



**OFFICE OF THE CITY ATTORNEY**

20410 TOWN CENTER LANE, STE 210 • CUPERTINO, CA 95014  
TELEPHONE: (408) 777-3403 • FAX: (408) 777-3401

TO: David Brandt, City Manager  
Grace Schmidt, City Clerk

FROM: Carol Korade, City Attorney  
Colleen D. Winchester, Assistant City Attorney

DATE: October 14, 2015

RE: Potential Ballot Measures Regarding Civic Center Master Plan and  
Vallco Shopping District Special Area

---

This memorandum reviews the options for voter input on two potential projects within Cupertino: (1) implementation of the Civic Center Master Plan; and (2) a recently submitted application for development of the Vallco Shopping District Special Area (Vallco). The applicability of the California Environmental Quality Act (CEQA) to each of these options is also discussed, as are the election timing and cost considerations.

There are four types of ballot measures that could potentially be used to seek voter input on the two projects, as follows: (1) voter-sponsored initiative; (2) voter-sponsored referendum; (3) Council-sponsored "initiative"; and (4) Council-sponsored advisory measure. In addition, certain types of financing mechanisms that could be used to implement the Civic Center Master Plan would require voter approval, although these are currently not the recommended financing alternative.

The various types of measures, their timing constraints, and whether they are subject to CEQA are described below and summarized in the attached Table 1. The potential applicability of each type of measure to the Civic Center

and Vallco proposal is discussed in Sections II and III. The memo concludes with information on the estimated cost and timing considerations for conducting an election on these issues.

## **I. Types of Ballot Measures and Applicability of CEQA**

### **A. Voter-sponsored initiative (not subject to CEQA)**

Voter-sponsored initiatives are limited to “legislative” acts; they may not be used for administrative or quasi-adjudicatory actions. In the land use context, the distinction between legislative and non-legislative acts is not always clear-cut. However, the courts have adopted a largely “categorical approach” under which certain types of decisions—e.g., general plans and amendments, specific plans and amendments, and zoning ordinances and re-zonings—are considered legislative and therefore subject to voter-sponsored initiative. *See, e.g., Arnel Development Company v. City of Costa Mesa*, 28 Cal.3d 511, 522-24 (1980).

Other types of decisions—e.g., subdivision maps, variances, conditional use permits—are considered adjudicative or administrative and therefore non-legislative and not subject to initiative. *Id.* Courts will deviate from this categorical approach only rarely where unique circumstances are present. In general law cities such as Cupertino, voter-sponsored initiatives cannot be used for advisory measures. *See American Federation of Labor v. Eu*, 36 Cal.3d 687, 714-15 (1984); *Marblehead v. City of San Clement*, 226 Cal.App.3d 1504, 1509 (1991).

Voter-sponsored initiatives are drafted and prepared by individual voters or groups of voters, who have a maximum of 180 days to gather the requisite number of valid signatures (10% of registered voters for a regular election; 15% for a special election) to qualify a proposal for the ballot. Elec. Code §§ 9208, 9214, 9215. Although the individuals signing the petition must be registered voters, there is no similar requirement for those who simply propose or circulate an initiative. The 180-day period commences only after the proponents have prepared the text of the initiative, submitted it to the city, and received the City Attorney’s official ballot title and summary. Elec. Code

§§ 9202, 9208. According to the County Registrar, as of the last official voter rolls, there were 26,866 registered voters in the City; so it would take a minimum of 2,687 valid signatures to qualify an initiative for the ballot.

Once an initiative qualifies for the ballot and is presented to the City Council, the Council must either adopt the measure exactly as proposed or submit it to the voters at the next regular or special election for which it qualifies. The timing of the election depends on several factors, but cannot be any earlier than 88 days after the City Council receives certification that the measure has qualified for the ballot. *See* Elections Code §§ 1405, 9214, 9215.

A voter-sponsored initiative is not subject to CEQA, regardless of whether the City Council adopts it or places it on the ballot. *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal.4th 1029, 1043 (2014); CEQA Guidelines § 15378(b)(3). It is possible, however, that subsequent discretionary decisions necessary to implement an adopted initiative measure would be subject to CEQA.

#### **B. Voter-sponsored referendum (not subject to CEQA)**

The “referendum” is the power of the voters to approve or reject legislative acts approved by the City Council. Referendums have been used, for instance, to challenge general plan amendments, specific plans, coastal plans, and development agreements. *See, e.g., Chandis Securities Company v. City of Dana Point*, 52 Cal.4th 475 (1997). Like initiatives, however, referendums cannot be used for administrative or quasi-adjudicatory approvals such as tentative subdivision maps and conditional use permits.

To qualify a referendum on the ballot, proponents must gather and submit referendum petitions signed by at least 10% of city voters. These signatures must be submitted within 30 days after the City Council’s adoption of the legislation is certified by the City Clerk. Elec. Code § 9237. If the sufficient number of signatures is submitted, the City Council must either repeal the challenged legislation or submit it to the voters. Elec. Code § 9241. The measure must appear on the ballot either at the next regular election occurring at least 88 days after the order of election, or at a special election occurring at least 88 days

after that order. *Id.* If the legislation is rejected by the voters (or repealed by the Council), the City Council cannot re-enact it for a period of at least one year. *Id.*

A referendum itself is not subject to CEQA. However, the City Council would need to comply with CEQA, to the extent applicable, prior to adopting any legislation subject to referendum.

**C. Council-sponsored legislation (subject to CEQA)**

The City Council may voluntarily submit any proposed legislative act directly to the voters. Elec. Code § 9222. In our view, although the Elections Code only refers expressly to “ordinances,” this option also applies to other legislative acts (such as general plan amendments) that are adopted by “resolution” rather than ordinance. *See DeVita v. County of Napa*, 9 Cal.4th 763, 773-75 (1995) (holding that the voters’ initiative power applies to general plan amendments even though they are adopted by “resolution”); *see also* Gov’t Code § 65453 (providing that a specific plan “may be adopted by resolution *or* by ordinance”) (emphasis added).

Any such council-sponsored measure would be subject to CEQA. *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal.4th 165, 191 (2001). Such measures may appear on the ballot at any regular or special election date occurring at least 88 days after the order of election. Elec. Code § 9222.

**D. Council-sponsored advisory measure (not subject to CEQA)**

The City Council may also place an “advisory” measure on the ballot “for the purpose of allowing voters . . . to voice their opinions on substantive issues, or to indicate to the [City Council] approval or disapproval of the ballot proposal.” Elec. Code § 9603(a). The measure would appear on the

ballot at the next *currently scheduled* regular or special election at least 88 days after the order of election.<sup>1</sup> See Elec. Code §§ 9603(a); 1405.

Advisory measures do not commit the City Council to take (or not take) any particular action. Elec. Code § 9603(b) (“The results of the advisory vote will in no manner be controlling on the sponsoring legislative body.”); *see also id.* “[A]dvisory vote’ means an indication of general voter opinion regarding the ballot proposal.”). Accordingly, the placement of an advisory measure on the ballot would not constitute an approval of a project under CEQA and therefore would not require CEQA review. *Save Tara v. City of West Hollywood*, 45 Cal.4th 116, 135, 138-39 (2008); *Cedar Fair v. City of Santa Clara*, 194 Cal.App.4th 1150, 1165 (2011); *see also Chung v. City of Monterey Park*, 210 Cal.App.4th 394, 405-06 (2012).

#### **E. Financing mechanisms (potentially subject to CEQA)**

Certain types of financing mechanisms (e.g., general obligation bonds) that could potentially be used to finance public projects require voter approval. *See, e.g.*, Gov’t Code § 43608. A proposal to issue general obligation bonds generally can be placed on the ballot in the same manner as any other ballot measure. *See, e.g.*, Gov’t Code §§ 43613; Elec Code § 9401.

Other types of financing mechanisms that do not increase taxes or the city’s debt limit (e.g., certificates of participation backed by leases) do not require voter approval. *See, e.g., Rider v. City of San Diego*, 18 Cal.4th 1035, 1046-49. We understand that the type of financing under consideration for the Civic Center Master Plan would consist of certificates of participation (COPs) issued by the Cupertino Financing Authority or other similar authority and thus would not require voter approval.

Whether a particular financing mechanism is subject to CEQA depends on the specificity of the mechanism and whether it commits the City to

---

<sup>1</sup> Unlike for the other types of ballot measures discussed above, the City Council could not *order* a special election just for an advisory measure. Elec. Code § 9603(a). However, if a special election were already scheduled in the City, the Council could add the advisory measure to the ballot for that election.

any specific project. CEQA Guidelines § 15378(b)(4) (CEQA's definition of a "project" does not include "[t]he creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment.").

Because the City has already completed its CEQA review for the Civic Center Master Plan, additional CEQA review would not be required to approve any particular financing mechanism unless there were substantial changes to the project or the surrounding circumstances that triggered the thresholds for additional environmental review. *See* Pub. Res. Code § 21166; CEQA Guidelines § 15162.

## **II. Options Regarding the Civic Center Master Plan**

The Council's options regarding this project include: (1) a binding legislative proposal to affirm, rescind, or modify the Master Plan in specified ways, or (2) an advisory measure on that question or on a more specific conceptual plan. In our view, the Council could also submit its proposal for how to finance the project to the voters for an advisory vote, even if the particular financing mechanism does not require voter approval. Particularly in light of the CEQA review that the City has already conducted for the Master Plan, it is unlikely that any of these approaches would require CEQA review.

## **III. Options Regarding the Vallco Shopping Center**

The City's recently adopted General Plan (Community Vision 2040) sets forth the City Council's broad vision for the redevelopment of the Vallco Shopping District Special Area into a vibrant mixed-use "town center." Land Use Policy LU-19.1 of the General Plan requires the creation of a "Vallco Shopping District Specific Plan prior to any development on the site . . ." This Specific Plan must lay out the specific land uses, design standards, and infrastructure improvements for the area, based on the 14 specific "strategies" set forth in the General Plan. *See* Policy LU-19.1. Strategy LU-19.1.4 specifies the uses envisioned for the site, which include Retail, Hotel, Residential, and Office. Both the Land Use Element and the City's subsequently enacted Housing

Element identify the Vallco area as a potential “housing element site” to meet the City’s State-mandated Regional Housing Needs Assessment allocation.

The Council’s options regarding this project include: (1) an advisory measure or measures seeking guidance on one or more conceptual proposals for this development; and (2) upon completion of the CEQA process, submittal of the specific plan, development agreement, and/or other related legislative approvals to the voters as a proposed Council-sponsored ordinance. Any legislative proposal submitted by the Council would require prior CEQA

#### **IV. Election costs and timing**

##### **A. Costs**

The estimated costs for holding an election depend on whether the City places the measure(s) on the ballot at (1) a stand-alone election (either at the April 12, 2016 “established” election date or at another special election date if authorized); (2) at the June 7, 2016 state-wide primary; or (3) the November 8, 2016 general election.

A stand-alone election (i.e., an election on a date that the County is not already conducting an election) would include a “base charge” of \$377,600 plus an additional cost of roughly \$35,350 for an average length ballot measure. Thus, the total estimated costs to conduct a stand-alone election that included measures on both the Civic Center Master Plan and on Vallco would be approximately \$448,300.

For the June primary, the “base charge” would be \$68,500 and the additional \$35,350 per-measure costs would remain the same. Thus, the total estimated costs for a two-measure election at the June primary would be approximately \$139,230. For the November general election, the “base charge” would be \$34,000 and the additional \$35,350 per-measure costs would remain the

same.<sup>2</sup> Thus, the total estimated costs for a two-measure election at the November election would be approximately \$104,700.

These costs are *estimates* only. The final costs would depend on the actual full costs for the County to conduct the election. These estimates do not include any staff time or other expenses the City might itself incur.

## **B. Timing**

The last day for the City Council to place a measure on any ballot is 88 days before the election. Thus, the last date for the City to place a measure on the ballot for the established election dates in 2016 is as follows:

<u><b>Election Date</b></u>	<u><b>Last Day to Place Measure on Ballot</b></u>
April 12, 2016	January 15, 2016
June 7, 2016	March 11, 2016
November 8, 2016	August 12, 2016 <sup>3</sup>

---

<sup>2</sup> November 8, 2016 is a City Council election, so the City will be required to spend \$34,000 whether or not measures are proposed for that ballot.

<sup>3</sup> If a voter-sponsored initiative measure qualified for a special election (i.e., if it were signed by at least 15% of the City's registered voters), then the City would ordinarily be required to conduct a special election within 88 to 103 days after the order of election. Elec. Code § 1405(a). However, the City Council would have the discretion to move that date to one of the three established election dates. *Id.*