

EDWARD J. ELSNER  
1708 Milan Ave.  
South Pasadena, CA 91030  
Telephone: (626) 233-1543  
Email: edelsner44@gmail.com

Petitioner in Pro. Per.

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

EDWARD J. ELSNER,

Petitioner,

v.

MARK PEREZ, in his capacity as Deputy City  
Clerk of the City of South Pasadena; DEAN C.  
LOGAN, in his capacity as the Registrar-  
Recorder/County Clerk of the County of Los  
Angeles,

Respondents.

Case No. 24STCP02719

PETITIONER'S OPENING BRIEF

Date: September 4, 2024

Time: 9:30 a.m.

Place: Dept. 85

Judge: Hon. James C. Chalfant

Petition Filed: August 26, 2024

1<sup>st</sup> Amended Petition Filed: August 27, 2024

KARISSA ADAMS; ANDREW BERK; ODOM  
STAMPS; PETE KUTZER; and BIANCA  
RICHARDS, in their capacities as authors of the  
ballot argument in favor of the South Pasadena  
Neighborhood Preservation, Local Control  
measure; RICHARD D. SCHNEIDER; HARRY  
A. KNAPP; ANNE BAGASAO; JOANNE  
NUCKOLS; and DELAINE SHANE, in their  
capacities as authors of the ballot argument against  
the South Pasadena Neighborhood Preservation,  
Local Control measure; ROXANNE M. DIAZ, in  
her capacity as author of the city attorney's  
impartial analysis of the South Pasadena  
Neighborhood Preservation, Local Control  
measure,

Real Parties in Interest.

PETITIONER’S OPENING BRIEF

I. INTRODUCTION.

The first amended petition seeks a writ of mandate requiring the amendment of false or misleading statements in the ballot arguments for and against a local initiative appearing on the ballot in the November 5, 2024, election: the “South Pasadena Preservation, Local Control” measure, also known as “Measure SP.” (*Elsner Decl.*, Exhs. B and D.) Petitioner and the authors of the ballot arguments have agreed on proposed amendments to the ballot arguments which address the concerns raised in the petition. (*Elsner Decl.*, ¶¶ 5, 7, Exhs. C and E.) The petition’s third cause of action relating to the city attorney’s impartial analysis of Measure SP has been resolved by stipulation.

II. HISTORY OF MEASURE SP.

The intent of Measure SP is to repeal “Measure 1,” a citywide, maximum building height approved by voters in 1983. Measure 1 restricted building heights to forty-five (45) feet in all of the city’s zoning districts, including its residential and commercial zoning districts. (*Elsner Decl.*, Exh. A., p.7.) Measure 1’s maximum building height cannot be repealed or amended without voter approval: “No ordinance that is...adopted by the voters, shall be repealed or amended except by a vote of the people....” Elec. Code § 9217. For more than forty (40) years, Measure 1 has restricted the City Council’s ability to increase maximum building heights through legislative action.

Measure SP would enact an ordinance establishing a voter-approved forty-five (45) foot height limit, but only in the city’s single-family residential zoning districts. In these districts, Measure SP provides that the City Council shall set by ordinance, adopted through a public process, allowed heights that are less than or equal to forty-five (45) feet. (*Elsner Decl.*, Exh. A, Section 4.) The city’s zoning code<sup>1</sup> is already consistent with this requirement, as existing allowed heights in the single-family residential zoning districts are currently thirty-five (35) feet and twenty-five (25) feet, depending on location. South Pasadena Municipal Code (“SPMC”) § 36.220.020.A. and B., 36.220.040.A., Table 2-3, 36.250.050.D., Table 2-7. With a voter-approved maximum building height, the City Council could not

<sup>1</sup> Relevant excerpts from the city’s zoning code (Chapter 36 of the South Pasadena Municipal Code) are attached as Exhibit L to petitioner’s supporting declaration.

1 increase allowed heights beyond forty-five (45) feet without voter approval. It is in this sense that  
2 Measure SP “protects” single-family residential zoning districts.

3 Measure SP further provides that for all other zoning districts, including the city’s multi-family  
4 residential zoning districts, the City Council shall set maximum building heights by ordinance, adopted  
5 through a public process. (*Elsner Decl.*, Exh. A, Section 5.)

6 Again, with respect to other zoning districts, the city’s current zoning code is consistent with this  
7 requirement, specifying various maximum building heights that do not exceed forty-five (45) feet. See,  
8 e.g., SPMC § 36.020.040.A., Table 2-3 (maximum building height of forty-five [45] feet for the  
9 Residential Medium Density and Residential High Density zoning districts). Measure SP would not  
10 repeal codified height limits for the other zoning districts, and any increase in maximum building  
11 heights specified in the zoning code would require action by the City Council. However, City Council  
12 action would not be constrained by a voter-approved, maximum building height. This means that other  
13 zoning districts, including the city’s multi-family residential zoning districts, would not have the same  
14 “protection” that Measure SP provides for single-family residential zoning districts.

15 Last, Measure SP provides that when establishing maximum building heights in any zoning  
16 district with a base density exceeding fifty (50) dwelling units per acre, the City Council shall set the  
17 height limit by ordinance, adopted through a public process, at a height limit to achieve the applicable  
18 base density. (*Elsner Decl.*, Exh. A, Section 6.)

19 The reason for this provision is that the California Department of Housing and Community  
20 Development views the city’s voter-approved forty-five (45) foot height limit as a constraint on the  
21 development of affordable housing in the city. (*Elsner Decl.*, Exh. A, p.2.) In order to comply with  
22 state housing mandates, and with a settlement agreement in a housing element lawsuit filed by a housing  
23 advocacy organization, the city committed to and implemented a rezoning program. Residential  
24 densities were increased dramatically in certain mixed-use and multi-family residential zoning districts  
25 to seventy (70) or one hundred and ten (110) dwelling units per acre. The city also committed to seek,  
26 through voter approval, repeal of Measure 1’s forty-five (45) foot height limit. These commitments are  
27 described in programs 2.j., 2.k., 2.n., and 3.a. of the city’s 2021-2029 housing element update. (*Elsner*  
28 *Decl.*, Exh. G.) The repeal of Measure 1 would allow the City Council to set new maximum building

heights, by ordinance and without voter approval, sufficiently high to accommodate the higher densities that have already been enacted and to encourage development of multi-family and other residential housing projects.

To implement the housing element's rezoning program, the City Council generally increased density in the city's two multi-family residential zoning districts to thirty (30) dwelling units per acre in the "Residential Medium Density" zoning districts, and to forty-five (45) dwelling units per acre in the "Residential High Density" zoning districts. SPMC § 36.220.040.A., Table 2-3. The City Council also established two (2) "Housing Opportunity Overlay" districts, the "Ostrich Farm" and "Huntington Drive," with a density of seventy (70) dwelling units per acre for the multi-family residential zoning districts located within the overlay districts. SPMC § 36.250.050.D. (See *Elsner Decl.*, Exh. I for background on the Housing Opportunity Overlay districts.)

Only multi-family residential zoning districts are located within the two Housing Opportunity Overlay districts, and only multi-family residential land uses, i.e., apartment buildings and condominiums, are permitted in the overlay districts. (*Elsner Decl.*, Exh. I, Attachments 5 and 7.) A city press release confirms that Measure SP would direct housing into these multi-family residential districts:

The proposed measure - consistent with the Housing Element and State law - aims to preserve the City's existing neighborhoods and directs future housing units into residential multi-family and/or commercial mixed-used areas served by transit, with convenient access to shopping and services.

(*Elsner Decl.*, Exh. K.) If Measure SP is approved by voters, the City Council would be obligated to set new maximum building heights in the Housing Opportunity Overlay districts to accommodate the higher density. The city attorney's impartial analysis confirms that the residential zoning districts in the Ostrich Farm and Huntington Drive overlay areas would be impacted:

The height limit for residential or mixed-use buildings in any zoning districts on parcels with a base density in excess of 50 du/ac will be set by the City Council to achieve the necessary base density. The areas where those densities are allowed are Downtown Specific Plan, Ostrich Farm, Huntington Drive and Mixed-Use Overlay.

(*Elsner Decl.*, Exh. F.) Increased height and seventy (70) dwelling units per acre density in Ostrich Farm and Huntington Drive overlay areas is designed to incentivize the redevelopment of multi-family apartment buildings, which would result in the eviction and displacement of existing residential tenants.

The recently amended land use element of the city’s general plan projects housing growth of 805 new units (net of existing units that would be demolished during redevelopment) in the city’s medium and high density multi-family residential zoning districts. (*Elsner Decl.*, Exh. H, Table B3.2.)

The relevant take-aways from the above are:

- Measure SP protects only single-family residential zoning districts with a voter-approved maximum building height;
- Multi-family family residential zoning districts, wherever located, would not be protected by a voter-approved maximum building height;
- To implement the housing element rezoning plan, the city has increased density in all multi-family residential zoning districts, wherever located;
- The two higher-density Housing Opportunity Overlay districts, with a seventy (70) dwelling unit per acre density, are comprised solely of multi-family residential zoning districts;
- Multi-family residential zoning districts are located both within and outside the Housing Opportunity Overlay districts;
- Existing height limits that are codified in the city’s zoning code or specified in the city’s general plan would survive Measure SP;
- If Measure SP is approved by voters, City Council action would be required to modify height limits codified in the city’s zoning code or specified in the city’s general plan; and
- Measure SP requires the City Council to set height limits by ordinance in all zoning districts.

III. A PETITION FOR WRIT OF MANDATE IS THE ONLY PROCEDURE BY WHICH FALSE OR MISLEADING INFORMATION IN BALLOT ARGUMENTS MAY BE AMENDED.

“For measures placed on the ballot by the legislative body,...an individual voter who is eligible to vote on the measure, or bona fide association of citizens, or a combination of voters and associations, may file a written argument for or against any city measure.” Elec. Code § 9282(b).

Real parties in interest and individual voters Karissa Adams, Andrew Berk, Odom Stamps, Pete Kutzer, and Bianca Richards co-authored the ballot argument in favor of Measure SP. The ballot

argument in favor of Measure SP was submitted to respondent Mark Perez, the city’s Deputy City Clerk and election official, on August 16, 2024.

Real parties in interest and individual voters Richard D. Schneider, Harry A. Knapp, Anne Bagasao, Joanne Nuckols, and Delaine Shane co-authored the ballot argument against Measure SP. The ballot argument against Measure SP was submitted to respondent Mark Perez on August 15, 2024.

The elections official must make copies of the ballot arguments for and against a local initiative available for public examination during a 10-calendar-day period immediately following the filing deadline for submission of the arguments. Elec. Code §§ 9282, 9295(a).

“During the 10-calendar-day public examination period provided by this section, any voter of the jurisdiction in which the election is being held...may seek a writ of mandate or an injunction requiring any or all of the materials to be amended or deleted. The writ of mandate or injunction request shall be filed no later than the end of the 10-calendar-day public examination period.” Elec. Code § 9295(b)(1). The Elections Code does not authorize any procedure other than a writ of mandate to amend false or material statements in ballot materials.

For Measure SP, the 10-calendar day public examination period began on August 16, 2024, and ended on August 26, 2024. The petition was timely filed on August 26, 2024, the tenth day of the ten-calendar-day public examination period. Elec. Code § 9295(b)(1).

“A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law.” Elec. Code § 9295(b).

The County’s ballot printing deadline is September 6, 2024, and this petition will be heard on September 4, 2024. Issuing a writ before the printing deadline would not substantially interfere with the printing or distribution of official election materials. (See *Respondent Dean C. Logan's Response to Petition for Writ of Mandate and Declaration of Aman Bhullar in Support Thereof*, filed on August 27, 2024.)

“In determining whether statements are false or misleading, courts look to whether the challenged statement is subject to verifiability, as distinct from ‘typical hyperbole and opinionated

1 comments common to political debate.’ [Citation.] An ‘outright falsehood’ or a statement that is  
2 ‘objectively untrue’ may be stricken. [Citation.] We need only add that context may show that a  
3 statement that, in one sense, can be said to be literally true can still be materially misleading; hence, the  
4 Legislature did not indulge in redundancy when it used both words.” *Huntington Beach City Council v.*  
5 *Superior Court* (2002) 94 Cal.App.4th 1417, 1432.

6 For the reasons discussed below, there is clear and convincing proof that the ballot arguments for  
7 and against Measure SP contain false or misleading statements. Petitioner and the authors of the ballot  
8 arguments have also agreed on proposed amendments to the arguments addressing the issues presented  
9 in the first amended petition. A writ of mandate should therefore issue requiring the ballot arguments to  
10 be amended.

11 “Restricting information in the voter pamphlet to material which is neither false, misleading nor  
12 inconsistent with the purpose of the forum represents the city's chosen method to best foster the integrity  
13 of the election process and to aid its citizens in making informed voting choices.” *Patterson v. Bd. of*  
14 *Supervisors* (1988) 202 Cal.App.3d 22, 30.

#### 15 16 IV. THE BALLOT ARGUMENT IN FAVOR OF MEASURE SP.

17 The argument in favor of Measure SP submitted to respondent Mark Perez on August 16, 2024  
18 (*Elsner Decl.*, Exh. B) contains the following false or misleading statements:

- 19  
20 (#1) “A Vote YES on this Measure will protect South Pasadena’s residential neighborhoods  
21 and accommodate the State mandate for additional housing units only in certain  
22 commercial zones.”

23 This is a false statement because Measure SP will not “protect” the city’s multi-family residential  
24 neighborhoods with a voter-approved maximum building height, and Measure SP will not accommodate  
25 the state housing mandate “only in certain commercial zones.” Measure SP will enable the City Council  
26 to set new height limits in the all-residential Housing Opportunity Overlay zones to accommodate a  
27 seventy (70) dwelling units per acre density. The Housing Opportunity Overlay zones are exclusively  
28 residential, not commercial.

- (#2) “New California laws require all cities throughout the State to plan and zone for more  
housing units and density to address the housing shortage. South Pasadena has two  
options: (1) spread additional housing density throughout the City, including single-

1 family and multi-family neighborhoods OR (2) direct increased housing density to  
2 specific areas which are closer to major transportation and commercial areas. South  
3 Pasadena has chosen to increase density exclusively in the following commercial  
4 corridors (the “Housing Zones”): • Ostrich Farm • Huntington Drive • Mission Street •  
5 Fair Oaks Avenue”

6 These statements are false or misleading because they suggest that the city chose not to spread  
7 additional housing density in multi-family residential neighborhoods, but the city did just that when it  
8 implemented the housing element’s rezoning program. Also, the Ostrich Farm and Huntington Drive  
9 corridors include the city’s two Housing Opportunity Overlay zones, which are entirely residential.  
10 Corridors which include both commercial zoning districts and residential zoning districts cannot  
11 properly be described solely as “commercial” or “residential,” they are both.

12 Taken as a whole, these statements would mislead voters about Measure SP’s impact on multi-  
13 family residential zoning districts, especially tenants residing within the higher density Ostrich Farm and  
14 Huntington Drive overlays. Also, “Exclusively...in commercial corridors” necessarily means “not in  
15 residential corridors,” but Measure SP is specifically designed to encourage and enable redevelopment  
16 of multi-family residential parcels located within the all-residential Ostrich Farm and Huntington Drive  
17 overlay zones. Tenants residing in these (and other multi-family residential neighborhoods where  
18 density has been increased) are at risk of being evicted and displaced during redevelopment of existing  
19 apartment buildings. If tenants believe they would not be impacted because they are not residing in a  
20 commercial zoning district, they could end up voting against their own interests.

21 (#3) “A vote YES for this measure will maintain and protect the 45-foot height limit in all  
22 areas of South Pasadena, except for the Housing Zones.”

23 This statement is false or misleading because multi-family residential areas located outside the  
24 “Housing Zones” would not be protected by Measure SP. Only single-family residential zoning districts  
25 would be protected by a voter-approved height limit.

26 (#4) “A vote NO for this measure will require the City to provide alternate locations with the  
27 State for additional housing, which may include spreading density throughout the City,  
28 including our more residential neighborhoods.”

Statement #4 in the ballot argument in favor of Measure SP is misleading because it suggests that  
the city has not already “spread density” in all of the city’s multi-family residential neighborhoods,  
wherever located. This impression is reinforced by the false and misleading language elsewhere in the



1 ballot argument, such as “only in certain commercial zones” and “exclusively in the following  
2 commercial corridors.”

3       Petitioner and the authors of the ballot argument in favor of SP have agreed on proposed  
4 amendments to the argument which correct the false or misleading statements listed above. (*Elsner*  
5 *Decl.*, ¶ 5, Exh. C.) The proposed amended argument truthfully conveys that Measure SP will protect  
6 most but not all residential neighborhoods<sup>2</sup> and will accommodate higher buildings and increased  
7 density in both commercial as well as higher density residential zones, such as the Ostrich Farm and  
8 Huntington Drive overlay areas. Petitioner requests that the Court issue a writ of mandate requiring the  
9 proposed amended argument to be printed in the ballot as the argument in favor of Measure SP.

10  
11 V.     THE BALLOT ARGUMENT AGAINST MEASURE SP.

12       The argument against Measure SP submitted to respondent Mark Perez on August 15, 2024  
13 (*Elsner Decl.*, Exh. D) contains the following false and/or misleading statements:

14  
15       (#1)     “Why are we asking you to VOTE NO on the so called South Pasadena Preservation,  
16                 Local Control measure? Because, instead of preservation, this measure eliminates  
                    building height limits in large parts of our city!”

17       This statement is false or misleading because Measure SP does not repeal or “eliminate” height  
18 limits codified in the zoning code or specified in the general plan. These height limits will survive  
19 Measure SP, subject to future action by the City Council. For higher density zones, Measure SP requires  
20 the City Council to enact ordinances setting height limits to achieve applicable base densities; although  
21 height limits in these areas will be increased, at no time will the height limits be “eliminated.”

22       (#2)     “Eliminating building height limits does NOT encourage sensible housing development.  
23                 Instead, it’s a blank check for real estate developers who will build projects that  
                    maximize their profits.”

24       This statement is misleading because the “blank check” language suggests that if Measure SP is  
25 approved, developers could file land use applications for projects of unlimited height, which could not  
26 be disapproved on the basis that the project exceeded a specified height limit.

27     ///

28     <sup>2</sup> By acreage, single-family residential is the main land use in the city. (*Elsner Decl.*, Exh. H, Figure B3.4).

1 (#3) “South Pasadena’s current height limit was approved by voters; that means our limits  
2 cannot be controlled by the State. This measure eliminates that limit and with that, our  
3 local control.”

4 This statement is false because ordinances zoning ordinances enacted by local initiatives can be  
5 and have been preempted by state law. A city may not adopt ordinances and regulations which conflict  
6 with the state Planning and Zoning Law, including zoning ordinances adopted through the initiative  
7 process. *Leshner Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 547.

8 (#4) “VOTE NO to demand that the City does its homework, honestly and transparently,  
9 before asking voters to eliminate building height limits.”

10 The statement is false or misleading because Measure SP does not eliminate codified building  
11 height limits.

12 (#5) “We know that California has a housing crisis. Eliminating building height limits won’t  
13 solve it. Sky high development could make it worse.”


14 This statement is false or misleading because Measure SP does not eliminate codified building  
15 height limits. Also “[s]ky high” suggests that if Measure SP is approved, developers could file land use  
16 applications for projects of unlimited height, and that the city could not disapprove the project on the  
17 basis that it exceeded a specified height limit.

18 Petitioner and the authors of the ballot argument against Measure SP have agreed on proposed  
19 amendments to the argument which correct the false or misleading statements described above. (*Elsner*  
20 *Decl.*, ¶ 7, Exh. E.) The amended ballot argument against Measure SP truthfully conveys that Measure  
21 SP does not eliminate codified height limits, but instead lifts Measure 1’s restriction on the City  
22 Council’s ability to increase height limits beyond forty-five (45) feet. Petitioner requests that the Court  
23 issue a writ of mandate requiring the proposed amended argument to be printed in the ballot as the  
24 argument against Measure SP.

## 25 VI. CONCLUSION.

26 For the foregoing reasons, petitioner requests that the Court issue a writ of mandate requiring the  
27 amendment of the ballot arguments to conform with the proposed amendments agreed to by petitioner  
28 and the authors of the ballot arguments.

1 Date: August 29, 2024

2   
3 \_\_\_\_\_  
4 EDWARD J. ELSNER  
5 Petitioner in Pro. Per.  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28