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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

CITY OF MARINA, Plaintiff, vs. ARMSTRONG RANCH PROPERTY OWNERS; GIBSON SPENO LLC- MARINA; RMC LONESTAR; LANDWATCH MONTEREY COUNTY; and DOES 1 through 20, inclusive, Defendants.	Case No. M 52386 **DEFENDANT LANDWATCH MONTEREY COUNTY'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE** Date: May 4, 2001 Time: 9:00 a.m. Dept.: 17 Hon. Michael S. Fields Action Filed: February 1, 2001

I. PRELIMINARY STATEMENT

On November 7, 2000, the voters of the City of Marina voted to adopt the Marina Urban Growth Boundary Initiative ("Measure E"). Under the California Constitution, Measure E thus became the "final legislative word" of the City, which the Marina City Council ("Council") has no power to alter or undo. Rossi v. Brown, 9 Cal.4th 688, 704 (1995). Nevertheless, two months after Measure E became valid and binding, and in plain contravention of its duty to implement and defend the Measure, the City of Marina filed the instant action attempting to shirk that duty. The City's lawsuit, styled as a "declaratory relief" action, seeks to do what not a single case supports: use taxpayer funds--the funds of the very people who voted to adopt Measure E--to raise questions as to the validity of a duly enacted initiative that the Council itself is charged with implementing. Named as defendants are developers opposed to Measure E and LandWatch Monterey County ("LandWatch"), one of its many supporters.

Because it was allegedly informed that the Measure "may" be invalid, the City apparently believes it can foist its mandatory duty to defend this ordinance onto LandWatch, on the grounds that the organization supported the initiative. The Council may have its own political agenda for singling out LandWatch, as opposed to suing any of the other organizations, or thousands of citizens, who supported Measure E. What the City emphatically does not have, however, is any legal basis whatsoever for using taxpayer funds to sue LandWatch--or any other person or entity--over the validity of a duly adopted initiative measure.

Indeed, eight years ago, the Legislature took steps to address precisely this sort of litigation. Finding that "it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process," the Legislature enacted Code of Civil Procedure ("CCP") section 425.16, commonly known as the "anti-SLAPP" statute. ("SLAPP" stands for strategic lawsuit against public participation.) This law authorizes the victim of a SLAPP to bring a special motion to strike lawsuits such as the present action. The Court must grant the motion if the SLAPP arises out of any act in furtherance of the

rights of petition or free speech in connection with a public issue, unless the plaintiff can prove a substantial likelihood of prevailing on the SLAPP claim. As detailed below, because the City sued LandWatch solely because it exercised its members' First Amendment rights, and because the City cannot possibly prevail on its unprecedented and illegal attack on a nonprofit entity to overturn the voters' "final legislative word," this Court must grant LandWatch's special motion to strike.

II. MEASURE E QUALIFIES FOR THE BALLOT

Measure E creates an urban growth boundary ("UGB") along the City's northern boundary, beyond which the Council may not permit urban development for a period of twenty years, except in certain circumstances. Complaint, Ex. A. The measure's central purpose is "to promote stability in long-term planning for the City by establishing a cornerstone policy within the General Plan that designates appropriate geographic limits for urban development . . ., and that allows sufficient flexibility within those geographic limits to respond to the City's changing needs over time." Id.

The proponents of Measure E sought the input of City officials before circulating the initiative for signatures. On February 9, 2000, Kenneth Gray, an official proponent of Measure E, provided the City Planning Director and City Attorney with a preliminary draft of the measure. See Declaration of Robert S. Perlmutter ("Perlmutter Decl."), Ex. 1. Mr. Gray stated that his organization, Marina 2020 Vision, wanted to place the UGB on the November ballot. Id. He further explained that Marina 2020 first wanted to solicit any comments that City staff or officials could timely provide. Id. Two weeks later, having received no response, Mr. Gray formally filed the proposed initiative, along with the official Notice of Intent ("NOI") to circulate and the required request for a ballot title and summary. Perlmutter Decl. Ex. 2; see Elections Code[1] § 9203. An initiative may not be circulated for signatures until the city provides the title and summary. § 9205.

On March 3rd, Robert Perlmutter, counsel for Marina 2020, learned from the City Attorney that, in drafting the official summary, he had become "concern[ed] about [a] possible ambiguity" in the Measure. Perlmutter Decl. Ex. 3. After discussions with Mr. Perlmutter, the City Attorney

[1] Unless indicated otherwise, all further statutory references are to the Elections Code.

concluded "that the purpose and intent of the initiative could be [] easily clarified by minor revisions," and he proposed such revisions in writing. Id. A few days later, Mr. Gray submitted the second--and final--version of Measure E, revised to address the City Attorney's concerns. Id., Ex. 4.

On March 10, 2000, the City Attorney provided the City Clerk with the official ballot summary. Id. Ex. 5. Although it is common for city attorneys and county counsel to express any concerns they may have about a proposed initiative's validity in the official summary, see Id. Exs. 6 & 7, the City Attorney expressed no such concerns here. Notably, however, the official summary did close with the following legal conclusion:

> If the City's current General Plan is revised or amended (as is presently proposed) prior to the adoption of this initiative, that new General Plan would have to be further revised or amended as soon as possible to the extent that it or any provisions therein are inconsistent with any provisions and policies of this [] initiative.

Complaint, Ex. A. This legal conclusion is unquestionably correct. See infra Part II.D.

Measure E's supporters quickly gathered nearly twice the requisite number of signatures to place the initiative on the ballot and, on May 4, 2000, submitted these signatures to the City Clerk. Perlmutter Decl. ¶ 17. LandWatch actively supported the proponents of Measure E in this process, but played no official role in proposing or qualifying the measure for the ballot. Id. ¶ 18.

On July 18, 2000, the City Clerk verified that the petitions contained the sufficient number of valid signatures. Id. ¶ 19. Pursuant to its mandatory duty to either adopt any qualifying measure without change or to place it on the ballot, the Council voted that same day to place the initiative on the November 7, 2000 ballot. Id.; see § 9215; Save Stanislaus Area Farm Econ. v. Board of Supervisors, 13 Cal.App.4th 141, 149 (1993) ("SAFE") (council has no power to "unilaterally decide to prevent a duly qualified initiative from being presented to the electorate").

As required by the Elections Code, the official ballot materials presented to the voters contained the City Attorney's "Impartial Analysis of Measure E." See King v. Lewis, 219 Cal.App.3d 552, 556-57 & n.3 (1990) ("impartial analysis" must be "accurate" and free from

opinion). The Impartial Analysis reiterated that, in the event the Council subsequently revised or amended the City's General Plan in a manner that was inconsistent with Measure E, the mandatory remedy, if the voters also approved Measure E, would be for the Council to further revise or amend the General Plan "as soon as possible" to be consistent with Measure E. Perlmutter Decl. Ex. 8.

The City Attorney's official advice apparently fell on deaf ears at the Council. Indeed, after Measure E qualified for the ballot, the Council appears to have speeded up the process of amending the General Plan. The Marina Planning Commission, which normally meets twice a month, met seven times between August 10, and September 21, when it formally recommended that the Council adopt the new General Plan. Id. Ex. 9. The Council immediately moved into high gear, holding no less than seven meetings regarding the proposed General Plan between September 5 and October 31. Id. Moreover, the Council did so in a manner that it was informed would conflict with the initiative.[2] While Measure E would restrict urban development beyond the UGB, the new General Plan then being drafted would allow intensive development in that same area.

Marina 2020, LandWatch, and over 150 Marina citizens urged the Council not to take final action on the proposed General Plan until after the imminent election. Id. Exs. 11-12. Instead of waiting seven days to see what the voters thought, however, the Council hastily adopted the new General Plan on October 31, Halloween night. One week later, on November 7, with the support of Marina 2020, the local League of Women Voters, the Sierra Club, LandWatch, and many others, the City's voters adopted Measure E. Under state law, the new General Plan did not become effective until, at the very earliest, 30 days after the Council's vote (i.e., Nov. 30, 2000). Complaint ¶ 3. Thus, when the voters adopted Measure E on November 7, 2000, the old General Plan remained in effect. The Council certified the results of the November 7 election on December 5, five days after the new General Plan allegedly took effect. Id. ¶ 4.

III. THE CITY SUES LANDWATCH.

[2] Marina City Council, "Measure E Background/Briefing Paper" at 2, 5 (March 5, 2001) ("White Paper") (attached to Perlmutter Decl. as Ex. 10).

After the voters adopted Measure E, the Council refused to follow the City Attorney's earlier advice that the new General Plan must be amended "as soon possible" to remove any inconsistencies with the initiative. Indeed, more than four months after the election, the Council has yet to take any specific steps to revise the new General Plan, other than to "direct[] City staff to obtain proposals for this work." White Paper at 4 (emphasis added). Instead, on February 1, 2001, the Council instituted the instant action for declaratory relief against LandWatch, as a supporter of the initiative, and various property owners, who allegedly oppose it. The Council did not name as a defendant Mr. Gray, who was the sole signatory to the official NOI. Nor did it name any of the six other proponents, including City Councilman Bruce Delgado, who signed the official ballot arguments in favor of Measure E, or any of the 2,925 Marina citizens who voted for it. The Council did, however, "invite[] Vision 2020 and its members to intervene or answer as Doe defendants." Complaint ¶ 7.

Since then, the Council has sought to justify its decision to bring the instant challenge to Measure E. For instance, although the Council acknowledges that it has yet to begin implementing Measure E, it has explained in Orwellian fashion, that "[b]y acting quickly to obtain full declaratory relief from the courts, the Council has ensured that the implementation process will start at once. . . ." White Paper at 4 (emphasis added); see id. at 3 (insisting that "we are not attempting to frustrate the will of the people"). Moreover, four days after the Council filed its suit, a group of property owners filed a cross-complaint seeking to invalidate Measure E in its entirety. This facial attack, which the Council claims it knew "the land owner and developer would be filing [] with or without the City doing so first" (id. at 4), belies the Council's claim that its declaratory relief action was necessary to secure a ruling on the Measure's validity. Id. at 3.

Despite this cross-complaint, and LandWatch's repeated requests that the City dismiss its Complaint (see Perlmutter Decl. Exs. 13 & 14), the City inexplicably continues to pursue its "declaratory relief" action. Accordingly, LandWatch brings the present motion to strike the City's action, as against LandWatch. To ensure that the City actually defends Measure E, LandWatch also

intends to file shortly a Petition for Writ of Mandate requesting that the Court order the Council to: (1) comply with its mandatory duty to defend Measure E; and (2) dismiss its declaratory relief action. This separate Petition is necessary because, while the present motion will remove LandWatch as a party defendant, it will not prevent the City from continuing its ill-conceived declaratory relief action. Of course, LandWatch reserves the right to subsequently seek intervention in the property owners' cross-claim, to help defend Measure E, pursuant to Building Industry Ass'n v. City of Camarillo, 41 Cal.3d 810, 822 (1986) ("BIA").

IV. THE CITY'S ACTION AGAINST LANDWATCH MUST BE STRUCK BECAUSE IT ARISES FROM LANDWATCH'S EXERCISE OF ITS MEMBERS' FIRST AMENDMENT RIGHTS AND BECAUSE THE COUNCIL CANNOT ESTABLISH A REASONABLE PROBABILITY THAT IT WILL PREVAIL.

Under CCP section 425.16, this Court must strike a cause of action if it arises out of a person's exercise of First Amendment rights, unless the plaintiff can establish a substantial probability that it will prevail. The operative language is as follows:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

CCP § 425.16(b)(1). To prevail on a motion to strike, the defendant must make a prima facie showing that the plaintiff's suit arises from the exercise of free speech or petition rights enumerated in subsection (e) of section 425.16. The burden is then on the plaintiff to show a "reasonable" probability that it will prevail. Equilon Enterprises v. Consumer Cause, Inc., 102 Cal.Rptr.2d 371, 375-77 (2000) (applying the statute to strike an action brought against a nonprofit corporation). Because LandWatch was targeted by the City based solely on the exercise of its members' First Amendment rights, and because the City cannot possibly prevail in its post-election attack on an adopted initiative, the Court must grant LandWatch's motion.

A. The City's Lawsuit Arises out of LandWatch's Exercise of its Members' Free Speech and Petition Rights in Connection with a Public Issue.

The Legislature and the California courts have expressly directed that the anti-SLAPP statute be applied as "broadly" as possible. CCP § 425.16(a); Averill v. Superior Court, 42 Cal.App4th 1170, 1176 (1996). Under any interpretation of the statute, however, there is no doubt that supporting an initiative measure--which is the only reason that the Council chose to sue LandWatch--is a form of protected speech and petition activity. Specifically, the City alleges that LandWatch: (1) "may have" participated in the drafting of Measure E; (2) was "a major proponent" of the Measure; and (3) made remarks regarding Measure E at a City Council hearing. Complaint ¶ 6. Each of these activities is expressly protected by CCP section 425.16(e), which covers:

> (1) any written or oral statement [ ] made before a legislative [ ] proceeding, . . . (3) any written or oral statement [ ] made in a . . . public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or . . . free speech in connection with a public issue.

To propose and advocate for a ballot measure is "core" political speech, for which the First Amendment's protection "is at its zenith." Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 187 (1999). The California Constitution similarly declares that the "'people have the right to [] petition government for redress of grievances' . . . . That right in California is, moreover, vital to a basic process in the state's constitutional scheme -- direct initiation of change by the citizenry through initiative." Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899, 907-08 (1979). Accordingly, the courts have repeatedly held that the anti-SLAPP statute applies to statements made during political campaigns. Conroy v. Spitzer, 70 Cal.App.4th 1446, 1454 (1999) (granting motion to strike suit based on defendant's campaign statements about a candidate's qualifications); Beilenson v. Superior Court, 44 Cal.App.4th 944, 956 (1996) (same); Matson v. Dvorak, 40 Cal.App.4th 539, 549 (1995) (same); Robertson v. Rodriguez, 36 Cal.App.4th 347, 360 (1995) (same re recall election). Of necessity, the anti-SLAPP statute also applies to initiative campaigns.

The Council's unprecedented and unlawful use of taxpayer funds to shift its burden of defending Measure E onto one of the measure's non-profit supporters has ramifications that extend

far beyond this case. The City's lawsuit, if permitted to proceed, will have the profound effect of chilling the valid exercise of First Amendment rights by ordinary citizens. Few citizens would be willing to actively support an initiative once they realize they may be sued by the very government to which their initiative is directed. Simply stated, the City's lawsuit is barred by CCP section 425.16 because action "protected under the First Amendment . . . cannot be the basis for litigation." Ludwig v. Superior Court, 37 Cal.App.4th 8, 22 (1995).

B. The City Cannot Establish a Reasonable Probability That it Will Prevail.

Because the City's action plainly arises from LandWatch's exercise of First Amendment rights, the burden shifts to the City to establish a "reasonable" probability that it will prevail on its claim. Equilon, 102 Cal.Rptr.2d. at 377. The City cannot meet this burden here, for four independent reasons. First, as a matter of law, the City has a mandatory duty to defend Measure E; it simply has no power to use taxpayer funds proactively to contest an adopted initiative measure that it is now charged with enforcing. Second, declaratory relief is not available against LandWatch because there is no actual controversy between LandWatch and the City. Third, under the Noerr-Pennington doctrine, a private organization such as LandWatch cannot be sued based upon the exercise of its members' free speech and petition rights. And fourth, even assuming this Court were to reach the merits of the City's lawsuit, Measure E is plainly valid. If the Court agrees with any of these four arguments, it must grant the motion to strike.

1. Under the California Constitution and Elections Code, the City May Not Use Taxpayer Funds to Sue Private Organizations to Invalidate a Law That the City Has a Duty to Defend.

Declaratory relief is not available to the City here because "a city or county is required to defend an [adopted] initiative ordinance." BIA, 41 Cal.3d at 822. This duty is rooted in the fact that the constitutionally reserved initiative power not only is "greater than that of the [legislative body]", but in fact gives the people "the final legislative word, a limitation upon the power of the Legislature." Rossi, 9 Cal.4th at 704. Indeed, for the past century, California citizens have exercised

their reserved powers of initiative and referendum as a "legislative battering ram" for the purpose of "tear[ing] through the exasperating tangle of the traditional legislative procedure and strik[ing] directly toward the desired end." Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 228 (1978). In Rossi, 9 Cal.4th at 695, the Supreme Court reiterated its long-standing directive that the judiciary must jealously guard and protect this power:

> The initiative and referendum are not rights 'granted to the people, but . . . power[s] reserved by them. Declaring it the duty of the courts to jealously guard this right of the people', the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' [I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserved power, courts will preserve it.

Because of this constitutionally compelled mandate, a number of legal safeguards exist to "ensur[e] that successful initiatives will not be undone by subsequent hostile boards of supervisors." DeVita v. County of Napa, 9 Cal.4th 763, 788 (1995). Most importantly, the Legislature has expressly provided that "[i]f 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 . . . adopted by the voters[] shall be repealed or amended except by a vote of the people . . ." § 9217 (emphasis added); see DeVita, 9 Cal.4th at 796-97 (applying analogous provisions of section 9125 to uphold an initiative general plan amendment that, like Measure E, prohibited county elected officials from changing the relevant provisions of the general plan without a vote of the people).

As noted above, the Supreme Court in BIA expressly recognized the legislative body's duty to defend a duly adopted initiative, which is grounded in these same constitutional principles. At issue in BIA was whether Evidence Code section 669.5--which places the burden of defending a growth control ordinance on its proponents--applied to adopted initiatives. An amicus had argued that section 669.5 should not apply because local elected officials, like the Council here, generally

do not favor slow-growth initiatives and would therefore not conscientiously defend them. The Supreme Court rejected that argument, noting that the "the city or county would have a duty to defend the ordinance."[3] BIA, 41 Cal.3d at 822. Of course, the Court was also realistic enough to recognize that, despite this duty, the city "might not [defend] with vigor if it has underlying opposition to the ordinance." Id. Accordingly, the Court concluded that the initiative proponents should be allowed to intervene, if they so chose. Id.

In the entire history of the initiative power in this state, however, not a single published case has ever found--or even remotely suggested--that a legislative body has the power to avoid its duty to defend an adopted initiative, or to shift that obligation to a private party. Rather, even hostile city councils and boards of supervisors that initially opposed initiative measures have repeatedly recognized that, once the voters have spoken, their elected officials have the duty to defend and uphold the voters' final legislative word. See, e.g., DeVita, 9 Cal.4th at 771, 788; Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal.3d 534, 551(1990) (Mosk, J,. dissenting); Mervyn's v. Reyes, 69 Cal.App.4th 93, 98-99 (1999) (council voluntarily adopted qualifying measure that flatly reversed council majority and defended measure in court); Bank of the Orient v. Town of Tiburon, 220 Cal.App.3d 992, 997 (1990); BIA v. Oceanside, 27 Cal.App.4th 744, 748 (1994). Indeed, in the one Supreme Court decision where the council decided not to vigorously defend a challenge brought by a third party, the Court roundly condemned the city attorney for not doing so. Arnel Dev. Co. v. City of Costa Mesa, 28 Cal.3d 511, 514 n.3 (1980). The Court stated, "Apparently believing that his duty is to represent the city council instead of the voters of Costa

[3] This constitutionally based duty to defend enacted initiatives is consistent with the general duty of public officials to defend enacted legislation. See, e.g., Deukmejian v. Brown, 29 Cal.3d 150, 158 (1981) (agreeing with a "federal court [which] found it incongruous for an attorney general, purporting to act for the people, to mount 'an attack by the State upon the validity of an enactment of its own legislature.'"); Cal. Const. Art. III, § 3.5; 64 Op. Atty. Gen. 690 (1981).

Mesa, the city attorney did not defend the initiative. When the Court of Appeal held the initiative invalid, he did not petition this court for hearing." Id. So outraged was the Court that, on its own motion, it reviewed the court of appeal decision invalidating the initiative and reversed. Id.

Does this mean that a council is powerless to prevent the expenditure of public funds on a measure that it firmly believes is invalid? Not at all. While the courts have insisted that public officials' duties with respect to proposed measures are almost entirely ministerial,[4] they nonetheless have carved out a narrow exception for precisely this situation. If a council believes that it can make a compelling showing that a measure is clearly invalid, it may seek judicial review before the election to determine whether the matter should be placed before the voters. SAFE, 13 Cal.App.4th at 149; deBottari, 171 Cal.App.3d at 1209 (council may lawfully withhold a qualified measure from the ballot only if it is "'directed to do [so] by a court on a compelling showing that a proper case has been established for interfering with the [initiative] power'"); see Schmitz v. Younger, 21 Cal.3d 90, 92-93 (1978) (even where the Attorney General believes an initiative is invalid, he has a ministerial duty to prepare a ballot title and summary, but noting that "[t]his does not mean that the Attorney General may not challenge the validity of a proposed measure by timely and appropriate legal action").

The City did not take advantage of this procedure here by filing a timely pre-election challenge to Measure E. Nor could it have done so successfully. As the Council itself acknowledged in its White Paper, the primary basis for Measure E's alleged invalidity (viz., its inconsistency with the new General Plan) did not even exist until at least 23 days after the election. See White Paper at 5-6. Now that the voters have enacted Measure E, the Council may not properly initiate a post-election court challenge questioning the measure's validity. Rather, the validity of Measure E, like

[4] E.g., SAFE, 13 Cal.App.4th at 149 (board of supervisors has no power to "unilaterally decide to prevent a duly qualified initiative from being presented to the electorate");deBottari v. Norco City Council, 171 Cal.App.3d 1204, 1209 (1985) (same re city council); see, e.g., Farley v. Healey, 67 Cal.2d 325, 327 (1967) (same re registrar of voters) Billig v. Voges, 223 Cal.App.3d 962, 968-69 (1990) (same re city clerk).

any other city enactment, is properly tested in an action against the governmental official or entity responsible for its enforcement--not against a private party that supported enactment of the ordinance. CCP § 1085; see, e.g., Legislature v. Eu, 54 Cal.3d 492 (1991); BIA, supra. Of course, in the present case, such a post-election challenge to Measure E has already been filed against the City. The City's declaratory relief action should be stricken.

2. The City Cannot State a Cause of Action Against LandWatch Because there is no Present Controversy Between LandWatch and the City Over the Validity of Measure E.

The City's Complaint should also be stricken because declaratory relief is available only in cases of "an actual controversy relating to the legal rights and duties of the respective parties." CCP § 1060; see Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 117-18 (1973); Equilon, 102 Cal.Rptr.2d at 377. Here, there is no actual controversy between the City and LandWatch over Measure E's validity, for two reasons. First, there is simply no valid basis for the Council choosing to sue LandWatch, as opposed to any other supporter of Measure E, or indeed any other Marina resident. Second, even assuming arguendo that LandWatch could be a proper party, the City has not alleged any facts that remotely constitute a concrete, justiciable controversy. The City has alleged only that it "has been advised that all or portions of Measure E may be invalid." Complaint ¶ 1. It has not alleged that it will refuse to implement Measure E or that LandWatch intends to sue the City to force it to implement Measure E.[5] Thus, the City brings this lawsuit only to ask the Court to resolve, in the absence of an actual controversy, the "uncertainty" regarding Measure E and the City's General Plan. Id.

This alleged uncertainty does not constitute a justiciable controversy under CCP section

[5] The writ action LandWatch intends to file goes only to the City's duty to defend Measure E and thus does not create a controversy over the initiative's validity. The filing of a cross-complaint by various property owners likewise does not create an actual controversy between the City and LandWatch, although it does remove the City's asserted basis for prosecuting its own declaratory relief action.

1060. City of Santa Rosa v. Press Democrat, 187 Cal.App.3d 1315 (1986), which dealt with a similar situation, is controlling. In that case, the City of Santa Rosa sought declaratory relief regarding the scope of its disclosure obligations under the Public Records Act. The city had not yet determined whether to disclose the requested material and there was no allegation that the requestor, if refused, would bring an action to compel disclosure. Nonetheless, the city, like the Council here, hauled the defendant into court and essentially asked the court to tell it what to do. The court squarely rejected the notion that declaratory relief was available, holding that a "difference of opinion as to the interpretation of a statute as between a citizen and a governmental agency does not give rise to a justiciable controversy and provides no compelling reason for a court to attempt to direct the manner by which the agency shall administer the law." Id. at 1324; see also Equilon, 102 Cal.Rptr.2d at 377-78 (granting anti-SLAPP motion and dismissing declaratory relief action brought against nonprofit organization that had filed a notice of intent to sue under Proposition 65).

3. Under the Noerr-Pennington Doctrine, A Private Entity Cannot Be Sued Based Upon the Exercise of Free Speech and Petition Rights.

The City's lawsuit is also barred under the Noerr-Pennington doctrine. Rooted in the First Amendment right of all citizens to petition the government, this doctrine creates a virtually unqualified immunity from suit for citizens exercising these rights. As stated by Ludwig, supra, "an action protected under the First Amendment by the right of petition cannot be the basis for litigation." 37 Cal.App.4th at 22. Noerr-Pennington applies broadly to all litigation arising out of First Amendment activities and "to all facets of the exercise of the right of petition, from litigation to attempts to influence opinion." Id. at 21 n.17, 23 n.22. Thus, for instance, the Supreme Court has long held that governmental entities cannot bring malicious prosecution lawsuits--even against the most bad-faith litigants--because such government-sponsored litigation would unconstitutionally chill the First Amendment right to petition the government. City of Long Beach v. Bozek, 31 Cal.3d 527, 537-39 (1982).

Ludwig raises facts closely analogous to those here. That case involved an individual,

Ludwig, who desired to develop a shopping mall in one of two adjacent cities. The neighboring City of Barstow hoped to attract a mall of its own. To forestall competition from a Barstow mall, Ludwig funded lawsuits against the City, as well as protests to the Barstow City Council by various individuals. 37 Cal.App.4th at 13-14, 21. In response, the City of Barstow sued Ludwig. The Court of Appeal held that the activities funded by Ludwig were protected by the First Amendment and therefore could not, under Noerr-Pennington, be the basis for the City's litigation against Ludwig--unless their activities were a "sham" and "baseless." Id. at 21-23. Accordingly, the appellate court reversed the trial court and ordered it to grant Ludwig's motion to strike the City's action.

Here, the only factual predicate underlying the City's choosing to attack LandWatch is LandWatch's exercise of its members' First Amendment rights. The City's lawsuit is even more egregious than the lawsuits brought by the cities in Bozek and Ludwig because, unlike the bad-faith litigants there, LandWatch has not undertaken any activity that harms the public trust. Rather, LandWatch is being subjected to a retaliatory lawsuit by government officials simply because it supported Measure E. Such conduct undermines the very purpose of the First Amendment right to petition the government for redress of grievances, and should not be permitted to stand.

4. Measure E is Plainly Valid.

The Council offers three vague and conclusory reasons why Measure E "may" allegedly be invalid: "(a) it is inconsistent with the General Plan that was in effect when the [Measure] took effect; (b) it directs the City Council to enact laws that are not expressly stated in the [Measure]; and (c) it violates State law that requires the City to accommodate its fair share of housing." Complaint ¶ 11. Because LandWatch's motion to strike rests on other, independent grounds discussed above, the Court need not reach the issue of Measure E's validity to grant the motion; and, of course, this issue will be adjudicated in the property owners' cross-claim against the City. However, LandWatch briefly explains below why the City's allegations are so lacking in legal or factual support that, even if the City could properly bring this action against LandWatch, it cannot

establish the "reasonable probability" of prevailing on the merits necessary to survive LandWatch's motion.

a. The City's General Plan Consistency Argument Cannot Succeed.

Even assuming that the new General Plan took effect prior to, and is inconsistent with, Measure E, there is no legal authority to support the contention that Measure E should not be given effect. Rather, as the City Attorney explained to the voters and the Council in both the Impartial Analysis and the official ballot summary, the Council must implement the voters' will by amending the General Plan "as soon as possible" to be consistent with Measure E. See, e.g., Complaint, Ex. A; Perlmutter Decl. Ex. 8.

This is so because, if the Court were to find such an "internal" or "horizontal" general plan inconsistency, no law requires that the most recent plan amendment be rescinded. Rather, state law mandates that the appropriate remedy would be a compliance decree ordering the City to "bring its general plan . . . into compliance with the [Planning and Zoning Law] within 120 days." Gov't Code § 65754(a). As the Supreme Court explained in Lesher, this section "provides that if the court finds inconsistencies in a general plan, the city must amend the general plan to bring it into conformity with the requirements of the Planning and Zoning Law." Lesher, 52 Cal.3d at 546 n.12;[6] see also Garat v. City of Riverside, 2 Cal.App.4th 259, 303 & n.33 (1991) (same).

Because the Council has no power to amend Measure E (§ 9217), the only way it could comply with such an order would be to amend other portions of the General Plan to achieve the required consistency. See, e.g., DeVita, 9 Cal.4th at 796-97 ("We see no difference in principle between an initiative which bars a city council from repealing newly enacted zoning restrictions, and one which freezes existing restrictions; either, to be effective, must limit the power of a hostile city

[6] The Court in Lesher thus distinguished the instant case from the situation where a subordinate zoning ordinance is "vertically" inconsistent with the General Plan.

council to evade or repeal the initiative ordinance"); Rossi, 9 Cal.4th at 715-16 ("The people's reserved power of initiative is greater than the power of the legislative body. . . . [A]n initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people may bind future legislative bodies other than the people themselves.").

Any other holding would render it impossible for the people, in the face of a hostile city council or board of supervisors, to amend their general plan by initiative. Because of the procedural requirements set forth in the Elections Code, it generally takes a minimum of six months, and usually much longer, between the formal filing of a proposed initiative with the city clerk and the election on the proposed measure. See generally Rossi, 9 Cal.4th at 703-04. According to the novel theory presented in the City's Complaint, the council or board could simply amend the existing general plan in this intervening period, as the Council hastily did here, to create an inconsistency with the proposed measure. If this were sufficient to render the initiative invalid, then the initiative power effectively would no longer be available to amend the general plan.

Such a result would directly contravene the Supreme Court's express holding that general plans may be amended by initiative, DeVita, 9 Cal.4th at 795-96, and defies common sense. Instead, the new General Plan must be amended to conform to Measure E. "To hold otherwise would place an insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of [planning] ordinance." BIA, 41 Cal.3d at 824 (explaining why Gov't Code § 65863.6, which requires local legislative bodies to make certain findings before they can adopt ordinances affecting housing supply, could not constitutionally apply to initiatives).

b. The City's Other Purported Claims Lack Merit.

The City's second basis for attacking Measure E is that it allegedly "directs the City Council to enact laws that are not expressly stated in the initiative." Complaint ¶ 11 (presumably referring to Measure E's implementation provision, section 5, which directs the Council to amend, as necessary, the General Plan and subordinate land use policies to conform to Measure E). The main problem with this claim, which is one of the boilerplate claims favored by developers attacking land

use initiatives, is that the Court of Appeal expressly rejected it in Pala Band of Mission Indians v. Board of Supervisors, 54 Cal.App.4th 565 (1997). Measure E's implementation language was patterned virtually verbatim after the implementation clause upheld in that case, which "authorized and directed [the County] to amend other elements of the General Plan, sub-regional plans, community plans, Zoning Ordinance, and other ordinances and polices affected by this initiative as soon as possible." Id. at 575 n.6. The Court emphatically rejected any notion that this language improperly constituted "indirect" legislation, holding instead that it was valid "enabling legislation" designed to ensure general plan consistency. Id. at 577-78.

The City's third basis for attacking Measure E is so conclusory and vague that it could not possibly survive a demurrer. The Council simply alleges that Measure E "violates State law that requires the City to accommodate its fair share of housing." Complaint ¶ 11. This rote allegation suffers from two fatal flaws. First, it is devoid of any specific allegations and therefore is insufficient to support a claim for declaratory relief. See CCP § 430.10(e), (f); Ankeny v. Lockheed Missiles, 88 Cal.App.3d 531, 537 (1979). Second, this attack, which is limited to a facial challenge, fails to recognize that Measure E contains an express exception allowing the Council to amend the Measure "to comply with any applicable state law relating to the provision of housing . . ." See, e.g., Measure E, § 2 (Policy 1.2(a)).

V CONCLUSION

LandWatch respectfully requests that the Court grant its motion to strike and award LandWatch attorneys fees pursuant to the mandatory provisions of CCP § 425.16(c).

Dated: April ___, 2001 SHUTE, MIHALY & WEINBERGER LLP

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