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## Memorandum

### **PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION**

**To:** Board of Directors, Kensington Police Protection and Community Services  
District

**From:** Randy Riddle  
Teresa L. Stricker 

**Date:** August 22, 2016

**Re:** KPPCSD Board Policy Changes

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At the request of Board President Welsh, we have examined the question Director Toombs raised regarding whether the Board may amend a variety of the rules set forth in its Policy and Procedures Manual by a simple majority vote notwithstanding Rule 1010.20, which requires a 4/5 vote of the Board to adopt a new policy or amend an existing Board policy.

Specifically, Director Toombs asked whether a majority of the Board may amend (1) Rule 1010.20 itself, (2) Rule 1010.20 which requires a 4/5 vote to continue a meeting past 10 pm, (3) Rule 5040.20 which provides that a 4/5 vote is required whenever "policy or other law" requires a 2/3 vote for passage, and (4) Rule 5030.41 which sets forth the amount of time permitted for public comment. We conclude that the Board may amend each of these rules by a simple majority vote notwithstanding Rule 1010.20.

Government Code section 61045 grants the board of directors of a community service district the power to adopt rules by a simple majority vote unless otherwise specifically required by law. Based on the same analysis set forth in our October 2, 2013 memorandum (a copy of which is attached to this memorandum), we conclude that the Board may not adopt a rule conditioning its power or the power of a future board under Government Code section 61045 on a 4/5, rather than a simple majority, vote of the Board.

*People's Advocate Inc. v. Superior Court* (1986) 181 Cal. App. 3d 320 is directly on point. That case involved a challenge to a state-wide initiative measure that, among other things, repealed statutes governing the internal proceedings of the State Assembly and State Senate, established new rules for each house and limited how those rules could be modified. (181 Cal.App.3d at p. 321.)



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The Court of Appeal concluded that these provisions "invaded one or more of the powers of the houses over their committees, staff and internal proceedings as expressly delegated to them" by the state constitution. (*Id.* at p. 324.) The court rejected the argument that because the internal rules changed by the initiative measure had been adopted by statute – rather than by each house exclusively – the initiative did not conflict with the constitutional authority of each house to adopt its own internal rules. (*Id.* at pp. 326-327.) The court explained:

*Nor could a house estop itself or a future house by use of the statutory form from adopting any rule the substance of which is within the powers exclusively delegated to it by the Constitution. "The long indulgence in [a] custom cannot create a right in the legislature, or either house thereof, to do that which it has no power or authority to do." (Special Assembly Int. Com. v. Southard (1939) 13 Cal. 2d 497, 509 [90 P.2d 304].) A house "has power to adopt any procedure and to change it at any time and without notice. It cannot tie its own hands by establishing rules which, as a matter of power purely, it cannot at any time change and disregard. Its action in any given case is the only criterion by which to determine the rule of proceeding adopted for that case." (French v. Senate (1905) 146 Cal. 604, 608 [80 P. 1031]; see In re Collie (1952) 38 Cal. 2d 396, 398 [240 P.2d 275].) A power conferred exclusively upon a house of the Legislature cannot be delegated. (In re McGee (1951) 36 Cal. 2d 592 [226 P.2d 1] [jurisdiction to judge qualifications of members cannot be delegated]; cf. the limited exception now contained in art. IV, § 5.)*

(181 Cal. App. 3d at p. 327 [emphasis added].)

The same principle applies here. No community services district board may bind itself, or a future board, by conditioning on a 4/5 vote of the board the power Government Code section 61045 grants to the board to adopt or amend its internal rules by a simple majority.

We make one additional observation with respect to Rule 5030.20. As explained above, that rule requires a 4/5 vote of the Board where "policy or law" requires a 2/3 majority vote. Given that the Board consists of five members, where state law requires a 2/3 vote of a governing body, the result is that the Board would need a 4/5 vote to act under state law regardless of what the Board's own rules proscribe. Accordingly, any amendment to that rule would be without practical meaning or effect.

Please let us know if you want to discuss our analysis further.




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## Confidential Memorandum

**To:** Board of Directors and General Manager/Police Chief  
Kensington Police Protection and Community Services District

**From:** Randy Riddle   
Teresa L. Stricker

**Date:** October 2, 2015

**Re:** Validity of 2009 Initiative Measure

### I. INTRODUCTION

Under the terms of an initiative measure (“Initiative Measure”) adopted in 2009 by the Board of Directors of the Kensington Police Protection and Community Services District (“District”), the District may not eliminate its independent police department or contract out a substantial portion of its police protection and law enforcement responsibilities without voter approval.

We have been asked us to provide a legal opinion about whether the Initiative Measure is valid and enforceable. We conclude that a court would likely find that the Initiative Measure exceeds the initiative power of the voters and is thus unenforceable. This memorandum sets forth our analysis.

### II. BACKGROUND

In August 2009, petitions proposing the adoption of the Initiative Measure were presented to the District. The District determined that the petitions had been signed by a sufficient number of registered voters to qualify for the ballot.

Under governing state law, the Board of Directors had the option of calling for a special election at which voters would consider whether to approve the Initiative Measure, or adopting it without change. (See Elec. Code §§9310, 9311.) On October 8, 2009, the Board chose to adopt the Initiative Measure rather than submit it to the voters.

The Initiative Measure declares that “[t]he maintenance of an independent police department staffed by peace officers, including a Police Chief, employed directly by the District is in the best interest of the District.” The measure’s express purpose is “to ensure that no action can be taken to disband or eliminate the District’s independent police department, or to subcontract, assign or delegate the District’s police protection and law enforcement responsibilities, without prior voter approval.”

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The Initiative Measure then provides in relevant part:

No ordinance by which the District would divest itself of its police protection and law enforcement power shall be adopted by the Board of Directors, and, except as provided in paragraphs B and C of this Section II, no contract or other arrangement between the District and any other agency of the government, or non-governmental entity, pursuant to which all or any substantial part of the District's police protection and law enforcement functions would be performed by peace officers employed by the other agency or agencies or entity, shall be executed or become effective for any purpose, unless such ordinance, contract or other arrangement has first been approved by a majority of the votes cast in a duly called and conducted special or general election in which the ordinance, contract or other arrangement is submitted for voter approval.

(Section II(A).)

The Initiative Measure carves out several exceptions. First, it does not apply to agreements related to police protection and law enforcement support services such as, for example, communications, information technology or forensic science services. Nor does the Initiative Measure apply to employment agreements between the District and individual peace officers. (Section II(B).)

Second, the Initiative Measure does not limit the Board's authority in case of emergency to accept temporary emergency assistance from, or provide temporary emergency assistance to, any other police agency. It makes express that the District's financial condition does not constitute an emergency within the meaning of this exception. (Section II(C).)

Third, the Initiative Measure does not limit the Board's authority to determine appropriate levels of staffing for the District's police department. (Section II(D).)

### III. ANALYSIS

#### A. **There is a Strong Presumption in Favor of Initiative Rights.**

The power of initiative is held by all Californians, including the voters of community service districts. (CAL. CONST., art. II, §11(a); Elec. Code §§9300, 9301.) Because the right of initiative is fundamental, courts go to great lengths to protect that right. Consistent, long-standing judicial policy has been "to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled." (*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 41.)

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Accordingly, all presumptions will favor the validity of initiative measures, which “*must* be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.” (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501 [emphasis added].) The reluctance of courts to interfere with the right of initiative has been described as a “judicial policy of liberally construing the power of initiative.” (*Empire Waste Management v. Town of Windsor* (1998) 67 Cal.App.4th 714, 718.)

**B. A Court Would Likely Conclude That The Initiative Measure Improperly Seeks to Bind the Actions of Future Boards and Is Therefore Invalid.**

Despite the strong presumption in favor of the initiative power, it is our view that a court would likely conclude that The Initiative Measure exceeds the electorate’s power because it seeks to bind the future actions of the Board in a manner that neither the Board itself nor the voters may do.

As a starting point, it is important to recognize that the power of voters to enact legislation through the initiative process is generally co-extensive with the legislative power of the local governing body. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776; *Mueller v. Brown* (1963) 221 Cal.App.2d 319, 324 [“[T]he power of the electorate to enact legislation by use of the initiative process is circumscribed by the same limitations as the legislative powers resting in the legislative body concerned.”].) Accordingly, in exercising their initiative power, voters may adopt only those legislative measures that the local legislative body itself may adopt. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 549 [“In general, voters may not enact a statute or ordinance that the legislative authority itself has no power to enact.”].)

Once the voters have adopted an initiative measure – or, as here, the legislative body has chosen to adopt a qualifying initiative measure rather than submit it to the voters – only the voters may subsequently amend that measure, unless the measure itself provides otherwise. (Elec. Code §9323; *DeVita*, 9 Cal.4th at 798.)<sup>1</sup> Critically, however, this provision is triggered only if the measure itself was originally within the power of the voters to adopt, that is, one the governing body itself could have enacted. (See *City of County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 104 [charter provision mirroring Elections Code section 9323 does not expand initiative power but rather limits the board’s power to amend or repeal an initiative ordinance the voters had authority to enact in the first instance]; cf. *DeVita*, 9 Cal.4th at 798-99 [“But if the electorate enacts a legislative measure the governing body could have itself

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<sup>1</sup> In *DeVita*, the challenged measure was an amendment to the city’s general plan, and it contained a provision prohibiting for 30 years any amendment to the measure absent voter approval. The Court noted that an amendment to a general plan is a legislative action the council itself could have taken. Thus, once the voters adopted the measure, under the Elections Code it could only be amended by the voters. Accordingly, the court viewed the voter approval provision in the measure itself as redundant, noting that it merely formalized the amendment ban already imposed by the Elections Code. (9 Cal.4th at 796.)

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enacted, then such measure may, pursuant to Elections Code section 9125, circumscribe the power of future governing bodies”].)

Accordingly, the core issue is whether the Board itself could have enacted the Initiative Measure. In our view, a court would likely conclude that the Board could not have done so, and therefore neither may District voters.

It is an established principle of government law that "no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence." (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929; see *People's Advocate v. Superior Court* (1986) 181 Cal.App.3d 316, 328 [a legislative body may not “bind its own hands or those of future [legislative bodies] by adopting rules not capable of change ... What is at issue is not the authority to amend a statute, however adopted, but the power to say what content a future statute may have”].) Accordingly, neither may the voters. (*People's Advocate, supra*, 181 Cal.App.3d at pp. 328-329.)

*City of County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 directly addresses this point. *Patterson* involved a pre-election challenge to an initiative ordinance that attempted to limit the San Francisco Board of Supervisors' legislative discretion under the San Francisco Charter to authorize certain types of real property transactions without voter approval. Citing the “familiar principle of law that no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence,” the Court upheld a trial court decision removing the measure from the ballot:

The charter grants the board of supervisors the power to sell (or lease) real property under certain specific terms and conditions pertaining to such transactions. *Neither the electorate nor the board can attempt to legislatively alter these provisions so as to bind a future board except by an appropriate charter amendment.* In point of fact, the proposed initiative is an indirect attempt to accomplish what can only be done directly by amendment of the charter.

(*Id.* at p. 105 [emphasis added]; see also *L.I.F.E Committee v. City of Lodi* (1989) 213 Cal.App.3d 1139, 1148 [initiative ordinance conditioning city council's exercise of power under state land use statutes on voter approval is beyond the initiative power].) In our view, the Initiative Measure suffers from the same fatal flaw as the initiative ordinance in *Patterson*.

The Government Code expressly grants a community services district broad discretion to contract or enter into joint powers agreements with other public entities to provide or share any services the district is authorized to provide itself. (Gov. Code §§ 61060(j) [joint powers agreements], 61070 [contracting out].) The Attorney General has concluded that these provisions grant community services districts that provide police protection services the authority to enter into agreements with the county or another local

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public agency “to have the county sheriff or other local agency police department provide those services.” (95 Ops. Cal. Atty. Gen. 26 (2012).)

The Initiative Measure attempts to directly restrict the discretion granted by these state laws to the Board in the same manner as the challenged ordinance in *Patterson* sought to circumscribe the contracting power granted to the San Francisco Board of Supervisors by the San Francisco Charter. It is likely that a court would conclude that the Board itself could not impose such a restriction on future boards, and therefore neither may the voters.

A court would likely find that the Initiative Measure runs afoul of this principle in another regard. Subject to certain restrictions, Government Code section 61107 grants a community service district board the discretion to pass an ordinance divesting itself of any authorized power, including its police protection and law enforcement powers. Again, the Initiative Measure expressly seeks to subject that explicit statutory discretion to approval by District voters, which under *Patterson*, neither the Board itself nor the voters may do.

Courts have recognized a narrow exception to the fundamental rule against initiative ordinances that limit the power of future legislative bodies. In *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1034-35, the court of appeal considered the validity of a proposed initiative measure that would have prohibited the Riverside City Council from enacting certain legislation targeting homosexuals and persons suffering from AIDS. The Court determined that the measure was beyond the power of the electorate to enact, citing *Patterson*. (*Id.* at p. 1024.) In reaching this conclusion, the Court observed:

We recognize, of course, that not all laws which restrict the future freedom of a legislative body to alter them or to legislate on a specific subject are invalid. An obvious example is the power to bind a public entity by a long-term contract. (See *San Francisco Gas Light Co. v. Dunn* (1882) 62 Cal. 580.) As *Citizens* points out, initiative ordinances restricting future acts have been upheld *when the restrictions were sharply limited in scope*. Thus, in *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, the electorate was held to have the power to forbid the city council from resolving to construct a municipal golf course; in *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, a valid initiative forbade the construction of a new jail and required the renovation of the old jail; in *Associated Home Builders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d 582, an initiative was upheld which restricted the issuance of building permits. *But in each of these cases, the initiative ordinance effected a result which would have been within the power of the legislative body itself to reach*. (See e.g. *Associated Home Builders Etc. Inc. v. City of Livermore, supra*, 18 Cal.3d at p. 601.) That is not so here, where the

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initiative ordinance would carve out a significant exception to the council's charter powers.

(*Id.* at pp. 1034-1035.)

It is likely that a court would conclude that the Initiative Measure is not a measure that is “sharply limited in scope” or, as we have explained, one the Board itself could have adopted. Rather, as was true in *Citizens for Responsible Behavior*, the Initiative Measure would “carve out a significant exception” the Board’s broad powers under state law in a manner the Board itself could not have lawfully accomplished. Accordingly, a court would likely invalidate the Initiative Measure.

**C. A Court May Also Conclude that The Initiative Measure Fails Because the Legislature Intended to Restrict Initiative Power To Determine Whether Community Service District Boards Divest Their Powers**

As noted, the Initiative Measure provides that “[n]o ordinance by which the District would divest itself of its police protection and law enforcement power shall be adopted by the Board of Directors” unless approved by the voters. A court may conclude, based on the statutory language in the Community Services District Law, that the Legislature intended to remove decisions about whether to divest the District of its police protection authority from the initiative power, and that therefore this provision of the Initiative Measure is invalid.

In determining whether the Legislature intends to restrict the power of initiative by delegating exclusive authority to a local governing body, courts construe statutory “reference[s] to ‘legislative body’ or ‘governing body’” as carrying only a “weak inference that the Legislature intended to restrict the initiative or referendum power, and reference[s] to ‘city council’ and/or ‘board of supervisors’ ... [as carrying] a stronger one.” (*DeVita, supra*, 9 Cal.4th at p. 776, citing *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501.) Courts also consider “whether the subject at issue was a matter of ‘statewide concern’ or ‘municipal affair,’ with the former indicating a greater probability of intent to bar initiative and referendum.” (*Ibid.*) And finally, courts examine any other indication of legislative intent. (*Ibid.*)

Here, the statutory language strongly suggests that the Legislature intended to restrict initiative power over whether the community service district boards divest themselves of powers. Government Code section 61107 provides “[i]f the *board of directors* [of a community service district] desires to divest itself of a power that is authorized pursuant to this chapter... *the board of directors* may, by ordinance, divest itself of that power.” (Gov. Code §61107(a), (c) [emphasis added].) Under *DeVita* and *Committee of Seven Thousand*, there is a strong inference that by explicitly delegating the authority to divest the board of powers to the “board” rather than the “district” or the “legislative body,” the Legislature intended to remove the initiative power over such decisions. This inference may be strengthened further if, as may well be the case, a court concluded that the exercise of the initiative power



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in these circumstances would interfere with the District's essential government functions. (*Totten v. Board of Supervisors* (2006) 139 Cal.App.4th 826, 838.)

But the second criterion set forth in *DeVita* and *Committee of Seven Thousand* – whether the subject is a matter of statewide concern or a municipal affair – does not provide any clear indication of legislative intent. On the one hand, a community service district board's decision to terminate its police protection or law enforcement authority could have broad impacts well beyond the district's local jurisdiction as other public agencies would be forced to provide at least a basic level of such services. On the other hand, the Legislature confined the impact of such power divestment decisions by requiring advance LAFCO approval where “termination of [a community services district board's] power would require another public agency to provide a new or higher level of services or facilities. . . .” (Gov. Code §61107(a).)

Given this LAFCO pre-approval requirement, a court may conclude that any decision about whether to divest a community services district board of any authorized power is primarily a matter of *local* and not statewide concern. And any such ruling would likely be dispositive: “Only in matters that transcend local concerns can the Legislature have intended to convert the [local] governing bodies into its exclusive agents for the achievement of a ‘legislative purpose of statewide import.’” (See *DeVita, supra*, 9 Cal.4th at p. 780, citing *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780.) But given the lack of any cases specifically addressing this issue under section 61107, it is unclear how a court ultimately would resolve this issue.<sup>2</sup>

#### **D. Severability of The Initiative Measure's Limitation on Contracting Out Police Services.**

Where a particular provision of a statute has been determined to be invalid, a court may sever that invalid provision and give effect to the valid provision. Severability is appropriate where “the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute ... or constitutes a completely operative expression of the legislative intent ... [and is not] so connected with the rest of the statute as to be inseparable.” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821, quoting *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.)

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<sup>2</sup> We have also considered, and found inapplicable, other limits on the power of initiative. For example, courts are divided on the issue of whether approval of a particular contract is an administrative act, rather than a legislative act, and therefore not subject to the initiative power. (See *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App. 4th 1099 [interim contract was legislative act subject to referendum]; *Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140-41 [contract between government entities was an administrative act not subject to referendum].) In any event, the Initiative Measure does not address approval of a specific contract. Rather, the measure purports to establish a contracting policy for the District, albeit in a manner is likely invalid for the reasons discussed in the body of this opinion.

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Here, however, a court would likely conclude either that both provisions of the Initiative Measure violate the rule discussed in *Patterson*, or that neither provision does. Accordingly, it is unlikely that a court would find the Initiative Measure severable.

#### **IV. CONCLUSION**

For the reasons discussed in this opinion, a court would likely conclude that the Initiative Measure is invalid, and may not be enforced.