



CITY COUNCIL AGENDA REPORT

MEETING DATE: July 5, 2016

ITEM NUMBER: OB-2

SUBJECT: ELECTION CODE SECTION 9212 REPORT ON “AN INITIATIVE REQUIRING CHANGES IN USE AT FAIRVIEW PARK BE SUBJECT TO VOTER APPROVAL”, CONSIDER PLACING THE INITIATIVE ON THE NOVEMBER 8, 2016 BALLOT; AND PROVIDE DIRECTION ON AN ALTERNATIVE MEASURE

DATE: JUNE 24, 2016

FROM: CITY CLERK AND CITY ATTORNEY’S OFFICE

PRESENTATION BY: BRENDA GREEN, CITY CLERK
BART MEJIA, CITY ENGINEER
YOLANDA SUMMERHILL, DEPUTY CITY ATTORNEY

FOR FURTHER INFORMATION CONTACT: BRENDA GREEN, CITY CLERK, 714-754-5225

RECOMMENDATION:

Staff recommends that the City Council:

1. Receive the Elections Code Section 9212 report regarding the initiative.
2. Order placement of the measure on the November 8, 2016 consolidated municipal election by adopting the following resolutions:
 - a. Resolution 2016-41: Calling and giving notice for the holding of a General Municipal election to be held on November 8, 2016 for the submission to the voters of a proposed ordinance entitled, “An Initiative Requiring Changes in use at Fairview Park Be Subject to Voter Approval” (Attachment 3); and
 - b. Adopt Resolution 2016-42: Requesting the Orange County Board of Supervisors to Consolidate a General Municipal election to be held on November 8, 2016, for the purpose of submitting to the voters of the City of Costa Mesa a question relating to the adoption of a proposed ordinance entitled, An Initiative Requiring Changes in use at Fairview Park Be Subject to Voter Approval” (Attachment 4); and
 - c. Adopt Resolution 2016-43: Authorizing written arguments for or against the proposed ordinance “An Initiative Requiring Changes in use at Fairview Park Be Subject to Voter Approval”, setting priorities for filing written arguments, determining the authors of the written arguments, and directing the City Attorney to prepare an impartial analysis (Attachment 5).

3. Provide special counsel with direction on an alternative measure to be placed on the November 8, 2016 ballot.

BACKGROUND:

At the June 21, 2016 meeting, the City Council accepted the City Clerk's certification of sufficient signatures to place a voter sponsored measure entitled "An Ordinance To Give The People Of Costa Mesa A Vote To Determine What Significant Changes To Fairview Park May Be Made" (hereinafter "Initiative") on the November 2016 general election ballot. The City Council also considered whether to adopt the measure, place it on the ballot and/or order an alternative measure.

The City Council provided staff with the following direction:

- 1) In accordance with Elections Code Section 9212, provide a report regarding the measure's impact on Americans with Disabilities Act (hereinafter "ADA") and related legal issues; and
- 2) Provide a city sponsored alternative measure that simply prohibits athletic fields/ball fields without voter approval.

ANALYSIS:

A. Elections Code Section 9212 Report

Elections Code § 9212 authorizes the City Council to order a report of the Initiative's impact on finances, use of land, infrastructure, open spaces, ability to attract business, use of vacant property, among other impacts, as well as "any other matters that the legislative body wishes to be considered in the report." At the June 21, 2016 meeting, the City Council directed staff to prepare a report related to ADA and its potential legal impacts.

1. Compliance with the ADA under the Initiative

When considering how the Initiative impacts the City's ability to comply with the ADA, the most common legal challenges would include either a *facial challenge* or *as-applied* challenge to the validity of the Initiative.

a. Facial Challenge to Initiative for Violation of the ADA

A facial invalidity claim is tenable only if the terms of the ordinance will not permit those who administer it to avoid an invalid application to the complaining parties.¹ To prevail with a facial challenge, the plaintiff must prove that the ordinance is invalid in all its possible applications.² Typically, a facial challenge to the validity of an ordinance requires the court to consider only the text of the ordinance, not its application to the particular circumstances of an individual.³ It is clear under Title II of the ADA, that the City is prohibited in discriminating in "all services, programs, and activities" that it provides. Thus, a facial challenge to the Initiative would potentially stand if it prohibited the City from exercising its duty to comply with federal law-namely the ADA.

¹ Building Industry Assn. v. County of Stanislaus, (2010) 190 Cal.App.4th 582, 590.

² Tobe v. City of Santa Ana, (1995) 9 Cal.4th 1069, 1084.

³ Arcadia Development Co. v. City of Morgan Hill, (2011) 197 Cal. App. 4th 1526.

In reviewing the Initiative, it does not appear to prohibit the City from complying with its legal obligations under the ADA. Specifically, Section 10 of the Initiative entitled "Construction" states, "This ordinance shall be liberally construed to accomplish its purpose. *Nothing herein shall be construed ... to prohibit any activities required by State or Federal law.*" Additionally, Section 3(A)(2)(iii) authorizes the installation of ADA compliant rest areas along existing trails and any level concrete pads needed for those rest areas..." Courts have generously interpreted initiatives that may overlap in some areas in finding that "statute does not restrict or preempt the power of an initiative simply because the initiative includes some elements of statewide concern."⁴ Finally, assuming the Initiative was found to be facially invalid, Section 12 provides that any provision which is found to be invalid "by a court of competent jurisdiction, the remaining sections ... shall remain valid and enforceable." Although the Initiative would eliminate a number of projects proposed under the current Fairview Park Master Plan, Section 10 of the Initiative authorizes the City to comply with federal law-the ADA.

b. As-Applied Challenge to Validity of Initiative Based on ADA

Conversely, with an *as-applied* challenge, a plaintiff must demonstrate that an impermissible injury is occurring or has occurred in the past.⁵ The Supreme Court has held that the ADA does not require that persons with disabilities be given "adequate recreational programs." However, the ADA does require that persons with disabilities be given equal access to whatever benefits the City offers persons without disabilities.⁶ Thus, the mere fact that the City does not operate a specific program to disabled persons does not, in and of itself, constitute a violation of the ADA.

However, lower courts have distinguished circumstances where the *elimination* of recreation services for the disabled has occurred. For instance, in Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, (S.D. Fla. 1994) 846 F. Supp. 986, a Florida city had made available recreational and social programs and activities for disabled individuals at Dreher Park.⁷ Budget constraints caused the city to make various cuts, including effectively eliminating the existing recreational programs for disabled individuals.⁸ The court concluded that the complete elimination of the programs at Dreher Park likely violated the ADA because there were no equivalent programs available to fill the void left by the closure. Although disabled individuals could theoretically participate in the general recreational programs the city offered at other locations and the city was not required to offer to the public (disabled or non-disabled) any type of recreational or leisure programs in the first place, when it does provide and administer such programs, it must use methods or criteria that do not have the purpose or effect of "defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities..."⁹

As previously indicated, the Initiative if adopted would prohibit the following programs currently proposed under the Fairview Park Master Plan from going forward:

Fairview Park, east of Placentia Avenue:

- Platforms/retaining walls for vista overlook area

⁴ Shea Homes Limited Partnership v. County of Alameda, (2003) 110 Cal. App. 4th 1246.

⁵ Tobe v. Santa Ana, (1995) 9 Cal.4th 1069, 1084.

⁶ Alexander v. Choate, (1985) 469 U.S. 287, 303, 105 S. Ct. 712.

⁷ *Id.* at 988.

⁸ *Id.* at 989.

⁹ 28 C.F.R. § 35.130(b)(3).

- Museum/multipurpose building
- Constructing two paved parking lots to accommodate a total of 131 cars
- Playground

Fairview Park, west of Placentia Avenue:

- Covered picnic areas
- Bus turnaround
- Stairs to allow bluff access
- Grading bluffs to prevent erosion
- New restrooms
- Playground
- Boardwalk and pedestrian bridge

Other examples of activities that would be prohibited unless voter approval is obtained include:

- Completing structures that were under construction when the initiative became effective
- Installing concrete curbs
- Expanding existing buildings
- Installing additional lighting
- Expanding park hours
- Installing new trails not listed in the Fairview Park Master Plan
- Installing water, electric, gas or sewer lines
- Expanding parking lots
- Constructing retaining walls
- Increasing the number of community events such as concerts-in-the-park, seasonal festivals or races
- Increasing staffing to facilitate a greater number of park visitors
- Installing pergolas and gazebos
- Providing rest areas along trails that are larger than the minimum required by law, or are within 100 feet of one another

None of the above projects are currently in existence at this time. However, a plaintiff's attorney could argue that the *elimination* of these projects authorized under the Fairview Park Master Plan, many of which would be ADA compliant, discriminates against the disabled by "defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities..."¹⁰ in violation of the ADA.

B. Direction on the Alternative Measure

Special counsel proposes drafting an alternative measure that prohibits all Athletic Fields at Fairview Park unless approved by a vote of the people. All passive recreational uses that do not include Athletic Fields, including those outlined in the Fairview Park Master Plan, would be allowed without a vote of the people, subject to State and Local law.

Athletic Fields would be defined as "A piece or part of a piece of property that is developed, constructed, or otherwise improved for the purpose of facilitating active, outdoor team sports, including but not limited to baseball fields, soccer fields, football

¹⁰ 28 C.F.R. § 35.130(b)(3).

fields, or volleyball courts, but expressly not including trails which might have multiple purposes including bicycling, walking or running.”

FISCAL REVIEW:

The cost for the signature verification of the initiative by the Orange County Registrar of Voters Office is \$20,485.00. The estimated election costs to add the initiative to the consolidated general election is \$10,000.00.

If adopted, the City would save monies on projects no longer authorized under the initiative. Additionally, grants authorized prior to the adoption of the initiative would have to be rescinded and/or returned to the granting authority. Finally, Election Code Section 9212 report and/or an alternative measure requires approximately 60 hours of staff, City Attorney, and special counsel’s time.

At present the estimated costs of implementing the ordinance is indeterminate.

LEGAL REVIEW:

The City Attorney’s office has reviewed this report and has approved it as to form and legal content.



YOLANDA SUMMERHILL
Deputy City Attorney



BRENDA GREEN
City Clerk



RICHARD L. FRANCIS
Assistant CEO

- ATTACHMENTS:
- 1. [June 21, 2016 Staff Report \(excluding attachments\)](#)
 - 2. [Proposed Ordinance & Ballot Title and Summary](#)
 - 3. [Resolution 16-41](#)
 - 4. [Resolution 16-42](#)
 - 5. [Resolution 16-43](#)