CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: ALEX TOURK
Deputy Chief of Staff, Office of the Mayor
YOMI AGUNBIADE
Acting General Manager, Recreation and Park Department

FROM: AMY L. BROWN
BUCK DELVETHAL
Deputy City Attorneys

DATE: September 13, 2004

RE: Effect of Proposition H, if Approved by the Voters, on the Agreement for Naming Rights for Candlestick Park

Question Presented

You have asked us for written advice as to whether Proposition H, if approved by the voters on November 2, 2004, would invalidate the Agreement for Naming Rights (the "Agreement") dated as of July 23, 2004, between the City and County of San Francisco (the "City) and the San Francisco Forty Niners, Ltd. (the "49ers"), for the sale of naming rights to the City-owned sports stadium at Candlestick Point (the "Stadium"). Proposition H would name the Stadium as "Candlestick Park."

Short Answer

No. Proposition H would likely not invalidate the Agreement for two reasons. First, Proposition H does not purport to apply to any contractual obligations that the City incurred before the date the ordinance would become operative. There is no statement in the measure itself, the ballot digest or the official proponent's ballot arguments that the measure is intended to rescind the Agreement, which is a legally binding contract. Accordingly, under well-established rules of statutory construction, a court would likely conclude that Proposition H's naming requirement, if adopted by the voters, would not preclude a sale of naming rights by the 49ers under the Agreement, for so long as the existing Agreement remains in effect according to its stated terms. The Agreement expires in May 2008, subject to certain rights the 49ers have to extend the term as described below. Second, courts interpret legislation, including voter adopted ordinances, to avoid violating the Federal or State Constitution. Here, a court would likely find that Proposition H may not ban the sale of naming rights by the 49ers under the Agreement because to do so would effect an unconstitutional impairment of the 49ers' contractual rights and the City's obligations.

In rendering this opinion, we are mindful that the City Attorney's Office has a long-standing policy to decline to provide advice concerning the legality of a ballot measure once the measure has been submitted to the voters, pending the outcome of the election. There are sound reasons for this general policy. It is a principal duty of this Office to defend the legality of voter-

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adopted measures. If we issue advice about a proposed measure, assessing its legality and the strength of arguments that might be made in its defense, we may compromise the City's ability to defend the measure if the voters approve it. This is particularly true when the measure tests the limits of the law, or the measure may be challenged in court.

But there are recognized, limited exceptions to the policy where City officials need legal advice about the effect of a pending ballot measure on their ability to discharge their duties or protect the City's interests and cannot await that advice until after the election. That is the case here.[1] The City's adopted budget for this fiscal year assumes that the Recreation and Park Department will receive revenues from a sale of naming rights under the Agreement. You inform us that the 49ers are negotiating a contract for the sale of naming rights with a sponsor and have put the City on notice that they intend to enter into an agreement shortly in reliance on their belief that Proposition H, if adopted, would not affect the Agreement. Your ability to give the 49ers the assurance they seek will have a direct and immediate effect on the City's ability to receive the revenues it bargained for when it entered into the Agreement. Therefore, this is one of the limited instances where, consistent with the long-standing policy of the City Attorney's Office, it is appropriate for us to advise about the legal significance of Proposition H before the election.[2]

Background

The City owns, operates and maintains the Stadium at Candlestick Point. The Stadium is under the jurisdiction of the City's Recreation and Park Department. The 49ers lease the Stadium from the City for the exhibition of professional football games (the "Stadium Lease"). The Stadium Lease expires on May 31, 2008. The 49ers have the right to extend the term of the Stadium Lease for up to three successive five-year periods. As owner of the Stadium, the City retains the rights to name the Stadium and has not granted those rights to the 49ers under the Stadium Lease.

In recent years, the City has sold naming rights to the Stadium to generate revenues for the Recreation and Park Department. In 1995, the City entered into the first of these agreements: a one-year, interim arrangement with the 49ers for the sale of naming rights for the 1995-96 football season. The 49ers purchased the rights to the stadium name from the City for $500,000 and resold them to a corporate sponsor. The Stadium was renamed 3 Com Park for that season.

In 1996, the City, with approval of the Board of Supervisors, Mayor and Recreation and Park Commission, entered into a longer-term agreement with the 49ers for the sale of naming

[1] In contrast to ballot measures that the full Board contemplates submitting to the voters, and ordinances that the Board and Mayor consider, the City Attorney's Office does not approve as to form ballot measures that four or more individual Board members submit under Charter Section 2.113, such as Proposition H. Accordingly, the City Attorney does not typically have the opportunity to advise City policymakers, including the Board and Mayor, about legal issues raised by such a measure before it is placed on the ballot.

[2] We note that the advice we give in this memorandum is consistent with past oral advice we have given City policymakers on the same subject matter.

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rights. That agreement expired on January 31, 2002. The City received a total of $4,700,000 from the sale of the naming rights. Throughout the five-year term of that agreement, the Stadium name continued to be 3 Com Park. When the agreement expired, the Recreation and Park Department proposed a new naming rights agreement with the 49ers, but the Board of Supervisors rejected that agreement. For the past two seasons, the Stadium has been referred to as "Candlestick Park."

In connection with the adoption of the City's budget for this fiscal year, on July 13, 2004, the Board of Supervisors passed Resolution No. 417-04, approving the existing Agreement for the sale of naming rights to the Stadium, and on July 14, 2004, the Mayor signed the resolution. The resolution was contingent upon approval of the Agreement by the Recreation and Park Commission (the "Commission"). On August 5, 2004, the Commission, by Resolution 0408-002, approved the Agreement. On the same date, the Acting General Manager of the Recreation and Park Department signed and delivered the Agreement on behalf of the City. The Agreement, having already been signed and delivered to the City by the 49ers, then became a legally binding contract.

Under the Agreement, the 49ers have the right to affix the name or logo of a sponsor to the Stadium. The term of the 49ers' right is the same as the term of the Stadium Lease, meaning that the Agreement would expire on May 31, 2008, unless the 49ers exercise their right to extend the term of the Stadium Lease by giving the City advance written notice under that lease. If the 49ers exercise all three of their options, the 49ers could extend the term of the Stadium Lease to May 31, 2023. The Agreement requires the 49ers to pay the City 50 percent of net revenues obtained from the sale of the name of the Stadium to a sponsor. Provided that the sponsor is one of five companies listed on an exhibit attached to the Agreement and that the City's share of naming rights revenues exceeds $3,000,000 over the term of the Agreement, no further City approvals are necessary for the 49ers to enter into a sponsorship agreement to sell the name of the Stadium.

The City's Annual Appropriation Ordinance (Ordinance No. 197-04) for the current fiscal year assumes that the City will receive the minimum revenues contemplated by the Agreement by June 30, 2005. Specifically, the Annual Appropriation includes an appropriation of $3,000,000, projected from the sale of naming rights to the 49ers for Fiscal Year 2004-2005, as part of the Recreation and Park Department's budget.

On August 4, 2004, which was the last day to submit measures for the November 2, 2004 ballot, four individual supervisors presented the Stadium naming ordinance to the Department of Elections. They acted according to their powers under Charter Section 2.113, which allows four

or more members of the Board to propose to the voters any matter that the Board of Supervisors is empowered to pass.[3]

If approved, the Stadium naming ordinance – now known as Proposition H – will add a new Section 4.24 to the Administrative Code. Proposition H reads in its entirety as follows: "The City-owned sports stadium located at Candlestick Point, at Jamestown Street and Harney Way, is hereby named and shall be referred to as "Candlestick Park." This ordinance shall not apply to any privately owned facility that may be in the future constructed at that location." The first sentence of Proposition H, which is the critical language here, would effectively prohibit the City from selling naming rights to the current Stadium, which is publicly owned.

Proposition H does not mention the Agreement. Similarly, the ballot digest for the measure, submitted by the Ballot Simplification Committee, does not refer to the Agreement. The official proponents' argument and rebuttal, submitted for inclusion in the ballot pamphlet by the four Board members who signed the ordinance, criticize the policy of selling naming rights to balance the budget and condemns the business terms of the Agreement. But those arguments do not specify that Proposition H is intended to invalidate the Agreement.

In his statement on the fiscal impact of Proposition H, which is a required part of the City's Voter Information Pamphlet, the City Controller states:

> Should the proposed ordinance be approved by the voters, in my opinion, it could cost the City approximately $3 million in lost revenues in FY 2004-2005. If a contract for naming rights is signed before the November 2004 election, it is likely that this ordinance would not affect those revenues. However, the ordinance may decrease future revenues by limiting the ability to sell naming rights for either the existing or for a new stadium at the Candlestick Point location.

Accordingly, the Controller concludes it is "likely" that Proposition H would not affect the projected revenues to the City in the current fiscal year if a contract for naming rights is signed before the election. While it is not clear whether the Controller is referring to the contract between the 49ers and the City or the agreement between the 49ers and a corporate sponsor, it does not matter here: for purposes of this opinion we assume that both contracts will be legally binding before the November 2nd election.

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[3] There is an argument that the Board of Supervisors has the authority to name the Stadium. The approval of contracts for the sale of intangible rights, such as naming rights, is generally a reserved power of the Board. And under Charter Section 2.105, the Board of Supervisors usually has the authority to establish by ordinance City policy to name City owned facilities, except where the Charter otherwise places those facilities under the exclusive jurisdiction of a commission. Charter Section 4.113 gives the Recreation and Park Department broad authority over property under the jurisdiction of the Commission "unless otherwise specifically provided in this Charter." Some have questioned whether the Board, without the approval of the Recreation and Park Commission, can name a particular City recreational facility. While we do not need to resolve this question here, it will require further analysis if Proposition H is approved by the voters.

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You inform us that the 49ers intend to enter into an agreement in the near future with one of the sponsors specified in the Agreement, and that you expect that the City will receive this fiscal year at least the amount assumed in the current Annual Appropriation Ordinance. The 49ers have stated that they do not believe that Proposition H would invalidate the existing Agreement and have asked the City for appropriate assurances.

Analysis

I. Proposition H Does Not on its Face Purport to Preclude the Naming of the Stadium Permitted under the Agreement

As a general matter, laws do not apply to pre-existing obligations unless they clearly indicate an intent to do so, either on the face of the law or, if necessary, in the legislative history. (Western Security Bank v. Superior Court, 15 Cal.4th 232, 243 (1997); Aetna Casualty & Surety Co. v. Industrial Accident Comm'n, 30 Cal.2d 388, 393 (1947); Plotkin v. Sajahtera, Inc., 106 Cal.App.4th 953, 960 (2003) (citations omitted).) This rule of construction presumes that a statute will not operate to change previously approved contractual agreements unless the intent to do so is made clear. (Aetna Casualty & Surety Co., supra, 30 Cal.2d at 405.)

Rules of statutory construction applicable to laws adopted by the legislature also apply to voter adopted laws. (John L. v. Superior Court, 33 Cal.4th 158, 169 (2004); Robert L. v. Superior Court, 30 Cal.4th 894, 900-901 (2003); People v. Spark, 121 Cal.App.4th 259, 267 (2004).) In interpreting a statute, the language of the statute itself is examined first. If the language of a law is clear and unambiguous, there is no need to consider extrinsic sources such as legislative history. (Alameida v. State Personnel Brd., 120 Cal.App.4th 46, 58(2004) (quoting Lungren v. Deukmejian, 45 Cal.3d 727, 735 (1988).) But if the language is ambiguous on its face, legislative history, including analyses and arguments contained in the ballot pamphlet, is properly considered. (Spark, supra, 121 Cal.App.4th at 267.)

Here, Proposition H does not state that the voters would intend to apply it to a legally binding contract that is already in existence before the date Proposition H would go into effect.[4] The Agreement was duly authorized and executed and became binding months before the voters will consider Proposition H. Under the Agreement, the City granted the 49ers the contractual right to name the Stadium. The 49ers intend to enter into a contract with a sponsor to sell the naming rights before the election to capture revenues for this year's football season.

Even if there is ambiguity as to whether Proposition H on its face is intended to invalidate the Agreement there is nothing in the analyses or official proponent arguments submitted for the ballot pamphlet about Proposition H that indicates Proposition H is intended to affect the Agreement.

[4] Proposition H, if approved by the voters on November 2, 2004, would become operative when the Board of Supervisors declares the results of the election, following certification of those results by the Director of Elections.

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Given the presumption against the application of a law to previously assumed contractual obligations, and also in light of the fact that Proposition H does not state that it is intended to alter the City's existing contractual obligations, Proposition H would not affect the validity of the Agreement, for so long as the Agreement remains in effect in accordance with its stated terms. By contrast, once the Agreement expires or otherwise terminates, Proposition H would limit future agreements to sell naming rights to the current Stadium or to any other publicly owned stadium built at Candlestick Point.

II. If Applied to the Agreement, Proposition H Would Effect an Unconstitutional Impairment of Contract

Even if one were to argue that Proposition H is intended to apply to the Agreement, to do so would constitute an unconstitutional impairment of contractual obligations. As further described below, Proposition H is an exercise of the City's proprietary powers as owner of the Stadium to name that Stadium. While the courts have recognized certain exceptions where legislation can impair the obligation of contract consistent with the Constitution, those exceptions apply to limited instances involving the exercise of the police power (the power of the government to protect public health, safety and welfare). Proposition H does not involve the exercise of the police power, and thus clearly falls within the scope of the constitutional protections of the obligations of contracts.

Both the California Constitution and the United States Constitution prohibit impairment of contract by any law (Cal. Const. art. I, § 9; U.S. Const. art. I, § 10). Any law adopted after a contract is effective that "substantially defeats the *end* contemplated by the parties in making the contract must impair its obligations." (Robinson v. Magee, 9 Cal. 81, 84 (1858) (emphasis original).) The impairment can be direct, such as by the imposition of conditions in addition to those contained in the contract. (Id. at 84-85.) The impairment can also be indirect, as is the case with legislation that diminishes the value of a contract. (Planters Bank of Mississippi v. Sharp, 47 U.S. (6 How.) 301, 326 (1848).)

Courts have upheld legislative acts that interfere with contracts when the impairment is reasonable and necessary in order to serve an important public purpose, but only in instances involving the exercise of the police power. (United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 23-24 (1977). The prohibition against any impairment of law "is accommodated to the inherent police power of the state to safeguard the vital interests of its people." (Interstate Marina Development. Co. v. County of Los Angeles, 155 Cal.App.3d 435, 445 (1984).)

The prohibition against impairment of contract applies with particular force when the government is seeking to alter its own contractual obligations. (Interstate Marina Development, supra, 155 Cal.App.3d at 445; California Teachers Ass'n v. Cory, 155 Cal.App. 3d 494, 511-12 (1984).). When the governmental entity is party to the contract, it cannot use even the police power to evade its contractually required financial obligations. (Interstate Marina Development, supra, 155 Cal.App.3d at 448). Moreover, the governmental body must assert a compelling public interest for the impairment of a contract to which the entity is party. (California Teachers Ass'n, supra, 155 Cal.App.3d at 511-12.)

Here, Proposition H would operate as a substantial impairment of the City's own contractual obligations to the 49ers. The Agreement grants the 49ers the right to sell the name of the Stadium in exchange for payment to the City of one-half of the net revenues generated from the sale of the name. Thus, by naming the Stadium, Proposition H would frustrate the very purpose of the Agreement and would constitute a substantial impairment of the contract.

Proposition H is an exercise of the City's proprietary powers in its capacity as the owner and landlord of the Stadium, rather than its police power to address an issue of public health, safety or welfare.[5] Proposition H seeks to replace the policy decision reached by the Recreation and Park Commission, the majority of the Board of Supervisors and the Mayor about naming the Stadium with an entirely different policy decision. Having entered into the Agreement, the City is not now free "to consider impairing the obligations of its own contracts on a par with other policy alternatives." (United States Trust Co. of New York, supra, 431 U.S. at 30-31.)

If the voters adopt Proposition H and the City were to seek to immediately name the Stadium as Candlestick Point and consequently repudiate the Agreement, the City would not only lose the money the City is entitled to under the Agreement but would also potentially be exposed to claims by the 49ers for millions of dollars in damages for breach of contract. Courts have held that governmental entities cannot pass laws impairing their own contracts in order to save money. (See, e.g., California Teachers Ass'n, supra, 155 Cal. App. 3d at 512 & n.15 (quoting United States Trust Co. of New York, supra.).) In light of these cases, it is highly unlikely that a court would find a legislative act that would cost the City money, by impairing a contractual obligation of the City to allow the 49ers to name the Stadium, reasonable and necessary to serve any public purpose.

Whenever possible, a court will interpret a statute in such a way as to avoid constitutional infirmity. (Alameida, supra, 120 Cal.App.4th at 56 (citations omitted); People v. Vasquez, 118 Cal.App.4th 501, 506 (2004) (citations omitted).) If there is a potential application of Proposition H that could be unconstitutional and the language does not clearly mandate that application, then a court would construe the measure to avoid that application. As discussed above, there is no clear statement in the measure itself that it is intended to apply to the Agreement. And, as also described above, construing Proposition H to require renaming of the Stadium immediately upon adoption in violation of the Agreement would render the ordinance an unconstitutional impairment of contract. By contrast, interpreting Proposition H to apply only prospectively and to rename the Stadium only upon expiration of the City's contractual

[5] The Agreement contains a standard City contractual provision requiring compliance with "local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time." (Agreement, § 26, p.13.) Such a contractual provision embodies the principles that a governmental body's reservation of essential attributes of sovereign power, such as the police power and power of eminent domain, are read into all contracts and cannot be contracted away. (United States Trust Co. of New York, supra, 431 U.S. at 23-24; Castleman v. Scudder, 81 Cal.App.2d 737, 740 (1947).) The provision does not require that the Agreement be subject to subsequent laws such as Proposition H, which concern only proprietary and financial matters. In fact, for all the reasons discussed above, to attempt to interpret the provision in such a way to make the Agreement subject to Proposition H, if it is approved, would be an unconstitutional impairment of contract.

obligations to the 49ers avoids such constitutional infirmity. Accordingly, it is highly likely that a court would therefore interpret Proposition H in such a way, leaving the Agreement unimpaired for its duration.

Conclusion

Proposition H would likely not invalidate the Agreement. Because the measure does not state that it extends to pre-existing obligations on the part of the City and because there is no other clear evidence of such an intent in the ballot materials, courts would not interpret Proposition H to apply in that manner. Even if one read Proposition H as applying to the Agreement, to do so would violate the provisions in both the Federal and State Constitutions against laws that impair obligation of contracts. Courts interpret statues to avoid violating the Constitution. Accordingly, for these reasons a court would likely determine that Proposition H would not invalidate the Agreement – or any sale of the naming rights by the 49ers to a sponsor consistent with the existing terms and conditions of that Agreement – for so long as the Agreement remains in effect under its stated term and is a legally binding obligation on the part of the City.[6] But once the existing Agreement terminates, Proposition H could preclude future agreements to sell naming rights to the current Stadium or to any other publicly owned stadium built at Candlestick Point.

[6] Proposition H may limit the City's ability to amend the existing Agreement after the voters adopt the measure, but to our knowledge no amendments or modifications are contemplated. Proposition H may also bar any extension of the term of the existing Agreement beyond May 31, 2008, if the 49ers wish to amend the Stadium Lease in connection with their exercise of any their extension options under that lease.