June 6, 2019

Honorable Mayor and
Members of the City Council
City of San Diego
202 C Street
San Diego, CA 92101

RE: The City’s Obligation to Defend Prop B.

Dear Mayor and Councilmembers:

It has been reported that the City Council is scheduled to consider, in closed session, a request that the City join in a Quo Warranto challenge of Proposition B, the pension reform measure adopted by a vote of the people in 2012. The request has been accompanied by a flood of opinionated argument that requires this balancing reply.

On behalf of the Proponents of Proposition B, the Citizens Pension Reform Initiative (Prop. B), we emphasize the legal necessity for the City to stay the course of the last seven years and continue its support of Prop B in the context of the Unions’ threatened quo warranto action.

Some thoughtful scholars of municipal election law, consider it the legal duty of a charter City to uphold and defend a citizen’s initiative measure. As counsel for the proponents of Proposition B, we will not presume to lecture the City as to its duty in this regard. We anticipate that the Council will be properly guided by the advice of the City Attorney.

However, should the City abandon its duty to defend, contradicting the position it has previously taken with respect to Prop. B, it will significantly infringe on Proponents’ and the electorate’s constitutional rights to petition and to legislate through initiative.

Our principle focus is upon the law that affirms the validity of Proposition B. The Unions have consistently mischaracterized the California Supreme Court’s and the California Court of Appeal’s decisions in this matter. No Court has found that Prop. B was enacted as a direct consequence of the City of San Diego’s (City) meet and confer violation. And no Court has deemed Prop. B invalid. Instead, the California Court of Appeal, on remand, held that at present, Prop. B is
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Prop. B was an amendment to the San Diego City Charter. There is a basic presumption of validity given to all statutes and charter amendments. (Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1302; Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1086; Taylor v. Cole (1927) 201 Cal. 327, 333.) Under the Constitution, Charter amendments are given the same dignity as state statutes. (Cal. Const. Art XI, Sec. 3(a).) Statutes are presumed valid. A Charter Amendment is enrolled in the same manner as a statute and has the same presumption of validity as statutes enjoy. (Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal.3d 805, 814-15.)

The unions claim that the Courts “invalidated” Prop B. That is a misstatement of the law. It is critical to properly interpret the decision of the Supreme Court. Certainly, it found that the City should have met and conferred with the unions in 2012. And the Court had the perfect chance to cite that as a reason to invalidate Prop B (as the Unions urged) but it pointedly did not. Prop B was left in full force and effect. As was mentioned by one Justice, the case was considered as “two silos;” the meet and confer silo and the constitutional validity silo. The court never addressed the second silo. It said that the challenge of the validity of Prop B had to be considered in the Quo Warranto context.

While the California Supreme Court did find that the Mayor triggered a meet and confer obligation, at no time did the Court hold that to be a “procedural defect” in the enactment of Prop. B, for the simple reason that the Meyers-Milias-Brown Act does not apply to Proponents or a voter initiative. In fact, the Court of Appeal concluded that “contrary to the Unions’ assertion, the City’s failure to comply with the Act before placing the Initiative on the ballot does not necessarily invalidate the Initiative.” Id., at 385, [citing Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 594 which stands for the proposition that “procedural requirements governing city council action generally do not apply to a voter-sponsored initiative and noncompliance with the procedural requirements does not invalidate the initiative.”].) Thus the Unions’ preemption argument has not been decided – and despite the confidence with which it is asserted – it is not the law.

The passion of the challengers runs high, but the Unions’ pre-emption argument is not a close call. The thought that the statutory enactment of the MMBA could trump the Constitutional guarantees of Article 2, Section 8 is novel; without precedent. The right of the citizenry to engage in the initiative process is a reserved right; it cannot be abrogated by any legislative enactment. The courts have likened it “to a ‘battering ram’ because [initiatives] ‘may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.” (Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1035 [quoting Amador Valley, supra 22 Cal.3d., at p. 228].)
A joinder by the City in the active challenge of Prop B raises practical issues of exposure for the City. Assume the City joins the Unions in attacking the measure. As pointed out above, the proponents of Prop B have a significant legal edge in this case. It is reasonable to predict that they will win. If that prediction is borne out, the question of responsibility for the payment of the proponents’ fees arises. The Supreme Court, and the Court of Appeal, have both ordered that the question of the validity of Prop B, and the issue of the payment of attorney’s fees due to the prevailing party, must be decided in the Quo Warranto proceedings. Up to now, all prior challenges have been advanced by the Unions and PERB; the City has never been a challenger. If the City joins the challengers in such proceedings, and loses, it joins the parties responsible for paying the fees due to the prevailing party. The price, financially and politically, would be noteworthy.

The law blends with politics in the case of a citizen’s initiative measure, adopted by more than a 65% vote of the electorate. Elected officials, as a matter of both law and politics, simply cannot ignore – let alone actively oppose – a strong mandate from the voters.

Sincerely,

KENNETH H. LOUNSBERY

cc: via electronic and USPS:

Mara W. Elliott, City Attorney
M. Travis Phelps, Chief Deputy City Attorney