FREDRIC D. WOOCHER (SBN 96689)
BEVERLY GROSSMAN PALMER (SBN 234004)
STRUMWASSER & WOOCHER LLP
10940 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024
Telephone: (310) 576-1233
Facsimile: (310) 319-0156
E-mail: bpalmer@strumwooch.com

Attorneys for Petitioner and Plaintiff
Fix the City, Inc.

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
Related Case No. 20STCP03529

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 4

ARGUMENT 5

I. THE OPPOSITION DOES NOT ESTABLISH THAT THE TOC GUIDELINES WERE WITHIN THE PLANNING DEPARTMENT'S AUTHORITY TO ADOPT 5

A. The TOC Guidelines Exceed the Authority Delegated to the Planning Department in Measure JJJ as well in the Charter and Municipal Code 5

B. Measure JJJ and the Voters Set Policy, But the TOC Guidelines Departed from those Policies 7

C. The Opposition Does Not Demonstrate that the TOC Guidelines Incentives, Labor Standard Rules or Tiers Comply with Measure JJJ 9

1. The Opposition Fails to Acknowledge Measure JJJ's Ambiguities 9

2. Because Measure JJJ is Ambiguous, the Legislative History Materials Must be Consulted; These Materials Support Petitioner's Interpretation 12

3. The Opposition Does Not Identify a Basis in Measure JJJ for the Reliance on Tiers to Differentiate Incentives, Which Effectively Create New Zones 13

4. The Opposition Does Not Establish That Deference is Due to a Construction of the Term "Incentive" in Section 6 of Measure JJJ that Contradicts the Measure; Nor was Reference to Other Laws Appropriate or Supported by Measure JJJ 14

5. The Opposition Fails to Address the Fact the Guidelines Effectively Amend Measure JJJ Without a Vote of People in Violation of Charter Section 464(a) 17

II. PETITIONER'S CHALLENGE TO THE PROJECT IS NOT TIME BARRED 18

CONCLUSION 20

TABLE OF AUTHORITIES

State Cases

Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139 12
Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321 17
City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153 12
Coastside Fishing Club v. Calif. Resources Agency (2008) 158 Cal.App.4th 1183 8
County of Sonoma v. Superior Court (2010) 190 Cal.App.4th 1312 19
Diageo-Guinness USA, Inc. v. Board of Equalization (2012) 205 Cal.App.4th 907 17
Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247 12
Huening v. Eu (1991) 231 Cal.App.3d 766 18
Interinsurance Exch. of Auto. Club v. Superior Court (2007) 148 Cal.App.4th 1218 17
Kugler v. Yocum (1968) 69 Cal.2d. 371 8
Larkin v. Workers' Comp. Appeal Bd. (2015) 62 Cal.4th 152 14
Morris v. Williams (1967) 67 Cal.2d 733 8
People v. Valencia (2017) 3 Cal.5th 347 16
Protect Our Benefits v. City and County of San Francisco (2015) 235 Cal.App.4th 619 12
Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291 8
State of California ex rel. Nee v. Unumprovident Corp. (2006) 140 Cal.App.4th 442 .... 8, 17
Travis v. County of Santa Cruz (2004) 33 Cal.4th 757 .... 18, 19, 20
Yamaha Corp. of America v. State Bd. Of Equalization (1998) 19 Cal.4th 1 14

Statutes

Gov. Code,
§ 65009 .... 19, 20
§ 65915(a) 16
§ 65915(d) 16
§ 65915(k) 15, 16

Los Angeles City Charter

Charter, § 464 .... 5, 17

Los Angeles Municipal Code

Municipal Code, § 12.22 A 25 (f) 5 6

INTRODUCTION

Respondents City of Los Angeles, the Los Angeles City Planning Commission, and Vincent Bertoni ("Respondents" or "the City") acknowledge in their Opposition Brief on Issue Related to Transit Oriented Communities Program ("Opposition") that the approval of the project at 10400 Santa Monica Boulevard ("Project") relies upon additional incentives included in Transit Oriented Communities Guidelines ("TOC Guidelines"). There is no question but that the Project could not be approved in its present form without reliance on additional discretionary incentives such as height and reduced yards, among other incentives that were not included in Measure JJJ, which is the sole basis for the TOC Guidelines. Nor has the Project agreed to comply with the labor standards that provide the wages and "good jobs" that were a promise of the ballot measure that created the TOC Program, Measure JJJ. Petitioner seeks to enforce, not challenge, Measure JJJ, as the measure was approved by the voters.

The Opposition repeatedly hides behind the shield of deference, urging that the expertise of the Planning Department requires that this Court defer to its reading of Measure JJJ and the permissible scope of the TOC Program that it claims Measure JJJ authorized it to create.

What the Opposition fails to address is the significant manner in which the TOC Guidelines depart from the dictates of Measure JJJ. It is basic administrative law that an erroneous interpretation by an administrative agency is entitled to no deference. Moreover, when an ordinance is enacted by initiative, the voters are entitled to an interpretation of the measure that reflects what the voters were told they were getting. Voters are also entitled to have the substance of the measure unchanged absent a vote of the people, which the voters were promised in Measure JJJ.

In drafting the TOC Guidelines, however, Planning moved well beyond what Measure JJJ instructed and developed a program that far exceeded what was described to voters. It did so by adding numerous incentives to the list of incentives set forth in the statutory program – incentives which permit non-compliance with other provisions of the Los Angeles Municipal Code that were enacted by ordinance. Planning also created a concept entirely absent from Measure JJJ by inventing geographic "Tiers" that award different properties with different levels of development potential, even if those properties have the same zoning. Respondents argue that this is not a zone amendment, but it certainly has the same practical effect as one. And none of this was done by legislative act through an ordinance.

And in doing all of this, Planning drafted TOC Guidelines that did not require compliance with the "good jobs" requirements that voters were repeatedly informed were a significant purpose of the measure. The Opposition carefully avoid discussing the ballot materials that serves as legislative history, and attempts to obfuscate the lack of authority supporting the TOC Guidelines in Measure JJJ itself by conflating provisions in this TOC Guidelines and the municipal code to make it seem as if Measure JJJ itself contained the provisions in the TOC Guidelines. A careful reading of Measure JJJ reveals that Planning significantly added to the measure in a manner that expanded the scope of the initiative.

The Opposition fails to acknowledge that the effect of the additional discretionary TOC incentives is to effectively amend Measure JJJ. Los Angeles City Charter section 464(a) prohibits amendment of an initiative measure without a vote of the people. By using Tiers, adding incentives (specifically height increases and other incentives to evade legislatively created development rules), and eliminating the labor standards as a qualification for the TOC program, the TOC Guidelines amend Measure JJJ. These aspects of the TOC Guidelines are therefore invalid.

For these reasons, the approval of the Project cannot be sustained. The incentives that it relies upon are legally flawed because they do not comport with the voters' intent in adopting Measure JJJ.

ARGUMENT

I. THE OPPOSITION DOES NOT ESTABLISH THAT THE TOC GUIDELINES WERE WITHIN THE PLANNING DEPARTMENT'S AUTHORITY TO ADOPT

A. The TOC Guidelines Exceed the Authority Delegated to the Planning Department in Measure JJJ as well in the Charter and Municipal Code

The Opposition creates a strawman argument: that Petitioner contends that the TOC Guidelines were required to be adopted by ordinance because *guidelines* cannot be adopted by ordinance. (Opp., p. 15: 20, citing Opening Br., p. 10:10-23.) Petitioner's argument is not that guidelines *in general* needed to be adopted by ordinance, nor that the Charter and Municipal Code prohibit the adoption of guidelines. Indeed, the Opposition acknowledges that Petitioner cited the very provisions upon which the Opposition relies to support its point that an ordinance was not required for the adoption of the TOC Guidelines. (See Opp., p. 15:1-7.)

The Opposition does not respond to Petitioner's *actual* point, which is that the *substance* of the TOC Guidelines that were adopted by the Planning Department were in excess of its authority under both Measure JJJ and the existing provisions of the Charter and Municipal Code. The limited grant of authority to prepare guidelines did not authorize wholescale departures from the provisions of Measure JJJ, which is the enabling ordinance and the dictate of the voters.

Measure JJJ authorized the "Director of Planning" to "prepare TOC Affordable Housing Incentive Program Guidelines . . . that provide the eligibility standards, incentives and other necessary components if this TOC Incentive Program ***described herein***." (AR0019 [emphasis added].) This limited authorization is consistent with Municipal Code provisions allowing the CPC (or its designee as identified by resolution) to adopt guidelines for "the administration of the provisions of this chapter." (Petitioner's RJN, Exh. 4, p. 50.) If the TOC Guidelines simply administered the program provided in Measure JJJ, they would arguably fall within the powers of Director of Planning as delegated by Measure JJJ, consistent with the Municipal Code.[1] As set forth at length in Petitioner's Opening Brief, and as further discussed herein, the TOC Guidelines do far more than simply administer the program set forth in Measure JJJ. They expand the eligibility, add additional incentives that alter the provisions of the Municipal Code, waive the Labor Standard, and they depart from Measure JJJ's structure by creating tiers that are essentially new zones.

The City fails to respond to the observation in Petitioner's Opening Brief that where Measure JJJ permits modification of the incentives or eligibility, it *requires a legislative process* to do so. (Opening

[1] It should be noted that Measure JJJ is silent as to who *approves* the TOC Guidelines. The measure provided that the "City Planning Commission shall review the TOC Guidelines and shall by vote make a recommendation to adopt or reject the TOC Guidelines." (AR0020.) The measure does not specify to whom that recommendation is made, but in other contexts the CPC makes recommendations *to the City Council*. Indeed, shortly after Measure JJJ was adopted, the City Council made a motion that "the JJJ ballot initiative requires the adoption of an ordinance to: . . . . 4. Create a new affordable housing incentive program for developments near major transit stops." (Petitioner's Reply Request for Judicial Notice, Exh. 1.) The motion added that "[i]t is imperative that the implementation of this ballot initiative be fully vetted and discussed by policy makers and all interested stakeholders." (*Ibid.*) The city's policy makers are the City Council. Government Code section 65915, subdivision (a)(1) also requires the preparation of an ordinance to implement state density bonus law, which the City did, establishing incentives under that program in Los Angeles Municipal Code 12.22 A 25 (f) 5. (See Respondents' RJN, p. 39.)

Br., p. 12:12-15.) "***The TOC Incentives and the required percentages for [affordable housing] may*** be adjusted for an individual TOC Affordable Housing Incentive Area ***through a Community Plan update, Transit Neighborhood Plan, or Specific Plan***." (AR0020.) Respondents do not argue that these are not legislative acts, nor could they so argue. Measure JJJ provides a method for modifying incentives, should such modification prove necessary, and that measure requires a legislative process (see RJN, Exh. 4, pp. 50-52), just like the voters undertook when they adopted the incentives included in Measure JJJ. Because the TOC Guidelines modify the substance of Measure JJJ, they violate Measure JJJ's express language; the components that violate this language are impermissible expansions of the measure, and as set forth herein, they impermissibly override existing legislative development rules.

B. Measure JJJ and the Voters Set Policy, But the TOC Guidelines Departed from those Policies

The Opposition argues that Measure JJJ did not unlawfully delegate to the CPC or Planning Department. (Opp., p. 16:11.) Again, the Opposition has missed the point in the Opening Brief. Petitioner did not argue that Measure JJJ constituted an unlawful delegation. Petitioner noted that *if* Measure JJJ were *interpreted* to allow the Planning Department to draft whatever incentives it wanted, altering Municipal Code provisions, and set new rules regarding eligibility and applicability of Measure JJJ, such interpretation would result in an unlawful delegation to the Planning Department of policy making authority. But Petitioner's point has always been that Measure JJJ *doesn't* delegate that authority to the Planning Department!

Measure JJJ explains precisely what authority Planning had when preparing the TOC Guidelines. Measure JJJ specifies as to "[e]ligibility for TOC [i]ncentives" that minimum percentages of affordable housing must be set aside, and that Planning has the authority to determine the appropriate percentage set asides. (AR0019.) Petitioner does not contest the determinations of Planning on this issue in its challenge to the approval of the Project, nor does Petitioner allege the TOC Guidelines were improper in this regard in this action.

Measure JJJ also provides what kind of incentives were allowed to be included in the TOC Guidelines: a qualifying project "shall be granted TOC Incentives, as determined by [Planning] ***consistent with the following***. . . ." (AR0019.) The measure specifies that projects shall be granted

increased residential density, which increased levels Planning may specify. (AR0019-20.) The measure specifies that Planning "may allow adjustments to minimum square feet per dwelling unit, floor area ratio, or both." (AR0020.) The guidelines may also "allow different levels of density increase depending on the Project's base zone and density." (*Ibid.*) The measure specifies that parking reductions shall be granted, consistent with state density bonus law. (*Ibid.*) Again, Petitioner does not challenge these aspects of the Project approval or these aspects of the TOC Guidelines in this matter.

Petitioner does not contend that the delegation of this provisions were without "adequate safeguards." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) Nor does Petitioner object to aspects of the existing TOC Guidelines that are consistent with these instructions and incentives. It is the *departures* from those voter-approved and very specific incentives and standards that are the basis for Petitioner's objections to the incentives awarded to the Project.

"As a general rule regulations enacted by an agency exercising delegated powers 'must conform to the legislative will if we are to preserve an orderly system of government' and hence, for example, may not validly conflict with the enabling statute." (*Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 301 [quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 737].) For instance, the legislative body can delegate the power to make legislative acts inoperative but there must be "appropriate standards and safeguards for the exercise of the delegated power." (*Salmon Trollers*, 124 Cal.App.3d at p. 302.) In *Salmon Trollers*, the enabling statute contained requirements limiting the duration of regulations that suspended or altered the fishing season, as well as an immediate report to the Legislature regarding such actions. (*Id.*, 124 Cal.App.3d at pp. 297, 301; see also *Coastside Fishing Club v. Calif. Resources Agency* (2008) 158 Cal.App.4th 1183, 1209-1210 [describing statutory scheme delegating detailed components of required plan and concluding that such details provided adequate safeguards permitting delegation].) Of course, an administrative agency "does not have the authority to 'alter or amend' a statute, or 'enlarge or impair its scope.'" (*State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442, 451.)

Measure JJJ did set out components of existing law that Planning was required to consider and evaluate changing. But the Planning Department took Measure JJJ as a blank check to develop any type of incentive that Planning thought might be helpful to those developers participating in the TOC

program. (See, e.g., AR0060-61, 0038-49.) The Planning Department staff acknowledged that Measure JJJ itself provided "no option for off-menu . . . incentives . . . that was not contemplated in JJJ, so there's not the ability to ask for additional incentives and come to the [CPC]." (AR1790-1791.) Even though Planning acknowledged that the measure specified incentives for density, floor area ratio, and parking, it wrote numerous additional incentives into the TOC Guidelines, despite the absence of any specific authority to alter these existing code provisions or to provide for incentives other than those identified. Indeed, Section 10 of Measure JJJ provides that all of the provisions shall remain in force for 10 years, unless amended or repealed by the voters. (AR0022.) Moreover, there are no safeguards provided in Measure JJJ governing the adoption of incentives not listed in the measure. There is no opportunity for the legislative body to evaluate them. The TOC Guidelines are not consistent with Measure JJJ, because they exceed the authority delegate to Planning by the measure.

C. The Opposition Does Not Demonstrate that the TOC Guidelines Incentives, Labor Standard Rules or Tiers Comply with Measure JJJ

Petitioner identified three key areas where the TOC Guidelines depart from the particulars of Measure JJJ: eliminating compliance with the labor standards as requirement for eligibility, the addition of incentives that alter or eliminate other requirements of the Municipal Code that were not provided for in Measure JJJ, and the use of Tiers based on distance to establish differential increases in density. The Opposition does not succeed in its efforts to demonstrate that any of these aspects of the TOC Guidelines serve as a proper basis for the approval of the Project.

1. The Opposition Fails to Acknowledge Measure JJJ's Ambiguities

According to the Opposition, Measure JJJ's plain language is clear and unambiguous, and thus there need be no consideration of the information provided to voters about the purpose and intent of the measure. Indeed, the Opposition avoids any discussion whatsoever of the ballot materials that serve as Measure JJJ's legislative history. There is good reason for this, because those ballot materials tell a far different story than what has emerged from the TOC Guidelines and their implementation.

First, the Opposition argues that Planning's reading of Measure JJJ's eligibility provisions stating that Planning "shall identify incentives for projects that adhere to the Labor Standards," is without ambiguity, resolvable solely by reference to the text of Measure JJJ. (Opp., pp. 18-19.)

Respondents do not acknowledge that their reading of the phrase "shall identify incentives for project that adhere to the Labor Standards," requires reading the word "additional" into the text of Measure JJJ. (See Opening Br., p. 11:17-18.) The measure does not refer to "additional" incentives, as Planning read the measure, but rather includes adherence "to the labor standards" as part of the *eligibility* for the TOC incentives in the measure's discussion of the eligibility requirements for the TOC program. (See AR0019.)[2] The fact that the word "additional" must be read into the statute in order to support Respondents' reading means that the language is at best ambiguous.

Respondents further argue that the "eligibility" requirements are set forth in full in the first sentence of Section 6 (b)(1), "Eligibility for TOC Incentives," ignoring the remainder of that paragraph. (Opp., p. 18:14-20.) Respondents further contend that "[n]one of the other basic eligibility provisions in Section 6 reference or implicate the Labor Standards of Section 5A." (*Id.* at p. 18:21-22.) Respondents also note that Section 6 mentions labor standards only once while Section 5 refers to those standards more regularly. Of course, Section 6 refers directly to Section 5's standards, so there would be no need for those standards to be set forth again in Section 6 with the same level of detail, so this observation does not prove that Measure JJJ excluded labor standards from the eligibility requirements in Section 6. Moreover, an "Eligible Housing Development" in Section 6 is a "Housing Development that includes On-Site Restricted Affordable Units at a rate that meets or exceeds the minimum requirements to satisfy the TOC Incentives, as determined by [Planning] *and as set forth in paragraph (b)(1)* above." (AR0019-20.) Paragraph (b)(1) is titled "Eligibility for TOC Incentives." The requirement that a project both meet the minimum requirements for TOC Incentives and the requirements of paragraph (b)(1) also suggests that paragraph (b)(1) contains additional eligibility requirements. The fact that labor standards are specifically mentioned in the *eligibility* paragraph (and *not* in the discussion of incentives in the next

[2] Respondents' Request for Judicial Notice demonstrates how the TOC Guidelines have resulted in far *fewer* projects proceeding under section 5 of Measure JJJ, the only section of Measure JJJ for which Planning requires compliance with the labor standards. At Exhibit E, the City's Housing Progress Report show that in years prior to the TOC Guidelines (2015-2016) far more residential units were proposed through zone change or General Plan Amendment than they were in years after the TOC Guidelines were in effect (2017-2020). (Respondents' RJN, Exh. E, p. 72.) Petitioner made this observation in the Opening Brief based on 2018 reporting and Respondents do not have any argument to the contrary, other than an observation of the units of housing approved through the program. (Opp., p. 13:3-9.) Respondents do not address the reduction in legislative approvals.

paragraph) at least creates the type of ambiguity that requires consideration of the legislative history materials. As discussed in Petitioner's Opening Brief and herein, those materials support Petitioner's interpretation of Measure JJJ.

Respondents also fail to identify where Measure JJJ's text supports the Planning Department's addition of its own incentives in the TOC Guidelines. While the Opposition contends that "[t]he TOC Program text authorizes the award of three Base Incentives, up to three Additional Incentives, and optional Labor Standards incentives," (Opp., p. 23:23-24), the Opposition cannot point to language in Measure JJJ itself matching this description. Instead, the Opposition is forced to resort to the TOC Guidelines themselves to support this contention (see Opp., pp. 23:28-24:8.) This circular analysis simply demonstrates the lack of support in the text of Measure JJJ for the additional incentives in the TOC Guidelines, upon which the Project's approval indisputably relies. The City cannot rely on the TOC Guidelines of its own creation to show that the substance of those guidelines was authorized, or the City could have put literally anything in the TOC Guidelines simply because Measure JJJ authorized the drafting of guidelines. Measure JJJ did not grant such unfettered authority.

The actual language of Measure JJJ does not refer to base or additional incentives. The measure says "an Eligible Housing Development shall be granted TOC Incentives, as determined by the Department of City Planning ***consistent with the following***." (AR0019 [emphasis added].) The measure provides for residential density increases, specifically stating that Planning "may allow adjustments to minimum square feet per dwelling unit, floor area ratio, or both, and may allow different levels of density increase depending on the Project's base zone and density." (AR0020.) The measure then says that qualifying developments "shall be granted parking reductions consistent with California Government Code Section 65915(p)." (*Ibid.*) Last, the measure provides that eligible project "may be granted up to either two or three incentives or concessions based upon the requirements set forth in California Government Code Section 65915(d)(2)." (*Ibid.*) The cited provision lists the number of incentives that can be provided based on the percentage and level of affordability of set-aside housing units. (See RJN, Exh. 5, p. 81.) There is nothing in the measure that authorizes Planning to draft other incentives involving part of the code that do not involve residential density (including minimum unit size or floor area ratio), and parking. Moreover, to the extent the measure is unclear, the legislative

history materials show that the incentives were not intended to expand beyond those encompassed in the text of the measure itself.

2. Because Measure JJJ is Ambiguous, the Legislative History Materials Must be Consulted; These Materials Support Petitioner's Interpretation

As the cases cited by Respondents recognize, "[e]xtrinsic materials, such as analyses and arguments contain in the official ballot pamphlet, may be used to interpret ambiguous language or to confirm the plain meaning of the provision." (*Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 633.) While such materials may not be used re-write a measure, "[t]he mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) "If that statutory language is susceptible to more than one reasonable interpretation, 'we look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1172 [quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139,1153].)

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

stop." (*Id.* at p. 8.) The legislative analyst did not read the TOC program as permitting increased height or departure from other land use regulations, but rather understood the program as being confined to those incentives mentioned in the text of the measure itself. In addition, the ballot materials did not exempt TOC projects from the labor standard. Indeed, the ballot title of the measure was "Affordable Housing and Labor Standards Related to City Planning." (*Id.*, Exh. 2, p. 43.)

Moreover, the measure's preamble clearly links the initiative's programs to the creation of both affordable housing *and* good jobs: "As LA continues to suffer through a homeless and affordable housing crisis, we need a General Plan and zoning codes that create incentives for projects that create affordable housing and provide local jobs at the income levels needed to pay the rents found throughout the City." (AR0003.) Moreover, "[e]ach development which contributes to affordable housing and good jobs through the provisions of this Initiative augments the City's housing mix, helps to increase the supply of housing for all economic segments of the community, and supports a balanced community which is beneficial to the public health, safety, and welfare of the City." (AR0003.) The measure's findings conclude: "based upon these findings the people declare that the City adopt the legislation contained herein in order to address our homeless and affordable housing crisis, while also creating good jobs with family-supporting wages." (AR0003.)

The text of the measure and its history together demonstrate that the TOC program was part of a package that combined both good jobs and increased affordable housing. Although Respondents note that the ballot materials suggest that the TOC program was a "standalone TOC program," that fact does not remove the significant nexus between the "good jobs" and "affordable housing" that was promised throughout the ballot materials. Nor does that fact address the significant expansion of incentives in contradiction to both the express language of the measure and the ballot materials. The ballot materials support Petitioner's reading of Measure JJJ and the determination that the additional incentives awarded to the Project were in violation of the measure.

3. The Opposition Does Not Identify a Basis in Measure JJJ for the Reliance on Tiers to Differentiate Incentives, Which Effectively Create New Zones

The Opposition acknowledges that the concept of Tiers was created entirely by Planning in its drafting of the TOC Guidelines. (Opp., p. 23:12-17.) In its express instructions to Planning regarding

the TOC Guidelines, Measure JJJ authorized "different levels of density increase depending on the Project's base zone and density." (AR0019.) The Opposition does not, and cannot, contend that the Tiers adhere to this instruction. The Tiers are *not* based on a property's base zone, but are based on the a property's distance to different types of transit. This was not what the voters specifically instructed in Measure JJJ. Although Planning may have thought it preferable not to provide uniform density increases unrelated to base zoning, Planning is not authorized to rewrite the measure.[3]

The Opposition relies on the fact that Section 6 of Measure JJJ was codified under the "Exceptions" section of the zoning code, as if this fact means that any change could be made regardless of whether it was consistent with the statutory language of Measure JJJ. The Opposition relies on the idea that Planning's determinations are entitled to deference because of its expertise, but an interpretation that is clearly erroneous or unauthorized is not entitled to deference. (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 12; *Larkin v. Workers' Comp. Appeal Bd.* (2015) 62 Cal.4th 152, 158.) Respondents note that the Tiers "in no way amend[] the zoning of any property," but this is non-responsive to Petitioner's legal objection: the Tiers are not based on a property's base zone, as Measure JJJ required. Respondents want to read Measure JJJ as giving Planning free reign to create whatever density bonus program it thought best, and not subject that program to the legislative process because the voters had enacted it. But the voters enacted a statute that granted some discretion to Planning and contained express instruction; the discretion to disregard the instructions is only afforded if through the Community Plan or Specific Plan legislative processes, as set forth in Measure JJJ.

4. The Opposition Does Not Establish That Deference is Due to a Construction of the Term "Incentive" in Section 6 of Measure JJJ that Contradicts the Measure; Nor was Reference to Other Laws Appropriate or Supported by Measure JJJ

The Opposition contends that because Measure JJJ does not define the term "incentives," or forbid any types of incentives, that Respondents had the discretion to broadly define the term to include

[3] Measure JJJ requires a minimum 35 percent density increase incentive, which the TOC Guidelines far exceeded. The statement at AR0058-59 quoted in the Opposition regarding Tiers being preferable to "uniform 50% bigger, higher, and denser buildings," creates a false dichotomy because Planning could have created a uniform, lower standard or created lower standards for different base zones, as permitted by Measure JJJ.

"exceptions to the wide range of development standards expressed in the TOC Guidelines." (Opp., p. 24:17-21.) The Opposition first supports this contention by reference to the TOC Guidelines themselves, arguing circularly that "departures from height, yard, and open space requirements indisputably fall within the understanding of 'incentives' in the TOC Guidelines. (Opp., p. 24:24-25.) Since Petitioner's argument is that the TOC Guidelines should not have included additional incentives not provided for in Measure JJJ, the City's self-referential argument does nothing to support its claim of a proper interpretation in that document itself.

Respondents rely on two aspects of Measure JJJ to support Planning's approach to incentives in the TOC Guidelines. First, Respondents argue that Measure JJJ simply authorized Planning to prepare guidelines with incentives and did not restrict the type or range of what development standards constituted incentives. (Opp., p. 25:5-7.) This argument distorts the actual language of Measure JJJ. Measure JJJ provides that a project shall be granted "TOC Incentives" "consistent with the following," and then describes a range of incentives that Planning was required to establish in the TOC Guidelines. (AR0019-20.) Measure JJJ nowhere states that the TOC Guidelines may include any type of incentive that Planning could desire to impose. It did restrict the range of incentives, by stating that the TOC Guidelines would include TOC Incentives, "consistent with the following" listed incentives.

Respondents also observe that section 5 of Measure JJJ incorporates by reference the definition of incentives in Government Code section 65915(k), so contends that it was reasonable for Planning to utilize the same definition in the TOC Guidelines implementing Section 6. First, it is not clear that the drafters of Measure JJJ *defined* incentive by reference to Government Code section 65915(k) in Section 5. The measure provides that "[i]n addition to the requested General Plan amendments, zone changes, and/or height district changes, a Project that provides affordable housing consistent with this Section shall also be entitled to three incentives or concessions specified in California Government Code section 65915(k) or the applicable Affordable Housing Incentive Program." (AR0013.) The measure does not expressly state that "incentive" is to be understood as having the same definition as in Government Code section 65915(k), but rather requires use of incentives or concessions of the type listed in that statute, or elsewhere in the City's density bonus program.

If the drafters of Measure JJJ had intended for the same definition of incentive to apply in

Section 5 and Section 6, they could have done so, either by referencing Government Code section 65915(k) in Section 6 as well, or by defining the term incentive throughout the measure. The drafters did neither of those things. This calls into question Respondents' assumption that the same meaning of the term incentive should apply throughout the measure, for if the drafters defined the term in one way elsewhere in the measure, why would one assume that it has the same meaning elsewhere when no such reference is provided? Indeed, the language in Section 6 regarding incentives refers to a *different* part of Government Code 65915, subdivision (d), which does not contain any of the information in subdivision (k). Finally, it is notable that Government Code section 65915, subdivision (a) requires the adoption of an ordinance by all cities in order to implement the program. (RJN, Exh. 5, p.78.) Given the City Council's November 22, 2016 motion prior to the draft TOC Guidelines (Reply RJN, Exh. 1), it was the Council's expectation to receive an implementing ordinance for TOC from DCP.

The Opposition also relies on the definition of "incentive" in the City's Density Bonus Program, which reflects the City's implementation of Government Code section 65915. Of course, unlike the TOC Guidelines, these incentives were enacted by ordinance, and as these incentives alter the applicability of other ordinances, the City Council was within its power to enact such ordinances altering its own laws. And while "incentive" may be broadly defined in that part of the Municipal Code, the City Council legislatively imposed limitations on the incentives while allowing for an "off-menu" incentive program that is by the City's own admission inapplicable to the TOC Program. (AR1790-1791.)

And while cases on statutory interpretation may operate under the assumption that the legislative body uses a term the same way in different sections of the same code, as the Supreme Court explained in *People v. Valencia*, the same is not true for the voters. (*Id.*, (2017) 3 Cal.5th 347, 372-373.) The voters are not assumed to have "thoroughly stud[ied] and underst[ood] the content of complex initiative measures," (*id.* at p. 372) or to have been aware of existing law that might be modified by a measure that were not specifically identified (*id* at p. 373). And nowhere in Measure JJJ or the ballot materials were voters informed that the TOC Program would offer an even more expansive set of incentives than the City Council had developed for the density bonus program.

An administrative agency "does not have the authority to 'alter or amend' a statute, or 'enlarge

or impair its scope.'" (*State of California ex rel. Nee v. Unumprovident Corp.*, supra, 140 Cal.App.4th at p. 451, 44 Cal.Rptr.3d 491.) Ultimately, any question regarding the proper interpretation of a statute is an exercise of judicial power for the courts. (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326; *Interinsurance Exch. of Auto. Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1236.) An administrative regulation that alter or amends a statute must be struck down, and a regulation that exceeds an agency's delegated authority is likewise invalid. (*Diageo-Guinness USA, Inc. v. Board of Equalization* (2012) 205 Cal.App.4th 907, 920 & 922.) While the Opposition may have arrived at some post-hoc justifications for the Planning Department's departures from the text of Measure JJJ, the language of the measure along with its legislative history compel the conclusion that the additional incentives are outside of the authority of the Planning Department to adopt.

5. The Opposition Fails to Address the Fact the Guidelines Effectively Amend Measure JJJ Without a Vote of People in Violation of Charter Section 464(a)

Petitioner's Opening Brief explained that the TOC Guidelines effectively amended Measure JJJ. (Opening Br., pp. 16:27-17:23.) By adding incentives, creating a program of Tiers that awards property owners in the same zones different incentives based on proximity to transit, and by eliminating compliance with the labor standards as an eligibility for incentives, the TOC Guidelines amend aspects of Measure JJJ. Petitioner's Opening Brief pointed out that Charter section 464(a) provides that "[a]ny ordinance adopted by a vote of the electors of the City pursuant to an initiative petition cannot be amended or repealed, except by an ordinance proposed either by petition or by the Council at its own instance and adopted by a vote of the electors, or by an amendment of the Charter superseding the ordinance." (RJN, Exh. 3, p. 47.) Measure JJJ itself provides that "[t]he Los Angeles City Council shall have authority to make ***non-substantive modifications*** to the language contained within this Initiative solely to conform to the Los Angeles Municipal Code, to the extent necessary." (AR0008 [emphasis added].) These provisions make clear that amendments to Measure JJJ are impermissible without voter approval.

The City provided no response to Petitioner's argument, nor Petitioner's citations demonstrating that an initiative measure can be deemed to have been amended without an express statement of amendment. "Where a new section affects the application of the original statute or impliedly modifies

its provisions, the new section is an amendment to the statute." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 777.) The adoption of these impermissible alterations to Measure JJJ's TOC scheme amended the statute without the approval of the voters. Because the Project was approved in reliance upon these improper expansions of Measure JJJ, the approval is invalid.

II. PETITIONER'S CHALLENGE TO THE PROJECT IS NOT TIME BARRED

Reiterating the argument that this Court rejected in its August 31, 2020 ruling denying Respondents' Motion to Strike ("Order"), the Opposition contends that Petitioner may not pursue legal theories arising out of the adoption of the TOC Guidelines. The Opposition asserts that "the gravamen of each of these claims is a pure facial attack on the TOC Program." (Opp., p. 27:28-28:1.) This Court's previous ruling held that *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767 applied to the claims in the Petition because "section 65009, subdivision (c)(1)(E), in setting a time limit for actions challenging permit conditions, does not purport to restrict the legal theories or claims that may be made in such an action." (Order, p. 6.) Respondents now argue that Petitioner's briefing insufficiently connects its challenge to the approval of the Project with the invalidity of the aspects of the TOC Guidelines upon which the Project approval relies.

There is no reason for the Court to revisit the conclusion it reached on the Motion to Strike. First, Respondents mischaracterize the nature of Petitioner's challenge to the approval of the Project. The Project's approval rests on invalid components of the TOC Guidelines, for the reasons set forth in the Court's August 31, 2020 Order.

First, critically, the California Supreme Court has plainly held that a facial challenge to the validity of an ordinance that comes within section 65009's statute of limitations may be brought in the context of a timely-filed challenge to the conditions of approval of a project, even if the sole basis for that challenge is the invalidity of an ordinance that can no longer be timely challenged. In *Travis*, the Supreme Court considered two challenges to conditions on permits to construct second dwelling units, both based on an ordinance that had been enacted by the county in the early 1980s. (*Id.* at p. 763.) In 1999, Travis was granted a permit to construct a second dwelling unit, subject to the requirements of the County's ordinance, which he challenged first administratively and then in court, within 90 days of the date his administrative appeal was denied. (*Id.* at p. 764.) Another party, the Sokolows, had been issued

1 a permit in 1998, subject to the same conditions, but did not challenge those conditions administratively
2 or commence litigation within 90 days of approval. (*Ibid.*) The plaintiffs' writ petition was denied by
3 the trial court because the sole basis for contesting the conditions on their permits was a facial challenge
4 to the validity of the ordinance, and the court of appeal affirmed on the same grounds. (*Id.* at p. 765.)
5 The Supreme Court reversed as to Travis, the plaintiff who had filed suit within 90 days of the
6 denial of his administrative appeal. (33 Cal.4th at p. 767.) The Court examined the language of section
7 65009, subdivision (c)(1)(E), explaining that the action fell within that provision as it was "in part one to
8 'determine the . . . validity' of conditions imposed on the permits and to 'void, or annul' the decisions
9 imposing those conditions." (*Id.* at p. 766.) While the County argued that Travis's challenge was based
10 solely on a general challenge to the permit conditions as unconstitutional, and not challenging its
11 particular application to the permit at issue, the Supreme Court was not persuaded. (*Id.* at p. 767.) The
12 Court found that "[s]ection 65009, subdivision (c)(1)(E), in setting a time limit for actions challenging
13 permit conditions, ***does not purport to restrict the legal theories or claims that may be made in such an***
14 ***action***." (*Ibid* (emphasis added).) As the Court explained, "[t]hat the Ordinance could have been facially
15 attacked in an appropriate action at an earlier time, before it was applied to Travis's property, does not
16 make section 65009, subdivision (c)(1)(E) inapplicable to Travis's claim for removal of invalid
17 conditions. . . . Having brought his action in a timely way after application of the Ordinance to him,
18 Travis may raise in that action a facial attack on the Ordinance's validity." (*Id.* at pp. 768–769.)
19 *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312 does not compel a different
20 conclusion. In that case, a dispensary that had not applied for a use permit, but which had been
21 subjected to an order to stop its operations, challenged on constitutional grounds the requirement to
22 obtain a use permit. (*Id.* at p. 1317.) The Court of Appeal concluded that lawsuit was a facial challenge
23 to the ordinance requiring a use permit, not an as-applied challenge that fell within the *Travis* rule. First,
24 the case was not an as-applied challenge, because the business had never applied for a use permit. (*Id.*,
25 p. 1329.) Moreover, because the plaintiff had never applied for a permit, it could not be challenging
26 improper permit conditions, as was the case in *Travis*. (*Id.* at p. 1330.)
27 The Supreme Court's holding in *Travis* applies precisely to Petitioner's challenge to the Project.
28 Petitioner's challenge alleges that the Project's approval is premised on the granting of invalid
incentives that alter the normally applicable limitations on height, open space, and side and front yards.

1 This challenge was a timely filed challenge to the conditions of approval of a project that falls precisely
2 under section 65009, subdivision (c)(1)(E) as a challenge to "determine the reasonableness, legality, or
3 validity of any condition attached to a variance, conditional use permit, or any other permit." While
4 Petitioner is not the property owner on whom conditions were imposed, as was the case in *Travis*, the
5 principle articulated by the Supreme Court, that section 65009 does not restrict the legal theories that
6 may be raised in a timely-filed challenge, applies all the same. *Travis* provides protection to property
7 owners who could not have foreseen how an ordinance might apply to their property in the future; it
8 should provide the same protection to, for instance, a neighbor who might not be aware of the rights
9 granted to a neighboring property owner under a land use ordinance until long after that ordinance was
10 enacted. A rule that applied only to those seeking to exercise their property rights would be one-sided
11 and unfair.

12 In summary, section 65009 does not restrict the legal theories that Petitioner may rely upon to
13 challenge the validity of the conditions of approval of an individual project, as Petitioner has done in this
14 action. Moreover, Measure JJJ provides that any member of the public has the right to maintain an
15 action to restrain violations of the measure. (AR0021.) All of the issues discussed in this "TOC Issues"
16 brief relate to the ways in which the TOC Guidelines are violating the language of Measure JJJ, and do
17 so each time a project is approved that utilizes the additional incentives and fails to comply with the
18 Labor Standard. Under this provision as well, this suit may be maintained as a timely filed challenge to
19 the approval of the Project pursuant to the TOC Guidelines.

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.

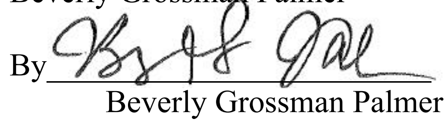
26 //

27 //

28

DATED: June 7, 2021

Respectfully Submitted,
STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Beverly Grossman Palmer

By 
Beverly Grossman Palmer

Attorneys for Petitioner Fix the City, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Fix The City v. City of Los Angeles et al.*
L.A.S.C. Case No. 19STCP03740
Related Case No. 20STCP01569
Related Case No. 20STCP03529

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

On **June 7, 2021**, I served the foregoing document(s) described as **PETITIONER'S REPLY BRIEF ON ISSUES RELATED TO TRANSIT ORIENTED COMMUNITIES PROGRAM** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

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

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

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

I am a resident or employed in the count where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this is executed on **June 7, 2021**, at Los Angeles, California.

LaKeitha Oliver

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

Fix The City v. City of Los Angeles et al.
L.A.S.C. Case No. 19STCP03740
Related Case No. 20STCP01569
Related Case No. 20STCP03529

Via EFS Michael N. Feuer Terry K. Macias Donna Wong Morgan Hector 200 N. Main Street City Hall East Room 701 Los Angeles, California 90012-4131 Tel: 213-978-7121 ● Fax: 213-978-8090 Email: Morgan.Hector@lacity.org kimberly.huangfu@lacity.org *Attorneys for Respondents City of Los Angeles, Vincent P. Bertoni, in his capacity as Director of City Planning for the City of Los Angeles, and Los Angeles City Planning Commission*	*Via EFS* Andrew K. Fogg Alexander M. DeGood Adam Z. Bierman Cox, Castle & Nicholson, LLP 2029 Century Park East, Suite 2100 Los Angeles, California 90067 Tel: 310-284-2205 ● Fax: 310-284-2100 Email: adegood@coxcastle.com *Attorneys for Real Parties in Interest Elliot Nayssan, Robhana, Inc., NHD Terrace, LLC*
Via EFS Elisa L. Paster Glaser Weil Fink Howard Avchen & Shapiro 10250 Constellation Boulevard Los Angeles, California 90067 Tel: 310-556-7855 ● Fax: 310-843-2655 Email: epaster@glaserweil.com *Attorney for Real Parties in Interest 530 North Francisca, LLC, and Banarsi Agarwal*	*Via EFS* Ellia M. Thompson Allan B. Cooper Ervin, Cohen & Jessup, LLP 9401 Wilshire Boulevard, 9th Floor Beverly Hills, California 90212-2974 Tel: 310-273-6333 ● Fax: 310-859-2325 Email: ethompson@ecjlaw.com acooper@ecjlaw.com *Attorney for Real Party in Interest 5891 Boulevard LP*