AGENDA DATE:    July 23, 2019

TO:        Mayor and Councilmembers

FROM:      City Administrator/City Clerk
           City Attorney

SUBJECT:   Council Action Options For The Proposed Initiative Measure To
           Eliminate Zoning Information Reports By Repealing Santa Barbara
           Municipal Code Section 28.87.220 And Related Code Sections

RECOMMENDATION:  That Council provide direction and take action on one or
                  more action options for the Proposed Initiative Measure to Eliminate Zoning Information Reports
                  by Repealing Santa Barbara Municipal Code Section 28.87.220 and Related Code
                  Sections, including but not limited to the following:

1. Take action to initiate General Plan and Zoning text amendments by approving the
   accompanying resolution entitled, A RESOLUTION OF THE COUNCIL OF THE
   CITY OF SANTA BARBARA INITIATING GENERAL PLAN AND ZONING TEXT
   AMENDMENTS IN RESPONSE TO AN INITIATIVE PETITION TO REPEAL
   ORDINANCES RELATING TO ZONING INFORMATION REPORTS; and/or

2. Place the ZIR Initiative on the ballot by approving the accompanying resolution
   entitled, A RESOLUTION OF THE COUNCIL OF THE CITY OF SANTA BARBARA
   CALLING AND GIVING NOTICE OF THE HOLDING OF A SPECIAL MUNICIPAL
   ELECTION TO BE HELD IN THE CITY OF SANTA BARBARA ON TUESDAY,
   NOVEMBER 5, 2019 FOR THE SUBMISSION TO THE VOTERS OF AN
   INITIATIVE MEASURE PERTAINING TO THE REPEAL OF THE CITY’S ZONING
   INFORMATION REPORT ORDINANCE; and/or

3. Take concurrent and immediate action to direct an administrative suspension of the
   ZIR program through reallocation of FY 2020 appropriated resources or otherwise.

EXECUTIVE SUMMARY:

On July 16, 2019, the City Council certified the sufficiency of the signatures on the
proposed initiative measure to eliminate Zoning Information Reports (“ZIR Initiative”). This
action triggered a 10-day timeframe within which the Council must adopt the ZIR Initiative or place it on the ballot.

The Council voted 5-2 (Mayor Murillo and Council Member Sneddon\(^1\) opposed) to direct staff to take appropriate actions to bring the ZIR Initiative back for Council adoption on July 23. The City Attorney advised that there were procedural and legal concerns relating to the proposed Council adoption that would require further analysis and reporting back to the Council. This report explains those concerns, as well as the Council’s options for addressing them.

**Summary of Concerns**

1. The City Planner and City Attorney’s Office have independently concluded that the ZIR Initiative would likely be found to be inconsistent with the City’s General Plan (for reasons explained in detail below).

2. As a result of this finding, action by the Council or the City’s voters to adopt the ZIR Initiative would be vulnerable to legal challenge, and could be found void *ab initio*.

3. The inconsistency can be resolved by a General Plan Amendment (GPA), but the GPA must occur before the ZIR Initiative is adopted by the Council or voters.

4. If the Council or voters adopt the ZIR Initiative and it is later found to be inconsistent with the General Plan, the ZIR Initiative would be void *ab initio*, meaning it would be a nullity treated as if it never existed. This is not a risk we can advise the Council to take, given our view of the likelihood of an inconsistency finding.

**Summary of Options**

We have identified two major options, with several sub-options. There may be other options Council wishes to pursue.

1. Take Action to Initiate General Plan and Zoning Text Amendments

   a. A super-majority of the City Council expressed its agreement with the concept of eliminating Zoning Information Reports. The Council can, independently of the ZIR Initiative, take action to initiate the ZIR zoning text repeal along with the necessary GPA. While not guaranteeing a repeal, this

\(^1\) Council Member Sneddon’s stated reason for joining the opposition was her interest in seeing the information that would have been developed in an Elections Code Section 9212 report.
action would commit the City Council to hearing the repeal through to a final
decision.

b. The Council may also take concurrent action to direct an administrative
suspension of the ZIR program through reallocation of FY 2020 appropriated
resources. This action would achieve an immediate suspension of the ZIR
program, months sooner than could be accomplished through an arguably
unnecessary election.

c. The Council may also consider refusing to place the ZIR Initiative on the
ballot.

Accordingly, the Council might begin the process of amending or repealing
the City’s ZIR program, while refusing to place a defective measure before
the voters at significant (and potentially wasted) expense to the taxpayers.
This could result in litigation against the City by the initiative proponents or
others.

2. Place the ZIR Initiative on the ballot

a. The ZIR Initiative can be placed before the voters without regard to the
potential General Plan inconsistency. The Council may express its support
for the measure in the resolution placing the measure on the ballot and in
ballot arguments. The ZIR Initiative would remain vulnerable to pre or post
election legal challenge, however.

b. The Council may also take concurrent action to direct an administrative
suspension of the ZIR program through reallocation of FY 2020 appropriated
resources or otherwise.

c. The Council may also take concurrent action to initiate a General Plan
Amendment and/or Zoning Text Amendment. Should the ZIR Initiative pass
before the GPA is complete, it would remain vulnerable to legal challenge
because, again, it would be void \textit{ab initio} so that later passage of the GPA
would not revive the failed law. In addition, upon passage, the Council may
not amend or repeal the ZIR Initiative without a vote of the people, so it is
unclear whether the Council would have the power to accomplish the Zoning
Text Amendment should the defective ZIR Initiative be approved by the
voters. Thus, should the ZIR Initiative pass, the City Council might be faced
with the untenable situation of having an unenforceable ZIR repeal effort on
the books that cannot be amended or repealed, perhaps forcing the City
itself to seek court resolution.
DISCUSSION:

The Council has been presented with an initiative petition which proposes to amend the City’s Zoning Ordinances by repealing the Zoning Information Report (ZIR) program established in Santa Barbara Municipal Code sections 28.87.220 and Chapter 30.285. The ZIR program was created in 1976, and states its legislative intent as follows:

“These regulations are intended to require a Zoning Information Report for purchasers of residential property, setting forth matters of City record pertaining to the authorized use, occupancy, zoning and the results of a physical inspection of the property. [sic] Primary purpose of the report is to provide information to the potential buyer of residential property concerning the zoning and permitted use of the property.” (SBMC, § 28.87.220 A.)

The ZIR program has generated controversy and litigation for many years. The City undertook years of effort to redefine and amend the program in conjunction with the Santa Barbara Association of Realtors (SBAOR), an effort that resulted in substantial changes to the ZIR Ordinances to minimize the impacts of the discovery by the City or homeowners of previously unreported conditions or alleged code violations. The 2014-15 Santa Barbara County Grand Jury characterized the program as “inconsistent and unreliable.” Most recently in 2017, the SBAOR and Robert D. Hart sued the City challenging the ZIR program on constitutional grounds. Given that the ZIR Ordinance is indeed a zoning ordinance, the case was rejected because, among other reasons, it was untimely. In addition, no evidence was provided to support unsubstantiated allegations that the City had engaged in unlawful searches during consensual ZIR inspections over the last 40 plus years.

Against this background, on July 16, 2019, the Council certified the sufficiency of the signatures gathered to place the ZIR Initiative on the ballot. Council further directed staff to bring the ZIR Initiative back for Council adoption on July 23, along with our analysis of legal and procedural issues related to the ZIR Initiative. That analysis follows, along with a survey of options available to accomplish the Council’s policy objective.

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2 Santa Barbara Municipal Code Title 28 addresses coastal zoning and Title 30 addresses inland zoning.
ISSUE ANALYSIS

Procedural Issues

The Elections Code does not specify the manner in which the Council must “adopt” the ZIR Initiative, stating simply that the Council must “[a]dopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.” (Elec. Code, § 9215(a).) In general, the courts have rejected procedural barriers to initiatives, particularly when compliance is impossible as a result of the short timeframes under the Elections Code. So, for example, the California Environmental Quality Act does not apply to require the City to do an EIR on a citizen-proposed initiative, although it must do so when needed for a Council-drafted measure. (Lee v. City of Lompoc (1993) 14 Cal.App.4th 1515; Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal.4th 165, 191 [initiative measures generated and placed on the ballot by a public agency are not exempt from CEQA], as modified (May 2, 2001).)

Here, City Charter Section 1507 requires a super-majority (5 members) vote of the City Council to adopt any amendment to the City’s Zoning Ordinances. Because this local procedural requirement can be accomplished consistent with the Elections Code 10-day timeframe, we believe it is applicable and binding on the Council.

In addition, it is common for cities to take an additional second reading action on initiatives in order to provide assurance that the procedural requisites for a non-initiative action are also met as a defensive back stop.

Substantive Issues

General Plan Consistency Legal Review: “The tail does not wag the dog”

The City’s General Plan is its “constitution” to guide the physical development of the community. (Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531, 540.) And, the California Supreme Court has emphasized that:

“The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. The tail does not wag the dog. The general plan is the charter to which the ordinance must conform.” (Id., at p. 541.)

Thus, in Lesher, the California Supreme Court invalidated a growth control initiative that was inconsistent with acceptable traffic levels allowed by portions of Walnut Creek’s pro-growth General Plan. The law is inarguably clear that a zoning action that is inconsistent with a city’s General Plan is invalid. The Court held that the State Planning and Zoning Law “does not permit a court to rescue a
zoning ordinance that is invalid *ab initio.*” (*Id.,* at p. 545.) Thus, action by the Council or voters on an inconsistent zoning ordinance is void *ab initio.*

Just last year, the California Supreme Court considered whether a referendum could be enacted to repeal a Zoning Ordinance which was enacted by the Council to create consistency. In *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, the Court concluded that:

“A referendum is not impermissible—and its result is not null—simply because, if approved by the voters, it forces some change to a local government action taken to align zoning with the general plan currently in force.” (*Id.,* at p. 1080.)

A referendum, unlike an initiative, does not propose to enact a new law but rather prevents a proposed Council-developed law from becoming effective. The Supreme Court harmonized election law and planning law by reasoning that the Legislature intended to allow for cities to resolve short-term General Plan inconsistencies by amending the zoning ordinance within a reasonable time, so the return to inconsistency created by a referendum is neither inconsistent with state law or the legislatively-contemplated structure of the State Planning and Zoning Law. (*Ibid.*)

**General Plan Consistency Factual Review**

The foregoing legal analysis begs the question whether the ZIR Initiative is inconsistent with the City’s 2011 General Plan, including the 2015 Housing Element Update. Significantly, the Housing Element has been certified as adequate by the State Department of Housing and Community Development. This means the General Plan Housing Element has been determined to be substantively adequate in meeting the state’s general plan guidelines.4

The Santa Barbara General Plan is structured into 8 “elements,” 7 of which are mandatory under state law. Each element contains a set of “goals,” “policies” and “implementation actions to be considered.” (2011 General Plan, Introduction, p. 14.) The hierarchy and relationship of the General Plan’s goals, policies and implementation actions terms is important to understand.

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3 Traditionally, most chartered cities were exempt from the state law General Plan-Zoning consistency requirement. Santa Barbara has self-imposed a consistency requirement identical to the state law duty. (SBMC, § 30.235.100.)

4 Government Code Section 65040.2 requires the Office of Planning and Research (OPR) to develop general plan guidelines which guide and govern general plan preparation.
Goals

According to the City's General Plan, which in turn relies upon the OPR guidelines, a “goal” is a “direction setter. . . . generally not quantifiable, time-dependant [sic] or suggestive of specific actions for its achievement.” In the present case, the City’s 2015 Housing Element establishes 5 goals, including “Conservation and Improvement of Existing Housing.” (2015 Housing Element, p. 87.) This goal is explained to mean “Conserve the existing housing stock and improve its condition while minimizing displacement, maintaining housing affordability, and preventing future blight or deterioration.” (Ibid.) It is a broad statement establishing the City’s need and rationale for the goal.

Policies

A “policy,” on the other hand, is “the method to achieve the goals . . . ‘a specific statement that guides decision-making. It indicates a clear commitment of the local legislative body.’” (2011 General Plan, Introduction, p. 14.) Here, Policy H20 provides the Council’s “clear commitment” as follows:

“Property Improvements. The City shall encourage residential property owners to improve the conditions of their property(ies) to a level that exceeds the minimum standards of the California Building Code and Uniform Housing Code” (2015 Housing Element, p. 96.)

Implementation Strategies

Finally, the City’s General Plan defines “Implementation strategies” as:

“[S]pecific methods to achieve the vision of a more sustainable community and provide examples of programs and actions that the City may take to achieve the goal and policy. The General Plan Guidelines define an implementation strategy as ‘a rule of measure establishing a level of quantity that must be complied with or satisfied. Implementation strategies further define the abstract terms of goals and policies.’ To underscore that these are examples of what may be undertaken by the City, the subheading ‘Possible Implementation Action to be Considered’ is used throughout the document.” (2011 General Plan, Introduction, p. 14; emphasis added.)

5 OPR no longer looks for goals to be “suggestive of specific actions.” (2017 OPR Guidelines, Appendix E, p. 1.)
By the General Plan’s own definitional terms, which are derived from the state OPR Guidelines, implementation strategies “must be complied with or satisfied.” Here, Housing Element Implementation Strategy H20.4 provides as follows:

“H20.4 Zoning Information Reports. Continue to require Zoning Information Reports when residential units change ownership, excluding condominiums.” (2015 Housing Element, p. 97.)

Accordingly, Implementation Strategy H20.4 states in mandatory terms that “must be complied with or satisfied” that the City shall continue to require ZIRs.

In sum, both the City Planner and multiple staff from the City Attorney’s Office have reviewed the proposed ZIR Initiative and concluded that it would likely be found to be inconsistent with Housing Element Policy H20 and Implementation Strategy H20.4 if challenged in court.6

The City Attorney contacted legal counsel for SBAOR following the Council’s July 16 meeting. They appear to contend that the word “possible” at the head of the phrase “Possible Implementation Actions to be Considered,” and the closing phrase “to be considered” mean that ZIR Initiative is not inconsistent with Policy H20 and Implementation Strategy H20.4 because the quoted terms imply the Council can choose whether or not to follow that implementation strategy. In short, SBAOR would read “possible” to mean “optional.” Based upon the General Plan’s express definitional language stating that implementation strategies “must be complied with or satisfied,” the mandatory phrase “continue to require” in H20.4 itself, and the mandatory “shall” in Policy H20, we do not believe a court would find merit in SBAOR’s apparent position.

Litigation Procedure Issues

Council should be aware that there are significant litigation procedure issues in election law. First and foremost, because of the protected role of the initiative process – which grew out of the “power to the people” populist rebellion of the late 19th and early 20th century – pre-election challenges to defective initiatives have been generally disfavored by the courts. As the City Attorney withheld any early judgment on the legality of the ZIR Initiative before Council deliberation, so too the courts show their deference to the voters by generally letting them speak first. In other words, unless there is a clear and obvious defect in an initiative, there is a significant chance that a court would allow the matter to go to election before ruling on General Plan in consistency. However, in recent years the law is trending differently, with courts showing far more willingness to keep clearly defective initiatives off the ballot in order to save taxpayers substantial sums of money (in this

6 Obviously reasonable minds can differ on this conclusion. A city attorney lacks the authority to prevent the City Council from undertaking an unlawful enactment. On the other hand, an attorney cannot advise undertaking any violation of law.
situation the proposed ZIR Initiative will add approximately $200,000 to the City’s election costs).

Under the Elections Code, the Council has a duty either to adopt the ZIR Initiative or place it on the ballot. In order to test the legal sufficiency of the ZIR Initiative, Council might refuse to place the measure on the ballot and await a legal challenge. Given the tight timing of elections, that would result in the need for SBAOR to seek immediate judicial relief against the City, thus framing the issue for possible court resolution (or court deference to the voters as described above). On the other hand, it may be possible to bring a court challenge in which the City Clerk refuses to take a required action and the City Council then sues the City Clerk to compel placing the matter on the ballot. In any event, the only clear resolution of the potential inconsistency issue would come from a court or a General Plan Amendment.

AVAILABLE OPTIONS

1. Place the ZIR Initiative on the ballot

The ZIR Initiative can be placed before the voters without regard to the potential General Plan inconsistency. The Council may express its support for the measure in the resolution placing the measure on the ballot and in ballot arguments. The ZIR Initiative would remain vulnerable to pre or post election legal challenge, however.

The Council may also take concurrent action to direct an administrative suspension of the ZIR program through reallocation of FY 2020 appropriated resources or otherwise.

The Council may also take concurrent action to initiate a General Plan Amendment and/or Zoning Text Amendment. Should the ZIR Initiative pass before the GPA is complete, it would remain vulnerable to legal challenge because, again, it would be void ab initio so that later passage of the GPA would not revive the failed law. In addition, upon passage, the Council may not amend or repeal the ZIR Initiative without a vote of the people, so it is unclear whether the Council would have the power to accomplish the Zoning Text Amendment should the defective ZIR Initiative be approved by the voters. Thus, should the ZIR Initiative pass, the City Council would be faced with the untenable situation of having an unenforceable ZIR repeal effort on the books that cannot be amended or repealed.

2. Take Action to Initiate General Plan and Zoning Text Amendments

A super-majority of the City Council expressed its agreement with the concept of eliminating Zoning Information Reports. The Council can, independently of the ZIR Initiative, take action to initiate the ZIR zoning text repeal along with the necessary GPA. While not guaranteeing a repeal, this action would commit the City Council to hearing the repeal through to a final decision.
The Council may also take concurrent action to direct an administrative suspension of the ZIR program through reallocation of FY 2020 appropriated resources. This action would achieve an immediate suspension of the ZIR program, months sooner than could be accomplished through an arguably unnecessary election.

The Council may also concurrently refuse to place the ZIR Initiative on the ballot.

Accordingly, the Council might begin the process of amending or repealing the City’s ZIR program, while refusing to place a defective measure before the voters at great (and potentially wasted) expense to the taxpayers. This could result in litigation against the City by the initiative proponents, but given our opinion on General Plan inconsistency, we do not believe they would prevail.

PREPARED BY: Ariel Calonne, City Attorney
               Paul Casey, City Administrator

SUBMITTED BY: Ariel Calonne, City Attorney

APPROVED BY: City Administrator’s Office