charters do.

THE INITIATIVE IS ADMINISTRATIVE IN NATURE

California's Constitution guarantees the local electorate's right to initiative and referendum, and that right is generally coextensive with the local governing body's legislative power. The electorate has the power to initiate legislative acts but not administrative or adjudicatory ones. Initiatives that lodge adjudicatory powers in the electorate are invalid. The rationale for this rule 'is that to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality.

(*The Park at Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, 1203 (*City of Malibu*) citations omitted.)

In *City of Malibu*, voters approved Measure R to amend that city's Municipal Code. (12 Cal.App.5th at p. 1200.) "Measure R first requires Malibu's city council to prepare a specific plan for every proposed commercial or mixed-use development in excess of 20,000 square feet for the commercial area." (*Ibid.*) "Following the city

council's approval of a specific plan, the plan must be placed on the ballot for voter approval." (*Ibid.*) Malibu argued that, because Measure R concerned specific plans, the adoption of which is categorically a legislative act, the initiative did not exceed the initiative power. (*Id.* at p. 1204.) The Court of Appeal disagreed: "Measure R [] withdraws from Malibu's city council the ability to issue discretionary land use entitlements or permits concerning a development project—unless and until voters approve a specific plan for that project. [Citation.] In this respect, Measure R is really about project-by-project review—which would otherwise be subject to administrative, not voter, approval—in the guise of a specific plan." (*Id.* at p. 1207.)

Like *City of Malibu*, the Vallejo Initiative's voter requirement can be understood to address administrative acts that cannot be addressed by via initiative. Its section 6 provides:

Any General Plan amendment or revision that proposes to change the land use designation or to change the allowable uses allowed under the General Plan on certain lands designated in the General Plan as 'Parks, Recreation and Open Space,' shall require voter approval by a vote of the people of the City of Vallejo.

The requirement for voter approval requires each project requiring a General Plan amendment affecting some open-space parcels — but not other open-space parcels or non-open-space parcels — to obtain voter approval, waiting perhaps two years to do so. Such a project-by-project review is an administrative and quasi-adjudicatory function within the City Council's purview, not voters'. (*City of Malibu, supra*, 12 Cal.App.5th at p. 1205 ["There is a difference between, on the one hand, voter approval of a specific plan and, on the other, **requiring** a city council to prepare a specific plan and report, to hold a public hearing about the specific plan and report, and then requiring the plan to be submitted to voters for approval. The former is a legislative act; the latter is an adjudicative one"].)

Moreover, the Initiative invites voters to make decisions about the use of private property without providing standards to guide the exercise of the power it confers. The Initiative purports to preserve parks, but public parks are already protected from private development under Government Code section 38440 et seq. and the Municipal Park Abandonment Law of 1939, Government Code section 38501 et seq. Accordingly, the primary impact of the Initiative is on privately-owned open spaces, like golf courses, farms, and ranches. It states no standards to guide voters' decisions. Such regulation of

private property also animated the outcome in *City of Malibu*. (12 Cal.App.5th at p. 1206 [“The problem is Measure R requires details to be in specific plans that are voter-approved but sets no substantive policy or standards for those plans.”].)

THE INITIATIVE IMPROPERLY AMENDS THE CHARTER

An initiative seeking to amend a city’s general plan is an ordinary initiative subject to different procedures than those to amend its charter. A charter amendment is subject to more demanding procedures than an ordinary initiative. (Elec. Code, §§ 9255–9269.) For example, a charter amendment proposed by petition must be “signed by 15 percent of the registered voters of the city[,]” instead of the usual 10 percent. (Elec. Code, § 9255, subd. (c)(1).)

In *DeVita v. County of Napa*, voters approved Measure J, which confirmed and readopted “portions of the land use element of the general plan that designate land as either ‘Agricultural, Watershed and Open Space’ or ‘Agricultural Resource’ land.” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 771 (*DeVita*).) Measure J also required “the provisions of the general plan and map readopted by Measure J can be amended only on a vote of the people” (*Ibid.*) The Supreme Court concluded “that the land use element of a general plan can be amended by the exercise of the local right of initiative.” (*Id.* at p. 796.)

The Court distinguished proper legislative initiatives from improper constitutional initiatives:

It may indeed be the case that initiative ordinances broadly limiting the power of future legislative bodies to carry out their duties pursuant to either a governing charter or their own inherent police power, are, as it were, ‘constitutional’ rather than legislative measures. Such measures may therefore be either improper amendments to a city or county charter, or else may improperly create a charter-like provision in a city or county that does not possess one. But if the electorate enacts a legislative measure the governing body could have itself enacted, then such measure may, pursuant to Elections Code section 9125, circumscribe the power of future governing bodies.”

(*DeVita, supra*, 9 Cal.4th at pp. 798–799.)

DeVita held that Measure J was not a “constitutional” measure because the voter approval procedures merely confirmed existing state law. Measure J confirmed and readopted the existing General Plan land use designations. Its requirement that voters approve future amendments mirrored Elections Code section 9125, which states:

No ordinance proposed by initiative petition and adopted either by the board of supervisors without submission to the voters or adopted by the voters shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

Unlike Measure J in *DeVita*, the Initiative is an unlawful “constitutional” initiative. First, it does not confirm or readopt existing General Plan land use designations. It only states that those designations previously adopted cannot be changed without voter approval and only as to a hand-picked subset of open-space parcels. As a result, it does not mirror Elections Code section 9125 because it only limits City Council authority to amend the General Plan, without expressly adopting any General Plan designations, and only as to some parcels, with no stated rationale as to why those parcels were chosen and others relieved of the Initiative’s burdens.

Further, unlike Napa County, Vallejo has a charter that conflicts with the proposed initiative. Section 307 of Article III of the Charter provides, “All powers of the City shall be vested in the Council except as otherwise provided by law or in this Charter.” No provision of the Charter permits voters an ongoing veto over City Council decisions; nor does any provision of State law so provide except Elections Code section 9125, quoted above.

The Initiative reduces the City Council’s authority. Its voter approval requirement is not merely a recitation of existing law, but a new check on the City Council’s authority. The City Council itself does not have the authority under the Charter to impose such a requirement; it may only propose Charter amendments to voters. (Elec. Code, § 9255(b)(1).) Thus, this new power can only be effected by a charter amendment. *City of Malibu* made the point in these terms:

Measure R, however, does not merely formalize any existing power of the electorate. It creates a new power—the requirement of a specific plan—and subjects it to voter approval. In this respect, Measure R limits Malibu’s governing body from carrying out its duties pursuant to its police power. And, as *DeVita* suggests, such a limitation may be an

unconstitutional attempt to amend the charter or create a charter-like provision in a city or county that does not possess one.

(12 Cal.App.5th at p. 1206; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1039–1040 (*Citizens for Responsible Behavior*) put it this way:

an initiative ordinance purporting to circumscribe the power of the city council to address a broad range of discrimination issues ‘is a disguised, and illegal, attempt to amend the city charter.’

Therefore, the proponents of the Initiative should have submitted their petition as a charter amendment under Elections Code section 9125 et seq.

THE INITIATIVE SEEMS TO IMPOSE IRRATIONAL “SPOT ZONING”

Cities are prohibited from exercising their local zoning powers in a discriminatory manner. (Gov. Code, § 65008; *Arnel Dev. Co. v City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337 [ordinance is invalid exercise of city’s police power when it constitutes arbitrary and discriminatory rezoning].) Discriminatory zoning includes so-called “spot zoning,” which grants a small area more or less restrictive zoning than surrounding properties without a rational basis to distinguish it from neighbors. (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1311 [senior housing zone within single-family zone not arbitrary or capricious]; *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268 [“The essence of spot zoning is irrational discrimination”].) To be a legitimate exercise of the police power, an ordinance must bear a reasonable relationship to the public welfare and may not be arbitrary or discriminatory. (*Id.* at 1537.) Unlike most zoning ordinances, apparent spot zones are subject to searching judicial review. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.); *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 962–963.)

Citizens for Responsible Behavior considered an initiative to require voter approval for the Riverside City Council to adopt ordinances barring discrimination on the basis of sexual orientation or AIDS status. (*Citizens for Responsible Behavior, supra*, 1 Cal.App.4th at pp. 1039–1040.) The court invalidated the ordinance because “no rational basis justifies the distinctions drawn by the proposed ordinance with respect to the limitations placed on the City’s legislative power” (*Id.* at p. 1027.) The court asserted, “a more careful scrutiny is appropriate for any legislation which impinges upon a fundamental right. Arguably this ordinance attempts to restrict the right to

petition the government which is secured to the people by the First Amendment to the United States Constitution, and article I, section 3 of the California Constitution. This is so because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." (*Id.* at p. 1027, fn. 9.)

The Initiative's exemption for some, but not other, parcels lacks apparent rationale. Those subject to its burdens have a right to petition the government for a general plan amendment. Just as in *Citizens for Responsible Behavior*, property owners' petitions would be "a hollow exercise if the local government has been deprived of the power to grant redress" in the form of a general plan amendment. (*Romer v. Evans* (1996) 517 U.S. 620, 633 ["A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense"].)

The Initiative exempts a number of parcels with little explanation. Its section 6(A)(1)–(4) exempts four categories of land from its voter-approval requirement:

1. "Lands located on Mare Island within City limits,"
2. "A single parcel located east of Interstate 80 north of Columbus Parkway,"
3. "Eight parcels located next to and immediately east of the Northgate Specific Plan area," and
4. "Lands located within the currently-approved boundaries of specific plans or master plans"

As to the first, Section 3(1) states: "Mare Island will remain subject to its own intensive land use planning process and is not included in the Initiative." With respect to the fourth, Section 3(2) reads: "These areas are already subject to comprehensive land use plans that are suitable to the unique character of the areas subject to those plans, and often include open space as part of those plans." The preexisting planning documents governing the first and fourth categories may constitute a rational basis for exempting them if those planning documents advance the Initiative's objectives.

However, the exemptions for the second and third categories lack an apparent rationale. As to the second, Section 3(3) states: "This parcel is isolated between the Northgate Specific Plan to the east and Interstate 80 to the west." But the section does not provide a rationale for excluding it from the Initiative's burdens that relates to the Initiative's objectives. As to the third, Section 3(4) states: "These parcels are already developed with rural residential and agricultural uses." But as the Initiative's purpose is

to protect local ecosystems, reduce carbon emissions, and provide a buffer between incompatible uses (Section 4(A)), exclusion of these parcels requires justification.

ELECTION DATES

At its September 1, 2020 special meeting, the City Council will consider whether to adopt the Initiative, without alteration, or to submit it to the voters. The City may place it on the City's next general election ballot in November 2022. (Elec. Code §§ 9215, 1405.) The deadline to place a measure on the November 3, 2020 ballot has passed. Elections Code sections 9222 and 9255 requires at least 88 days between an order of election and the election date.

The City Council may also call a special election on a date that is at least 88 and not more than 103 days after it acts. (Elec. Code, § 1405(b).) The City Clerk estimates a special election would cost approximately \$10–15 per registered voter. As there are presently 66,675 registered voters in Vallejo, the City can expect to incur from \$666,750 to \$1,000,125 to conduct a special election.

THE INITIATIVE CANNOT APPLY RETROACTIVELY

Legislation is generally not given retroactive effect. "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 272.) Clear legislative intent is required for a statute to operate retroactively. (*Id.* at 280.) "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." (*General Motors Corp. v. Romein* (1992) 503 U.S. 181, 191.) Legislation that is ambiguous with respect to retroactive application is construed to be prospective. (*Myers v. Philip Morris Co., Inc.* (2002) 28 Cal.4th 828, 841.) The presumption against retroactive application applies to zoning ordinances. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560–561.) "Measures adopted by the voters through the initiative process, moreover, are subject to the ordinary rules and canons of statutory construction." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.)

There is no ambiguity regarding the Initiative's effective date. Section 5 defines its "Effective Date": "This Initiative becomes effective upon approval. The General Plan Amendment included in Section 6(A) through (E) of this Initiative shall be inserted into

the General Plan as soon as legally allowed.” Section 7(A) repeats that same language. The earliest the Initiative may apply is November 8, 2022 (unless the City Council opts to call a special election or adopts it directly). Neither the plain language of the Initiative, nor its context, suggest a different result. The Initiative cannot disturb any vested right achieved before its effective date. Therefore, the owners of the properties to be burdened by the Initiative will have a very large incentive to seek vested land use rights before the election on the Initiative. That may create a race-to-the-Planning-Commission and pressure on the City to decide land use applications before the time to do so runs.

CONCLUSION

For the reasons stated above, we conclude the Initiative has significant legal flaws. The Council may adopt it, place it on the November 2022 ballot, or call a special election to consider it sooner. Because the measure cannot be applied retroactively, it may provide a rush to entitle the properties it would affect before voters and approve it.

Thank you for the opportunity to assist. If we can provide further assistance on this subject, please let us know.



DATE: September 1, 2020
TO: Mayor and Members of the City Council
FROM: Anne Cardwell, Assistant City Manager
SUBJECT: **EXTENSION OF AGREEMENT WITH LEW EDWARDS GROUP**

RECOMMENDATION

Authorize the City Manager to execute the extension to the agreement with the Lew Edwards Group (LEG).

REASONS FOR RECOMMENDATION

This item was presented to Council on August 25, 2020. Based on public comment at the August 25 Council meeting, this item was continued to the next Council meeting to allow time for the City Attorney's Office to conduct a conflict of interest assessment. The City Attorney's Office has now prepared a conflict of interest assessment, which has been provided to the Mayor and Council.

The remainder of this staff report remains identical to the staff report dated August 25, 2020.

Given the Council's recent action to place a sales tax measure on the November 2020 ballot, staff is recommending an extension to the LEG contract to allow for their continued services as it relates to providing factual public information regarding the measure.

BACKGROUND AND DISCUSSION

LEG was brought on board in November 2019 in order to assist the City in developing a community survey and assessing the viability of a ballot measure. The original survey was conducted in December 2019, and then subsequently updated per City Council direction in July 2020 given changing circumstances (e.g., COVID-19).

On July 28, the Council gave direction to put a sales tax measure on the November 2020 ballot. With this extension, LEG will continue to provide services as it relates to providing the community with factual information regarding the measure.

FISCAL IMPACT

If the City Council approves the proposed action, the proposed \$49,500 increase to the Lew Edwards Group (LEG) contract for election consulting services will bring the total contract price to an amount not to exceed \$113,250. The \$49,500 proposed cost increase will be funded from the FY 20-21 General Fund adopted budget.

ENVIRONMENTAL REVIEW

This action is exempt from the California Environmental Quality Act (CEQA) because it is not a project which

has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, pursuant to CEQA Guideline section 15378.

ATTACHMENTS

1.	Vallejo - Election Consultant - Lew Edwards Group 2020 Amendment - CAO Stamp
2.	Vallejo - Election Consultants - Lew Edwards Group - Exhibit A1 - 7-23-2... (00000002)

CONTACT

Anne Cardwell, Assistant City Manager (707) 648-4579

anne.cardwell@cityofvallejo.net

Public Comment for Action 8A may be submitted by accessing the following link:

<https://www.opentownhall.com/9610>

Approved as to form:

By:



Randy J. Risner
Interim City Attorney

**FIRST AMENDMENT TO
AGREEMENT BETWEEN
CITY OF VALLEJO
AND
THE LEW EDWARDS GROUP**

This First Amendment to the Principal Agreement made and entered into on November 5, 2019, hereafter referred to as Agreement, between The Lew Edwards Group, a California corporation, therein referred to as Consultant, and the City of Vallejo, a municipal corporation, therein referred to as City, is made and entered into on this 23 day of July, 2020.

Consultant and City do mutually agree as follows:

- 1. Additional Services.** The scope of services to be provided as specified in Exhibit A of the Agreement is amended to include the services described in Exhibit A1 of this First Amendment ("Additional Services").
- 2. Amendment to Section 1 of Exhibit B.** Section 1 of Exhibit B of the Agreement shall be modified in its entirety to read:

1. Consultant's Compensation.

A. Services: City agrees to pay Consultant, at the rate(s) specified below, for those services set forth in Exhibit A of this Agreement and for all authorized reimbursable expenses, for a total not to exceed One Hundred Thirteen Thousand Two Hundred Fifty Dollars and No Cents (\$113,250.00).

In consideration of Consultant providing the Additional Services, Consultant shall be paid an amount not to exceed Forty-Nine Thousand Five Hundred Dollars and No Cents (\$49,500.00). The maximum not to exceed amount specified in Exhibit B of the Agreement is increased by said amount. The following is a breakdown of the additional compensation:

a. Professional Fees: Five (5) monthly payments at Consultant's rate of Six Thousand Dollars (\$6,000) per month due and payable on the last business day of each month commencing July 31, 2020, and ending November 30, 2020 (not to exceed Thirty Thousand Dollars for professional fees); and

b. Not to exceed Nineteen Thousand, Five Hundred Dollars (\$19,500) for a mailing file and graphic design for up to six mailings upon invoice by Consultant. City to print/mail at its own expense.

Professional fees do not include other hard project costs such as opinion research, printing, bulk postage, mail house processing fees, or digital media buys, which will be budgeted for separately by the City throughout the project.

Consultant shall notify City in writing no later than thirty (30) days prior to the estimated date when Consultant will have billed City the maximum payment amount permitted under this Agreement, and Consultant shall provide City with an estimate of the additional compensation required to complete the project.

3. Integration. This First Amendment contains the entire agreement between the parties with respect to its subject matter and supersedes whatever oral or written understanding they may have had prior to the execution of this First Amendment. This First Amendment shall not be amended or modified except by a written agreement executed by each of the parties. Except as specifically revised herein, all terms and conditions of the Agreement, and all prior amendments, if any, shall remain in full force and effect, and Consultant shall perform all duties, obligations and conditions required under the Agreement.

4. Inconsistencies. In the event of any conflict or inconsistency between the provisions of this First Amendment and the Agreement, and any prior amendment, if any, the provisions of this First Amendment shall control in all respects.

5. Ambiguities. The parties have each carefully reviewed this First Amendment and have agreed to each term of this First Amendment. No ambiguity shall be presumed to be construed against either party.

6. Counterparts. This First Amendment may be executed by the parties in one or more counterparts all of which collectively shall constitute one document and agreement.

7. Facsimile Signatures. This First Amendment shall be binding upon the receipt of facsimile signatures or e-mailed by PDF or otherwise. Any person transmitting his or her signature by facsimile or electronically shall promptly send an original signature to the other party at the addresses noted below. The failure to send an original shall not affect the binding nature of this First Amendment.

City:

Consultant:

8. Authority. The person signing this First Amendment for Consultant hereby represents and warrants that he or she is fully authorized to sign this First Amendment on behalf of Consultant.

(SIGNATURES ARE ON THE FOLLOWING PAGE)

IN WITNESS WHEREOF, the parties have entered into this First Amendment on the day and year first hereinabove appearing.

THE LEW EDWARDS GROUP,
a California corporation

CITY OF VALLEJO,
a municipal corporation

By: _____
Catherine Lew
President

By: _____
Greg Nyhoff
City Manager

DATE: _____

DATE: _____

Vallejo Business License No.

ATTEST:

By: _____
Dawn Abrahamson
City Clerk

APPROVED AS TO CONTENT:

Rekha Nayar
Finance Director

APPROVED AS TO FORM:

Randy Risner
Interim City Attorney

APPROVED AS TO INSURANCE:

Heather Ruiz
Interim Risk Manager

EXHIBIT A1

Task Two: Provide Ballot Measure Preparation and Voting Informational Services (July 2020-November 2020)

- Independently analyze 2020 follow up community survey results
- Provide strategic recommendations to City
- Confer with the City staff/City Attorney on measure materials.
- Work with City staff on related staff reports and measure refinement.
- Draft text copy updating community/public on placement of measure on the ballot
- Develop collateral informational materials about measure/new voting procedures, such as Frequently Asked Questions, factual presentational materials or handouts, web/social media/digital copy
- As needed, confer with the City on Rapid Response needs
- Provide print ready graphic design City can use as content for permissible post-placement informational mailings/materials
- Provide ongoing strategic advice for the extended project period

Legal services or advice are not included within Consultant's scope of services. All services are informational only. NO partisan information will be developed by the City or on the City's behalf.

SCHEDULE OF COMPENSATION RATES

An additional five (5) monthly payments at Consultant's rate of Six Thousand Dollars (\$6,000) per month due and payable on the last business day of each month, commencing July 31, 2020, and ending November 30, 2020 (not to exceed Thirty Thousand Dollars for professional fees).

Not to exceed Nineteen Thousand, Five Hundred Dollars (\$19,500) for a mailing file and graphic design for up to six mailings upon invoice by Consultant. City to print/mail at its own expense.