TO: TOWN COUNCIL

FROM: TOWN MANAGER

RE: BALLOT ARGUMENT REBUTTAL LANGUAGE OPPOSING TERM LIMIT INITIATIVE ON NOVEMBER ELECTION

ISSUE
At the August 5th special meeting Council agreed to have another special meeting on August 14 to consider rebuttal language to submit to County Elections opposing the term limit initiative that will be voted on in the November 2010 election.

RECOMMENDATION
Discuss and develop rebuttal ballot language opposing the term limit initiative to submit to County Elections.

CEQA
There are no CEQA issues in opposing or supporting ballot measures.

MONEY
There is no direct cost to the Town in opposing or supporting a term limit ballot measure.

DISCUSSION
Loomis citizens in support of Town Council term limits qualified a ballot measure (through the initiative process) that Council agreed to put on the November 2010 election. The initiative, if approved by the Town voters, would change the Municipal Code as follows:

> Section 1. Section 2.04.012 is added to the Loomis Municipal Code as follows:
>
> "2.04.012 Elections, powers and terms of office. The electorate shall elect a council of five at large members for a four-year term of office. The council shall constitute the legislative and governing body of the town and shall have the authority to duly exercise all powers of the town, and to adopt such ordinances and resolutions as may be proper in the exercise thereof. Two and three council members shall be elected alternately at the general

municipal election each even number year. No council member shall serve more than two consecutive four year terms. Any council member, who has served two consecutive four year terms as of August 1, 2010 shall be ineligible to serve as a council member again until eight years have passed since the last four year term was served. Council members who are currently in office at the time this section takes effect, shall be able to complete their remaining term."

At the August 5, 2010 Special Meeting Council was advised by the Town Attorney that pursuant to law only the Town Council could submit opposition language on the term limits initiative. In the course of that meeting opposition ballot language was submitted by Loomis citizen Sandra Calvert on behalf of an informal group of concerned Loomis Citizens (see attached). Council edited that language and submitted an Argument Against Measure A (see attached) which is the designation of the term limit initiative on the November ballot. The citizens favoring term limits (Measure A) have submitted language in support of the measure (see attached).

Council is now in the position of considering whether to submit a rebuttal to the argument in support. A rebuttal must be filed by August 16.

At the August 5th meeting Council asked that the Town Attorney prepare a legal opinion on the possible effects on Council seating should Measure A pass. Following is that opinion.

CITY ATTORNEY LEGAL OPINION

(August 7, 2010)

TO: Loomis Mayor and City Council
FROM: Dave Larsen, City Attorney
SUBJECT: Term Limits Initiative

Questions

The Town Mayor has asked: (1) Whether the law prohibits term limits from applying retroactively; (2) Whether the proposed term limits initiative calls for retroactive application of its provisions; (3) Whether a party can obtain a court order keeping an illegal initiative measure from being placed on the ballot; (4) What will happen to candidates who have served eight years if the initiative measure passes; and (5) what does the law provide concerning the filling of vacancies created because an elected council member is ineligible to serve?

As more fully explained below, the answers are: (1) yes; (2) yes; (3) probably not; (4) they will face the challenge of establishing that the provision is illegal; and (5) vacancies are filled by appointment or election depending on the circumstances.

1. Whether the law prohibits retroactive application of term limits

Gov’t Code § 36502 (b) provides in pertinent part:

> “Notwithstanding any other provision of law, the city council of a general law or charter city may adopt or the residents of the city may propose, by initiative, a proposal to limit or repeal a limit on the number of terms a member of the city council may serve on the city council, or the

number of terms an elected mayor may serve. Any proposal to limit the number of terms a member of the city council may serve on the city council, or the number of terms an elected mayor may serve, shall apply prospectively only." [Emphasis added]. [1]

Based on the above statute, term limits may not be applied retroactively.

2. Whether the proposed term limit initiative calls for retroactive application of its terms

The only portion of the proposed term limits initiative that may be illegal because it may constitute a retroactive application reads as follows:

"Any council member, who has served two consecutive terms
as of August 1, 2010, shall be ineligible to serve as a council member
again until eight years have passed since the last four year term was served."

As the United States Supreme Court has recognized, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task" (Landgraf v. USI Film Products (1994) 511 U.S. 244, 268, 114 S.Ct. 1483, 128 L.Ed.2d 229) and "comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event" (id. at p. 270, 114 S.Ct. 1483). In exercising this judgment, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." (Ibid.)

In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's

[1] Ex Post Facto laws do not prohibit all legislation from being applied retroactively. However, it is unnecessary to analyze whether common law principles would prohibit the retroactive application of term limits since state law already does so.

liability for, an event, transaction, or conduct that was completed before the law's effective date. (Landgraf v. USI Film Products, supra, 511 U.S. 244, 269-270 & fn. 23, 114 S.Ct. 1483; see also Rodriguez v. General Motors (9th Cir.1994) 27 F.3d 396, 398; Tapia v. Superior Court (1991) 53 Cal.3d 282, 291, 279 Cal.Rptr. 592, 807 P.2d 434; Kizer v. Hanna (1989) 48 Cal.3d 1, 7, 255 Cal.Rptr. 412, 767 P.2d 679; People v. Weidert (1985) 39 Cal.3d 836, 851, 218 Cal.Rptr. 57, 705 P.2d 380.) [Emphasis added].

Said another way, a “retrospective law” is one which affects rights, obligations, acts, transactions, and conditions which are performed or exist prior to adoption of statute. Cal. v. Johnson (1939) 31 Cal.App.2d, 88 P.2d770.

However, a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. (United States v. Jacobs, 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763.) Or, as said in Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 570-571, 54 S.Ct. 848, 78 L.Ed. 1425, a statute is not retroactive merely because it draws upon antecedent facts for its operation. (See also Cox .v Hart, 260 U.S. 427, 434-435, 43 S.Ct. 154, 67 L.Ed. 332.) Examples of the application of this principle in particular situations may be found in the following California cases: People v. Union Oil Co., 48 Cal.2d 476, 480-481, 310 P.2d 409, Eichelberger v. City of Berkeley, 46 Cal.2d 182, 189, 293 P.2d 1, and Gregory v. State of California, 32 Cal.2d 700, 702, 197 P.2d 7, 28, 4 A.L.R.2d 924.

In People v. Grant (1962) 20 Cal.4th 150, 973 P.2d 72, the court reviewed whether a new Penal Code section had been applied retroactively. Penal Code section 288.5 provided that any person who resides with or has recurring access to a child under the age of fourteen, and who molests that child at least three times during a period of not less than three months, is guilty of "continuous sexual abuse," a felony. The question was whether the state had applied this Penal Code section retroactively, given that defendant had committed some but not all of the requisite molestations before the effective date of this Penal Code. The court held that because the defendant could have avoided prosecution by changing his behavior after the law went into effect, there was no retroactive application.

In our case, had the term limit initiative been approved in June (as the proponents originally planned) one could argue that the initiative was not retroactive because it only targeted council members who would have had two consecutive four year terms after the measure had taken effect (e.g. on August 1, 2010). Arguably, the measure would not operate retroactively merely because some of the facts upon which its application depended, occurred prior to its enactment. As long as affected members could have avoided application of the measure by resigning before August 1, 1020 (and then running for re-election thereafter) the measure cannot be deemed retroactive. [2]

As events have unfolded, however, the vote on the measure will not take place until November. As a result, sitting council members who will have served two consecutive four year terms prior to August 1, 2010, have no way of avoiding being termed out immediately upon enactment of the measure. Therefore, the above-quoted portion of the initiative measure is invalid because it violates the statute which prohibits retroactive application of term limits.

3. Whether measure can be kept off of ballot

The court in Costa v. Superior Court (2006) 37 Cal.4th 986, 128 p.3d 675, addresses the issue as follows:

"Past California decisions have observed that, as a general rule, 'it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the

[2] Because the measure was not approved prior to August 1, 2010, it is not necessary for this analysis to delve into how a court may have reacted to the dubious argument that given the possibility of council members stepping down only to run again, the measure is not retroactive.

people's franchise, in the absence of some clear showing of invalidity.' (Brosnahan v. Eu (1982) 31 Cal.3d 1, 4, 181 Cal.Rptr. 100, 641 P.2d 200 (Brosnahan I).) More recently, however, in Senate of the State of Cal. v. Jones (1999) 21 Cal.4th 1142, 90 Cal.Rptr.2d 810, 988 P.2d 1089 (Senate v. Jones), we noted that decisions after Brosnahan I "have explained that this general rule applies primarily when a challenge rests upon the alleged unconstitutionality of the substance of the proposed initiative, and that the rule does not preclude preelection review when the challenge is based upon a claim, for example, that the proposed measure may not properly be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an amendment. [Citations.]" (21 Cal.4th at p. 1153, 90 Cal.Rptr.2d 810, 988 P.2d 1089.) [FN11] In the Senate v. Jones decision itself, we held that a constitutional challenge that rests upon a claim that a proposed initiative measure violates the single-subject rule may, in an appropriate case, be considered and resolved prior to the election, emphasizing that the constitutional provision establishing the single-subject limitation by its explicit terms contemplates the possibility and propriety of preelection review in providing that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d), italics added.)

FN11. See generally Gordon & Magleby, Pre-Election Judicial Review of Initiatives and Referendums (1989) 64 Notre Dame L.Rev. 298 (concluding that "it is generally improper for courts to adjudicate pre-election challenges to a measure's substantive validity" but that "pre-election review of challenges based on noncompliance with procedural requirements or subject matter limitations is proper").

In our case, the claim that a portion of the initiative measure is invalid because it violates state law is substantive rather than procedural in nature. Because the court can declare the "August 1st provision" invalid without otherwise throwing out the entire term limits measure, it is unlikely that a court will entertain a pre-election challenge.

4. What will happen to candidates that have served eight years if the measure passes?

The measure will be assumed to be valid. The statute of limitations upon which to challenge the measure will begin to run the day it takes effect, which is immediately upon being approved by the voters (not thirty days later).

If one or more candidates who have served two consecutive four year terms are elected, either they or the Town will need to consider mounting a legal challenge.

If the measure is challenged, plaintiff(s) will want to include a request for a temporary injunction and court order directing the Town to seat the affected candidates and allow them to participate as council members pending the outcome of the decision.[3]

5. How are vacancies filled if elected officials are found to be ineligible?

Gov't Code § 1770 provides in pertinent part that:

"An office becomes vacant on the happening of any of the following events before the expiration of the term:

. . . (j) The decision of a competent tribunal declaring void his or her election or appointment."

Therefore if, as part of the court's review of the "August 1st provision," it is also asked to determine the eligibility of the affected candidates in light of the ruling on retroactivity, we could (theoretically) have a decision declaring their elections void.

Once a vacancy exists, whether by court decision or otherwise, Gov't Code § 36512. provides in pertinent part:

[3] In deciding whether to issue an injunction, the court will evaluate the chances of the requesting party ultimately prevailing on the merits, and also the harm, if any, to other parties if the injunction issues.

"(b) If a vacancy occurs in an elective office provided for in this chapter, the council shall, within 60 days from the commencement of the vacancy, either fill the vacancy by appointment or call a special election to fill the vacancy. The special election shall be held on the next regularly established election date not less than 114 days from the call of the special election. A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent.

(c) Notwithstanding subdivision (b) and Section 34902, a city may enact an ordinance that does any of the following:

(1) Requires that a special election be called immediately to fill every city council vacancy and the office of mayor designated pursuant to Section 34902. The ordinance shall provide that the special election shall be held on the next regularly established election date not less than 114 days from the call of the special election.

(2) Requires that a special election be held to fill a city council vacancy and the office of mayor designated pursuant to Section 34902 when petitions bearing a specified number of verified signatures are filed. The ordinance shall provide that the special election shall be held on the next regularly established election date not less than 114 days from the filing of the petition. A governing body that has enacted such an ordinance may also call a special election pursuant to subdivision (b) without waiting for the filing of a petition.

(3) Provides that a person appointed to fill a vacancy on the city council holds office only until the date of a special election which shall immediately be called to fill the remainder of the term. The special election may be held on the date of the next regularly established election or regularly scheduled municipal election to be held throughout the city not less than 114 days from the call of the special election.

(d)(1) Notwithstanding subdivision (b) and Section 34902, an appointment shall not be made to fill a vacancy on a city council if the appointment would result in a majority of the members serving on the council having been appointed. The vacancy shall be filled in the manner provided by this subdivision.

(2) The city council may call an election to fill the vacancy, to be held on the next regularly established election date not less than 114 days after the call.

(3) If the city council does not call an election pursuant to paragraph (2), the vacancy shall be filled at the next regularly established election date." [Emphasis added].

So, depending on the circumstances, the remaining council members can appoint or call for an election to fill vacancies. However, they may not so appoint if that would result in a majority of members being appointed.

I hope this is helpful. Please advise if you have other questions or concerns.

Following are ballot language options that were included in the staff reports for the August 5th special meeting. The language may be useful in crafting rebuttal language.

OPTION A

TERM LIMIT OPPOSITION LANGUAGE

Term limits is a poor idea because it limits the choices that the voting citizens of Loomis have to choose their own representatives. Much has been written about term limits but before you vote ask yourself the question: Do I want to limit my choice as to who I can elect to serve me and carry out my interests to better the Loomis community? Of course you know that:

- term limits remove good and bad council members
- term limits result in the loss of knowledge and experience in office and can jeopardize Town government business with County, State and Federal agencies
- term limits increase the power of those working in bureaucracies and as lobbyists because those people do not have term limits
- term limits do not lower taxes, reduce spending or result in smaller government

We know these facts concerning term limits too and we find, and ask you to join us in fining, that we should not have our choices limited. We should be able to pick the best people in Loomis and have them work for us as long as they are willing and able. We should be able to vote people in and vote people out on our terms and not because of term limits. Please join us in voting NO on term limits.

OPTION B

TERM LIMIT OPPOSITION LANGUAGE LISS DRAFT

Term limits is a poor idea because it limits the choices that the voting citizens of Loomis have to choose their own representatives. Much has been written about term limits but before you vote ask yourself the question: Do I want to limit my choice as to who I can elect to serve me and carry out my interests to better the Loomis community? Of course you know that:

- term limits remove good and bad Council members
- term limits result in the loss of knowledge and experience in office and can jeopardize Town government business with County, State and Federal agencies
- term limits increase the power of staff and lobbyists because those people do not have term limits
- term limits do not lower taxes, reduce spending or result in smaller government

In Loomis, this measure will not allow Walt Scherer, Miguel Ucovich or Rhonda Morillas to continue as Council Members, until they have been off the Council for 8 years. This measure was clearly targeted at removing these members. If this term limits measure is adopted in 2010, the Walt Scherer and Miguel Ucovich will not be able to serve again, even if they receive the most votes in this 2010 election.

We ask you to decide that voters should not voting choices limited by arbitrary rules. We should be able to vote people in and vote people out on our terms and not because of term limits. We should be able to pick the best people in Loomis and have them work for us as long as they are willing and we vote them in. Please vote NO on term limits. If you want to discuss this with a Council Member, please contact us at: http://www.loomis.ca.gov/TCmbrs.html

OPTION C (the change from Option A is in the 3rd bullet point)

TERM LIMIT OPPOSITION LANGUAGE

Term limits is a poor idea because it limits the choices that the voting citizens of Loomis have to choose their own representatives. Much has been written about term limits but before you vote ask yourself the question: Do I want to limit my choice as to who I can elect to serve me and carry out my interests to better the Loomis community? Of course you know that:

- term limits remove good and bad council members
- term limits result in the loss of knowledge and experience in office and can jeopardize Town government business with County, State and Federal agencies
- term limits increase the power of special interests because those people do not have term limits
- term limits do not lower taxes, reduce spending or result in smaller government

We know these facts concerning term limits too and we find, and ask you to join us in fining, that we should not have our choices limited. We should be able to pick the best people in Loomis and have them work for us as long as they are willing and able. We should be able to vote people in and vote people out on our terms and not because of term limits. Please join us in voting NO on term limits.

Following in information provided by the Town Attorney on laws governing submittal of ballot arguments.

In our present case, however, only the arguments prepared by the proponents and the council are allowed to be placed on the ballot, and it does not seem logical to interpret this subject language as prohibiting the sharing of arguments simply because they may be amended, especially in light of the apparent intent of the overall language to the effect that arguments should be shared "immediately." Crickett has confirmed that Roseville agrees with our interpretation, and is posting measurement arguments for all to see, as soon as the arguments are turned into city hall.

Just to be clear, the law contemplates that each of the two authors (the council and the proponents) may do two things: (1) file an argument; and (2) file a rebuttal. Even so, it looks to me like the intent of the law is that these parties are entitled to see their opponent's argument as soon as possible.

➡§ 9282. Written arguments for and against ballot measures

(a) *For measures placed on the ballot by petition, the persons filing an initiative petition pursuant to this article may file a written argument in favor of the ordinance, and the legislative body may submit an argument against the ordinance*.

(b) For measures placed on the ballot by the legislative body, the legislative body, or any member or members of the legislative body authorized by that body, or any individual voter who is eligible to vote on the measure, or bona fide association of citizens, or any combination of voters and associations, may file a written argument for or against any city measure.

(c) No argument shall exceed 300 words in length.

(d) The city elections official shall include the following statement on the front cover, or if none, on the heading of the first page, of the printed arguments:

"Arguments in support or opposition of the proposed laws are the opinions of the authors."
(e) The city elections official shall enclose a printed copy of both arguments with each sample ballot; *provided, that only those arguments filed pursuant to this section shall be printed and enclosed with the sample ballot.* The printed arguments are "official matter" within the meaning of Section 13303.

(f) Printed arguments submitted to voters in accordance with this section shall be titled either "Argument In Favor Of Measure ____" or " Argument Against Measure ____," accordingly, the blank spaces being filled in only with the letter or number, if any, designating the measure. At the discretion of the elections official, the word "Proposition" may be substituted for the word "Measure" in these titles.

➡§ 9283. Names and signatures of authors submitting; maximum number

A ballot argument may not be accepted under this article unless accompanied by the printed name and signature or printed names and signatures of the author or authors submitting it, or, if submitted on behalf of an organization, the name of the organization and the printed name and signature of at least one of its principal officers who is the author of the argument. No more than five signatures shall appear with any argument submitted under this article. In case any argument is signed by more than five authors, the

signatures of the first five shall be printed.

§ 9285. Sending copies of arguments in favor of and against propositions; rebuttal arguments

(a)(1) *When an elections official receives an argument relating to a city measure that will be printed in the ballot pamphlet, the elections official shall send a copy of an argument in favor of the proposition to the authors of any argument against the measure and a copy of an argument against the measure to the authors of any argument in favor of the measure immediately upon receiving the arguments*.

(2) The author or a majority of the authors of an argument relating to a city measure may prepare and submit a rebuttal argument or may authorize in writing any other person or persons to prepare, submit, or sign the rebuttal argument.
(3) No rebuttal argument may exceed 250 words.

(4) A rebuttal argument relating to a city measure shall be filed with the elections official no later than 10 days after the final filing date for primary arguments.

(5) A rebuttal argument relating to a city measure may not be signed by more than five persons and shall be printed in the same manner as a direct argument and shall immediately follow the direct argument which it seeks to rebut.

(b) Subdivision (a) applies only if, not later than the day on which the legislative body calls an election, the legislative body adopts its provisions by majority vote, in which case subdivision (a) applies at the next ensuing municipal election and at each municipal election thereafter, unless later repealed by the legislative body in accordance with the procedures of this subdivision.

§ 9287. Submission of multiple arguments; selection for printing and distribution; preferences

If more than one argument for or more than one argument against any city measure is submitted to the city elections official within the time prescribed, he or she shall select one of the arguments in favor and one of the arguments against the measure for printing and distribution to the voters. In selecting the argument the city elections official shall give preference and priority, in the order named, to the arguments of the following:

(a) The legislative body, or member or members of the legislative body authorized by that body.

(b) The individual voter, or bona fide association of citizens, or combination of voters and associations, who are the bona fide sponsors or proponents of the measure.

(c) Bona fide associations of citizens.

(d) Individual voters who are eligible to vote on the measure.

(2) The author or a majority of the authors of an argument relating to a city measure may prepare and submit a rebuttal argument or may authorize in writing any other person or persons to prepare, submit, or sign the rebuttal argument.

(3) No rebuttal argument may exceed 250 words.

(4) A rebuttal argument relating to a city measure shall be filed with the elections official no later than 10 days after the final filing date for primary arguments.

(5) A rebuttal argument relating to a city measure may not be signed by more than five persons and shall be printed in the same manner as a direct argument and shall immediately follow the direct argument which it seeks to rebut.

(b) Subdivision (a) applies only if, not later than the day on which the legislative body calls an election, the legislative body adopts its provisions by majority vote, in which case subdivision (a) applies at the next ensuing municipal election and at each municipal election thereafter, unless later repealed by the legislative body in accordance with the procedures of this subdivision.