MEMORANDUM

TO: The Napa County Board of Supervisors

FROM: Sean Marciniak; Tori P. Gyulassy

CC: Minh Tran, Napa County Executive Officer;
Silva Darbinian, Deputy County Counsel

DATE: February 20, 2018

RE: Legal Analysis of Napa County Blakeley Construction Initiative of 2018

At the request of the Napa County Board of Supervisors, we have prepared the following legal analysis of the Napa County Blakeley Construction Initiative of 2018, with the understanding that it will be transmitted to the County's Board of Supervisors as part of the report prepared pursuant to Elections Code § 9111.

I. EXECUTIVE SUMMARY

In 2017, certain citizens of Napa County ("Proponents") proposed the Blakeley Construction Initiative ("Initiative"). This Initiative proposes to amend the Napa County General Plan and the County's Code of Ordinances ("County Code," or "NCC") to permit certain grading and paving businesses to continue operating in certain locations. Specifically, the Initiative states that it would:

- Amend General Plan Policy Ag/LU-20 to permit the operation of a grading and paving business on any parcel that (a) is 5 to 10 acres in size, (b) is located within one mile of the city limits of an incorporated city, and (c) has been the site of a grading and paving business in continuous operation since July 1, 1968 or earlier.

- Amend General Plan Policy AU/LU-5 to state that "rural grading and paving businesses" are part of the County's agricultural support system.

- Amend Section 18.20.020,[1] identifying "uses allowed without a use permit in AW districts," to add a new subparagraph (T), which would allow "grading and paving contractors, including offices, equipment storage and repair, and materials storage, so long as the following conditions are met:

    1. The grading and paving business has been conducted in the same location since July 1, 1968 or earlier;

[1] The Initiative purports to change "Chapter" 18.20.020. There is no "Chapter" 18.20.020, and so we presume the Initiative intends to change "Section" 18.20.020.

2. The number of buildings used for the grading and paving business, and the total square footage of the building used for the grading and paving business, do not exceed that in existence as of January 1, 2015;

3. The days and hours of operation of the grading and paving business do not exceed the average of the years 2013 through 2015;

4. The grading and paving business is located within 1 mile of the city limits of an incorporated city;

5. The grading and paving business is located on a parcel no smaller than 5 acres and no larger than 10 acres;

6. Uncovered storage areas shall be screened from pre-existing residences of adjacent parcels. Screening shall generally consist of evergreen landscape buggers and fences;

7. All exterior lighting, including landscape lighting, shall be shielded and directed downward, located as low to the ground as possible, and the minimum necessary for security, safety, or operations."

The Initiative has a number of potential legal flaws that might prompt litigation challenges if it were enacted. These potential legal issues are summarized as follows:

- While the great majority of the Initiative's terms are clear, the Initiative may be deemed unlawfully vague with respect to the introduction of a few undefined terms, including what commercial activities comprise a "grading and paving business." (*See* Section III.A. of this Memorandum.)

- The Initiative might be deemed to exceed the County's police power or violate the constitution through illegal spot zoning insofar as it appears to increase the rights for one particular site without granting similar rights to additional or neighboring properties. (*See* Section III.B. of this Memorandum.) While uncertain, there appears to be a reasonable possibility that the Initiative will only serve to legalize Blakeley Construction. If this is the case, the Initiative likely would constitute spot zoning. Spot zoning, however, is not in and of itself illegal, and will survive legal scrutiny where concerns about the public welfare demand refined zoning. Generally, this analysis depends on whether facts exist showing public benefits (rather than purely private benefits or detriments) will accrue from the spot zoning. Moreover, it is an unanswered question whether the general legal prohibition on spot zoning would be held to apply in the context of voter-controlled agricultural areas, as Measure J created within the County. It may be that any single site initiative adopted by the voters does not constitute spot zoning in this context because (1) the initiative process is effectively the only avenue for a property owner to pursue a use that is inconsistent with existing, voter-controlled land use regulations, and (2) all citizens are afforded this same opportunity to take their proposal to the voters.

- The Initiative might be deemed to violate the California Constitution in that it appears to name and grant rights to a specific private individual or corporation. (*See* Section III.C of this Memorandum.)

As a general matter, the Board's ability to bring a pre-election challenge to the Initiative is limited. Assuming the Initiative substantially complies with the procedural and substantive requirements of the Elections Code for local initiatives, the Board generally may not withhold an initiative from the ballot, since its legal duty to either enact "as is" or place a qualifying initiative on the ballot is considered ministerial. Thus, even though the Board may conclude that all or a portion of the Initiative would likely or potentially be invalid as a matter of substantive law, and that it will not enact the measure, the Initiative generally must be placed on the ballot.

II. BACKGROUND AND OVERVIEW OF BLAKELEY INITIATIVE OF 2018

The Proponent of the Initiative, Napa County resident Lester Hardy, has authored an initiative that, if enacted, would allow Blakeley Construction to continue operating in the same location on Franz Valley School Road where, it is asserted, the business has operated since 1962. Though no other specific businesses or locations have yet been identified by the County, it is possible that this initiative would also permit the continuation of other grading and paving businesses, provided such businesses met the conditions set forth in the Initiative's proposed legislation.

It appears the impetus for this Initiative is a stipulated judgment in the matter of *Napa County v. Blakeley Land, LLC* (Napa Co. Sup. Ct., Case No. 26-67898), requiring that Blakeley Construction cease construction business operations by June 30, 2018. (*See also* Initiative, Recital H.) This judgment arose out of a code enforcement action brought against Blakeley Construction in 2015.

III. LEGAL ANALYSIS

A. An initiative cannot be vague.

The United States Supreme Court's classic statement of the vagueness doctrine is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Connally* v. *General Const. Co*. (1926) 269 U.S. 385, 391; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1200.) California courts have further stated that "[s]o long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct - like the initiative measure at issue here - a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly vague in all of its applications.'" (*Evangelatos, supra,* 44 Cal.3d at 1201, citing Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 497; *see also Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1333-1335.)

In articulating rules of construction with respect to initiative measures, courts have held the following:

- Courts interpret voter initiatives using the same principles that govern construction of legislative enactments:
    - Courts begin with the text as the first and best indicator of intent.
    - If there is no ambiguity, the plain meaning of the language ordinarily will govern.

- If the text is ambiguous and supports multiple interpretations, courts may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent.
    - Legislative antecedents not directly before voters are not relevant to the inquiry.
    - The report of a legislative analyst may be used to clarify ambiguities in a given legislative proposal.
    - Ballot materials, including voter information pamphlets and arguments in favor of or opposed to a legislative proposal, may be used to clarify ambiguities therein.
    - A court cannot presume that the electorate as a whole is aware of statements made in an article published in magazine articles, legal periodicals, etc.
- The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and a court cannot say with assurance that the voters were aware of the drafters' intent. However, if there is reason to believe voters were aware of the drafters' intention and believed the language of the proposal would accomplish it, a drafter's intent may be relevant to the construction of a proposed law.
- In interpreting a voter initiative, courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote; a court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.
- A court must enforce the plain meaning of an initiative's text even when its consequences were not apparent from the ballot materials.
- A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions.

(*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321; *People v. Mentch* (2008) 45 Cal.4th 274, 282; *Ross v. RagingWire Telecom., Inc.* (2008) 42 Cal.4th 920, 930; *People v. Valencia* (2017) 3 Cal. 5th 347, 388, 397; *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805; *Robert v. Sup. Ct.* (2003) 30 Cal.4th 894, 904; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857; *Robert L. v. Superior Court* (2003) 30 Cal. 4th 894, 904, *as modified* (Aug. 20, 2003).)

- There is an assumption that voters who approve an initiative are presumed to "'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered....' " (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243-244, quoting *Wright v. Jordan* (1923) 192 Cal. 704, 713.)
- There is a presumption that the voters, in adopting an initiative, did so being "aware of existing laws at the time the initiative was enacted." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048; *see also In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)
- Courts cannot infer the realization of a voter intent where there is nothing to enlighten it in the first instance. (*Valencia, supra,* 3 Cal. 5th at 375.)

To some extent, the existing County Code provisions will also carry interpretative weight. Where an ambiguity surfaces in an ordinance, the County Code requires the County to interpret provisions so as "to avoid unconstitutionality wherever possible" (NCC, § 1.04.110), and that no

provision of the code "shall be construed as being broad enough to permit any direct or indirect taking of private property for public use" (NCC, § 1.04.130). Similarly, the County Code provides that it "is not the intent of the board of supervisors, in its administrative capacity, to condone or permit the violation of the constitutional rights of any person, nor to condone or permit the taking of private property for public use without payment of just compensation in violation of either the United States or California Constitutions." (NCC, § 1.04.140.)

1. *Evaluation of whether the Initiative contains terms that are ambiguous and result in confusion.*

(a) *Evaluation of the Initiative's addition of language to General Plan Policy AG/LU-20.*

The Initiative proposes to amend General Plan Policy AG/LU-20, which currently reads as follows:

> Policy AG/LU-20: The following standards shall apply to lands designated as Agriculture, Watershed, and Open Space on the Land Use Map of this General Plan.
>
> **Intent**: To provide areas where the predominant use is agriculturally oriented; where watersheds are protected and enhanced; where reservoirs, floodplain tributaries, geologic hazards, soil conditions, and other constraints make the land relatively unsuitable for urban development; where urban development would adversely impact all such uses; and where the protection of agriculture, watersheds, and floodplain tributaries from fire, pollution, and erosion is essential to the general health, safety, and welfare.
>
> **General Uses**: Agriculture, processing of agricultural products, single-family dwellings.
>
> **Minimum Parcel Size**: 160 acres, except that parcels with a minimum size of 2 acres may be created for the sole purpose of developing farm labor camps by a local government agency authorized to own or operate farm labor camps, so long as the division is accomplished by securing the written consent of a local government agency authorized to own or operate farm labor camps that it will accept a conveyance of the fee interest of the parcel to be created and thereafter conveying the fee interest of such parcel directly to said local government agency, or entering into a long-term lease of such parcels directly with said local government agency. Every lease or deed creating such parcels must contain language ensuring that if the parcel is not used as a farm labor camp within three years of the conveyance or lease being executed or permanently ceases to be used as a farm labor camp by a local government agency authorized to develop farm labor camps, the parcel will automatically revert to, and merge into, the original parent parcel.
>
> **Maximum Building Intensity**: One dwelling per parcel (except as specified in the Housing Element). Nonresidential building intensity is non-applicable. Pursuant to Measure Z (1996), the sale to the public of

> agricultural produce, fruits, vegetables, and Christmas trees, grown on or off premises, and items related thereto, as well as the recreation and educational uses by children of animals, such as children's pony rides and petting zoos, and construction of buildings to accommodate such sales and animals shall be permitted on any parcel designated as agricultural produce stand combination district. (See Policy AG/LU-132.)

The Initiative proposes to amend General Plan Policy AG/LU-20 by adding the following language:

> To serve the needs of agricultural and other rural property owners, the operation of a grading and paving business shall be permitted on any parcel that meets all of the following criteria: (a) is less than ten acres and more than five acres in size, (b) is located within one mile of the city limits of an incorporated city and (c) has been the site of a grading and paving business in continuous operation since July 1, 1968 or earlier. Due to the small number of such parcels, permitting existing grading and paving businesses will not be detrimental to the Agricultural, Watershed and Open Space policies of the General Plan.

(Initiative, §3.) It is unclear from the Initiative's language where this proposed new language would be added to Policy AG/LU-20. It is possible the language would be inserted after the Measure Z language, or, alternatively, the language might be more appropriately placed in the "Intent" or "General Uses" section. Despite the lack of clarity as to where the new proposed language would be added, it is unlikely that a court would find the location of the language would affect its meaning, and therefore this ambiguity is unlikely to result in a determination that the Initiative is unconstitutionally vague.

(b) *Evaluation of the Initiative's use of the term "rural" in the proposed amendment to General Plan Policy AG/LU-5.*

General Plan Policy AG/LU-5 currently reads: "The County will promote an agricultural support system including physical components (such as farm labor housing, equipment supply and repair) and institutional components (such as 4-H, FFA, agricultural and natural resources education and experimentation)."

Section 3 of the Initiative proposes amending General Plan Policy AG/LU-5 to add the following:

> Rural grading and paving businesses are part of the County's agricultural support system.

(Initiative, § 3.) It is unclear how the term "rural" is defined. The common meaning of "rural" means relating to, or characteristic of, the countryside rather than a town or other urban center. The County's Code contains numerous sections which use the term "rural," and the County generally interprets it to have its common meaning. Presumably, the County would apply the same definition as used and applied in the County's existing legislative provisions, should voters adopt the initiative. (*See Kempton, supra,* 40 Cal.4th at 1048 [voters presumed to be aware of existing law].)

All that said, the foregoing ambiguity would not present the possibility of any significant adverse consequences for the citizenry. Policy AG/LU-5 does not impose any actual restrictions or

regulations, but rather articulates a position — i.e., a stance that rural grading and paving businesses are part of an agricultural support system. By contrast, if this policy were amended to impose a restriction that, if violated, would incur criminal penalties such as fines and incarceration, a court would likely take a harder look at the proposed amendment. As it stands, given the term "rural" has an uncontroversial, common meaning, and that the proposed amendment does not impose any restrictions, it appears there is not a significant risk a court would find the introduction of the term "rural" renders the Initiative unconstitutionally vague.

(c) *Evaluation of Initiative's introduction of the term "paving and grading business," and its inconsistent description of the term in its proposed legislative amendments..*

The Initiative aims to permit a "grading and paving business" on a property on Franz Valley Road (Initiative, Statement of Purpose), but it is unclear what this term means, exactly.

As described above, a court's interpretation begins with the text as the first and best indicator of intent and, if there is no ambiguity, the plain meaning of the language ordinarily will govern. While the County Code does not appear to specifically define the phrase "grading and paving business," portions of the Code define "grading" to mean "any stripping, cutting, filling, contouring, recontouring or stockpiling of earth or land, including the land in its cut or fill condition," which definition sometimes includes "earthmoving activity."[2] (*See e.g.,* NCC, §§ 18.106.020 [defining "grading" for purposes of Chapter 18.106], 18.108.030 [defining "grading" for purposes of Chapter 18.108].) Presumably, the term "grading" in the context proposed in the Initiative could be interpreted consistently with the way "grading" is interpreted in other contexts throughout the Code.

The County Code does not appear to define "paving," but its common meaning, as it appears in the Miriam-Webster Dictionary, defines "pave" as "1 : to lay or cover with material (such as asphalt or concrete) that forms a firm level surface for travel; 2 : to cover firmly and solidly as if with paving material; [and/or] 3 : to serve as a covering or pavement of." A court may determine that this "plain meaning" of the term renders the proposed language unambiguous, and thus the Initiative would not be deemed unconstitutionally vague.

Overall, the terms "grading" and "paving" have common, fairly uncontroversial meanings and, if there were no other factors to consider, it would be a straightforward matter to conclude that a "grading and paving business" would likely be construed as a business devoted solely to grading and paving activities. However, there are two complicating factors here.

The first issue is that the Initiative includes multiple variations of the term "building and paving business," making for considerable inconsistency in the language of its proposed legislative enactments. For example, Section 3 of the Initiative proposes amending General Plan Policy AG/LU-5 to add the following: "*Rural grading and paving businesses* are part of the County's agricultural support system," and part of the proposed amendment to General Plan Policy AG/LU-20 uses the term "grading and paving business" without the "rural" qualifier. Meanwhile, Recital J states that the ordinance applies only to "grading businesses," and the Initiative's

[2] "Earthmoving activity" means "any activity that involves vegetation clearing, grading, excavation, compaction of the soil, or the creation of fills and embankments to prepare a site for the construction of roads, structures, landscaping, new planting, and other improvements. It also means excavations; fills or grading which of themselves constitute engineered works or improvements"

proposed addition of County Code Section 18.20.020(T) refers to "grading and paving contractors," followed below by the use of "grading and paving business" in subordinate sections. This inconsistent language and the lack of a singular term for what constitutes the proposed, permitted use may be problematic from an implementation standpoint. While it seems likely a court would ignore the foregoing variations and focus on the term "grading and paving business," some uncertainty remains.

The second issue is perhaps more problematic. While the components of the term "grading and paving business" may have common meanings, a court may decide the term is unconstitutionally vague because the purpose of the Initiative, as presented to County voters, is to permit a specific business (i.e., Blakeley Construction). (*See, e.g.*, The Statement of Purpose, the Title, and The Purpose and Intent Section.) Insofar as Blakeley Construction offers services over and above grading and paving, such as excavating and/or the installation of any improvements, it would raise questions as to what activities the term "grading and paving business" is meant to encompass. To this end, Blakeley Construction's website[3] indicates:

- "Our services are an answer to paving, excavating, grading and utility needs."
- That its services include:
    - Residential and commercial excavating, including for residential-house pads, driveways, septic systems, utilities, subdivisions, city streets and roads, utilities and sewer.
    - Residential and commercial paving, including for residential-asphalt repair and maintenance, paving yards, driveways, tennis courts, city streets, parking lots and roads.
    - Residential and commercial trenching, including for septic fields and lines, utility lines, drainage, building footings, and sewers.
    - Residential and commercial sewer construction, including engineered and Standard leech field systems, city mains, private laterals, and winery wastewater systems.

The foregoing activities include more than "grading" and "paving," including the "construction" of sewer infrastructure and utilities. If the Proponent intended the reference to a "grading and paving business" to include all the aforementioned activities, and if there is reason to believe voters were aware of the drafters' intention and believed the language of the proposal would accomplish it, this intent could be relevant to the construction of a proposed law. It is possible that there is a common history and understanding within the community of the Proponent's intent in drafting this Initiative, in which case such intent would be relevant for a court to consider. What might preclude a court from considering these facts is the canon of construction providing that courts generally may only turn to extrinsic sources if a statute's text is ambiguous and supports multiple interpretations. In other words, a court could decide the plain language of the Initiative is clear — i.e., that a "grading and paving business" contemplates only "grading" and "paving," as those activities are commonly defined — and that resort to the Initiative's

[3] http://www.blakeleyconstruction.com/, http://www.blakeleyconstruction.com/services.html, visited February 15, 2018.

statements of intent, ballot materials, and other extrinsic evidence is not a necessary or proper exercise.

Overall, there is some ambiguity with respect to what a "grading and paving business" means. It is most likely a court would find the term should be defined by the common meanings ascribed to the phrase's component parts,[4] though there is some possibility a court would fix the term's meaning by reference to the business services offered by Blakeley Construction. If the latter meaning governs, the County would then have to obtain a clear understanding of Blakeley Construction's business services so that it could methodically apply and enforce the ordinance. From a practical perspective, it might be difficult to discern the full array of services offered by Blakeley Construction. Another practical difficulty would arise insofar as other construction businesses in the County try to qualify for the permitted use identified in the Initiative. Such businesses, to the extent they exist, would have to determine their eligibility by reference to another private business, as opposed to a clear objective standard laid out in the County Code.

This problem does not appear to be merely an academic one. We understand from discussions with the County that there might be several other unpermitted construction businesses within the County[5] and, upon reviewing the Initiative's proposed regulations, the proprietors of these businesses might have great difficulty deciding whether they qualify as "grading and paving businesses" and/or what steps they need to take to achieve compliance. The consequences of a misstep, meanwhile, are potentially significant. Any violation of an enacted ordinance qualifies as a misdemeanor under County Code section 1.20.150(B). Violations also can result in civil and administrative penalties (NCC §§ 1.20.155, 1.24.020), and the County further has the right to deem a violation to be a public nuisance, which the County can abate at the cost of the violator (NCC, § 1.20.020.)

Ultimately, it is most likely a court would determine the Initiative permits only businesses engaged in grading and paving, as those terms are commonly defined. If a court were to find the Initiative is ambiguous because the voters intended to permit only businesses with the same exact array of services offered by Blakeley Construction, constitutional issues might arise insofar as the County and other construction businesses attempted to determine what specific activities were permitted under the Initiative.

[4] As indicated above, the County Code requires the County to interpret provisions so as "to avoid unconstitutionality wherever possible." (NCC, § 1.04.110.) Determining that only grading and paving, as those terms are commonly defined, are permitted as part of any grading and paving business would minimize the risk of a court finding the Initiative's proposed legislative amendments were unconstitutional.

[5] This comment is based on anecdotal knowledge and somewhat speculative. County staff do not have a list of nonconforming businesses; if such a list did exist, the County would have engaged in targeted enforcement actions. To the extent unpermitted businesses do exist, at least some have continued by virtue of being clandestine or circumspect about their services.

(d) *Evaluation of Initiative's proposed condition that the business "has been conducted in the same location."*

To qualify as a permitted grading and paving business, a "grading and paving contractor"[6] must show that the "[t]he grading and paving business has been conducted in the same location since July 1, 1968 or earlier." (Initiative, § 4 [proposed NCC, § 18.20.020(T)(1)].) The clause "has been conducted in the same location" has room for interpretation. (*See id.*) For instance, does the "same location" mean the subject parcel, the portion of the subject parcel that was used for the grading and paving business, or a particular building footprint and envelope? The text of the Initiative itself does not provide a clear answer for how this would be determined.

In the event a legislative enactment's plain text is ambiguous, the resort by courts to extrinsic evidence to assist in interpretation is permitted as an interpretative device. Here, the Initiative's Statement of Purpose states that "[t]he purpose of this initiative is to permit Blakeley Construction to continue to operate its grading and paving business at its historic location on Franz Valley School Road." While this purpose might appear to suggest that only businesses occupying the same location as Blakeley Construction qualify as a permitted use under the Initiative's proposed terms, such a requirement could raise an issue whether the Initiative constitutes illegal spot zoning.[7]

Assuming the Initiative does apply to sites other than the property occupied by Blakeley Construction, a court might try to ascertain the meaning of "same location" by evaluating how Blakeley Construction occupied land prior to July 1, 1968, and what methodology the County has used or would use to establish this fact. Based on the County's report on Blakeley Construction's June 23, 2015 Certificate of Extent of Legal Nonconformity Request, County staff have attempted to identify the location of Blakeley Construction's activities on the basis of tax assessor records and historical aerial photography, which were reviewed to identify: (1) the square footage of buildings onsite; and (2) the extent and location of paved work areas. Accordingly, it would appear that "location," as currently interpreted, contemplates greater specificity than merely identifying a parcel, but rather entails a focused inquiry into the location of buildings and work areas within a parcel, and an accounting of their area in terms of square footage. Presumably, then, County staff would apply this methodology in determining the location of any other potentially eligible grading and paving businesses.

As of the date of this report, no other businesses have been identified as meeting the conditions specified in the Initiative, so it is unclear whether this Initiative might be applied to other grading and paving operations. County staff do not maintain, and to some extent cannot maintain, a list of unpermitted construction businesses, since many of these survive precisely because their proprietors are either evasive about their activities or unaware of regulatory obligations.

Overall, there is some ambiguity about what the Initiative means when it says that a qualifying grading and paving business must have operated continuously "in the same location." To the extent the Initiative contemplates the specific location of various Blakeley Construction buildings and work areas, the Initiative may raise concerns about improper spot zoning, as discussed below in Section III.B. To the extent the Initiative contemplates a wider population of

[6] *See* Section III.A.1.c for discussion of inconsistent use of terms in the Initiative. As discussed above, it seems most likely a court would determine a "grading and paving contractor" is the equivalent of a "grading and paving business" owner.

[7] See discussion in Section III.B of this Memorandum.

businesses, and that the methodology for locating business operations shall mimic the procedure used to adjudicate Blakeley Construction's historical operations, the inquiry would involve using extrinsic evidence to determine the footprints of various uses and their square footage.

While the County's methodology is not uncommon, a person of average intelligence might have difficulty ascertaining the meaning of the Initiative without the benefit of extrinsic evidence, such as Blakely Construction's request for a Certificate of Extent of Legal Nonconformity. Therefore, while the meaning of the proposed ordinance ultimately might be explainable, the lack of guidance in its plain text raises the danger that a court would find the "location" requirement unconstitutionally vague. This risk, however, does not appear to be high.

(e) *Evaluation of Initiative's use of the terms "number of buildings" and "total square footage."*

To qualify as a permitted grading and paving business, a "grading and paving contractor" must also show that the "[t]he number of buildings used for the grading and paving business, and the total square footage of the building used for the grading and paving business, does not exceed that in existence as of January 1, 2015." (Initiative, § 4 [proposed NCC, § 18.20.020(T)(2)].) Questions arise as to the Initiative's use of the term "building." For instance, what do the terms "number of buildings" and "total square footage of the building used" mean? Does an unenclosed roofed structure (that requires a building permit) count toward the number of buildings and total allowable square footage, or does such requirement only apply to enclosed roofed structures (or some other configuration)?

These questions can seemingly be resolved by consulting existing regulations. The County Code incorporates the California Building Code, which defines "building" as "any structure used or intended for supporting or sheltering any use or occupancy." (County Code § 15.12.010; Cal. Building Code, § 202.) This would appear to include both enclosed and unenclosed buildings in the definition of "number of buildings" and for purposes of calculating the square footage. Presumably the County would apply these same definitions should it or the voters adopt the initiative, and it bears mention that the public is presumed to be aware of existing law. (*See Kempton, supra,* 40 Cal.4th at 1048.) Therefore, it appears there is a low risk of a court finding the Initiative's use of the word "building" renders the Initiative unconstitutionally vague.

(f) *Evaluation of Initiative's reference to the "days and hours of operation of the [business not exceeding] the average of the years 2013 through 2015."*

Another condition with which grading and paving contractors must comply includes the following: "[t]he days and hours of operation of the grading and paving business do not exceed the average of the years 2013 through 2015." (Initiative, § 4 [proposed NCC, § 18.20.020(T)(3)].) The Initiative's terms seem fairly clear, but it does not state who would be responsible for determining the average intensity of operations between 2013 and 2015, or how this fact would be established. Per input from the County, it is assumed that the Planning, Building and Environmental Services Director would make the determination, but it is unclear what evidence the Director should rely upon to determine the number of operational days and the typical hours of operation for each year and how the data is averaged.

Therefore, while the Initiative's use intensity requirement is likely to survive constitutional scrutiny, a practical problem surfaces with respect to how the County is expected to implement this legislative provision.

(g) *Evaluation of Initiative's requirement that the "business is located on a parcel no smaller than 5 acres and no larger than 10 acres."*

The Initiative would permit a grading and paving business so long as "[t]he grading and paving business is located on a parcel no smaller than 5 acres and no larger than 10 acres." (Initiative, § 4 [proposed NCC, § 18.20.020(T)(5)].) This requirement seems fairly clear, as it is a common and simple task to determine the area of any particular parcel. A complication might arise, however, if an otherwise qualifying business underwent a lot line adjustment ("LLA") that increased or decreased the underlying property's area such that it fell outside the acceptable range. In this scenario, it would appear that the subject grading and paving business would not be authorized by the Initiative and would be considered an illegal, non-conforming use.

(h) *Evaluation of Initiative's requirement that "[u]ncovered storage areas shall be screened from pre-existing residences on adjacent parcels. Screening shall generally consist of evergreen landscape buffers and fences."*

The Initiative would permit grading and paving businesses on the condition that "[u]ncovered storage areas shall be screened from pre-existing residences on adjacent parcels. Screening shall generally consist of evergreen landscape buffers and fences." (Initiative, § 4 [proposed NCC, § 18.20.020(T)(6)].) The Initiative does not explain or clarify the following terms:

(1) "pre-existing residences." It is unclear, for instance, whether this clause refers to residences that existed before the overall use was established; before the uncovered storage area was established; before the ordinance was adopted; or before some other point in time. Where the term "pre-existing residences" is currently used in the County Code (*see* NCC, § 18.08.040), County staff indicate the term is interpreted to mean homes existing at the time a storage use is approved. However, where it is not a new storage use that is proposed but a new change in the law, County staff indicate that uncovered storage areas would have to be screened vis-à-vis any homes that existed at the time the change in law occurred.

(2) "adjacent parcels." It is unclear whether screening is only required for residences on parcels that abut the subject property, or whether the screening requirement applies to residences on parcels across a street or private drive from the uncovered storage. The concept of adjacency varies depending on context. For instance, in Chapter 2.94 of the County Code, which addresses agriculture and the right to farm, "adjacent land" is broadly defined as "land located within one mile of the exterior boundaries of a parcel that qualifies as agricultural land" unless the "context otherwise requires." (NCC, § 2.94.010) Other uses or definitions in other chapters, meanwhile, imply that "adjacent" is more synonymous with "abutting." (*See, e.g.*, NCC, § 18.44.110 [stating "where the use is on a parcel adjacent to *or across the street from* one or more parcels within the IP district ..." where the italicized text would be unnecessary if the term "adjacent" also contemplated a property across a street].) Further, for purposes of regulating subdivisions, the concept of adjacency or being contiguous does not require that properties touch. (*Save Mount Diablo v. Contra Costa County* (2015) 240 Cal.App.4th 1368, 1381 [division within meaning of Subdivision Map Act is not established just

because parts of property do not touch; *see* Gov. Code, § 66424; 61 Ops.Cal.Atty.Gen 299 (1978) [contiguous for purposes of Subdivision Map Act means "nearby," and not necessarily in physical contact]; 56 Ops.Cal.Atty.Gen. 105 (1973); 54 Ops.Cal.Atty.Gen. 213 (1971); NCC, § 17.02.160.) Finally, County Code section 18.08.040, in setting forth the parameters of "farm management" activities, already requires that "[u]ncovered storage areas [be] screened from preexisting residences on adjacent parcels and from designated public roads." In interpreting this last ordinance, County staff indicate the provision has been interpreted to apply to both properties physically touching a parcel with storage areas, and properties located across a street, private drive, or access corridor. Ultimately, given the similarities between the Initiative's screening requirements and those set forth in section 18.08.040, it is likely a court would determine the County reasonably could, and would, interpret section 18.20.020(T)(6) to require screening so that storage areas cannot be seen from abutting properties and any properties located across a street.

(3) "uncovered storage areas." The initiative provides that "uncovered storage areas" require screening. Given the similarities between the Initiative's screening requirements and those set forth for "farm management" activities in section 18.08.040, County staff indicate that all outdoor storage visible to existing adjacent residences would be subject to screening whether covered or uncovered. Storage within enclosed buildings, or covered storage containing a wall or walls effectively screening the view of storage areas under the cover, would not trigger additional screening.

(i) *Evaluation of what penalties apply to businesses that do not conform to the Initiative's safe harbor for certain grading and paving businesses.*

The Initiative does not provide, in its proposed ordinance amendments, for any enforcement mechanisms or penalties where a property owner or other individual violates any of the Initiative's proposed terms. However, there are default penalties that the County Code has established for violation of its regulations. Any violation of an enacted ordinance qualifies as a misdemeanor under County Code section 1.20.150(B). Violations also can result in civil and administrative penalties (NCC §§ 1.20.155, 1.24.020), and the County further has the right to deem a violation to be a public nuisance, which the County can abate at the cost of the violator (NCC, § 1.20.020). In general, cities and counties can impose administrative fines or penalties for the violation of an ordinance, and can adopt legislation providing for the abatement of any nuisance at the expense of the person responsible for the nuisance. (Gov. Code, §§ 38773 to 38773.5, 53069.4.) Penalties also can increase depending on the duration of a violation; i.e., each new day a violation continues, the County Code provides that such non-compliance shall constitute a distinct and separately punishable offense. (NCC, § 1.20.160.) Each of the foregoing penalty provisions would appear to apply in the event a party violated the Initiative's proposed ordinance changes.

B. An initiative may not exceed an agency's police power or violate the constitution through illegal spot zoning.

If the content of an initiative violates either the state or federal constitution, the initiative is invalid. For instance, an initiative that violates the due process or equal protection rights of affected property owners will not survive judicial scrutiny. (*Building Indus. Ass'n v. City of Carmillo* (1986) 41 Cal.3d 810, 824.) A city's "authority under the police power is no greater than otherwise it would be simply because the subsequent rezoning was accomplished by

initiative." (*Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337.) Here, an issue arises whether the Initiative may be considered to constitute illegal "spot zoning" and violate equal protection rights guaranteed to local property owners.

An initiative exceeds an agency's police power, and is invalid, where its provisions constitute arbitrary and discriminatory zoning. Spot zoning occurs where a favor or disfavor is conferred upon the owner or occupant of a small parcel that his or her neighbors do not experience, thereby creating an "island" of zoning in the middle of a larger area devoted to other uses, such "as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of larger area devoted to other uses." (*Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536; *Foothill Communities Coalition v. County of Orange* (2014) 222 Cal. App. 4th 1302, 1314 ["T]he creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning."].) However, not all spot zoning is illegal, and spot zoning may be upheld if the public would benefit from it. (*Foothill, supra,* 222 Cal. App. 4th at 1314.) Longstanding law has established that the critical difference between illegal spot zoning and acceptable zoning practice is that the former is intended to confer personal gain or detriment upon a particular owner, whereas the latter recognizes that a substantial public need may exist that requires refined zoning. (See, e.g., *Foothill*, *supra*, 222 Cal. App. 4th 1302; *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526.)

One of the leading opinions addressing the impropriety of spot zoning is *Arnel Development Co. v. City of Costa Mesa*. In that case, the Court of Appeal reviewed the validity of an initiative ordinance that rezoned certain properties to allow for only single family development, effectively precluding the approval of a pending development proposal that sought to introduce multi-family units. The court ruled that the subject initiative failed, among other grounds, because it lacked a substantial and reasonable relationship to the public welfare since no attempt had been made to accommodate the competing public interests that were present. (*Arnel*, *supra*, 126 Cal.App.3d at 335.)

In determining whether an agency exceeds its authority, courts have acknowledged it can be difficult to show discrimination has occurred, holding that a city's exercise of its constitutionally-derived police power is subject to substantial deference from the judicial branch. (*Arcadia*, *supra*, 197 Cal.App.4th at 1536.) Where a zoning ordinance is attacked on this basis, the usual test is whether or not the ordinance bears a substantial and reasonable relationship to the public welfare. (*Arnel*, *supra*, 126 Cal.App.3d at 336.) The ordinance is invalid only if it is arbitrary, discriminatory, and bears no reasonable relationship to a legitimate public interest. (*Arcadia*, *supra*, 197 Cal.App.4th at 1536.)

While courts pay deference to municipal action under the "reasonable relationship" test, courts may also, in establishing discrimination, investigate the motive behind a legislative act. In considering allegations of spot zoning, a concurring opinion in a case before the California Supreme Court specifically stated that "[w]hen the zoning ordinance appears to subject a property owner to a special restriction not applicable to similarly situated adjacent property, courts will conduct a more searching inquiry into the reasons and motives of the legislative body to determine if the zoning was arbitrary and discriminatory." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900, citing *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 962-963; *Arnel*, *supra*, 126 Cal.App.3d 330 at 337.)

With respect to the Initiative, while no exact site is specifically identified in the Initiative's proposed amendments to the County's General Plan and zoning ordinances, the conditions set forth therein are so specific that there is a reasonable possibility that only the Blakeley Construction site will benefit if they are adopted. Specifically, eligibility requirements governing the approval of grading and paving businesses under the Initiative include: "(1) [a] grading and paving business must have been conducted in the same location since July 1, 1968 or earlier; . . . (4) the business is located within 1 mile of the city limits of an incorporated city; [and] (5) the parcel is between 5 and 10 acres in size ...." (Initiative, Summary and § 4 [proposed NCC, § 18.20.020(T)(1),(4),&(5)].) Further evidence that the Initiative is intended to affect only one site in particular is that:

- The Statement of Purpose explicitly states that the purpose of the Initiative is to permit Blakeley Construction to continue to operate its grading and paving business "at its historic location." (Initiative, Statement of Purpose)

- The maximum permitted number and area of buildings are those existing as of January 1, 2015 (Initiative, § 4 [proposed NCC, § 18.20.020(T)(2)].)

- The days and hours of operation cannot exceed the average number of days and hours of operation the business was open from 2013 through 2015. (Initiative, § 4 [proposed NCC, § 18.20.020(T)(3)].)

Collectively, the intention seems clear that the Initiative is primarily designed to allow Blakeley Construction to remain open as a permitted use at a specific location, and with the configuration and intensity of use being fixed on the basis of operations occurring during very specific time windows.

Determining whether such "spot zoning" would be illegal would require consideration of whether the identified spot zoning is for the public benefit. The Statement of Purpose in the Initiative explains that part of the legislative intent is to permit Blakeley to "continue to provide grading and paving services to the rural areas of Napa County, including emergency repairs to public roads during flood and storm events, for the benefit of residents and businesses located in Napa County's agricultural zoning districts." The Initiative text goes on to explain that Blakeley has responded to emergency requests for work after severe storms and floods, that the business has been an important resource for agricultural property owners, that such services are essential to the infrastructure that serves residents and businesses in the agricultural zoning districts, and that continued operation of the business would promote the financial health, well-being and economic viability of the County agriculture. (Initiative, § 2.) Finally, the Initiative seeks to amend General Plan Policy AG/LU-20 to specifically state that permitting such business would be "to serve the needs of agricultural and other rural property owners." (Initiative, § 3.)

Technically, there is a pathway whereby the Initiative Proponent could demonstrate that the Initiative's proposed legislation is legal. If the stated public-benefit claims are supported by substantial evidence, it appears that the Initiative's "spot zoning" of the Blakeley Construction site would be valid. To justify spot zoning, a substantial public need generally must exist that requires refined zoning. (See, e.g., *Foothill*, *supra*, 222 Cal. App. 4th 1302; *Arcadia, supra,* 197 Cal.App.4th 1526.) Demonstrating a qualifying need here could involve several factors. For instance, has the County experienced a public injury or emergency that demanded services only Blakely Construction could provide? Does there exist, or has there existed, a group of competitors in the marketplace for grading and paving that could provide, or has provided,

comparable services? Is Blakely Construction unique and distinguishable from other members of the class of grading and paving businesses operating within the County? Absent circumstances showing substantial public need for the refined zoning, the proposed legislation might be construed as arbitrary, raising due process and equal protection vulnerabilities. Another complication involves the Initiative's provisions regarding the intensity of operations, particularly its limit on the number of buildings to those in existence as of January 1, 2015, and its requirement that days and hours of operation not exceed the average recorded in 2013 through 2015. While these ceilings on use intensity may be shown to have a reasonable relationship with a public purpose or need, to the extent these operations levels are the byproduct of purely private economic goals, the Initiative's proposed legislation might be vulnerable to legal attack.

An additional factor is whether the typical spot zoning analysis would be applied by a court differently in this particular context, i.e., a voter-controlled agricultural area where the initiative process is effectively the only avenue for a property owner to pursue a use inconsistent with voter-controlled land use regulations. As is well-known, the County's agricultural zones are subject to Measure J, a 1990 initiative in which the County voters amended the General Plan to protect agricultural uses, and which provided that amendments to Measure J's agricultural zoning restrictions only could be approved by a vote of the people. Despite general rules of law stating that initiatives are subject to the same interpretive rules and limitations as enactments of the local legislative body, a court could be sympathetic to the argument that Measure J subjects Napa County citizens in agriculturally designated lands to a sort of "Catch-22." Specifically, the quandary is that citizens can only go to the voters if they want non-agricultural uses approved but, upon securing voter approval of such uses, the new zoning might be invalidated as illegal "spot zoning." As a practical matter, multiple voter-approved land use changes effectively benefitting a single property — e.g., initiatives affecting Brix, Don Giovanni, Pumpkin Patch (twice), and multiple boat storage facilities — have occurred since Measure J's enactment, while numerous other attempts to effect such changes have been rejected by the voters.

The facts relevant to the foregoing legal questions are currently unknown, but it appears there does exist some degree of risk that if the requisite public need for continuing the Blakely Construction business could not be established, a court could determine the Initiative, if enacted, would implicate illegal spot zoning.

C. An initiative may not name a specific private party to perform functions, duties, or powers.

The California Constitution provides that "[n]o amendment to the Constitution, and no statute proposed to the electorate by the Legislature or by initiative, that names any individual to hold any officer, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." (Cal. Const., Art II, § 12.) This rule prohibiting the naming of private parties is not limited to statewide initiatives, but also applies to local initiatives. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 580.) Meanwhile, Blakeley Construction has been registered as Blakeley Construction, Inc., a California Corporation (C0926423), since 1979.[8]

[8] We recognize that the County's judicial action against Blakeley Construction was against Blakeley Land, LLC; we have not been able to investigate the relationship between the LLC and the corporation named above.

There are only a few cases on this issue, none of which are precisely on point. However, these cases could be read to hold that an initiative conferring a development privilege on a *specifically named* party is unconstitutional.

In *Pala Band of Mission Indians v. Board of Supervisors* ("*Pala*"), San Diego County voters approved an initiative designating a certain site for use as a privately owned solid waste facility and placed an obligation on a specifically-named entity, "Servcon-San Marcos, Inc. or its assignee or authorized representatives," to obtain the necessary permits for such operation, and imposed duties and powers related to the operation of the facility.[9] (*Pala*, *supra*, 54 Cal.App.4th 565 at 570.) The Pala Band of Mission Indians challenged the initiative on multiple grounds, including on the grounds that it violated the California Constitution by designating a specific entity to perform functions or duties. (*Id*.) The court agreed. It also noted, in dicta, that while most of the project-related approvals imposed on Servcon-San Marcos a duty (e.g., to complete a site plan, carry out mitigation measures), the approval also conferred on the business "exclusive authority … to operate the project," which fell within the definition of "functions, powers, and duties" as contemplated by the California. (*Id.* at 585.) Accordingly, the initiative provisions were held to be unconstitutional. (*Id.* at 584-585.)

In another case, a citizen challenged a measure aimed at aiding development of a new shopping center that included a large Walmart, alleging it violated the constitutional prohibition on assigning functions, powers, and duties to a private corporation. The court, following the *Pala* court's reasoning, held that since the initiative did not name the developer, and any rights granted by the initiative would pass to any new developer or owner of the land, the initiative did not violate the California Constitution. (*Hernandez v. Town of Apple Valley* (2017) 7 Cal. App. 5th 194.) The court so ruled despite ballot materials and newspaper articles that all said the initiative would approve a new Walmart, indicating the public's understanding was that the measure would benefit Walmart specifically. (*Id*.) The *Hernandez* court then distinguished its reasoning from "the only other significant case," *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805. (*Id*. at 212.) The *Calfarm* case found an initiative to be unconstitutional since it provided for the formation of a non-profit entity which *alone* would have the power to send out information to consumers, while no other entity would be permitted to do so. (*Id*. at 212-213.) The significant fact that the *Hernandez* court used to distinguish the two cases was that, in *Hernandez*, the initiative did not grant rights that were solely for the benefit of a single entity, but would be equally valid for a subsequent owner or developer of the subject land.

As a threshold matter, one must ask whether the "ability to operate a specific type of business" is the type of power or duty that article II, section 12, of the California Constitution is concerned with. To the end, there is evidence in dicta (especially in the *Pala* case) that granting a right to operate a particular business would fall within the intent of the constitutional provision.

[9] The court cited the following duties and powers imposed by the proposition: "(1) "shall widen and realign State Route 76" (§ 5I); (2) "shall ... implement[ ]" a landscaping plan prepared by a licensed architect (§ 5O); (3) "shall submit a mitigation and monitoring program meeting state and federal law to the Integrated Waste Management Board" (§ 5R); (4) "shall maintain trained, full-time personnel engaged exclusively and continuously in the inspection of incoming refuse loads for hazardous waste" (§ 5D); and (5) "shall retain a qualified archaeologist to investigate and recommend appropriate mitigation measures" and "shall " implement these mitigation measures (§ 5P)."

The next question is whether the Initiative improperly confers benefits on Blakeley Construction. The Initiative could be found to violate the Constitution if it would benefit Blakeley Construction alone, and not, for instance, any successor in interest. (*Calfarm, supra,* 48 Cal.3d 805; *Hernandez*, *supra,* 7 Cal. App. 5th at 212-213 [initiative was unconstitutional since it provided for the formation of a non-profit entity which *alone* would have the power to send out information to consumers, while no other entity would be permitted to do so].) Here, the Initiative contains numerous indicia that, as a practical matter, it would benefit only Blakeley Construction, as discussed above in Section III.B of this Memorandum. However, while the Initiative is clear that it would allow Blakeley Construction to continue its operations, there is nothing in the Initiative's title, recitals, or proposed legislative enactments that would prevent, for instance, a successor in interest from enjoying any benefits potentially conferred on the business. The Initiative benefits Blakeley Construction, but it does not appear to be personal to the business in that no other entities could benefit from the Initiative's development rights if the property were sold.

Ultimately, the jurisprudence is undeveloped in this area of the law. While it appears more likely the Initiative would not be found to violate the Constitution's prohibition on conferring powers on private corporations, it is possible a court could hold otherwise.

D. To what extent may a portion of the Initiative survive if other portions are not valid?

Potential defects in portions of the proposed Initiative might affect the validity of the entire proposal. The Initiative does not contain a severability clause, stating that if any portion of it is held to be invalid or unconstitutional by a court, such decision shall not affect the validity of the remaining portions of this initiative. The question is whether portions of the Initiative may survive in the event other sections are held invalid.

"A provision in, or a part of, a legislative act may be unconstitutional or invalid without invalidating the entire act." (13 Cal. Jur. 3d. Const. Law, § 76; *Verner, Hilby & Dunn v. Monte Sereno* (1966) 245 Cal.App.2d 29, 33.) Thus, "[a]n ordinance may contain provisions which are invalid, either because of a conflict with state law or for any other reason, and other provisions which appear to be valid, and in such case the question arises whether the good may be separated from the bad and allowed to stand. Sometimes the legislative body declares its intent, by a severability clause, that each part of its enactment stands or fall on its own merits, regardless of the others, and considerable weight is given to such a clause." (*People v. Commons* (1944) 64 Cal.App.2d Supp 925, 932-933; *see Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 227, 237-238.) The inclusion of a severance clause creates a presumption in favor of severance, but resolution ultimately depends on other factors, including whether the invalid provision is grammatically, functionally, and volitionally separate. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 270–271; *see Verner, supra,* 245 Cal.App.2d 29, 35.) California courts explain that:

> Grammatical separability, also known as mechanical separability, depends on whether the invalid parts can be removed as a whole without affecting the wording or coherence of what remains. Functional separability depends on whether the remainder of the statute is complete in itself. Volitional separability depends on whether the remainder would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.

(*Id.* [quotations and citations omitted].)

Local provisions in the County code also address severability, providing that "[i]f any section, sentence, clause, phrase or portion of this code is for any reason held to be invalid or unconstitutional by the decision of any court, such decision shall not affect the validity of the remaining portions of the code." (NCC, § 1.04.150.) In support of this provision, the code provides that the "board of supervisors would have adopted this code and each section, sentence, clause or phrase and portion thereof, irrespective of the fact that any one or more sections, sentences, clauses, phrases or portions be invalid or unconstitutional." (*Id.*) While the code provision would suggest the Initiative's terms would be severable, the meaning of the Initiative, assuming it is placed on the ballot, would be dictated by the intent of the voters who participated in the upcoming election, and thus it is unclear that section 1.04.150 would apply to the Initiative's terms.

With respect to the Initiative, its apparent purpose is to allow Blakeley Construction to continue its operations at specified levels of intensity, and to do likewise with other grading and paving businesses that operate in a similar manner, and that have operated since at least July 1, 1968. As discussed above, the Initiative contains some potential legal infirmities, including:

- **Its use of undefined terms.** The Initiative presents a low to medium risk that its terms would be deemed unconstitutionally vague. For the most part, the subject terms do not affect the whole panoply of proposed legislative requirements, but individual criteria governing what types of grading and paving businesses are permitted. To the extent any criteria are declared to be unconstitutionally vague, it is possible, and likely, a court could invalidate these terms without affecting the validity of other portions of the Initiative. The exception here would be if a court found the term "grading and paving business" to be ambiguous, which is a term contemplated by nearly every portion of the Initiative's proposed legislative enactments. In the event a court determined this term was unconstitutionally vague, it is more likely the court could invalidate those terms without affecting the validity of other portions of the Initiative.

- **Its potential to constitute illegal spot zoning.** It is unlikely a court could invalidate only portions of the Initiative if it determined its legislative amendments constituted illegal spot zoning. The gravamen of the Initiative, as stated in its Statement of Purpose, is to allow Blakeley Construction to continue operating. Based on the evidence before the voters at this time, it seems likely that, if the Initiative could not accomplish its stated purpose, the voters would not enact it. If other businesses emerge in the months leading up to the election and it becomes clear the Initiative would benefit them, and County voters understand and take interest in this development, this severability calculus could change (as could determinations about the nature of the Initiative's "spot zoning"). (*See Pala*, *supra*, 54 Cal.App.4th 565 at 586 [severability is operative if "it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted by them in the absence of the invalid portions."], citing *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707 at 714–715; *compare id.* [identity of initiative's beneficiary was not deemed a main consideration where initiative and background materials did not give additional information about the specific entity, and there was no evidence that public debate included identification of the specific entity as the operator].)

- **Its potential to violate the Constitution's prohibition on conferring powers on private corporations.** The Initiative's potential to violate this constitutional prohibition seems more a calculus involving the intent behind its terms, and so it appears a mere determination about the voters' intent, rather than a reformation of the Initiative's text,

could salvage the Initiative. Therefore, it does not appear there is a danger here that rendering a portion of the Initiative invalid would taint the whole.

Generally, in the event a court determined a portion of the Initiative were invalid, it appears the only instances where the severability doctrine would fail to protect remaining portions of the Initiative would be: (1) where the court determined that "grading and paving businesses" was unconstitutionally vague; and (2) where the court determined that the Initiative constituted illegal spot zoning. Additional facts and events could emerge, however, in the months leading up to the election that could affect voter intent and, in turn, affect this analysis.

IV. CONCLUSION.

Overall, there is some risk that, if enacted, the proposed Initiative, or portions of it, could be vulnerable to being legally challenged and invalidated. The Initiative's potential legal defects include:

- The Initiative may be deemed unlawfully vague with respect to the introduction of a number of undefined terms. This risk is considered low.
- The Initiative might be deemed to exceed the County's police power or violate the constitution through illegal "spot zoning" insofar as it appears to increase the rights for one particular site without granting similar rights to additional or neighboring properties. This risk is considered low to medium, depending on the existence of facts to support the public benefits of the "refined zoning."
- The Initiative might be deemed to violate the California Constitution in that it appears to names and grant rights personal to Blakeley Construction. This risk is considered low.

Based on (a) the ministerial nature of the County's role under the Elections Code and (b) existing law that strongly disfavors pre-election review of Initiative measures, it is highly unlikely that pre-election review of the Initiative would be granted by a court. Therefore, it is not recommended that pre-election review of the Initiative or any aspects of it be sought.