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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FIX THE CITY, INC., a California
nonprofit corporation,

Petitioner and Plaintiff,

v.

CITY OF LOS ANGELES, a municipal
corporation; LOS ANGELES CITY
PLANNING COMMISSION;
VINCENT P. BERTONI, in his capacity
as Director of City Planning for the City
of Los Angeles; and DOES 1 through
100, inclusive,

Respondents and Defendants.

ELLIOT NAYSSAN; ROBhana, INC.;
NHD TERRACE, LLC; and ROES 1
through 100, inclusive,

Real Parties in Interest.

Case No. 19STCP03740
Related to Case No. 20STCP01569

Assigned for All Purposes to the
Hon. Mitchell L. Beckloff, Dept. 86

**PETITIONER'S OPENING BRIEF ON
ISSUES RELATED TO TRANSIT
ORIENTED COMMUNITIES PROGRAM**

Dept.: 86
Trial Date: July 14, 2021
Time: 9:30 a.m.

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INTRODUCTION

Voters in Los Angeles were told when they approved Measure JJJ in November 2016 that the measure would achieve twin aims: It would increase the supply of affordable housing in Los Angeles, and it would supply good, well-paying jobs to construction workers. Nearly every piece of information provided to voters about the measure promotes these two aspects, together. The majority of the initiative’s text is focused on the labor standards. The title of the initiative, Affordable Housing and Labor Standards Related to City Planning, speaks to these goals.

Yet, pursuant to a program that was scarcely drawn to the voters’ attention, the Department of City Planning (Planning) and the City Planning Commission (CPC) have sabotaged the “good jobs” requirements of Measure JJJ. In drafting the Transit Oriented Communities (TOC) Guidelines, Planning went far beyond the scope of the incentives set forth in Measure JJJ by adding incentives not included in the initiative and awarding them to projects that do not meet the measure’s labor standards. In granting the project incentives not approved by the voters, Planning and the CPC exceeded the scope of their authority, superseded the scope of Measure JJJ and overturned validly-enacted ordinances.

Real Party In Interest (RPI) is the proponent of one project that benefited from these guidelines, receiving entitlements that rest upon incentives that invalidly expand the scope of a voter initiative. The project received more incentives than authorized by Measure JJJ, as well as incentives that were not included in the initiative. What’s more, the project does not satisfy Measure JJJ’s requirement to provide “good jobs.”

The Planning Director and the CPC abused their authority by approving the Project in reliance on the TOC incentives that were not authorized by the voters. In doing so, they have undercut the promise to the voters who enacted Measure JJJ that it would provide both more affordable housing and good paying jobs.

STATEMENT OF FACTS

Measure JJJ: Affordable Housing and Labor Standards

On November 8, 2016, voters in the City of Los Angeles approved a ballot measure known as Measure JJJ, titled “Affordable Housing and Labor Standards Related to City Planning.” (Petitioner’s Request for Judicial Notice (RJN), Exh. 1, p. 6; AR0023.) As the ballot title reveals, Measure JJJ

1 promoted two purposes: an increase in the amount of affordable housing and the creation of local jobs
2 paying adequate wages.

3 The ballot question for Measure JJJ read:

4 “Shall an ordinance: 1) requiring that certain residential development projects provide for
5 affordable housing and comply with prevailing wage, local hiring and other labor
6 standards; 2) requiring the City to assess the impacts of community plan changes on
7 affordable housing and local jobs; 3) creating an affordable housing incentive program
8 for developments near major transit stops; and 4) making other changes; be adopted?”
(RJN, Exh. 2, p. 43.)

9 As the introductory clauses of the initiative provide, the measure is intended to both increase the
10 production of affordable housing, and create local jobs “to raise families out of poverty.” (AR0003.)
11 The people adopted the initiative “in order to address our homeless and affordable housing crisis, while
12 also creating good jobs with family-supporting wages.” (*Ibid.*)

13 Measure JJJ established two primary programs.¹ Section 5, entitled “Affordable Housing and
14 Good Jobs,” established requirements for projects with 10 or more residential units that require “a
15 discretionary General Plan amendment . . . or any zone change or height-district change that results in
16 increased allowable residential floor area, density or height.” (AR0008.) This section modified
17 provisions of the municipal code pertaining to General Plan amendments to require compliance with
18 affordable housing requirements for rental or for-sale housing, alternative compliance options and in-
19 lieu fees for affordable housing, and allowed for development incentives or concessions for projects that
20 provide affordable housing. (AR0008-13.) Section 5 also requires employment of construction workers
21 that are either Los Angeles residents, “transitional workers,” or graduates from apprenticeship programs,
22 and to pay all such workers a locally-prevailing wage. (AR0008; AR0014-16; AR0018-19.)

23 In Section 6, Measure JJJ establishes a “Transit Oriented Communities Affordable Housing
24 Overlay,” a ministerial program of incentives. (AR0018.) This portion of the initiative amends section
25 12.22 of the Los Angeles Municipal Code, adding a new subdivision that creates the “Transit Oriented
26 Communities Affordable Housing Incentive Program.” (*Ibid.*) The program “applies to all Housing
27 Developments that are located within a one-half mile radius of a Major Transit Stop. . . . Each one-half
28 mile radius around a Major Transit Stop shall constitute a unique Transit Oriented Communities
Affordable Housing Incentive Area.” (AR0019.)

¹ Measure JJJ also includes requirements for making amendments to General Plan and Community Plans. (AR0007-8.)

1 The initiative required that, within 90 days of enactment, the “Director of Planning shall prepare
2 TOC Affordable Housing Incentive Program Guidelines (“TOC Guidelines”) that provide the eligibility
3 standards, incentives, and other necessary components of this TOC incentive program *described*
4 *herein.*” (AR0019 [emphasis added].) Measure JJJ provides that “[t]he TOC Guidelines shall be drafted
5 consistent with the purposes of this Subdivision and shall include the following” (*Ibid.*) The
6 measure then set forth requirements for “Eligibility for TOC Incentives” and “TOC Incentives.”
7 (AR0019-20.)

8 The Eligibility requirements are based upon the provision of “minimum required percentages of
9 On-Site Restricted Affordable Units,” which thresholds “shall be determined by the Department of City
10 Planning,” subject to minimums included in the measure. (AR0019.) In addition, “[i]n creating the TOC
11 Guidelines, [Planning] shall identify incentives for projects that adhere to the labor standards required in
12 Section 5” so long as the incentives would not undermine affordable housing incentives. (*Ibid.*)

13 As for the TOC Incentives, the measure provides:

14 “[a]n Eligible Housing Development shall be granted TOC Incentives, as determined by
15 the Department of City Planning consistent with the following: (i) Residential Density
16 Increase. An Eligible Housing Development shall be granted increased residential
17 density at rates that shall meet or exceed a 35% increase. In establishing the density
18 allowances, [Planning] may allow adjustments to minimum square feet per dwelling unit,
19 floor area ratio, or both, and may allow different levels of density increase depending on
20 the Project’s base zone and density. (ii) Parking. An Eligible Housing Development
21 shall be granted parking reductions consistent with California Government Code section
22 65915(p). (iii) An Eligible Housing Development may be granted up to either two or
23 three incentives or concessions based upon the requirements set forth in California
24 Government Code Section 65915(d)(2).” (AR0019-20.)

25 The measure instructs that that the TOC Guidelines are to be reviewed by City Planning
26 Commission which “shall be vote make a recommendation to adopt or reject the TOC Guidelines.”
27 (AR0020.) The TOC Incentives “may be adjusted for an individual TOC Affordable Housing Incentive
28 Area through a Community Plan update, Transit Neighborhood Plan, or Specific Plan, provided that the
required percentages for On-Site Restricted Affordable Units may not be reduced below the percentages
set forth” in the eligibility section. (AR0020.)²

Voters were informed about Measure JJJ by the Voter Information Pamphlet. (RJN, Exh. 1.) In

² Measure JJJ provides that “any aggrieved person or resident of the City of Los Angeles shall have the right to maintain an action for equitable relief to restrain any violation of this Ordinance.” (AR0021.)

1 the plain language summary, voters were told that a “yes” vote means “You want to amend City law to
2 add affordable housing standards and training, local hiring, and prevailing wage requirements for certain
3 residential projects seeking General Plan amendments or zoning changes.” (*Id.*, p. 6.) The Impartial
4 Analysis stated that Measure JJJ “will amend City law to add affordable housing standards and training,
5 local hiring, and specific wage requirements for certain residential projects of 10 or more units seeking
6 General Plan amendments or zoning changes.” (*Id.*, p. 7.) The analysis detailed the planning and labor
7 requirements of Section 5. It also explained in a single sentence that “[t]his measure also creates an
8 affordable housing incentive program with increased density and reduced parking requirements in areas
9 within a one-half mile radius around a major transit stop.” (*Id.* at p. 8.)

10 The ballot arguments on Measure JJJ focused on the need for affordable housing *and* providing
11 jobs to local workers. (RJN, Exh. 1, pp. 9-16.) For instance, the Argument Against Measure JJJ and the
12 Rebuttal to the Argument in Favor of Measure JJJ discussed the increased cost of labor that might result
13 from the measure. (*Id.* at pp. 13, 11.) The Rebuttal to the Argument Against Measure JJJ countered that
14 it “simply requires that 30% of the jobs building affordable housing go to people in Los Angeles who
15 need the jobs most. . . .” (*Id.* at p. 15.)

16 **The TOC Guidelines**

17 As required by Measure JJJ, Planning prepared and adopted the TOC Guidelines, obtaining a
18 recommendation for approval including modifications from CPC, which issued a Determination Letter
19 on September 20, 2017. (AR0286-306.) However, the TOC Guidelines radically depart from the
20 requirements of Measure JJJ.

21 The CPC’s findings articulated its understanding of Measure JJJ’s requirements for the TOC
22 Guidelines: “The TOC Guidelines are a set of policies and procedures enacted to implement Measure
23 JJJ, and provide the necessary administrative framework to carry out its intent.” (AR0291.) According
24 to the findings, “[t]he Department was required to produce a set of development incentives for which
25 TOC projects would be eligible. The ballot measure specified the basic incentive structure, including
26 the number of incentives as well as the minimum allowable density, FAR and parking deviations. It also
27 created a process to determine the exact type of incentives to be offered in the draft TOC Guidelines.
28 For example, the measure requires that the Guidelines provide at least a 35% density and/or floor area

1 ratio increase, as well as an additional 2 or 3 incentives must be provided, depending on the amount of
2 affordable housing units being provided.” (AR0291.) Generally, the findings contend that “[t]he voter
3 initiative included several minimum requirements to be included in the TOC Guidelines. . . It includes a
4 set of definitions, an expanded explanation of the eligibility criteria, the list of incentives and greater
5 clarity on administrative procedures.” (AR0290.) Indeed, there was no review under the California
6 Environmental Quality Act, because “[a]doption of the TOC Guidelines would carry out the results of
7 Measure JJJ, a land use initiative proposed by the voters and approved by the electorate on November 8,
8 2016.” (AR0290.)

9 In spite of acknowledging that the guidelines are supposed to implement Measure JJJ, the TOC
10 Guidelines represent a significant departure from the provisions of Measure JJJ. In some instances,
11 Planning staff admitted that their approach departed from Measure JJJ. For instance, when describing
12 the system of “tiers” upon which the entire TOC Guidelines is premised, staff explained to CPC: “So
13 when we were handed JJJ . . . we were sort of handed this map of ‘Here’s the major transit stops, here’s
14 where this is applied,’ what we immediately sort of struggle with is not wanting to provide the same
15 incentives across the board to all of these areas, within these . . . half mile distances. . . . So, we came up
16 with a slightly complicated structure of tiers, four tiers low to . . . high or what we call regional, and it . .
17 . depends against what kind of stop you’re . . . next to.” (AR1792-1793.) While Measure JJJ authorizes
18 consideration of a property’s base zone, it does not permit differentiation by virtue of proximity to
19 transit. (AR0019.)

20 When presenting the TOC Guidelines to CPC, Planning explained that “the guidelines in front of
21 you provide eligibility standards and most importantly the incentives, the actual incentives were left to
22 the department and [CPC] to deliberate and . . . create in terms of what percent is density increase floor
23 area.” (AR0754.) As Planning staff described it, the TOC Guidelines “sets basically two sets of
24 incentives of base incentives as we call it, which is density, floor area ratio, and parking, and then a
25 second ability to attain two or three additional incentives on top of that.” (AR1790.) While base
26 incentives are ministerial, additional incentives require a director’s report. (*Ibid.*) Planning
27 acknowledged that Measure JJJ does not include “off menu” incentives the way the City’s density bonus
28 program does. “[T]here’s no option in JJJ for off-menu . . . incentives . . . that come here before [CPC],

1 that was not contemplated in JJJ, so there's not the ability to ask for additional incentives and come to
2 the [CPC]." (AR1790-1791.) In adopting "additional incentives," Planning did exactly what it said
3 Measure JJJ did not authorize.

4 The TOC Guidelines that were adopted by Planning after the CPC recommendation establish
5 "Tiers" based on a project's distance to transit and the type of transit. (AR0295.) A project's Tier
6 determines both what percent of units must be set aside for low-income housing (AR0297) as well as the
7 percentage increase in density and floor area ratio, or the decrease in parking requirements. (AR0299-
8 301.) The additional incentives also contain varying levels of incentive by Tier. (AR0302-303.)

9 The additional incentives include additional height, reduced yards and setbacks, reduced open
10 space, increased lot coverage requirements, and averaging of floor area ratio and other requirements
11 across parcels. (*Ibid.*) The base incentives for a project in Tier 3, like 10400 Santa Monica Boulevard,
12 include a 70 percent increase in density, a 50 percent increase in floor area ratio, and reduced parking at
13 0.5 spaces per unit. (AR0299-301.) The additional incentives for a Tier 3 project include two additional
14 stories in height (22 feet), among many other options not mentioned in Measure JJJ. (AR0303.)

15 The TOC Guidelines do not require projects to satisfy the Section 5 labor standards. As
16 Planning told CPC: "JJJ asked us to include an extra incentive for projects that do labor, prevailing wage
17 requirements, and we have given them two extra incentives." (AR1798.) Therefore, projects like the
18 10400 Santa Monica Boulevard Project have not committed to utilizing local labor and paying the fair
19 market base wages that were promoted by Measure JJJ.

20 **The 10400 Santa Monica Boulevard Project**

21 The 10400 Santa Monica Boulevard project is a seven-story, 120-unit residential building with
22 12 units set aside for Extremely Low Income households. (AR0838.) The project is located on five lots
23 measuring 25,869 square feet. (AR0848.) The General Plan designation for these properties is General
24 Commercial, and the zoning is C2-1VL. (AR0848, AR0438.) The project is located within 2,640 feet
25 from the intersection of Metro Bus and Rapid Bus lines, and the future Purple line Century City stop
26 will be within 2,650 feet. (AR0849.) It qualified for Tier 3 incentives under TOC Guidelines.
27 (AR0850.)

28 The Project received "base incentives" of a density increase, increased floor area, and reduced

1 parking, *as well as three additional incentives.* (AR0840-841.) The Project included the following
2 “incentives” from the TOC Guidelines: (1) a 70-percent density increase; (2) a floor area ratio of 3.75:1;
3 (3) a decrease in required parking to 0.5 spaces per unit; (4) reduced side yards from 10 feet to 5 feet
4 (50-percent reduction); (5) height increase of 22 feet plus 12 feet due to the slope of the lot, from 45 feet
5 to 79 feet; (6) reduced open space from 12,725 square feet to 9,948 square feet. (AR0840-841.)

6 ARGUMENT

7 THE PROJECT AND THE INCENTIVES AWARDED UNDER THE TOC GUIDELINES 8 FATALLY CONFLICT WITH ORDINANCE INITIATIVE MEASURE JJJ

9 A. Neither the Planning Commission Nor Planning Department Have the Authority to 10 Enact Ordinances Or Implement “Guidelines” that Directly Contradict Ordinances

11 The adoption of the TOC Guidelines by Planning is not consistent with Planning’s or CPC’s
12 powers under the Los Angeles City Charter (Charter) and Municipal Code (LAMC). The Charter and
13 LAMC delineate the powers of the CPC and Planning Department, as well as the City Council, with
14 respect to regulation of the use of land. Charter section 558 governs the adoption of “zoning or other
15 land use regulations concerning permissible uses, height, density, bulk, location or use of buildings or
16 structures, size of yards, open space, setbacks, building line requirements, and other similar
17 requirements, including specific plan ordinances.” (RJN, Exh. 3, p. 47 [subd. (a)(2)].) Such ordinances
18 may be proposed by the City Council, the CPC, or the Director of Planning, and are to be referred to the
19 CPC for its report and recommendation. (*Ibid.* [subd. (b)(1)-(2)]; see also RJN, Exh. 4, p. 50 [LAMC §
20 11.5.5 [requiring CPC review prior to ordinance consideration by Council].) It is up to the Council to
21 approve the ordinance after review of the CPC recommendation. (RJN, Exh. 3, p. 48 [Charter § 558,
22 subd. (b)(3).] LAMC section 12.32 provides further elaboration of the land use legislative process,
23 consistent with the Charter requirements of review by CPC (for citywide measures) and approval by the
24 City Council. (RJN, Exh. 4, pp. 63-65.)

25 Charter sections 550 and 551 limit the powers of Planning and CPC to those consistent with the
26 Charter or ordinance. (*Id.*, Exh. 3, p. 47.) LAMC section 11.5.3 grants the Director of Planning the
27 authority to “interpret the meaning of the General Plan and specific plans in instances when there is a
28 lack of clarity in the meaning of those regulations, subject to appellate review.” (*Id.*, Exh. 4, p. 50.) The
CPC “shall adopt guidelines for the administration of the provisions of this chapter if it determines that

1 guidelines are necessary and appropriate. Authority to adopt guidelines for the administration of the
2 provisions of this chapter may be delegated to others by adoption of a resolution by Council.” (*Ibid.*
3 [LAMC, § 11.5.4].)

4 Planning recognized that “the TOC Guidelines are not an ordinance . . .” (AR0288.) Yet, as
5 discussed in detail below, the Guidelines supersede and replace the requirements in numerous City
6 ordinances. The Guidelines were adopted by Planning, not CPC. (AR0799) [“[T]he commission is
7 making a recommendation back to the department.”].) The Guidelines do not simply administer an
8 ordinance: they set new requirements that contradict the substantive requirements of numerous
9 ordinances. The TOC Guidelines, as approved, were outside Planning’s power to adopt.

10 **B. Ordinance Initiative JJJ Specifies the Eligibility and Incentives for TOC Projects**

11 The TOC Guidelines alter both the eligibility and incentive requirements set forth in Measure
12 JJJ. Measure JJJ specifies as to “[e]ligibility for TOC [i]ncentives” that minimum percentages of
13 affordable housing must be set aside, and that Planning has the authority to determine the appropriate
14 percentage set asides. (AR0019.) In that same paragraph which describes eligibility for TOC
15 incentives, the measure states that “in creating the TOC Guidelines,” Planning “shall identify incentives
16 for projects that adhere to the labor standards required in Section 5 of this Ordinance.” (*Ibid.*) The
17 measure does not refer to “additional” incentives, as Planning read the measure, but rather includes
18 adherence “to the labor standards” as part of the *eligibility* for the TOC incentives in the measure’s
19 discussion of the eligibility requirements. Indeed, this interpretation is consistent with the purpose of
20 the measure: to both increase affordable housing *and* good jobs by incentivizing construction activity
21 performed under the specified conditions. The measure defines “Eligible Housing Development” is in
22 Section 6 as a “Housing Development that includes On-Site Restricted Affordable Units at a rate that
23 meets or exceeds the minimum requirements to satisfy the TOC Incentives, as determined by [Planning]
24 *and as set forth in paragraph (b)(1) above.*” (AR0019-20.) Paragraph (b)(1) is titled “Eligibility for
25 TOC Incentives.” This definition further clarifies that the requirements of paragraph (b)(1) establish
26 eligibility, and not simply grounds for an additional incentive as in the TOC Guidelines.

27 As for incentives, Measure JJJ is clear that that a qualifying project “shall be granted TOC
28 Incentives, as determined by [Planning] consistent with the following. . . .” (AR0019.) The measure

1 specifies that projects shall be granted increased residential density, which increased levels Planning
2 may specify. (AR0019-20.) The measure specifies that Planning “may allow adjustments to minimum
3 square feet per dwelling unit, floor area ratio, or both.” (AR0020.) The guidelines may also “allow
4 different levels of density increase depending on the Project’s base zone and density.” (*Ibid.*) The
5 measure specifies that parking reductions shall be granted, consistent with state density bonus law.
6 (*Ibid.*) Finally, eligible developments “may be granted up to either two or three incentives or
7 concessions based upon the requirements set forth in California Government Code Section
8 65915(d)(2).” (*Ibid.*) The cited statutory section simply establishes the number of incentives that a
9 housing development may receive at various thresholds of set asides. (RJN, Exh. 5, p. 81.) *There is*
10 *simply no authority granted in Measure JJJ for Planning or CPC to step into the shoes of the legislative*
11 *body and adopt incentives that were not enacted in any ordinance or approved by the voters.*

12 To the contrary. In fact, Measure JJJ specifies that TOC Incentives and Eligibility “may be
13 adjusted for an individual TOC Affordable Housing Incentive Area through a Community Plan update,
14 Transit Neighborhood Plan, or specific plan,” all of which are legislative processes that require approval
15 by the City Council. (RJN, Exh. 4, pp. 50-52 [LAMC 11.5.6 & 11.5.7].) In order to depart from the
16 incentives established in the ordinance, a *legislative* process is required. Nowhere does Measure JJJ
17 state that Planning may write its own additional or different incentives than those listed in initiative
18 ordinance Measure JJJ. It simply allows Planning, with the recommendation of CPC, to flesh out the
19 details of the incentives actually specified in the measure, an approach consistent with CPC’s and
20 Planning’s power under the Charter and LAMC.

21 Any contrary interpretation of Measure JJJ (such as the one adopted by Planning) would render
22 this aspect of the initiative invalid as an improper delegation of the legislative function from the City’s
23 legislative body. (See, e.g., *Kugler v. Yocum* (1968) 69 Cal.2d. 371, 375-376; *Groch v. City of Berkeley*
24 (1981) 118 Cal.App.3d 518, 522-523.) In *Kugler*, the Supreme Court explained that “the doctrine
25 prohibiting delegation of legislative power . . . is well established in California. The power to change a
26 law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and
27 cannot be delegated by it.” (69 Cal.2d at p 375.) The same principle applies to cities and to voters
28 standing in the shoes of the legislative body. (*Id.* at pp. 375-376.) The legislative body may set a policy

1 for an administrative body to execute and “fill up the details,” through rules and regulations. (*Id.* at p.
2 376.) From the language of Measure JJJ, that appears to have been the intent in requiring the
3 preparation of the TOC Guidelines: to provide, within the framework established by the initiative, “the
4 eligibility standards, incentives, and other necessary components.” (AR0019.) The measure provides the
5 policy framework for the incentives, with a minimum rate and specific incentives. The initiative cannot
6 be interpreted to allow Planning to alter any ordinances in whatever manner it desired, without any
7 check by City Council, without rendering this aspect of the initiative constitutionally invalid.

8 **C. The Legislative History of Measure JJJ Affirms the Eligibility and Incentive Rules**

9 While the language of Measure JJJ makes clear that in adopting the TOC Guidelines, Planning
10 and the CPC exceeded their limited authority under Measure JJJ, the Charter, and the LAMC, this
11 interpretation is further confirmed by review of the legislative history of Measure JJJ. When interpretive
12 guidance on an initiative is required, the court may consult the only source of legislative history: the
13 ballot materials, as reflecting “indicia of the voters’ intent” in approving the measure. (*Robert L. v.*
14 *Superior Court* (2003) 30 Cal.4th 894, 901.) A reviewing court may consult the legislative analysis and
15 the ballot arguments to ascertain the intent of the voters, including arguments for and against the
16 proposal. (*Id.* at p. 906.) As described by one court, “the voters should get what they enacted, not more
17 and not less.” (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) The ballot materials are a key
18 source of information about what the voters understood they were enacting.

19 The ballot materials for Measure JJJ did not inform voters that the TOC program would allow for
20 significant increases height or departure from many otherwise applicable land use regulations. Nor did
21 the ballot materials explain that the much-discussed labor standards would be inapplicable unless they
22 were voluntarily agreed to for projects proceeding under the TOC program. The ballot question simply
23 referred to the creation “of an affordable housing incentive program for developments near major transit
24 stops.” (RJN, Exh. 2, p. 43.) The Impartial Analysis largely focused on the details of the program for
25 housing requiring general plan amendments and zone changes, including discussion of labor provisions.
26 (*Id.*, Exh. 1, p. 7.) In nearly the final sentence, the analysis notes that “[t]his measure also creates an
27 affordable housing incentive program with increased density and reduced parking requirements in areas
28 within a one-half mile radius around a major transit stop.” (*Id.* at p. 8.) The legislative analyst did not

1 read the TOC program as permitting increased height or departure from other land use regulations, but
2 rather understood the program as being confined to those incentives mentioned in the text of the measure
3 itself. In addition, the ballot materials did not exempt TOC projects from the labor standard. Indeed, the
4 ballot title of the measure was “Affordable Housing and Labor Standards Related to City Planning.”
5 (*Id.*, Exh. 2, p. 43.)

6 The ballot arguments do not provide any other information to a voter regarding the scope of the
7 TOC program. The Argument in Favor focuses entirely on projects needing General Plan amendments
8 and zone changes, noting the nexus to “construction workers . . . from local communities who need jobs
9 the most.” (RJN, Exh. 1, p. 9 [also linking affordable housing and jobs, claiming that “if Proposition JJ
10 had been enacted three years ago, Los Angeles would have 5,522 additional new homes that people
11 could afford today and 11/656 local resident would have had the jobs to build them.”].) The Argument
12 Against focused entirely on the labor standard issues, as does the Rebuttal to the Argument in Favor.
13 (*Id.*, pp. 13, 11.) The Rebuttal to the Argument Against countered that the measure “simply requires that
14 30% of the jobs building affordable housing go to people in Los Angeles who need the jobs most –
15 including veterans.” (*Id.* at p. 15.) Nowhere do the materials explain that the TOC program will allow
16 for a wide variety of departures from development rules, and that these departures will be permitted for
17 projects that do not comply with the labor standards that were the focus of the ballot materials.

18 California courts have been careful to interpret initiative measures consistently both with the text
19 of the measure and with the information that was provided to voters who enacted the measure. “We
20 cannot presume that ... the voters intended the initiative to effect a change in law that was not expressed
21 or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot
22 pamphlet.” (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th at 842, 857-858.) In
23 *Farmers*, the Second Appellate District refused to read a private right of action into Proposition 103’s
24 rate-determination provisions, because the text of the measure did not support such an interpretation, and
25 the analysis and arguments in the ballot pamphlet did not indicate that one would be created. (*Id.* at pp.
26 854-855.) Similarly, in *People v. Valencia* (2017) 3 Cal.5th 347, the California Supreme Court
27 interpreted Proposition 47’s definition of the phrase “unreasonable risk of danger to public safety” “as
28 used throughout this code,” and whether Proposition 47 amended resentencing criteria for third-strike

1 offenders that were established in an earlier measure, Proposition 36. (*Id.* at p. 356.) The Court noted
2 that “the ballot materials supplied no notice to voters” that the measure would amend the Penal Code so
3 as to affect the provisions enacted in the earlier measure. (*Ibid.*) The Court explained that the ballot
4 materials focused on certain aspects of the law and “did not make any reference to three strike inmates.”
5 (*Id.* at p. 365, see also *id.* at p. 367.) The Court also refused to assume that the voters had “thoroughly
6 stud[ied] and underst[ood] the content of complex initiative measures,” (*id.* at p. 372) or that voters were
7 aware of existing law that might be modified by a measure that were not specifically identified (*id.* at p.
8 373). As Justice Krueger noted in her concurrence, while omission of information from ballot argument
9 is not “dispositive . . . neither is it irrelevant. Our cases recognize that, as a practical matter, voters often
10 rely on the experts employed by the Attorney General and the Legislative Analyst to summarize
11 proposed initiatives and to discuss their significant effects.” (*Id.* at p. 384 (Kreuger, J., concurring).)

12 Moreover, “[i]n considering the purpose of legislation, statements of the intent of the enacting
13 body contained in a preamble, while not conclusive, are entitled to consideration.” (*People v. Canty*
14 (2004) 32 Cal.4th 1266, 1280.) These provisions, too, demonstrate that the TOC Guidelines depart from
15 Measure JJJ’s purpose. The preamble clearly links the initiative’s programs to the creation of both
16 affordable housing *and* good jobs:

17 “[W]e must build more affordable housing and as [a] result, create the local jobs
18 necessary to raise families out of poverty. . . . LA recognizes that increasing housing
19 must also be connected to similar increases in local jobs. To ensure affordability, we
20 must also make sure that the jobs created from the construction boom pay good, family-
21 supporting wages. Each development which contributes to affordable housing and good
22 jobs through the provisions of this Initiative augments the City’s housing mix, helps to
23 increase the supply of housing for all economic segments of the community, and supports
24 a balanced community which is beneficial to the public health, safety, and welfare of the
25 City.” (AR0003.)

26 The text of the measure and its history together demonstrate that the TOC program was part of a
27 package that combined both good jobs and increased affordable housing. The TOC program was itself
28 intended to provide for density increases and parking reductions near transit, as the measure’s language
indicates and as the voters were informed.

**D. The Planning Commission Exceeded the Standards in Numerous Ordinances When
It Adopted the TOC Guidelines**

The creation of “Tiers” and the adoption of each of the “Additional Incentives” included in the
TOC Guidelines alters the land use regulations and standards established in duly-enacted ordinances of

1 the City. Yet neither the Tiers nor any of the “Additional Incentives” was adopted by ordinance: not in
2 Measure JJJ, nor by the Council. The concept of “Tiered” incentives is, by admission of Planning, a re-
3 write of Measure JJJ, which authorizes incentives that vary by zone, not by distance. (See AR1792-
4 1793.) There is no authority in Measure JJJ to create what is essentially a zoning overlay, giving greater
5 rights to building intensity and density to lots with the same underlying zoning on the basis of the
6 distance to transit. (See AR0365 [map of Tiers].) Measure JJJ authorized different intensity *based upon*
7 *legislatively created zoning*. It did not authorize Planning or CPC to create what are essentially new
8 zones for properties with the same underlying zoning, regardless of the intensity of the underlying zone.

9 Likewise, Measure JJJ nowhere authorizes Planning or CPC to rewrite ordinances involving
10 height, yards, or open space. For many of the “additional incentives,” the TOC Guidelines identify the
11 precise ordinance that is being adjusted by these non-legislative guidelines. (See AR0302 [referring to
12 LAMC provisions governing open space, lot coverage, and averaging across parcels].) In other
13 instances, such as height, the incentives modify provisions like LAMC 12.21.1, which includes height
14 limitations by feet in the R3 and R2 zones. (See RJN, Exh. 4, pp. 60-61; see also AR0370.) The TOC
15 Guidelines’ height incentive specifically removes those height limits that are included in specific zones.
16 (AR0319.) The height incentive also allows for departure from the transitional height requirements of
17 LAMC 12.21. 1 A 10, which significantly limit height on properties near low intensity residential zones.

18 In addition, the TOC Guidelines omit the requirement for Section 5-compliant labor to qualify
19 for incentives. This omission has resulted in few projects under the TOC program meeting the labor
20 standards, contrary to how the measure was presented to voters. (RJN, Exh. 6, pp. 93-94 [June 6, 2018,
21 Report Back from the Department of City Planning on Implementation of Measure JJJ, noting
22 “applications are trending toward a strong reduction in legislative . . . cases filed” under Section 5 of
23 Measure JJJ and that “[n]o TOC cases have elected to include labor requirements.”].) The TOC
24 Guidelines expanded eligibility in a way that has sabotaged the labor standards, rather than increasing
25 the “good jobs” the voters were promised.

26 **E. The TOC Guidelines Incentives Exceed the Scope of Measure JJJ, and Invalidly**
27 **Expand the Reach of the Initiative Without a Vote of the Electorate**

28 The TOC Guidelines effectively amend Measure JJJ, without following the procedures for the

1 amendment of an initiative ordinance. The TOC Guidelines amend the measure by removing the labor
2 standard requirement and by creating additional incentives that were not put before the voters and
3 creating TOC Tiers. These amendments are contrary to the City’s initiative provisions. Charter section
4 464(a) provides that “[a]ny ordinance adopted by a vote of the electors of the City pursuant to an
5 initiative petition cannot be amended or repealed, except by an ordinance proposed either by petition or
6 by the Council at its own instance and adopted by a vote of the electors, or by an amendment of the
7 Charter superseding the ordinance.” (RJN, Exh. 3, p. 47.)

8 A subsequent action need not be expressly deemed an amendment of an initiative for this
9 prohibition to apply. “[I]t is the effect of the added section and not its label or the representations in the
10 enactment creating it which controls. Where a new section affects the application of the original statute
11 or impliedly modifies its provisions, the new section is an amendment to the statute.” (*Huening v. Eu*
12 (1991) 231 Cal.App.3d 766, 777; see also *Mobilepark West Homeowners Assn. v. Escondido*
13 *Mobilepark West* (1995) 35 Cal.App.4th 32, 40, 41 [amendment is “any change of the scope or effect of
14 an existing statute” including “by an act independent and original in form.”].) The TOC Guidelines
15 constitute a change to the scope and effect of Measure JJJ, because the Guidelines expand the
16 applicability of the program to projects that do not utilize the labor standard, offer more incentives and
17 different types of incentives than provided in the Measure, and create a Tier system that alters the rights
18 of property owners apart from their base zoning.

19 Moreover, nothing in Measure JJJ alters the Charter’s limitation on amendments to voter
20 initiatives. The City Council may re-enact the same provisions without alteration after they expire;
21 modest changes to affordable housing percentages may be made upon specific findings. (AR0022;
22 AR0013.) The TOC Guidelines alter the scope and substance of Measure JJJ, and thus constitute an
23 impermissible amendment to the initiative measure.

24 **F. The Project’s Approval Relies on the Improper TOC Guidelines Incentives**

25 It is indisputable that the Project could not be constructed absent the TOC Guidelines additional
26 incentives. The Project’s height is 22-feet higher than permitted under the base C2-1VL zoning, which
27 in this case already allows for additional height due to the slope of the property. (AR812.) This
28 increase in height would have required a height district amendment, absent the “Additional Incentive”

1 for height. (AR0369.) A height district amendment is a legislative act subject to LAMC 12.32, and the
2 request would fall under Section 5 of Measure JJJ.

3 The Project also violates other generally applicable zoning requirements. Instead of 10-foot side
4 yards required by the C2 zone, the Project will have five foot side yards as allowed in the RAS3 zone,
5 another incentive that would have required a zone change. (AR0812.) Measure JJJ Section 6 does not
6 include a discretionary incentive permitting reduced side yards.

7 Moreover, the calculation of the FAR and density bonus under Measure JJJ Section 6 is required
8 to be based on the base zone and density, not on TOC tiers which were not authorized by the voters in
9 Measure JJJ. Finally, the project received three ministerial incentives: increased FAR and density
10 (dwelling units) and reduced parking. JJJ Section 6 permits a maximum of three ministerial incentives,
11 and does not include additional incentives. The Project received three additional *discretionary*
12 incentives, exceeding the maximum authorized in Measure JJJ.

13 The Project's approval rests entirely upon the incentives provided by the Planning Department,
14 not the voters in Measure JJJ. Without these improperly applied incentives, in order to construct at the
15 requested density and height, the Project would have required a zone or height district change and
16 variances for side yard and utilized incentives under JJJ Section 5(e), which would also require
17 compliance with the initiative's labor standards. Instead, because the number of TOC Incentives was
18 increased and did not require compliance with the labor standards, the Project avoided Section 5
19 altogether and required no legislative approvals at all.

20 CONCLUSION

21 The Project was approved with its entitlements resting upon a set of deeply flawed guidelines.
22 The TOC Guidelines contain incentives that impermissibly expand the scope of Measure JJJ. The
23 guidelines offer incentives far beyond what the voters approved. At the same time, the guidelines alter
24 the labor standard requirements of Measure JJJ. The approval of the Project relied on incentives that are
25 unavailable under Measure JJJ, and thus must be vacated.

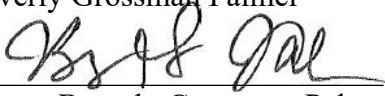
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DATED: March 18, 2021

Respectfully Submitted,
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By 
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF LOS ANGELES

4 Re: *Fix The City v. City of Los Angeles et al.*
5 L.A.S.C. Case No. 19STCP03740
6 Related Case No. 20STCP01569

7 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
8 not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los
9 Angeles, California 90024. My electronic mail address is jthomson@strumwooch.com.

10 On **March 18, 2021**, I served the foregoing document(s) described as **PETITIONER'S
11 OPENING BRIEF ON ISSUES RELATED TO TRANSIT ORIENTED
12 COMMUNITIES PROGRAM** on all appropriate parties in this action, as listed on the attached
13 Service List, by the method stated:

14 If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s)
15 with the Clerk of the Court by causing the documents to be sent to One Legal, the Court's Electronic
16 Filing Services Provider for electronic filing and service. Electronic service will be effected by One
17 Legal's case-filing system at the electronic mail addresses indicated on the attached Service List.


18 If fax service is indicated, by facsimile transmission this date to the fax number stated,
19 to the attention of the person named, pursuant to Code of Civil Procedure section 1013(f).

20 If U.S. Mail service is indicated, by placing this date for collection for mailing true
21 copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant
22 to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection
23 and processing correspondence for mailing. Under that practice, it would be deposited with the U.S.
24 Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the
25 ordinary course of business. I am aware that on motion of the party served, service is presumed invalid
26 if postal cancellation date or postage meter date is more than one day after date of deposit for mailing
27 contained in the affidavit.

28 If overnight service is indicated, by placing this date for collection by sending true
copies in sealed envelopes, addressed to each person as indicated, pursuant to Code of Civil Procedure,
section 1013(d). I am readily familiar with this firm's practice of collecting and processing
correspondence. Under that practice, it would be deposited with an overnight service in Los Angeles
County on that same day with an active account number shown for payment, in the ordinary course of
business.

I declare under penalty of perjury under the laws of the State of California that the above is true
and correct.

Executed on **March 18, 2021**, at Los Angeles, California.



Jeff Thomson

SERVICE LIST

Fix The City v. City of Los Angeles et al.
L.A.S.C. Case No. 19STCP03740
Related Case No. 20STCP01569

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