

**TOWN OF  
APPLE VALLEY, CALIFORNIA**

**AGENDA MATTER**

**Subject Item:**

**DISCUSSION OF MEASURE “N”, INCLUDING A POSSIBLE BALLOT MEASURE.**

**SUMMARY STATEMENT**

The Town Council previously retained Joel Kuperberg of Rutan & Tucker, as outside legal counsel, to advise Council and staff on matters regarding Measure “N”, including the possibility of developing and placing on a future ballot a measure clarifying the “voters’ intent” when Measure “N” was approved by the voters in November 1999. In carrying out the Town Council’s direction, Mr. Kuperberg has determined that, among other things, Measure “N” eliminates the Town Council’s ability to effect changes to the Town’s Land Use Element of its General Plan, through the General Plan Amendment/Zone Change (GPA/ZC) process, except by vote of the people. Mr. Kuperberg’s analysis of this and related issues is attached as Exhibit “1” to this staff report. Also attached as Exhibit “2” is a list of GPA/ZCs that have been approved by the Town Council since November 1999 and those GPA/ZC applications that are currently being processed by planning staff.

It is clear, in staff’s opinion, that elimination of the Town Council’s authority to amend the Land Use Element of the Town General Plan without a vote of the people is an unintended consequence of the language crafted by Measure “N” authors and, subsequently, overwhelmingly approved by the voters in November 1999. As elected representatives of the community, the Council developed and, subsequently, adopted Vision 2010 and its related work plan which has been fully embraced by the community. The ability to execute the adopted work plan, and fulfill the “Vision” established by the community, is severely impeded with respect to all ten (10) goals of Vision 2010 and virtually eliminated in the case of some goals (industrial development in north apple valley; a four-year learning institution; and, the Village revitalization plan, for instance). For a variety of General Plan management, Vision 2010 and government compliance issues, staff believes the land use regulatory authority of the Town Council should be restored within the earliest possible timeframe.

**Recommended Action:**

Provide direction to staff.

**Proposed by:**     Director of Economic & Community Development     **Item Number** \_\_\_\_\_

**T. M. Approval:**     \_\_\_\_\_     **Budgeted Item**    **Yes**    **No**    **N/A**

**Statement - Continued**

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Assuming Town Council approval, a measure restoring the Town Council’s land use regulatory authority could be placed on the June 2006 ballot as noted in Exhibit “3” attached to this report. Such a clarifying initiative measure could be structured to contain the following provisions:

- A restatement or reaffirmation of the findings and purposes of Measure “N”;
- A statement that the electorate passed Measure “N” to preserve the R-SF density and minimum lot size requirement, but not to restrict Town Council from regulating land uses through amendments to the General Plan, or the redesignation of properties;
- A statement or “readoption of the R-SF 2-unit per acre maximum density and 18,000 s.f., minimum lot size requirement which cannot be modified without the consent of the voters until January 1, 2021; and,
- A legislative determination that, notwithstanding any law to the contrary (including, but not limited to, Measure “N”), the Town Council has the authority to amend all portions of the Land Use Element, and all other Elements of the General Plan, and adopt General Plan Amendments changing the land use designation of parcels and areas in Apple Valley.

When Apple Valley incorporated in 1988, local control, better roads and public safety were the galvanizing issues that drove the successful incorporation effort. Having seized control of its land use destiny through incorporation, it is ironic that such control was inadvertently, and unwittingly, ceded to the general electorate in spite of our representative form of government and Apple Valley’s strong reputation of having an informed and engaged electorate. To effectively address local, state and Federal laws, rules and regulations governing the Town’s General Plan, it is essential that the Town’s land use regulatory authority be returned to its elected representatives.

## MEMORANDUM

**TO:** The Honorable Mayor and Members of the Town Council  
**FROM:** Joel D. Kuperberg   
**DATE:** January 12, 2006  
**FILE NO.:** 024741-0001  
**RE:** Analysis of the Effect of Measure N on Apple Valley Land Use Regulatory Authority

The voters of Apple Valley passed Measure N at the November, 1999 election, and the Measure became effective on January 1, 2000. In Section 1, Measure N makes findings supportive of retaining the Town's existing rural atmosphere and equestrian lifestyle. Section 2 of Measure N adopts three separate actions with respect to the Land Use Element of the Apple Valley General Plan; apparently best known is Section 2.C, which prohibits, until January 1, 2021, any change to the 2 dwelling units per acre density limit and the 18,000 square foot minimum lot size for development within the Land Use Element's R-SF (Single Family Residential) designation without a vote of the Town's electorate.

This memorandum analyzes the specific legislative actions that were enacted by Measure N, the extent to which Measure N restricts the ability of the Town Council to adopt amendments to the Land Use Element of the Apple Valley General Plan and change allowable land uses on parcels within the Town, and the legal effect of Land Use Element amendments adopted by the Town Council since the passage of Measure N.

### A. Issues

1. Does Measure N restrict the authority of the Apple Valley Town Council to amend the Land Use Element of the General Plan, or to adopt General Plan amendments changing the allowable land use of parcels from one Land Use Element designation to another?
2. Does Measure N restrict the Town Council's authority to modify the maximum density limits and minimum lot size requirements in the Land Use Element's "Specific Plan" designation?
3. Does Measure N restrict the Town Council's authority to modify the maximum density limits in the Land Use Element's R-MF (Medium Density) land use designation?

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EXHIBIT 1

4. What is the effect of Measure N on General Plan amendments adopted by the Town Council since November, 1999 to change the allowable uses on parcels from one land use designation to another?

**B. Conclusions**

1. Because Section Measure N "readopted" the 1991 Land Use Element goals and policies, and the 1998 Land Use Element designations and land use map, the Town Council lacks the authority, without a vote of the electorate, either (a) to amend the 1991 Land Use Element goals or policies, or (b) to adopt a General Plan amendment changing the allowable uses of a parcel from the land use designation specified in the 1998 Land Use Element to a different land use designation.

2. Because Measure N "readopted" both the 1998 Land Use Element designations (including the Specific Plan designation), and Policy LU-3.4 of the 1991 Land Use Element, the Town Council does not have the authority, without a vote of the electorate, to apply the R-SF density and minimum lot size requirements to Specific Plan projects.

3. Because Measure N "readopted" the 1998 Land Use Element designation of R-MF with allowable densities of 2-20 dwelling units per acre, the Town Council does not have the authority, without a vote of the electorate, to revise the R-M designation to reduce the maximum density from 20 to 10 dwelling units per acre

4. Any General Plan amendments adopted by the Town Council subsequent to the passage of Measure N to change the land use designations of specific properties were invalidly adopted. However, unless lawsuits were filed challenging those invalidly adopted General Plan amendments within 90 days of the amendments' adoption, the land use designation changes are now immune from challenge.

**C. Analysis**

1. Because Measure N "Readopted" All of the Substantive Provisions of the Apple Valley Land Use Element, the Measure Prevents the Town Council, Without a Vote of the Electorate, from Either (a) Amending the Land Use Element, and (b) Changing the Allowable Land Use Designation of any Parcel, Until January 1, 2021.

Measure N effects three substantive changes to Apple Valley's General Plan. The best known change is reflected in Section 2.C of the Measure, which amends the Land Use Element to preclude any change to the 2-unit per acre density limit and the 18,000 square foot minimum lot size requirement in the F-SF (Single Family Residential) land use designation until December 31, 2020, without a vote of the people. These limitations on changing the R-SF designation are consistent with, and further, the findings and purposes set forth in Sections 1.B, 1.D, and 1.E of Measure N.

While they have apparently received less attention, Sections 2.A and 2.B of Measure N also restrict Town Council authority over the Land Use Element. Section 2.A of the Initiative readopts the

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goals and policies of the Land Use Element, as it existed in 1991. Section 2.A provides in pertinent part as follows:

The Residential Lot Size initiative *hereby reaffirms and readopts*, until December 31, 2020, goal LU-1, policy LU-1.1, LU-1.2, . . . of the Land Use Element of the Town of Apple Valley General Plan adopted on *September 10, 1991*. (Emphasis added.)<sup>1</sup>

Similarly, Section 2.B of Measure N readopts the land use designations and land use map in the Town's Land Use Element in effect in 1998. Section 2.B provides as follows:

In addition, the initiative *hereby reaffirms and readopts*, until December 31, 2020, the Land Use Designation and Land Use Policy Map (figure LU-3), Equestrian Neighborhood Map of the Land Use Element of the Town of Apple Valley General Plan adopted on September 10, 1991, *as amended through January 1, 1999*. (Emphasis added.)

The reaffirmation and readoption of the Land Use Element goals, policies, and designations are not reflected in any of the findings and purposes set forth in Section 1 of Measure N. However, Measure N's language, "reaffirms and readopts, until December 31, 2020," has the effect of enacting the 1991 Land Use Element goals and policies, and the 1998 Land Use Element designations and maps, by initiative.

Under California law, legislation enacted by initiative may only be modified or repealed by a subsequent vote of the people, unless the initiative measure expressly provides otherwise. Elections Code § 9217 provides in pertinent part as follows:

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the City. . . . No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city 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.

Elections Code § 9217 prohibits any Council-adopted change to legislation enacted by initiative, even if the initiative does not contain that express prohibition. In *DeVita v. County of Napa*, 9 Cal.4<sup>th</sup> 763 (1995), the California Supreme Court construed a similar statute applicable to counties in holding that a land use element amendment enacted by initiative may only be amended or repealed by the electorate. See also, *Mobile Park West Homeowners Assn. v. Escondido Mobile Park West*, 35 Cal.App.4<sup>th</sup> 32 (1995); 36 Ops. Ag. 236 (1980).

<sup>1</sup> Section 2.A of Measure N "reaffirms and readopts" all of the goals and policies in the Land Use Element as it existed in 1991.

Elections Code § 9217 and the above case authorities therefore hold that, by reason of Section 2.A of Measure N, the Apple Valley Town Council may not itself amend the goals or policies of the Land Use Element adopted on September 10, 1991, until 2021. Similarly, these legal authorities hold that Section 2.B of Measure N precludes the Town Council from itself amending any of the land use designations or map in the Land Use Element in effect as of January 1, 1999, until the year 2021. Any action to amend these substantive land use portions of the Land Use Element may only be undertaken through the use of the initiative process.

2. Measure N Prevents the Town Council from Amending the Land Use Element to Modify the Density or Minimum Lot Size Requirements of the Specific Plan Land Use Designation.

The 1998 Land Use Element describes the land use designation for Specific Plan projects as permitting the following intensity:

Development densities for the entire residential and open space portions of the Specific Plan area shall not exceed two (2) dwelling units per gross acre subject to the limitations and criteria stipulated below. Therefore, small lots may be permitted where correspondingly larger amounts of open space are provided. The development density may be an average over the entire residential and open space areas, but in no case shall density transfers allow a density in excess of twenty-four (24) dwelling units per net acre for any portion of the Specific Plan (1998 Land Use Element, p. LU-7).

In addition, policy LU-3.4 of the 1991 Land Use Element provides that "open space equivalent to that provided by single-family units or 18,000 sq. ft. net lots shall be provided for in all specific plans."

Based upon information available to us, it appears that the Town Council took action in December, 2004 to deem PUDs (which, in Apple Valley, appear to be a form of Specific Plan development) subject to the 2-unit per acre/18,000 sq. ft. minimum lot requirements for R-SF (single family residential) development under Measure N. However, by reason of Elections Code § 9217 and the case authorities cited above, Section 2.B of Measure N divested the Town Council of the authority to modify any land use designations in the 1998 Land Use Element (including the flexibility for density averaging in Specific Plan projects); and Section 2.A of Measure N precludes the Town Council itself from modifying any of the goals or policies of the 1991 Land Use Element (including Policy LU-3.4, which provides flexibility for lot sizes in Specific Plan projects). Accordingly, the Town Council may not, until January 1, 2021, modify the standards or policies governing the Specific Plan land use designation without a vote of the Apple Valley electorate.

3. Measure N Prevents the Town Council from Amending the Land Use Element to Decrease the Maximum Density in the R-M (Medium Density Residential) Land Use Designation.

In the 1991 Land Use Element, the R-M (Medium Density) land use designation permits multi-family development at a density range of 2-10 units per net acre (1991 Land Use Element, p. 8). The 1998 Land Use Element, by contrast, defines the R-M designation to allow from 2-20 dwelling units per net acre (1998 Land Use Element, page LU-5). As indicated above, Section 2.B of Measure N "readopts" the land use designations in the 1998 Land Use Element, such that Measure N effectively "locks in" a density range of 2-20 units per acre for the R-M designation unless the designation is amended by a vote of the Apple Valley electorate.

The Town's June 27, 2000 Housing Element in some places assumes that the maximum R-M density is 20 units per acre (see Housing Element, at pp. 42, 54), but policy H-1.1 of the Housing Element (at p. 69) states that medium density development is 10 units per acre. Given that Section 2.B of Measure N precludes any action by the Town Council to modify the maximum allowable density of the R-M land use designation, the Housing Element is incorrect where it states that the R-M designation permits only 10 units per acre. Further, the Town Council may not reduce the maximum density of the R-M land use designation from 20 to 10 dwelling units per acre without a vote of the electorate.

4. While Any General Plan Amendment Adopted by the Town Council Subsequent to the Passage of Measure N that Changed the Land Use Designation of Any Parcel was Invalidly Adopted, Each Such General Plan Amendment is Now Immune from Legal Challenge if No Lawsuit was Filed within 90 Days of the Town Council's Adoption of the Amendment.

It is our understanding that the Town Council has adopted a number of General Plan amendments in the six years following the passage of Measure N, many of which have redesignated lands within the Town from the land use designations set forth in the 1998 Land Use Element to different designations. It is also our understanding that none of these General Plan amendments have been approved by the voters. Because Section 2.B of Measure N readopted all of the land use designations, and the land use map, in the Town's Land Use Element, these subsequent Council-adopted Land Use Element amendments were invalidly adopted under Election Code § 9217 and *Mobile Park West Homeowners Assn, supra*.

The fact that post-Measure N Land Use Element amendments were invalidly enacted by the Town Council, rather than by the Apple Valley electorate, does not address whether those Land Use Element amendments are valid and effective now. The validity of the post-Measure N Land Use Element amendments is addressed by Government Code § 65009, which creates a 90-day statute of limitations for any action to "attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan." While the specific question of whether the statute of limitations established by Government Code § 65009 applies to actions alleging violations of Election

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Code § 9217 has not been addressed by the courts, we believe case law makes this 90-day statute of limitations applicable to the post-Measure N Land Use Element amendments.

In *Ching v. San Francisco Board of Permit Appeals*, 60 Cal.App.4<sup>th</sup> 888 (1998), the court applied Government Code § 65009 to bar a challenge to a land use decision based on a statute unrelated to land use (in that case, the conflict of interest provisions of the Political Reform Act). We believe the reasoning employed by the court in *Ching* also applies to a claim challenging a land use action as a violation of Election Code § 9217. Therefore, like the claim in *Ching*, a claim challenging a post-Measure N Land Use Element amendment as a violation of Election Code § 9217 will probably be subject to the strict 90-day statute of limitations mandated by Government Code § 65009.

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<b>CASE ID</b>	<b>DATE SUBMITTED</b>	<b>APPLICANT</b>	<b>LOCATION</b>	<b>DESCRIPTION</b>	<b>STATUS</b>
ZC/GPA 99-001	17-Mar-99	GEDDES MOHAMMED	10553 KIOWA RD	C-G	APPROVED
ZC/GPA 2000-001	06-Mar-00	TOWN OF APPLE VALLEY	CHIWI ROAD	COMMERCIAL TO RESIDENTIAL	DENIED
ZC 2000-002 / GPA 2000-003	10-Apr-00	MIKE PONTIOUS	DALE EVANS PKWY/CORWIN		APPROVED
GPA 2000-006, ZC 2000-004	07-Dec-00	CHET HITT - SUNSET HILLS	1 SQUARE MILE EAST OF YUCCA, NORTH OF WAALEW		WITHDRAWN
GPA 2001-001 / ZC 2001-001	22-Mar-01	TOWN OF APPLE VALLEY	DALE EVANS PKWY/JOHNSON	R-C TO PLANNED INDUSTRIAL, I-P AND R-VLD, TO I-P	APPROVED
GPA 2001-002	14-Jun-01	SUSAN DUBAY	DAKOTA/PAPAGO	FROM RESIDENTIAL LOW-DENSITY TO LIGHT INDUSTRIAL	APPROVED
ZC 2001-003	30-Oct-01	DAVE FAYLOR	RIVERSIDE DRIVE TRACT 8476 LOTS 749-754 AND 793-796	RESIDENTIAL SINGLE FAMILY TO RESIDENTIAL EQUESTRIAN	APPROVED
GPA/2002-003; ZC 2002-001	11-Jun-02	MIKE PONTIOUS	SOUTHWEST CORNER OF APPLE VALLEY RD. AND YUCCA LOMA	RESIDENTIAL SINGLE FAMILY TO GENERAL COMMERCIAL	DENIED
GPA 2003-001; ZC 2003-001	07-Feb-03	GENTRY/SELBY	OUTER HWY 18 SOUTH BTWN MONDAMON RD & POHEZ RD.	RESIDENTIAL MULTI-FAMILY TO GENERAL COMMERCIAL	APPROVED
GPA 2003-002; ZC 2003-002; DP 2003-014	05-Sep-03	ROBERT MARTINEZ, ARCHITECT	19195 HIGHWAY 18	RESIDENTIAL MULTI-FAMILY TO GENERAL COMMERCIAL	APPROVED
TTM 16922; GPA 2004-002; ZC 2004-002	02-Nov-04	ALTEC ENGINEERING - CARL COLEMAN OR GINGER BECKER	NW COR. DEEP CREEK AND TUSSING RANCH	FROM R-A TO RSF AND REQ	PENDING
DP 2004-029; ZC 2004-001; GPA 2004-001; SUP 2005-007	18-Nov-04	HASSAN A. CHOUIHNI	CAR WASH AT APPLE VALLEY ROAD BTWN. HWY. 18 & QUANTICO	GENERAL COMMERCIAL	APPROVED

EXHIBIT 2

GPA 2004-004; ZC 2004-004	30-Dec-04	DAVE FAYLOR, CAMBRIDGE HOMES	NORTHPOINTE; WEST 1/2 SECTION 30; PORTIONS OF SECTION 19	FROM R-VLD TO RSF	PENDING
GPA 2005-001; ZC 2005-001	02-Feb-05	STRATA EQUITY INVESTMENTS; JAMES KOZAK	BRIDLE PATH ESTATES: SECTION 36	FROM R-VLD, OS-C, I-RE TO SFR	PENDING
GPA 2005-002; ZC 2005-002	07-Feb-05	VVCE, ROB KILPATRICK	SW COR. DEEP CREEK AND SITTING BULL	CHANGE FROM R-E TO RSF	PENDING
GPA 2005-004 ZC 2005-003	07-Jun-05	Mike Pontious	SECTION 31; Northeast of Apple Valley and Pimlico Roads	CHANGE TO GENERAL COMMERCIAL AND OFFICE PROFESSIONAL	PENDING
GPA 2005-006; ZC 2005-006	08-Jul-05	ALTEC ENGINEERING	CENTRAL RD. BTWN. LANCELET AND SANDIA	R-ESTATE TO R- EQUESTRIAN	PENDING
GPA 2005-007; ZC 2005-007	08-Jul-05	JEFF TALLMAN FOR JOHN WELDY	NE COR. JOHNSON AND NAVAJO	R-LD TO PLANNED INDUSTRIAL	PENDING
TTM 17321; GPA 2005-006; ZC 2005- 006	08-Jul-05	ALTEC ENGINEERING	NORTH SIDE OF LANCELET BTWN. QUINNAULT AND CENTRAL	R-ESTATE INTO R- EQUESTRIAN	PENDING
GPA 2005-008; ZC 2005-008; SP 2005- 001	01-Aug-05	Town of Apple Valley	NORTH APPLE VALLEY INDUSTRIAL SPECIFIC PLAN AREA: QUARRY/CENTRAL/WAALEW/DALE EVANS	R-LD, R-VLD AND COMM. RESERVE TO INDUSTRIAL	PENDING
GPA 2005-009; ZC 2005-009; ANNEXATION	01-Aug-05	Town of Apple Valley	GOLDEN TRIANGLE: MORRO/DALE EVANS/JOHNSON/I-15	ALONG 1-15 TO R-C ( APPROX. 180 ACRES 500 FT. DEEP X 3 MI.); BALANCE PROBABLY RESIDENTIAL (2.720 AC)	PENDING

**To:** Bruce Williams  
**From:** La Vonda M-Pearson, Town Clerk  
**Date:** January 9, 2006  
**Subject:** *2006 Election Calendar for Measures*

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Listed below is a summary for the Election Calendars for June 6, 2006 and November 7, 2006.

All preparation for the writing and reviewing of the proposed Ballot Measure would have to be completed prior to the following dates. If you have any additional questions, please let me know.

**JUNE 6, 2006 SCHEDULE – (General or Special Municipal Election)**

**February 14 – Suggested Last Day to Call Election for Ballot Measures**

Suggested last day for Town Council on its own motion to adopt a resolution placing a measure on the ballot. Absolute Deadline for calling election would be March 10, 2006. (Suggested Meeting Dates: February 14, 2006 and February 28, 2006)

**Clerk to Publish Notice of Election – Measure, No Candidates**

In case any measure is to be submitted at a special election where no candidates are to be elected, the Clerk shall publish a synopsis of the measure once. There is no deadline in the Elections Code; however, it must be published prior to Election Day.

**Clerk to Publish Notice of Election – Measure, No Candidates**

In case any measure is to be submitted at a special election where no candidates are to be elected, the Clerk shall publish a synopsis of the measure once. There is no deadline in the Elections Code; however, it must be published prior to Election Day.

**EXHIBIT 3**

**Suggested Last Day to Post Notice of Deadline for Filing Arguments**

If the measure is to be submitted to the voters of the Town, it is suggested that on or before this day, the Clerk fix the **last day for submitting arguments for and against Town measures, and the impartial analysis by the Town Attorney, and a notice of the last day for filing, be posted on the official bulletin board. Suggested last day for filing arguments and the impartial analysis by the Town Attorney should be ten (10) days after the Town Council calls the election.**

**Suggested Last Day to File Rebuttal Arguments**

Suggested last day to file rebuttal arguments is not more than **ten (10) days** after primary arguments are due.

**March 15 – Last Day to Withdraw Measure from Ballot**

Whenever a legislative body has ordered that a measure of proposal be submitted to the voters of any jurisdiction, the order of election shall not be amended or withdrawn after the 83<sup>rd</sup> day prior to the election.

**NOVEMBER 7, 2006 SCHEDULE – (General Municipal Election)**

**July 19 - Suggested Last Day to Call Election for Ballot Measures**

Suggested last day for Town Council on its own motion to adopt a resolution placing a measure on the ballot. Absolute Deadline for calling election would be August 11 (88 days prior to election). **(Suggested Meeting Dates: July 25, 2006 and August 8, 2006)**

**Clerk to Publish Notice of Election – Measure, No Candidates**

In case any measure is to be submitted at a special election where no candidates are to be elected, the Clerk shall publish a synopsis of the measure once. There is no deadline in the Elections Code; however, it must be published prior to Election Day.

**Suggested Last Day to Post Notice of Deadline for Filing Arguments**

If the measure is to be submitted to the voters of the Town, it is suggested that on or before this day, the Clerk fix the **last day for submitting arguments for and against Town measures, and the impartial analysis by the Town Attorney, and a notice of the last day for filing, be posted on the official bulletin board. Suggested last day for filing arguments and the impartial analysis by the Town Attorney should be ten (10) days after the Town Council calls the election.**

**Suggested Last Day to File Rebuttal Arguments**

Suggested last day to file rebuttal arguments is not more than **ten (10) days** after primary arguments are due.

*August 16 – Last Day to Withdraw Measure from Ballot*

Whenever a legislative body has ordered that a measure of proposal be submitted to the voters of any jurisdiction, the order of election shall not be amended or withdrawn after the 83<sup>rd</sup> day prior to the election.