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5 SUPERIOR COURT OF THE STATE OF CALIFORNIA
6 IN AND FOR THE COUNTY OF ALAMEDA
7

8 JESSE ARREGUIN, et al,

9 Petitioners,

10 v.

11 MARK NUMAINVILLE, et al,

12 Respondents.
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16

Case No. RG14-737457

ORDER GRANTING IN PART PETITION
FOR WRIT OF MANDATE.

DATE 8/29/14
TIME 1:30 PM
DEPT. 31

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19 The Petition for writ of mandate came on for hearing on August 29, 2014, in Department
20 31 of this Court, the Honorable Evelio Grillo presiding. After consideration of the briefing and
21 the argument, IT IS ORDERED: The Petition for writ of mandate is GRANTED IN PART.
22 The court will direct the clerk to issue a writ directing the Registrar of Voters of the County of
23 Alameda to modify the ballot question for Berkeley 2014 Measure R to read as stated at the end
24 of this order.
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1 LAW AND STANDARD OF REVIEW

2 The Ballot question must be neutral and non-argumentative. Elections Code 9051(c)

3 states:

4 (c) In providing the ballot title and summary, the Attorney General shall give a
5 true and impartial statement of the purpose of the measure in such language that
6 the ballot title and summary shall neither be an argument, nor be likely to create
prejudice, for or against the proposed measure.

7 Regarding the standard of review for neutrality, *McDonough v. Superior Court* (2012)

8 204 Cal.App.4th 1169, 1174, states:

9 The constitutional guarantees of equal protection and freedom of speech as
10 applied to public elections “mean, in practical effect, that the wording on a ballot
11 or the structure of the ballot cannot favor a particular partisan position.” ... The
12 ballot title, for example, “must not be false, misleading, or partial to one side....
13 We understand ‘partial’ to mean [that] the council's language signals to voters the
14 council's view of how they should vote, or casts a favorable light on one side of
15 the [issue] while disparaging the opposing view.” ... We independently examine
16 the question of whether the ballot title “substantially complies” with that standard.
17 ... As in the case of statewide initiatives, the drafter is afforded “considerable
18 latitude” in composing the ballot title, and we must presume its language to be
19 accurate. “Only in a clear case should a title so prepared be held insufficient.
20 Stated another way, if reasonable minds may differ as to the sufficiency of the
21 title, the title should be held to be sufficient.”

18 The Ballot question must be accurate and complete. Elections Code 9204 states:

19 A peremptory writ of mandate shall be issued only upon clear and convincing
20 proof that the ballot title or summary is false, misleading, or inconsistent with the
21 requirements of Section 9203.

22 Regarding the standard of review for accuracy and completeness, *Yes on 25, Citizens For
23 An On-Time Budget v. Superior Court* (2010) 189 Cal.App.4th 1445, 1452-1453, states:

24 [T]he Attorney General exercises judgment and discretion in discerning the chief
25 purposes and points of an initiative measure ..., which must be presented to the
26 electorate in clear and understandable language. ... “ ‘As a general rule, the title
and summary prepared by the Attorney General are presumed accurate, and
substantial compliance with the “chief purpose and points” provision is sufficient.
...

1 In preparing the ballot title and summary and the ballot label, the Attorney
2 General is afforded considerable latitude. ... This deference stems in part from the
3 recognition that drafting a title and summary “can be a difficult task where
multiple reasonable interpretations of the referendum ... are possible.” ...

4 If reasonable minds may differ as to its sufficiency, the title and summary
5 prepared by the Attorney General must be upheld ... because “all legitimate
6 presumptions should be indulged in favor of the propriety of the attorney-
7 general's actions.” .. “[O]nly in a clear case should a title [and summary] so
prepared be held insufficient.”

8 Similarly, *Horneff v. City and County of San Francisco* (2003) 110 Cal.App.4th 814, 820, states:

9 The test is not whether the digest is *complete*, but rather whether it contains “a
10 statement of the major objectives or ‘chief purposes and points’ of the measure.”
11 ... It need not refer to “ ‘auxiliary or subsidiary’ ” matters, nor need it “ ‘contain a
12 summary or index of all of the measure's provisions. Within certain limits what is
13 and what is not an important provision is a question of opinion. Within those
14 limits the opinion of the [Ballot Simplification Committee] should be accepted by
15 this court. ... Moreover, substantial compliance is sufficient, and if reasonable
16 minds may differ as to the sufficiency of the summary, it should be held
17 sufficient. ... Of course, “[t]he Attorney General's statement must be true and
18 impartial, and not argumentative or likely to create prejudice for or against the
19 measure. [Citation.] The main purpose of these requirements is to avoid
20 misleading the public with inaccurate information. [Citations.]” ... The ballot title
21 and summary must reasonably inform the voter of the character and real purpose
22 of the proposed measure. ... Still, [o]nly in a clear case should a title ... [or
23 summary] be held insufficient.

24 Comparison between neutrality and accuracy. The standards articulated in the case law
25 suggest that the court has applies the same level of review to both neutrality and accuracy.

26 *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248, states:

To comply with the election statutes, the ballot title need not be the “most
accurate,” “most comprehensive,” or “fairest” that a skilled wordsmith might
imagine. The title need only contain words that are neither false, misleading, nor
partial. The title adopted by the city council meets that standard, and the judiciary
is not free to substitute its judgment given its deferential standard of review.

1 (See also *Monette-Shaw v. San Francisco Bd. of Supervisors* (2006) 139 Cal.App.4th 1210, 1218
2 fn 5.)

3 There is no authority expressly stating that the court reviews ballot titles, questions, and
4 summaries more critically for improper advocacy than for accuracy and completeness. That said,
5 the outcomes of cases at the appellate level suggest that the court should be more sensitive to
6 whether ballot materials contain advocacy than to whether they are accurate and complete.

7 In *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22
8 Cal.3d 208, 243-244, the Supreme Court found that in the context of a voter initiative regarding
9 taxes (Proposition 13) that the title and summary were “technically imprecise” but nevertheless
10 adequate. The court stated that the title was adequate even though it stressed only the property
11 tax aspects of the initiative and that “[t]he summary's omission of any reference to the two-thirds
12 vote requirement was not critical [because] the initiative measure was extensively publicized and
13 debated, in all of its several aspects, and a corrected summary was contained in the voters’
14 pamphlet which was mailed to all voters.” Similarly, in *Zaremborg v. Superior Court* (2004) 115
15 Cal.App.4th 111, 118, the Court of Appeal found that the ballot title and summary were
16 “technically imprecise” but nonetheless fairly represented the measure.
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18 In contrast, in *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169, 1174-1174,
19 the court found that in the context of a pension modification measure that the phrase “Pension
20 Reform” was a form of advocacy. In *Huntington Beach City Council v. Superior Court* (2002)
21 94 Cal.App.4th 1417, the court found that in the context of a measure to increase the tax on a
22 utility that the words “exemption” and “fair share” were a form of advocacy. In *Citizens for*
23 *Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, the court found that in
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1 the context of a measure to permit a card room that the phrase “controlled gaming” was a form
2 of advocacy.

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4 EVIDENCE.

5 The court GRANTS Petitioners’ request for judicial notice of Exhibits 1 (Proposed
6 amendments - Official document) and 2 (Bates email - Admission of party opponent).

7 The court DENIES Petitioners’ request for judicial notice of Exhibits 3, 4, and 5 (Content
8 of Newspaper articles – fact of publication is not relevant to the case).
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11 PROPOSED 2014 MEASURE R.

12 The court reviews the Proposed 2014 Measure R. Petition, Ex. 1, purports to be a copy
13 of Measure R, but there is a discontinuity between pages 2 and 3. The court sua sponte takes
14 judicial notice of Measure R on the City’s website.¹ On its face, the measure would make the
15 following changes:

- 16
- 17 1. Eliminate the expedited procedure adopted in the 2010 Green Pathway Measure for
18 determining the impact of projects on historical resources. (BMC 23B.34.030
19 eliminated.)
 - 20 2. For new multi-unit residential projects making a Green Pathway election, reduce very
21 low income rental housing requirements from 20% to 10%. (New BMC 23B.34.030(A).)
 - 22 3. For new projects making a Green Pathway election, increase the local hire requirement
23 from 30% to 50%. (New BMC 23B.34.030(C).)
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¹ (http://www.cityofberkeley.info/Clerk/Elections/Election__2014_Ballot_Measure_Page.aspx)

- 1 4. For new projects making a Green Pathway election, require payment of construction
2 workers at the prevailing wage. (New BMC 23B.34.030(D).)
- 3 5. For new projects making a Green Pathway election, require that 16% of workers be
4 apprentices. (New BMC 23B.34.030(E).)
- 5 6. For new projects making a Green Pathway election, require payment of all hotel
6 employees as well as any maintenance and security works at the prevailing wage. (New
7 BMC 23B.34.030(F).)
- 8 7. For new multi-unit residential projects with Additional Bonus Height (up to 180 feet in
9 the City core and up to 120 feet in the outer core) making a Green Pathway election, set
10 very low income rental housing requirement of 20%. (New BMC 23B.34.040(A).)
- 11 8. For new projects with Additional Bonus Height making a Green Pathway election, charge
12 an additional fee of \$1.00 per square foot of new Gross Floor Area. (New BMC
13 23B.34.040(B).)
- 14 9. For new projects with Additional Bonus Height making a Green Pathway election,
15 require easily accessed public restrooms. (New BMC 23B.34.040(C).)
- 16 10. For new projects with Additional Bonus Height making a Green Pathway election,
17 increase minimum green building certification from LEED Gold to LEED Platinum.
18 (New BMC 23B.34.040(D).)
- 19 11. For new multi-unit residential projects with Additional Bonus Height making a Green
20 Pathway election, require that 20% of units be designed to accommodate families. (New
21 BMC 23B.34.040(E).)
- 22 12. For new projects lower than 75 feet making a Green Pathway election, elimination of
23 streamlined permitting process. (Old BMC 23B.34.080.)
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- 1 13. For all projects making a Green Pathway election, continuation of requirement that the
2 City take final action on a permit application within 210 days. (New BMC 23B.34.070.)
- 3 14. For all Downtown properties, prohibition of Adult Oriented Businesses. (New BMC
4 23E.68.030 [Table].)
- 5 15. For all Downtown properties, prohibition of Columbaria. (New BMC 23E.68.030
6 [Table].)
- 7 16. For all all Downtown properties in the City Core, continue to permit alcohol sales and
8 service until 2:00 am seven days a week, but for properties in the outer core restrict
9 alcohol sales and service to midnight from Sunday through Thursday. (New BMC
10 23E.68.060.)
- 11 17. For all Downtown properties, maintain maximum height at 60 feet in the Core Area,
12 Outer Core, and Corridor and 50 feet in the Buffer zone. The current maximum heights
13 can be increased by 10-15 feet with a Use Permit, and the proposed maximum heights
14 could be increased 10 feet with a Use Permit. (New BMC 23E.68.080(D).)
- 15 18. For all Downtown properties, permit up to 70% reduced vehicle parking if there is
16 alternative transportation so that the reduction will not substantially reduce the
17 availability of on-street parking. (New BMC 23E.68.080(E).)
- 18 19. For all Downtown properties, require vehicle sharing spaces and electric vehicle charging
19 stations. (New BMC 23E.68.080(L).)
- 20 20. For all Downtown properties, new projects must have minimum green building
21 certification of LEED Gold, must have energy efficiency 15% greater than otherwise
22 required, and must limit water runoff. (New BMC 23E.68.085(A).)
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1 21. For all Downtown properties, buildings must have on-site recycling and composting
2 facilities, and must pay a fee to support alternative transportation. (New BMC
3 23E.68.085(B).)

4 22. For all Downtown properties, new projects must pay \$0.50 per square foot to support the
5 Berkeley Revolving Loan Fund to support business in Berkeley. (New BMC
6 23E.68.085(C).)

7 23. For Civic Center Historic District properties, new projects are limited to 50 feet and are
8 subject to special parking, set-back and other requirements. (New BMC 23E.98.010 et
9 seq.)
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11
12 The court does not pretend the above to be a complete and fully accurate summary of the
13 material provisions in proposed 2014 Measure R. The court sets them out as an aid to
14 understanding and identifying the material provisions in the proposed Measure and the adequacy
15 of the ballot question.
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18 ADEQUACY OF THE 2014 MEASURE R QUESTION AS ADOPTED.

19 The ballot summary must be limited to 75 words. (Elections Code 9051.) On 6/24/14,
20 the Berkeley City Council adopted the following as the ballot question:

21 Shall an ordinance amending Zoning Ordinance provisions for downtown
22 Berkeley be adopted to: reduce height limits; impose significant new requirements
23 for new buildings over 60 feet; eliminate current historic resource determination
24 for Green Pathway projects; establish a Civic Center Historic District overlay;
25 amend LEED requirements; change parking requirements; restrict some permitted
26 uses; change prevailing-wage requirements for workers in specific categories;
and reduce hours of operation for businesses selling or serving alcohol?

1 The court compares the adopted question to the 23 point summary above. The court’s analysis
2 of the question is as follows:

3
4 Shall an ordinance amending Zoning Ordinance provisions for downtown Berkeley be adopted
5 to:

- 6 • “reduce height limits. Para. 17 above. **Not accurate.** The maximum building heights
7 without exceptions for Use Permits remains 60 feet in the Core Area, Outer Core, and
8 Corridor and 50 feet in the buffer. Allowing for the Use Permits, the permissible
9 building heights are only lower in certain areas and then only lower by 5 feet. The
10 statement that Measure R will “reduce height limits” might be technically accurate but it
11 is misleading. Neutral, if it were accurate.
- 12
13 • “impose significant new requirements for new buildings over 60 feet.” Para 2-11 above.
14 Accurate. New new buildings may exceed 60 feet only if they elect the Green Pathway,
15 and the Measure would impose many new requirements. **Not neutral.** Although the
16 Measure would impose many new Green Pathway requirements, the word “significant”
17 contains an implicit value judgment and is implicit advocacy.
- 18
19 • “eliminate current historic resource determination for Green Pathway projects.” Para 1
20 above. Accurate and neutral.
- 21 • “establish a Civic Center Historic District overlay.” Para 23 above. Accurate and neutral.
- 22 • “amend LEED requirements.” Para 23 above. Adequately accurate. Adequately neutral.
23 The question need not state that the amended LEED requirements will result in higher
24 LEED requirements.

- 1 • “change parking requirements.” Para 18 and 19 above. Adequately accurate. Adequately
2 neutral. The question need not state that the changed parking requirements will increase
3 bicycle, handicapped, care share and vehicle parking requirements.
- 4 • “restrict some permitted uses.” Para 14, 15, and 16 above. Adequately accurate,
5 although vague almost to the point of uselessness. Adequately neutral.
- 6 • “change prevailing–wage requirements for workers in specific categories.” Para 4 and 6.
7 Adequately accurate. Adequately neutral.
- 8 • “reduce hours of operation for businesses selling or serving alcohol.” Para 16 above.
9 Adequately accurate. Adequately neutral.
10

11
12 The court’s completeness analysis starts with the law that the summary must be limited to
13 75 words. (Elections Code 9051.) The court is then guided by *Yes on 25*, 189 Cal.App.4th at
14 1452-1453, and *Horneff*, 110 Cal.App.4th at 820, which point out that the drafter “exercises
15 judgment and discretion in discerning the chief purposes and points” in a measure, that the the
16 question need not “contain a summary or index of all of the measure's provisions,” and
17 “substantial compliance is sufficient, and if reasonable minds may differ as to the sufficiency of
18 the summary, it should be held sufficient.” The question adequately identifies and lists what are
19 arguably the most material points of proposed Measure R. The court notes that materiality will
20 vary significantly depending on the identity of the individual voter. Most obviously, the
21 provisions requiring the payment of prevailing wages to construction workers might be highly
22 material to developers considering a in Green Pathway election, the provisions increasing the
23 family unit requirement might be highly material to families, and the provisions changing the
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1 hours for alcohol sales and service might be highly material both to persons living close to bars
2 and to persons who tend to frequent bars.

3 The court’s accuracy analysis starts and ends by comparing the question with the text of
4 proposed Measure R. The statement that Measure R will “reduce height limits” is technically
5 accurate but is misleading. Under current law, the maximum height is 60 feet in the Core Area,
6 Outer Core, and Corridor and 50 feet in the Buffer. (BMC 23.68.070.) Under current law, the
7 maximum height with a Use Permit can increase by 15 feet in the Core Area, Outer Core, and
8 Corridor and by 10 feet in the Buffer. Under proposed Measure R, the maximum height remains
9 60 feet in the Core Area, Outer Core, and Corridor and remains 50 feet in the Buffer. (Proposed
10 BMC 23.68.070. Under proposed Measure R, the maximum height with a Use Permit and can
11 increase by 10 feet in the Core Area, Outer Core, and Corridor and by 10 feet in the Buffer.
12 Therefore, the maximum building heights without exceptions for use permits remains 60 feet in
13 the core and 50 feet in the buffer and allowing for the Use Permits, the permissible building
14 heights are only lower in the Core Area, Outer Core, and Corridor and then only lower by 5 feet.
15 A more accurate statement would be in the nature of “change exceptions to height limits.”
16

17 The court’s advocacy analysis is focused on whether any words or phrases appear to
18 advocate for or against the proposed Measure. The court follows *McDonough*, *Huntington*
19 *Beach*, and *Citizens for Responsible Government* and examines the adopted question more
20 closely and less deferentially for advocacy than the court did for completeness and accuracy.
21 The word “significantly” contains an value judgment and is implicit advocacy.
22

23 The court’s advocacy analysis has also considered the verbs used in the ballot question.
24 The verbs are: reduce, impose, eliminate, establish, amend, change, restrict, change, and reduce.
25 There is a good argument that the ballot question should consistently use either neutral verbs that
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1 disclose only that an action will be taken (establish, amend, change) or descriptive verbs that
2 disclose the nature of the action (reduce, impose, eliminate, restrict, and reduce). The selective
3 use of neutral verbs and descriptive verbs does not, however, rise to the level of improper
4 advocacy. As stated in *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, 1248, the court
5 applies a deferential standard of review and the ballot question need not be the fairest that a
6 skilled wordsmith might imagine.

7
8 **CONCLUSION.**

9
10 The petition for a writ of mandate is GRANTED IN PART. The court approves the
11 following 73 word text as the ballot question:

12 Shall an ordinance amending Zoning Ordinance provisions for downtown
13 Berkeley be adopted to: ~~reduce height limits; establish~~ impose significant new
14 requirements for new buildings over 60 feet; eliminate current historic resource
15 determination for Green Pathway projects; establish a Civic Center Historic
16 District overlay; amend LEED requirements; change parking requirements;
17 restrict some permitted uses; change prevailing-wage requirements for workers in
18 specific categories; and reduce hours of operation for businesses selling or serving
19 alcohol?

20 Dated: September 2, 2014

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Evelio Grillo
Judge of the Superior Court