


MEMORANDUM

PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION

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 Proposed Approach to Clarify Effect of Measure N

This memorandum addresses the effect of Measure N divesting the Town Council of a significant portion of its traditional land use regulatory authority, and proposes a means by which the Town Council may clarify the intent of Measure N while restoring its lost power to regulate land use in Apple Valley. To avoid unnecessary redundancy, this memo relies upon (and, where appropriate, summarizes) the reasoning and conclusions in our "Supplemental Analysis Regarding Land Use and Housing Issues in Light of Measure N" (the "Supplemental Analysis").

A. THE ISSUE: Measure N Removes the Town Council's Traditional Power to Regulate Land Use and Planning in Apple Valley Until 2021.

While Measure N may popularly be understood to have restricted Town Council authority to modify the existing density and minimum lot size requirements of the R-SF (Single Family Residential) land use designation in the Town's Land Use Element, Measure N in fact has much more far-reaching impacts. Section 1 of Measure N contains five "findings and purpose[s]," almost all of which¹ support the maintenance of the existing R-SF designation in the Land Use Element. Consistent with the findings and purposes in Section 1, Section 2.C adopts the specific provisions of the R-SF designation. However, Section 2.A of Measure N "readopts" the goals and policies of the 1991 Land Use Element, and Section 2.B of the Measure "readopts" the land use designations and land use map in the Town's Land Use Element in effect as of January 1, 1999. Sections 2.A and 2.B of Measure N thus effectively readopt all of the substantive provisions of the Land Use Element, although neither of these sections relate directly to, or are supported by, the findings and purposes set forth in Section 1 of Measure N.

¹ Unlike the other findings and purposes which directly relate to residential uses at no more than 2 units per acre, on minimum one-half acre lots, Section 1.C focuses on preserving the Town's equestrian lifestyle through existing provisions of the Circulation Element and other portions of the General Plan

As explained in detail in the Supplemental Analysis, Elections Code § 9217, the decisions in *DeVita v. County of Napa*, 9 Cal.4th 763 (1995) and *Mobile Park West Homeowners Assn. v. Escondido Mobile Park West*, 35 Cal.App.4th 32 (1995), and the conclusion of the State Attorney General published at 36 Ops. Ag. 236 (1980), all hold that a municipality's governing body is prohibiting from repealing or amending legislation that the municipality's electorate has enacted by initiative. By reason of these authorities, therefore, Measure N effectively removes the Town Council's authority to undertake any of the following traditional land use regulatory actions normally carried out by city councils and county boards of supervisors, such as:

- Amending Land Use Element goals and policies, either in conjunction with the amendment or update of other General Plan Elements, or to address community issues.
- Amending the land use designations in the Land Use Element (such as changing allowable densities or other features of a designation), either in response to changes in State law, or to reflect changing community, environmental or development issues.
- Changing the land use designation governing a parcel of property or an area of the Town (such as redesignating an area from industrial to commercial use, or redesignating agricultural lands to residential use), either to implement another Town program (such as implementation of a Housing Element program, as required by State law, to "identify adequate sites" for housing, or carrying out the renewal or redevelopment of an area of Town).

Under Measure N, each of these land use regulatory actions may only be accomplished by a vote of the electorate. At a minimum, the voter-approval process adds at least five months to the schedule for any of these land use decisions. More significant is the likely politicization of every Land Use Element amendment or property redesignation on the ballot. These circumstances could lead to paralysis in the Town's administration of its land use policy. Irrespective of these actual and potential impacts however, Measure N—apparently unintentionally—divests the Town Council of one of the fundamental powers of an elected local governing body: the authority to regulate the use of land within the locality's boundaries.

B. A Proposal: A City Sponsored Initiative Measure to Clarify Measure N, and to Restore to the Town Council the Traditional Land Use Regulatory Authority that Measure N Removed.

Should the Town Council desire to implement the apparent intent of Measure N by reaffirming the existing density and minimum lot size requirements of the R-SF land use designation, while removing the prohibitions against the Town Council's authority to amend the Land Use Element or modify the land use designations of parcels in Apple Valley, the Council could place on the ballot a new initiative. Elections Code § 9222 provides as follows:

The legislative body of a city may submit to the voters, without a petition therefor, a proposition for the repeal, amendment or enactment of any ordinance², to be voted on at any succeeding city election, and if the proposition submitted receives a majority of the votes cast for it at the election, the ordinance shall be repealed, amended or enacted accordingly.

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 restatement or "readoption" of the R-SF 2-unit per acre maximum density and 18,000 sf. minimum lot size requirement, which cannot be modified without the consent of the voters until January 1, 2021.
- 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 to adopt General Plan amendments changing the land use designation of parcels and areas in Apple Valley.

An initiative measure containing the above provisions would reaffirm the provisions of Measure N relating to the R-SF density and minimum lot size that the residents apparently understood to be the purpose of the Measure. At the same time, the proposed initiative would delete (either functionally or expressly) Sections 2.A and 2.B of Measure N, which removed the Town Council's authority to amend the Land Use Element and change land use designations.

While Council-initiated initiative measures are discretionary projects subject to CEQA, *Friends of Sierra Madre v. Cit of Sierra Madre*, 25 Cal.4th 165 (2001), it would appear that the proposed initiative does not constitute a "project" within the meaning of CEQA. State CEQA Guidelines § 15378(b)(5) provides that, for CEQA purposes, a "project" does not include "Organizational or administrative activities of government that will not result in direct or indirect physical changes in the environment." The proposed initiative would change the process by which Land Use Element amendments may be undertaken, and the process of redesignating land uses, but would not directly or indirectly affect any particular land use or property. Accordingly, the proposed initiative would seem to be exempt from CEQA under Guidelines § 15378(b)(5), such that no environmental impact report,

² Courts have held that the term "ordinance" includes all types of legislative enactments. *See, Nelson v. Carlson*, 17 Cal.App.4th 732 (1993).

~~negative declaration or other environmental disclosure document would be needed to approved as a condition to placing the proposed initiative on the ballot.~~

The proposed initiative is one of a number of ways to address the apparently unintended effect of Measure N removing the Town Council's power to amend the Land Use Element and change land use designations of properties.³ While not recommended because it violates Elections Code § 9217 and the effect (if not the intent) of Measure N, the Town Council could ignore the provisions of Sections 2.A and 2.B. On the other hand, the Town Council could follow Section 9217 and the express provisions of Measure N, and require a vote of the electorate on every Land Use Element amendment and land use redesignation. Finally, the Town Council could encourage residents to draft an initiative and solicit petition signatures, in order to qualify the measure for the ballot or permit the Council to adopt the measure without an election pursuant to Elections Code § 9214 or 9215. However, the Town Council's placement on the ballot of the proposed initiative appears to be the most expedient and efficient process that complies with Measure N and state law.

I look forward to meeting with the Town Council to discuss the issues raised in this memorandum, and any questions that you may have regarding it.

³ While not suggesting that the Town Council would have supported such a response to Measure N, it should be noted that a challenge could have been brought to the validity of the initiative because of the apparent failure of the initiative proponents to comply with the "full text" requirement, which mandates that a ballot measure contain the "full text" of the legislation that is the subject of the initiative. *See, Creighton v. Reviczky*, 171 Cal.App.3d 1225 (1985). Measure N "readopts" both the 1991 and 1998 versions of the Land Use Element, but there is no indication that either version of the Land Use Element was attached to the initiative petitions. Measure N is now very likely immune from challenge on this basis, however, given the passage of time.