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October 28, 1997

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MEMORANDUM

TO: Law and Legislation Committee Members

FROM: Samuel L. Jackson, City Attorney
William P. Carnazzo, Assistant City Attorney
Joe Robinson, Deputy City Attorney (0500) *JAR*

RE: Government Cost Savings and
Taxpayer Protection Amendment Initiative

INTRODUCTION

The above initiative, which has qualified for the June 1998 ballot, would impose new requirements on contracts for specified services on State, or State-funded projects.¹ At the Law and Legislation Committee meeting of October 21, 1997, various speakers discussed the initiative's potential applicability to local public entity contracts. Our office was asked to review materials addressing this issue provided by proponents of the initiative, and report back on our conclusions.

SUMMARY OF CONCLUSIONS

The materials provided to our office by the initiative proponents conclude, among other things, that the initiative would not apply to contracts for services performed on local

¹The initiative applies to contracts for engineering, architectural, landscape architectural, surveying, environmental, or engineering geology services.

public entity projects funded by gas tax revenues. For the reasons set forth below, we do not believe that it is possible at this time to state with any certainty whether the initiative would or would not apply to contracts for services funded by gas tax revenues. Because some of the language used in the initiative is ambiguous and subject to various interpretations, this issue, and probably other issues as well, can only be resolved by the courts if the initiative is adopted. Any such litigation filed with respect to contracts awarded by the City for City projects would likely delay and increase the cost of such projects, regardless of the litigation's ultimate outcome.

DISCUSSION

1. The Government Cost Savings and Taxpayer Protection Amendment Initiative

The initiative's provisions apply to contracts for the identified services awarded by the State, and to contracts for these services awarded by local public entities when the contract "involves expenditure of state funds or involves a program, project, facility or public work for which the state or any state agency has or will have ownership, liability, or responsibility for construction, operation, or maintenance." The term "state funds" is defined as "all money appropriated by the Legislature for expenditure by the state or a state agency and all money included in special funds that the state or a state agency controls."

2. Memoranda Provided by Initiative Proponents

Our office has been provided with two legal memoranda prepared for the Taxpayers for Efficient Government by Loren E. McMaster.² These memoranda reach the following conclusions:

- ▶ The initiative does not apply to service contracts awarded by local public entities simply because the services are performed for a project subject to review by the State under CEQA or the Subdivision Map Act.

²Our office also has reviewed copies of two opinions issued by the Legislative Counsel, concluding that the initiative would apply to local agency contracts related to school facilities constructed pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976, and also could apply to local agency contracts relating to the design or construction of adult correctional facilities and juvenile facilities. These opinions are not discussed herein, because the City typically does not award contracts for the design or construction of such facilities.

- ▶ The initiative does not apply to services performed by local government employees, since no private contracts are entered into in this case.
- ▶ The initiative does not apply to local public entity contracts for services performed on projects utilizing gas tax funds.

Although we agree with Mr. McMaster's conclusions regarding CEQA and Subdivision Map Act review, and the performance of services by local government employees, we believe that questions can be raised regarding his conclusion that the initiative would not apply to local contracts for services on projects funded by gas tax revenues. Mr. McMaster's memorandum reaches this conclusion, in part, by concluding that gas tax funds are not "state funds" within the meaning of the initiative, because such funds do not constitute "money included in special funds that the state or a state agency controls." The reasoning provided for this conclusion can be summarized as follows:

- ▶ Gas tax revenues are not deposited in a single special fund that is under the control of the State, but, rather, are disbursed to several different funds or disbursed directly to local governments.
- ▶ The California Constitution requires that gas tax revenues be allocated to local governments in a manner which ensures the continuance of existing statutory allocation formulas, unless the Legislature establishes another acceptable basis for allocation. (Any new allocation formula is required to give equal consideration to the transportation needs of all areas and population segments of the State, consistent with the orderly achievement of adopted local, regional and statewide ground transportation goals.)
- ▶ Once local governments receive their share of gas tax revenues, these funds belong to the local government and are not under the control of the State or a state agency.
- ▶ For the above reasons, gas tax revenues do not constitute "money included in special funds that the state or a state agency controls," so that gas tax revenues do not meet the definition of "state funds" provided in the initiative.

While it is certainly possible that a court could interpret the initiative in the above manner, it is also possible to interpret the initiative's provisions more broadly, so that gas tax revenues could fall within the definition of "state funds." First, the fact that such revenues

Law and Legislation Committee Members
Re: Taxpayer Protection Amendment Initiative
October 28, 1997
Page -4-

may be maintained in more than one fund is not dispositive, since the text of the initiative refers to money included in "special *funds* that the state or a state agency controls." Second, although the California Constitution requires that gas tax revenues be allocated to local governments, gas taxes are imposed by the State, and the allocation of gas tax revenues is made in accordance with an allocation scheme established by the Legislature, which can be changed by the Legislature, subject to general criteria set forth in the Constitution. This legislative imposition and allocation could be found to constitute "State control" of the gas tax revenues, whether or not the local government is subject to any further State control after the allocated revenues have been received. The fact that local government can only spend gas tax revenues for purposes enumerated in the Constitution or applicable State legislation, also could be found to constitute "State control" continuing after the gas tax revenues have been disbursed to local government.

For the above reasons, we do not believe that it is possible at this time to state with any certainty whether the initiative would or would not apply to contracts for services funded by gas tax revenues. Because some of the language used in the initiative is ambiguous and subject to various interpretations, this issue, and probably other issues as well, can only be resolved by the courts if the initiative is adopted.³ Any such litigation filed with respect to contracts awarded by the City for City projects would likely delay and increase the cost of such projects, regardless of the litigation's ultimate outcome.⁴

JR/gct

³ In addition to ambiguity concerning the meaning and scope of "state funds," we also note that the initiative would apply to local public entity contracts pertaining to improvements for which the state or any state agency "will have ownership, liability, or responsibility for construction, operation, or maintenance." Although the scope of this provision is subject to different interpretations, it clearly would apply to any state highway improvements undertaken by the City, regardless of whether or not such improvements are financed by State funds.

⁴The City's Truxel Interchange project is an example of the type of large project that would be affected by the initiative's provisions, since the project was funded, in part, by gas tax revenues, and the State will own the highway improvements constructed by the City.