ATTACHMENT 1

LAW OFFICES OF
NIELSEN, MERKSAMER,
PARRINELLO, MUELLER & NAYLOR, LLP

SACRAMENTO
1415 L STREET, SUITE 1200
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 446-6752
FAX (916) 446-6106

591 REDWOOD HIGHWAY, #4000
MILL VALLEY, CALIFORNIA 94941-3039
TELEPHONE (415) 389-6800
FAX (415) 388-6874

SAN FRANCISCO
225 BUSH STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 389-6800
FAX (415) 388-6874

August 29, 2006

VIA FACSIMILE AND FIRST CLASS MAIL

John Russo, City Attorney
City of Oakland
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, CA 94612

Re: Referendum Against Ordinance No. 12760

Dear Mr. Russo:

We represent Oakland Harbor Partners, LLP, the proponent of the approved development project at Oak to 9th, which is now the target of a referendum petition. The Referendum Against Ordinance No. 12760, which approved the Development Agreement relating to the Oak to 9th project (the "Referendum"), is illegal for at least five separate and independent reasons, and we write to request that the City of Oakland reject and decline to certify or place it on the ballot. The Referendum is fatally defective for the following reasons:

(1) The Referendum petition failed to include the full text of the legislative acts that are the subject of the Referendum, in violation of Elections Code section 9238;

(2) The Referendum petition was circulated, in at least some instances, without *any* of the required legislative attachments, in violation of Elections Code section 9238;

(3) The Referendum petition violated Elections Code section 101 by failing to include the statutory notice informing signers of their right to ask if the petition was being circulated by a paid signature gatherer or a volunteer, and instead included a notice that became obsolete several years ago;

(4) In order to maximize signature collection and meet the 30-day statutory deadline for the submission of petition sections, Referendum proponents and their paid and volunteer circulators repeatedly and systematically violated Elections Code section 18600 by distributing false statements calculated to mislead and misinform Oakland voters and induce them to sign the Referendum petition; and

(5) The Referendum petition was not circulated or made available in the minority languages required by the Voting Rights Act for the County of Alameda (Chinese and Spanish).

The fact that there are so many independent grounds for rejecting the Referendum petition underscores the need for the City Clerk and/or the City to refuse to certify it for the ballot.

1. The City Clerk and City Council Have a Ministerial Duty to Reject the Referendum Because It Is Facially Defective for Failing to Include the Full Text of the Legislative Acts Referred.

The Referendum petition plainly fails to comply with Elections Code section 9238, which requires a petition to contain the full text of the legislative act or acts that are subject to the referendum. Section 9238(b) provides:

> Each section of the referendum petition shall contain (1) the identifying number or title, and (2) the text of the ordinance or the portion of the ordinance that is the subject of the referendum. The petition sections shall be designed in the same form as specified in Section 9020.

Here, the Referendum proponents are attempting to refer the entirety of Ordinance No. 12760 (the "Ordinance"), which approves a comprehensive and detailed Development Agreement between the City of Oakland, the Redevelopment Agency of the City of Oakland, and Oakland Harbor Partners, LLC, relating to the Oak to Ninth Avenue Mixed Use Development Project.[1] Accordingly, the

---

[1] Ordinance No. 12760 is titled,

AN ORDINANCE APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF OAKLAND, THE REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND, AND OAKLAND HARBOR PARTNERS, LLC, AND AUTHORIZING THE CITY ADMINISTRATOR TO EXECUTE THE DEVELOPMENT AGREEMENT ON BEHALF OF THE CITY.

Ordinance expressly incorporates by reference, the following exhibits and relevant, integrated land use documents:

(1) Attachment "A," the Development Agreement approved by the City Council, which, in turn, incorporates the following exhibits:
   a. Exhibit A: List of CEQA Documents;
   b. Exhibit B: Master Fee Schedule;
   c. Exhibit C: Phasing Schedule;
   d. Exhibit D: Public Open Space Acquisition/Hazardous Materials;
   e. Exhibit D-1: Parcel N Map [identifies Parcel N, previously a development parcel, as part of the newly created open space];
   f. Exhibit D-2: Public Open Space Access Map [identifies the area designated for public open space];
   g. Exhibit D-3: List of Defendants Covered Under Release and Covenant Not to Sue by City;
   h. Exhibit E: Development Parcels Vesting Tentative Map No. 7621;
   i. Exhibit F: Park and Open Space Maintenance Guidelines;
   j. Exhibit G: Approval Documents for Oak to Ninth Mixed Use Development Project;
   k. Exhibit H: Site Plan Map;
   l. Exhibit I: Port's Non-discrimination and Small Local Business Utilization and Prevailing Wage Policy;
   m. Exhibit J: Local Hiring and Construction Job Training Benefits;
   n. Exhibit K: Port Art in Public Places, Ord. No. 3694;
   o. Exhibit L: Affordable Housing Obligation;
   p. Exhibit M: Conditions on Approval and Mitigation Monitoring and Reporting Program – "Master Developer Obligations";
   q. Exhibit N: Construction of Temporary Bay Trail;
(2) Exhibit "A" to All Approval Documents: CEQA Findings and Statement of Overriding Considerations;
(3) Exhibit "B" to All Approval Documents: Mitigation and Monitoring and Reporting Program;
(4) Exhibit "C" to All Approval Documents: Conditions of Approval; and
(5) Exhibit "D" to All Approval Documents: General Findings.

Elections Code section 9238 requires that *each* of these Exhibits be included, in full, in the Referendum petition. Development Agreement Exhibits A, B, D-1, D-2, D-3, I, K, and significant portions of Exhibit H, however, are wholly absent

from the Referendum petition. Page 21 of the Referendum petition is also missing.[2] (See Exhibit 1, attached hereto [providing an overview of the missing documents].) These omitted documents, which include an overview of the environmental review documents completed for the Project and detailed maps of the public open space to be created, are hardly insignificant or inconsequential, but contain indispensable information for prospective signers to effectively evaluate their support for or opposition to Ordinance No. 12760.

Moreover, because the text reproduced by proponents in the Referendum petition is apparently from an early draft of the Development Agreement and related exhibits, it contains extensive substantive errors and omissions and fails to reflect the significant amendments made to the Development Agreement *before* it was approved by the Council. (See Exhibit 2, attached hereto [ten (10) page chart outlining the significant and substantial differences between the documents as approved by the City Council, and those attached to the Referendum].) Entire provisions relating to the preservation of the Ninth Avenue Terminal Shed building, Affordable Housing, and the use of Public Open Space, each an important factor in an Oakland voter's decision whether or not to sign the Referendum petition, are not included in the petition. Further, the text included in the petition distorts, confuses, or wholly ignores nearly each and every reference to the geographical size of the Project, square footage of specific buildings impacted by the Project, and the amount of open space created by the Project.[3]

---

[2] The last four (4) pages of Exhibit A to All Approval Documents, which includes CEQA Findings and Statement of Overriding Considerations Nos. 35 through 51, is missing on many Referendum petitions. In addition, many of the Referendum petitions are missing the title of Exhibit B to All Approval Documents (i.e., "Exhibit B – Mitigation Monitoring and Reporting Program for the Oak to Ninth Mixed Use Redevelopment Project"). Of course, without the orienting title, the signer has no way to meaningfully identify and understand the text that follows. These materials, it appears, should have been reproduced on page 21 of the Referendum petition. Instead, page 22 of the petition was printed twice. It also appears that Referendum proponents became aware of this defect during the latter stages of circulation and attempted to correct it. Any remedial action taken, however, simply cannot address the defective petitions *already* circulated and signed.

[3] For example, Exhibit D to All Approval Documents, as approved by the City Council, states:

> The Project will include four major parks (**32** acres) along the waterfront: an expansion of Estuary Park for a total of **10.68** acres; the new Channel Park, 5.97 acres; the new South Park, 2.30 acres; the new Shoreline Park, 9.74 acres, **and Gateway Plaza, 3.2 acres.**
> (See Ex. D to All Docs, p.9, No. 39 [emphasis added].)

This provision, however, is reproduced in the Referendum petition as follows:

> The Project will include four major parks (**32.329.48** acres) along the waterfront: an expansion of Estuary Park for a total of

For example, before it was approved by the City Council, the Development Agreement was amended to remove development on Parcel N and dedicate that entire area to additional public open space. The text included in the petition, however, fails to recognize this significant amendment, and therefore repeatedly misstates the amount of public open space created by the Project. (See, e.g., Referendum petition at p. 58 [*missing* definition of "Parcel N" and Exs. D-1, D-2].) The effect of this omission is greatly increased by the fact that several key exhibits, including Exhibits D-1 (identifying Parcel N as part of the public open space) and D-2 (identifying the Project's over-all public open space commitment), are also not included in the Referendum petition. In no way, therefore, does the Referendum petition faithfully and accurately include the full text of Ordinance No. 12760.

Under the Elections Code and established caselaw, where, as here, a referendum petition fails to comply with mandatory statutory requirements, local elections officials have the *ministerial duty* to reject the measure and must refuse to take any action on it. An unbroken line of cases dating as far back as 1925 have struck down referendum and initiative petitions that failed to comply with the formatting provisions of the Elections Code, especially those such as section 9238, which are intended to provide information to petition signers. (See, e.g., *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 104-05 [relying on an "unbroken line of initiative and referendum cases covering the period 1925 to 1998" to strike down a petition for failing to include the full text of the measure].)

In *Billig v. Voges* (1990) 223 Cal.App.3d 962, the Court of Appeal upheld the San Luis Obispo City Clerk's rejection of a referendum petition for its failure to comply with the requirements set forth in what is now subdivision (b) of Elections Code 9238. The Clerk rejected the zoning ordinance referendum because the petition included a summary of the ordinance being referred, rather than the actual text of the twenty-two page ordinance. The Court of Appeal, recognizing the acceptance of a non-compliant petition would have "rendered the provisions of section [9238] null and void," concluded:

10.688r3? acres; the new Channel Park, 5.97 acres; the new South Park, 2.30 acres; the new Shoreline Park, 9.74 acres. (See Referendum petition at p. 58 [emphasis added].)

Thus, the reproduced text not only excludes language providing for an additional 3.2 acre public park, but distorts and confuses references to the parks actually mentioned so as to render them meaningless.

> Section [9238] involves purely procedural requirements for submitting a referendum petition. Therefore, a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a *ministerial function* involving no exercise of discretion.
>
> ...
>
> Consequently, the offices of city clerks throughout the state are mandated by the constitution to implement and enforce the statute's procedural requirements. *In the instant case, respondent [City of San Louis Obispo] had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of section [9238].*

(*Id.* at 968-69 [emphasis added]; see also *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1232 [invalidating a municipal referendum petition because the petition did not attach a copy of the ordinance being referred].)

In *Chase v. Brooks* (1986) 187 Cal.App.3d 657, similar to the situation here, proponents of a referendum petition against a rezoning ordinance included references to the city map number and reclassification of the property affected, but failed to attach a related exhibit which contained the legal description of the property affected. The Court of Appeal held that, because the exhibit had been incorporated by reference into the ordinance, proponents were required to reproduce the exhibit in their referendum petition. Accordingly, having failed to comply with the "full text" requirement of section 9238, the referendum was declared illegal. (*Id.* at 663.)

Following the lead of *Creighton*, *Chase*, and *Billig*, the Court of Appeal in *Nelson v. Carlson* (1993) 17 Cal.App.4th 732, struck down a referendum petition challenging a city's general plan because the petition did not have a copy of the plan attached. The referendum's proponents argued that requiring attachment of the two-and-a-half-inch-thick plan would be pointless and burdensome, but the Court rejected that argument. (*Id.* at 739-41.) To the contrary, the Court recognized that the importance of the general plan, as a key land use document, was a factor in favor of *requiring* its attachment to the petition seeking to refer it. (*Id.*; see also *Myers v. Stringham* (1925) 195 Cal. 672 [invalidating initiative petition that sought to amend a section of the law without setting out the full text of the section].)

Similarly, in *Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, the Court invalidated an initiative petition that purported to re-enact, and incorporate by reference, provisions of a general plan instead of including the provisions' actual text in the petition. Although approximately 17 pages of the City's general plan would have been affected by the initiative, no part of the actual text of the general plan, general plan map, or supporting policies of the City of Hayward was attached to the initiative petition. (*Id.* at 97-98.) In striking down the petition for its failure to include the full text of the proposed measure, the Court observed, "The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion." Accordingly, the Court held:

> For all the reasons given in the above-cited, unbroken line of initiative and referendum cases covering the period 1925 to 1998, we find that the petition in the instant case did not substantially comply with Elections Code section 9201. The approximately 17 pages of general plan sections omitted from the petition were the key element of the initiative. *Governmental land use decisions can be challenged by initiative or referendum. In either case, it is imperative that persons evaluating whether to sign the petition be advised which laws are being challenged and which will remain the same. Only inclusion of the existing general plan will accomplish such purpose.* Hayward's city council had the ministerial duty to reject the petition and could not validly adopt it as law.

(*Id.* at 104-05 [emphasis added].)

Less egregious violations of Section 9238 have produced the same result. In *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, a referendum petition challenging an ordinance altering a land use designation in a city's general plan merely misstated the title of the ordinance by inadvertently omitting *three words*. (*Id.* at 1338-40.) The Court of Appeal invalidated the referendum petition for failing to technically or substantially comply with Section 9238(b). In misstating the correct title of the ordinance, the Court held, the petition failed to inform voters which land was involved and thereby deprived them of vital, mandatory information. (*Id.* at 1340-41 ["[I]t is the responsibility of the petition proponents to present a petition that conforms to the requirements of the Elections Code"].)

The result must be no different here. The purpose and effect of Ordinance No. 12760 is to approve the Development Agreement and each of its twenty-one (21) Exhibits, which were expressly incorporated by reference by the City Council. Nevertheless, proponents of the Referendum have failed to include the full text of the Development Agreement in their petition, in clear violation of Elections Code section 9238. First, they wholly failed to include any portion of Exhibits A, B, D-1, D-2, D-3, I, and K to the Development Agreement. (See Exhibit 1, attached hereto.) Additionally, the text of the documents actually included in the petition are incomplete and incorrect, containing numerous and substantial errors and omissions. (See Exhibit 2, attached hereto.) As in each of the cases cited above, because of these clear deficiencies, the voters who signed the Referendum petition were unlawfully deprived of the statutorily mandated information necessary to intelligently exercise their electoral rights.

It is therefore without question that the Referendum petition is not entitled to be placed on the ballot, or to otherwise be acted upon. (See, e.g., *Billig, supra,* 223 Cal.App.3d at 969 [the city clerk and city council have a *ministerial duty* to reject a referendum petition that facially violates the statutory requirements contained in the Elections Code]; *Mervyn's, supra,* 69 Cal.App.4th at 104-05 ["Hayward's city council had the ministerial duty to reject the petition and could not validly adopt it as law."].) The City Clerk and City Council are obligated, *as a matter of law,* to reject this facially defective Referendum. The failure to do so would plainly violate the law.

2. The Referendum Is Also Defective Because Sections of the Petition Were Circulated Without *Any* Portion of the Referred Legislative Acts Attached.

There is a second "full-text" problem with the Referendum petition because, at least in some instances, it was circulated without *any exhibits or attachments whatsoever*, in clear violation of Elections Code section 9238. Several Oakland voters report that they were approached by Referendum supporters and asked to sign "petitions" consisting only of one or two sheets of paper. (See, e.g., Declarations, attached hereto as Exhibit 3.) This represents an unequivocal violation of Elections Code section 9238. (See *Creighton, supra,* 171 Cal.App.3d at 1232 [invalidating municipal referendum because the petition "failed to provide the electors with the information [] they needed in order to exercise intelligently their rights under the referendum law"].)

Additionally, we are aware that there were at least two types of Referendum petitions circulated. For at least the first week of the signature gathering period, petitioners circulated an 81-page petition, which was stapled at the top left and right corners. Later, the Referendum proponents used an 83-page petition, which was bound at the top. Neither form of the petition contained spaces for more than forty-eight (48) signatures. On August 19, 2006, however, the City Clerk's Office informed us that proponents submitted the Referendum petition in 541 sections, each section containing 20, 48, or 104 signatures. This information suggests that the "petitions" consisting of independent pieces of paper like those witnessed by multiple Oakland voters may have been stapled to other petition sections before the Referendum proponents filed them with the City Clerk.

Accordingly, in addition to directing the County Registrar to not count any signatures on "petitions" consisting of independent signature sheets, the City has a duty to investigate the possibility that the petition sections submitted were altered in order to append or incorporate independent signature sheets. If petition sections were in fact altered, the signatures on those sections must be rejected.

3. As a Separate and Independent Ground for Invalidity, the Referendum Is Facially Defective for Failing to Provide Signers with Statutorily Mandated Notices Required By the Elections Code.

Signature gathering is a critically important part of the referendum process, as it is at this stage where proponents of the referendum seek to obtain the requisite number of voter signatures on a petition to qualify the referendum for the ballot. In order to protect the integrity of this important process, the Legislature has included many requirements in the Elections Code regarding the specific format of referendum petitions, including the content of the petitions, type size, and signer and circulator information. Each of these requirements is intended to provide information to the voters.

Elections Code section 101 is such a provision. That Section states:

> **101. Petition notice to the public.**
>
> Notwithstanding any other provision of law, any state or local initiative petition required to be signed by voters shall contain in 12-point type, prior to that portion of the petition for voters' signatures, printed names, and residence addresses, the following language:

> "NOTICE TO THE PUBLIC
>
> THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK."

(Elec. Code § 101.)

There can be no dispute that the Referendum petition failed to include the notice mandated by Section 101. Instead, Referendum proponents printed the following on the face of the petition:

> NOTICE TO THE PUBLIC: THE USE OF YOUR SIGNATURE FOR ANY PURPOSE OTHER THAN QUALIFICATION OF THIS MEASURE FOR THE BALLOT IS A MISDEMEANOR. COMPLAINTS ABOUT THE MISUSE OF YOUR SIGNATURE MAY BE MADE TO THE SECRETARY OF STATE'S OFFICE.

Significantly, this language is not of the Referendum proponents' own design. Prior to January 1, 2005, when it expired by its own terms, Elections Code section 101.5 required initiative and referendum proponents to include a notice on their petitions relating to the lawful use of a voter's signature. The Section 101.5 notice was *in addition to the "paid circulator" notice required by Section 101.* Section 101.5 provided:

> (a) Immediately following the statement required by Section 101, the following statement shall be printed in 12-point type:
>
> "THE USE OF YOUR SIGNATURE FOR ANY PURPOSE OTHER THAN QUALIFICATION OF THIS MEASURE FOR THE BALLOT IS A MISDEMEANOR. COMPLAINTS ABOUT THE MISUSE OF YOUR SIGNATURE MAY BE MADE TO THE SECRETARY OF STATE'S OFFICE."

(Elec. Code § 101.5 [repealed by its own terms on Jan. 1, 2005] [emphasis added].)

Accordingly, here, the only notice included by proponents on the Referendum petition is from Section 101's companion statute, which is no longer law. The specific "paid circulator" notice required by Section 101, however, which is still valid and enforceable, is inexplicably missing from the petition.

Despite its reference to "state or local *initiative* petitions," Elections Code section 101 is made applicable to municipal referendum petitions by Elections Code section 9237.5, which is located in the portion of the Elections Code dealing specifically with the requirements for municipal referenda. That provision, which was enacted by the Legislature in 1999, states:

> The provisions of this code *relating to the form of petitions*, the duties of the ... elections official, and the manner of holding elections *shall govern the petition procedure and submission of the ordinance to the voters.*

(Emphasis added.)

Proponents of the Referendum obviously recognized the operation and effect of Elections Code section 9237.5 because they prominently included the notice formerly required by Section 101.5 (the *companion* statute to Section 101) on the face of the Referendum petition. Indeed, prior to its repeal on January 1, 2005, Section 101.5 was made applicable to municipal referenda by Section 9237.5 and, as such, proponents were required to include its specific notice provision on their petitions.[4] Of course, the notice mandated by Section 101.5 was *in addition* to the separate and distinct notice required by Section 101. Here, Referendum proponents wholly failed to include the critical "paid circulator" notice mandated by Section 101.

California courts have routinely held that such a failure to include the required statutory notices is a fatal defect which deprives voters of important,

---

[4] The Legislative Counsel's Digest for the final and chaptered version of AB 3148, which enacted Elections Code section 41.5 (later renumbered Section 101), recognized its application to referendum, as well as initiative, petitions:

> Existing law provides for the *format of petitions* with respect to initiatives, *referenda*, and other matters, at both the state and local level. This bill would provide that *each petition* shall contain, as specified, a notice that the petition may be circulated by either a paid signature gatherer . . .

(Legis. Counsel's Digest 1990 Cal. AB 3148 (Lexsee 1990 CA ALS 1026).)

statutorily mandated information, and thus, the referred measure must not be placed on the ballot. Moreover, as detailed above, California courts have consistently ruled that local officials have a *mandatory and ministerial* duty to enforce and give effect to the requirements of the Elections Code by refusing to certify any referendum petition that does not comply with the statutory requirements, including the mandate of Section 101.

For example, in *Myers v. Patterson* (1987) 196 Cal.App.3d 130, the Court of Appeal invalidated an initiative petition that failed to include a copy of the "notice of intention to circulate" as required by current Elections Code section 9207. The court reasoned:

> The statute in this case states that each petition section '*shall* bear a copy of the notice of intention and statement.' For purposes of the Elections Code, generally, 'shall' is mandatory and 'may' is permissive. To declare a registrar duty-bound to ignore the notice requirement would be to write it out of the code, leaving the requirement an idle act of the Legislature, something we must avoid if possible.

(*Id.* at 136-37.) Although the measure's proponents argued that they had substantially complied with the Elections Code, the *Myers* court clarified that, "Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute." (*Id.* at 138.) If a "notice-inclusion requirement serves some information purpose for prospective signers of a petition, then there clearly [is] no substantial compliance [when the] petition sections . . . *fail [] altogether to include the notice.*" (*Id.* [emphasis added].) Readily recognizing that the notice at issue "imparts useful information" to prospective signers, the Court held that its omission required invalidation. (*Id.* at 137-38.)

In *Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90, initiative proponents failed to comply with the Elections Code requirement (currently codified at Elections Code section 9205(b)) that they post, in three specific public places, the notice of intention to circulate a petition *before* starting to collect signatures. Despite the fact that they posted the required notice a mere three days after commencing petition circulation, the Court invalidated the petition. The posting requirement was intended to provide information to potential signers, and thus, proponents' failure to adhere to that requirement was a fatal defect which required

invalidation. (See also *Boyd v. Jordan* (1934) 1 Cal.2d 468, 475 [invalidating petition for failure to include a short title showing the nature of the petition and the subject matter to which it relates, as required by the Elections Code]; *Clark v. Jordan* (1936) 7 Cal.2d 248, 252 [same].)

Here, as in *Myers, supra,* Referendum proponents have wholly failed to comply with *any* aspect of Elections Code section 101. The required statutory notice relating to a prospective signer's right to ask whether the circulator is being paid for his or her effort is unmistakably absent. The notice requirement contained in Elections Code section 101, however, serves an important informational function designed by the Legislature to protect voters and preserve the integrity of the signature gathering process. (See *Chase v. Brooks* (1986) 187 Cal.App.3d 657, 663 ["statutes designed to protect the elector from confusing or misleading information should be enforced so as to guarantee the integrity of the process"].) The Referendum petition here, therefore, may not be certified or placed on the ballot.

4. To Maximize Signature Collection and Meet the 30 Day Statutory Deadline, Referendum Proponents And Circulators Violated the Elections Code By Distributing False Statements Calculated to Mislead and Misinform Oakland Voters to Induce Them to Sign the Referendum Petition.

The Referendum proponents were faced with the need to obtain almost 19,000 signatures in a very short time period. To accomplish this, they and their paid and volunteer circulators repeatedly made and published false and misleading statements regarding the Oak to Ninth Project and the effect of the Referendum. This type of improper signature gathering tactic is illegal and represents another independent reason why the Referendum may not lawfully be presented to the voters. (Elec. Code § 18600.)

Elections Code section 18600 prohibits making, circulating, publishing, or exhibiting "any false statement or misrepresentation concerning the contents, purport or effect of any state or local initiative, referendum or recall petition for the purpose of obtaining any signature to, or persuading or influencing any person to sign, that petition." California courts have squarely held that, where this provision is violated, the underlying petition may not be placed on the ballot. (See *San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 643.)

The facts in *San Francisco Forty-Niners* are virtually indistinguishable from those presented here. "To convince voters there was a need to repeal [two measures

providing for the construction of a new football stadium] and thus induce them to sign their petition, [proponents] falsely represented the purported invalidity of the propositions and their enactment, as well as their purported adverse impact on the City." (*Id.* at 646.) Specifically, proponents falsely stated that the City and County of San Francisco had acted fraudulently in connection with the two approved stadium-related measures, misrepresented the amount the stadium would cost San Franciscans, and made patently false statements of existing law. (*Id.* at 641.) Recognizing that a voter is unable to intelligently exercise his or her right to vote when they have been provided with undisputed, objective untruths, the Court of Appeal upheld the lower court's issuance of a writ of mandate prohibiting the San Francisco Director of Elections from qualifying the measure for the ballot. (*Id.* at 643 ["Ordinary citizens with a sense of trust should be able to believe in the accuracy of what they are signing."].)

The proponents of the Referendum have employed the same type of unlawful signature gathering tactics here. Working from a template provided by the primary supporters and organizers of the Referendum effort, the signature gatherers, many of whom were paid circulators, widely distributed several patently false statements as a cornerstone of their signature solicitation efforts, including:

- The City Council is "giving away" 64 acres of public land and selling public park land at a discount.
  - In fact, Oakland Harbor Partners is paying fair market value for the property as determined by an independent appraisal authorized by the Port of Oakland.
- The open space created by the Oak to Ninth Project will be "inaccessible by the general Oakland public."
  - In fact, the Project will create 32 acres of publicly accessible parks and open space.
- The "Estuary Plan" was approved by Oakland voters as Measure DD in 2000, thereby "reserving" the Oak to Ninth site for "parks and recreation facilities."
  - In fact, the Estuary Plan was never approved by, or even presented to, Oakland voters, but was simply added to the General Plan by the City Council in 1999. Measure DD was a bond measure, passed by voters to raise $198M for public improvements in Oakland, primarily focusing on projects in the Lake Merritt area. Its passage in no way "approved" the Estuary Plan. Moreover, the Estuary Plan simply recognized

possible uses on the Oak to Ninth site and does not "reserve" that land solely for parks and recreation.

- The City Council has "committed all 'tax increment' funds from all redevelopment areas of the city for the next 10 years" in a single project.
    - In fact, approximately $5-8 million per year will be available for affordable housing in other areas of the city, an amount that will increase annually.
- The affordable housing constructed "will not have access to ground level outdoor space."
    - In fact, the plans and designs plainly reflect that the affordable housing component of the project will have ample and unrestricted access to ground level open space.[5]

(See Exhibits 4-8, attached hereto, which were obtained at www.abetteroaktoninth.org, last accessed 8/22/06.)

Significantly, the website used to garner public support for the Referendum also served as a means to organize and "educate" the petition circulators.[6] Thus, in addition to repeating each of the false and misleading statements listed above, the proponents' website demonstrates the pervasiveness of these improper signature gathering tactics. Links to documents labeled "Guidelines for Petition Circulators," "Petition Script Suggestions," "Frequently Asked Questions," and "Download and Distribute the Flyer" expressly instruct circulators to repeat the false assertions listed above (among others) when soliciting signatures. (See Exhibits 4-8.)

---

[5] This is by no means an exhaustive list of the false and materially misleading statements made by Referendum circulators in an attempt to induce signatures. These specific misstatements, however, were prominently and repeatedly employed by petition circulators to mislead Oakland voters.

[6] Multiple Oakland voters have reported that many Referendum circulators were not registered or eligible Oakland voters, as required by Elections Code sections 9238 and 9022. Referendum proponents advertised on Craigslist for paid signature gatherers, offering up to $1.50 per signature obtained without reference to the requirement that persons answering the ad must be registered or eligible Oakland voters. (See Exhibit 9, attached hereto.) Accordingly, the accuracy of these reports should be verified by confirming the voter registration information for each person who signed and submitted a Declaration of Circulator, as required by Elections Code sections 9238 and 9022. In addition, Oakland voters reported that several petition sections were left unattended in coffee shops and cafes, making it impossible for a circulator to truthfully sign a Declaration of Circulator for those petition sections. A Declaration of Circulator requires the circulator to certify under penalty of perjury that he or she personally circulated that petition section and witnessed each signature being placed thereon. (Elec. Code §§ 104(b), 9022.)

For example, the document labeled "Petition Script Suggestion" informs circulators that voters may ask what the petition is about, and instructs them to reply,

> Answer: "It's the Oak to 9th Project."
>
> **"The City Council just voted to give 64 acres of prime, publicly owned Oakland waterfront property to a private developer to build 3,100 expensive condominium apartments."**
>
> **"In the Estuary Plan, approved by 80% of voters in 2000 as Measure DD, this land was originally reserved for parks and recreational facilities."**
>
> ...
>
> "Will you sign our petition to put it on the ballot?"

(See Exhibit 6.) The bolded statements, which are blatantly false as outlined above, were regularly used by petition circulators when attempting to induce signatures. (See attached Declarations, Exhibit 3.)

In addition, the Flyer, which was widely distributed during the signature gathering process, prominently features the false statements that Oakland is "selling our public land at a discount to a private developer" and that the "small amount of space that will be turned into parks will be ***inaccessible by the general Oakland public*** and will only provide private park space for the residents of the development." (See Exhibit 8 [emphasis in original]; see also attached Declarations, Exhibit 3.)

"The law is clear that election officials have a ministerial duty to reject initiative petitions which suffer from a substantial . . . statutory defect which directly affects the quality of information provided to the voters." (*San Francisco Forty-Niners, supra,* 75 Cal.App.4th at 644; see also *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384 ["There is no constitutional right to place an invalid initiative on the ballot."].) The Referendum proponents have clearly and repeatedly violated Elections Code section 18600. By making and distributing undisputed, objective untruths which were intended to mislead and misinform Oakland voters in order to collect the minimum number of signatures required to qualify for the ballot, they have incurably tainted the referendum process. The Referendum must be rejected.

5. The Referendum Petition Was Not Circulated or Made Available in the Minority Languages Required by the Voting Rights Act.

The Referendum petition was circulated only in English. Pursuant to the federal Voting Rights Act, Alameda County ballot and election materials must be printed in Chinese and Spanish as well. (See 28 C.F.R 55, Appendix [listing languages for jurisdictions covered under § 203 of the Voting Rights Act].)

As you are likely aware, the Ninth Circuit has recently held an *en banc* re-hearing to determine whether a 3-judge panel of that court, as well as several lower courts, correctly held that initiative, referendum and recall petitions are subject to the multi-lingual provisions of section 203 of the Voting Rights Act. (See *Padilla v. Lever* (9th Cir. 2005) 429 F.3d 910; *In re County of Monterey Initiative Matter* (N.D. Cal. 2006) Case No. 06-01407; *Chinchay v. Verjil* (C.D. Cal. 2006) Case No. 06-01637.) Although the Ninth Circuit's *en banc* decision is still pending, the Monterey County Board of Supervisors very recently refused to place a referendum on the ballot because it failed to comply with the multi-lingual provisions of the Voting Rights Act. The District Court declined to overturn that determination. (See *Rancho San Juan Opposition Coalition v. Bd. of Supervisors of the County of Monterey* (N.D. Cal. 2006) Case No. 06-02369 [Order issued 8/15/06, denying injunction to place English-only referendum petition on the ballot.]) The City of Oakland, therefore, is well within its rights to reject the Referendum petition in order to protect the voting rights of its citizens.

Oakland Harbor Partners has complied with all legal requirements and understandably believes that opponents of the project should be held to the same standards and that the City should reject the Referendum.

Thank you for your attention to this letter. I can be reached at (415) 389-6800. If I am not available to speak with you, please speak to Sean Welch, who is working with me on this case.

Sincerely yours,

James R. Parrinello

JRP/pas
Attachments

ATTACHMENT 2

EXHIBIT D-1

"PARCEL N" EXHIBIT

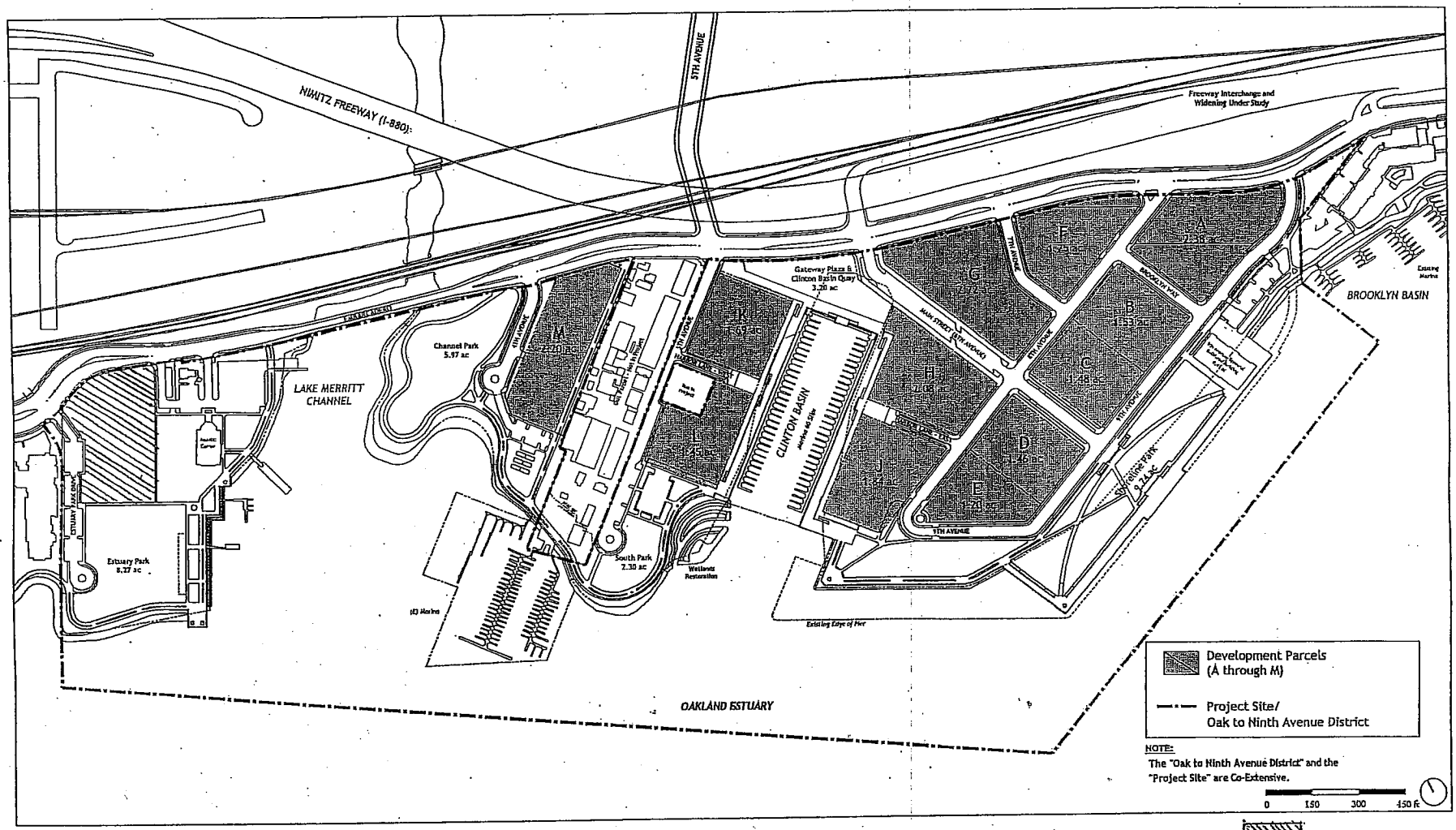


Exhibit D-1

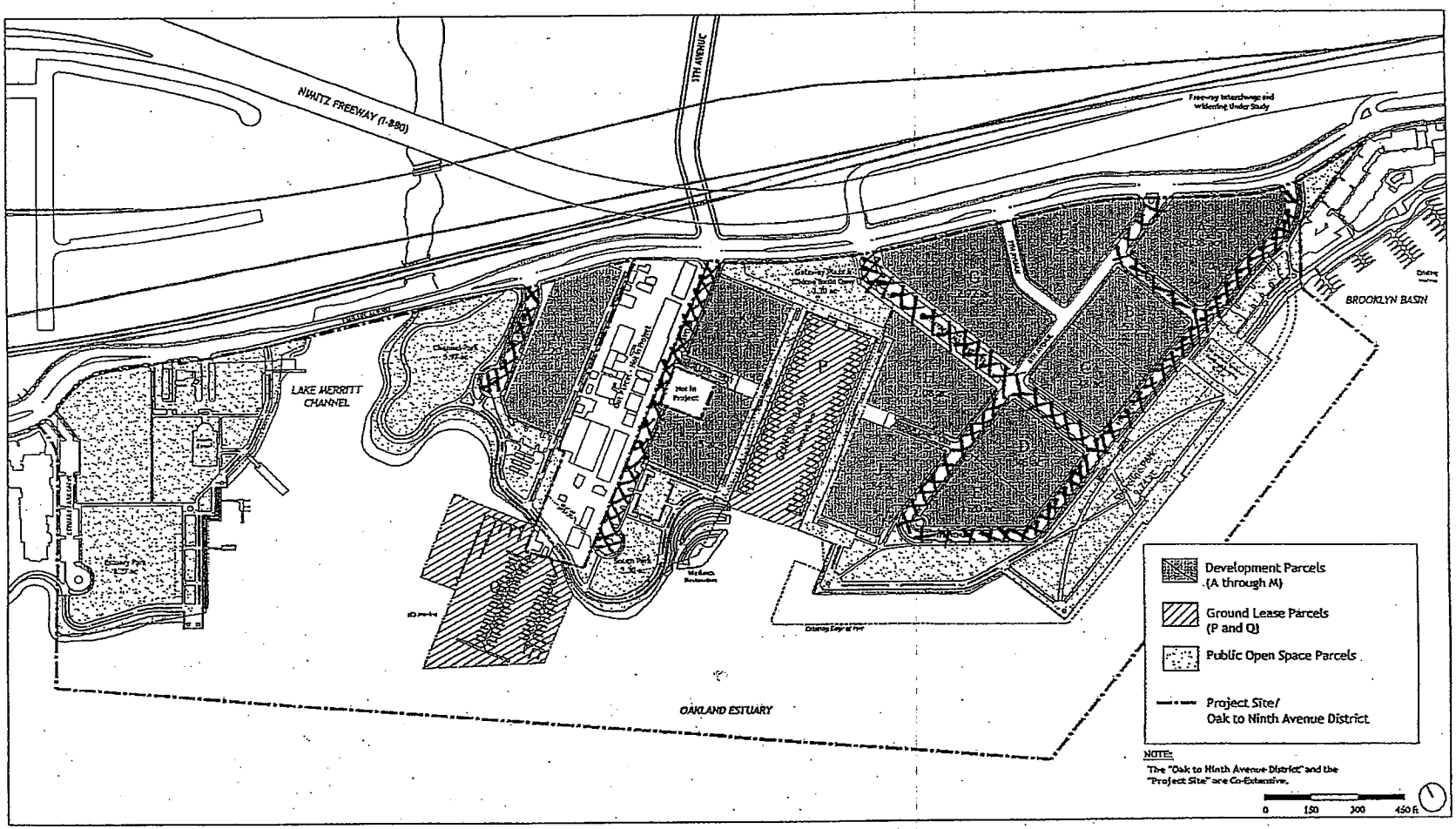
Brooklyn Basin - Oak to 9th Site Plan

Prepared for Oakland Harbor Partners by ROMA Design Group in association with MVE Architects, Moffatt & Nichol and BKF Engineers

JUNE 2006

EXHIBIT D-2

PUBLIC OPEN SPACE ACCESS



Brooklyn Basin - Oak to 9th Site Plan

Prepared for Oakland Harbor Partners by ROMA Design Group in association with MVE Architects, Moffatt & Nichol and BKF Engineers

JUNE 2006