

**FIRST AMENDED AND RESTATED AGREEMENT BETWEEN
THE COUNTY OF SANTA CLARA
AND CITY OF CUPERTINO FOR
A TOBACCO RETAIL PERMIT PROGRAM**

This First Amended and Restated Agreement (“Agreement”) is entered into by and between the County of Santa Clara (“County”) and City of Cupertino (“City”) relating to administration and enforcement of a tobacco retail permit program in the City of Cupertino. County and City may be referred to in this Agreement individually as a “Party” and collectively as “Parties.”

Background / Purpose

In 2010, the County ~~adopted~~ added Chapter XXIII to Division A18 of its Ordinance Code (“Chapter XIII”), thereby an ordinance establishing a permit requirement for retailers of tobacco products in the unincorporated areas of the County of Santa Clara (~~“County Ordinance”~~). The County has since expanded the scope of Chapter XXIII and modified provisions therein, the County Ordinance, which is currently codified in Chapter XXII of Division B11 of the County Ordinance Code. On February 18, 2020, the City has adopted an ordinance to mirror the substantive provisions of the County Ordinance, which is currently codified in City Code Chapter 5.50 to mirror the provisions of Chapter XXIII in their entirety, effective July 1, 2020, and intends to continue updating City Code Chapter 5.50 to maintain consistency with Chapter XXIII of the Cupertino Municipal Code (“City Ordinance”). The City and County intend for the County to administer and enforce the City’s tobacco retail permit program (as described in City Code Chapter 5.50) within the City, except as otherwise provided in this Agreement. The County intends to cite violators of the City’s Municipal Ordinance Code Chapter 5.50 pursuant to this Agreement. Terms used in this Agreement, such as, but not limited to, “tobacco products” and “retailer,” shall be interpreted in accordance with Chapter XXIII and City Code Chapter 5.50.

Agreement

The Parties agree as follows:

1. Designation

The City hereby designates the County of Santa Clara’s Department of Environmental Health and any agency or person designated by the Director of the Department of Environmental Health to enforce ~~and~~ administer the City Ordinance. The ~~County~~ shall act as the City’s designee “Department”, as defined in section 5.50.020(b) of the City Ordinance.

2. Scope of Work

Each Party shall perform the work as described in Exhibit A, attached hereto and incorporated herein by this reference.

3. Legislative Consistency

The County's administration and enforcement under this Agreement is contingent upon the City's adoption and maintenance of a City Ordinance that is the same as the County Ordinance in all material respects.

- 3.1 Within 90 days of the County's adoption of any material amendment to the County Ordinance, the City's governing body shall consider and vote upon an amendment to the City Ordinance that is the same as the County's amendment in all material respects. If the City does not adopt such an amendment within 90 days of the County's amendment to the County Ordinance, the County may, in its sole discretion, immediately terminate this Agreement by sending written notice to the City.
- 3.2 If the City wishes to amend the City Ordinance other than to conform to the County's prior amendment of the County Ordinance as set forth in Paragraph 3.1 above, the City shall provide the County with the full text of the proposed amendment 120 days prior to adoption of such an amendment. If the City adopts an amendment to the City Ordinance other than to conform in all material respects to the County's prior amendment of the County Ordinance, the County may, in its sole discretion, immediately terminate this Agreement by sending written notice to the City.
- 3.3 The County shall have no responsibility for administering or enforcing any provisions of the City Ordinance that are in addition to or otherwise materially different from the County Ordinance.

~~3.4 The Parties agree that the County Ordinance and City Ordinance effective on the date of this Agreement are the same in all material respects.~~

4. Relationship of Parties / Independent Contractors

Each Party shall perform all work described herein as an independent contractor and not as an officer, agent, servant or employee of the other Party. None of the provisions of this Agreement are intended to create, nor shall be deemed or construed to create, any relationship between the Parties other than that of independent parties contracting with each other for purpose of effecting the provisions of this Agreement. The Parties are not, and shall not be construed to be, in a relationship of joint venture, partnership or employer-employee. Neither Party has the authority to make any statements, representations or commitments of any kind on behalf of the other Party, or to use the name of the other Party in any publications or advertisements, except with the written consent of the other Party or as is explicitly provided herein. Each Party shall be solely responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any.

5. Term of Agreement

This Agreement is effective from the date that this Agreement is executed by all Parties, until terminated in accordance with this Agreement.

6. Payment

The City shall adopt, by reference, the County's fee schedule for annual tobacco retail permits and tobacco retail permit applications. All annual permit fees and application fees for the tobacco retail permit program shall be collected and retained by the County.

The County shall advise City of the initial permit fee and application fee necessary to cover County's anticipated costs under this Agreement. Thereafter, the County shall provide notice to the City and tobacco retail permit holders in the City of any increases or decreases in the cost of the County's work under this Agreement and any need to revise permit fees and/or application fees accordingly.

7. Termination

Except as provided in paragraphs 3.1 and 3.2 above, which allow for immediate termination in the specified circumstances, either Party may terminate this Agreement for any reason upon ninety (90) days' written notice. Upon service of a termination notice, the Parties shall use their best efforts to develop a mutually agreeable plan for transition of the County's responsibilities to the City. Upon termination of this Agreement, the City ~~shall~~ will be responsible for replacing the County-issued permits.

8. Indemnification and Insurance

~~The City shall indemnify, defend, and hold harmless the County, its officers, agents, and employees from any claim, liability, loss, injury, or damage arising out of, or in connection with, performance of this Agreement by the City and/or its agents, employees, or sub-contractors, excepting only loss, injury, or damage caused by the sole gross negligence or willful misconduct of personnel employed by the County. It is the intent of the parties to this Agreement to provide the broadest possible coverage for County. The City shall reimburse the County for all costs, attorneys' fees, expenses, and liabilities incurred with respect to any litigation in which the City contests its obligation to indemnify, defend, and/or hold harmless the County under this Agreement and does not prevail in that contest. In lieu of and notwithstanding the pro rata risk allocation, which might otherwise be imposed between the Parties pursuant to Government Code Section 895.6, the Parties agree that all losses or liabilities incurred by Party shall not be shared pro rata but, instead, County and City agree that, pursuant to Government Code Section 895.4, each of the Parties hereto shall fully indemnify and hold each of the other Parties, their officers, board members, employees, and agents, harmless from any claim, expense or cost, damage or liability imposed for injury (as defined in Government Code Section 810.8) occurring by reason of the negligent acts or omissions or willful misconduct of the indemnifying party, its officers, employees or agents, under or in connection with or arising out of any work, authority or jurisdiction delegated to such party under this Agreement. No party, nor any officer, board member or agent thereof shall be responsible for any damage or liability occurring by reason of the negligent acts or omissions or willful misconduct of the other Parties hereto, their officers, board members, employees, or agents, under or in connection with or arising out of any work authority or jurisdiction delegated to such other Parties under this Agreement.~~

Without limiting the indemnification both Parties shall maintain or cause to be maintained the following insurance coverage: (1) a policy of commercial general liability with limits of liability

not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) annual aggregate; (ii) a policy of workers' compensation providing statutory coverage; (iii) a policy of professional or public officials errors and omissions liability with limits of liability not less than one million dollars (\$1,000,000) per occurrence/aggregate; and (iv) such other insurance or self-insurance as shall be necessary to insure it against any claim or claims for damages arising under the Agreement. Each Party's insurance afforded by the commercial general liability policy shall be endorsed to provide coverage to the other Party as an additional insured. ~~Each Party shall provide~~ ~~a~~ Certificate of Insurance certifying that coverage as required herein has been obtained to the other Party. The requirements of this section may be satisfied by the provision of similar coverage through a self-insurance program.

9. Compliance with All Laws, Rules, Regulations, Policies and Procedures

The Parties shall comply with all applicable federal, state, and local laws, rules, regulations, policies, and procedures.

10. Monitoring / Records

10.1 Monitoring

Each Party shall permit the other Party to monitor its performance of this Agreement. To the extent permitted by law, such monitoring may include, but not be limited to, audits and review of records related to this Agreement. Upon request, a Party shall provide the other Party with access to facilities, financial, and employee records that are related to the purpose of the Agreement, except where prohibited by federal, state, or local laws, regulations, or rules. Monitoring shall be permitted at any time during normal business hours upon no less than 10 business days advance notice and may occur up to one year following termination of the Agreement.

Each Party shall designate a project director/coordinator responsible for overseeing that Party's performance of this Agreement. Each Party shall notify the other Party in writing of the designation of the project director/coordinator and of any change thereto.

10.2 California Public Records Act

The Parties are public agencies subject to the disclosure requirements of the California Public Records Act ("CPRA"). In the event of a CPRA request for information related to this Agreement, each Party ~~shall~~ will use its best efforts to notify the other Party before such disclosure.

11. ~~Conflict of Interest~~ Representations and Warranties

11.1 Conflict of Interest

~~Both Parties~~ Each Party shall comply, and require its subcontractors to comply, with all applicable: (i) requirements governing avoidance of impermissible client conflicts; and (ii) federal, state, and local conflict of

interest laws and regulations including, without limitation, California Government Code section 1090 et. seq., the California Political Reform Act (California Government Code section 87100 et. seq.) and the regulations of the Fair Political Practices Commission concerning disclosure and disqualification (2 California Code of Regulations section 18700 et. seq.). Failure to do so constitutes a material breach of this Agreement and is grounds for immediate termination of this Agreement by either Party.

~~In accepting this Agreement, each Party covenants that it presently has no interest, and shall not acquire any interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of this Agreement. Each Party further covenants that, in the performance of this Agreement, it shall not employ any contractor or person having such an interest. Each Party, including but not limited to each Party's employees and subcontractors, may be subject to the disclosure and disqualification provisions of the California Political Reform Act of 1974 (the "Act"), that (1) requires such persons to disclose economic interests that may foreseeably be materially affected by the work performed under this Agreement, and (2) prohibits such persons from making or participating in making decisions that will foreseeably financially affect such interests. If the disclosure provisions of the Political Reform Act are applicable to any individual providing service under this Agreement, each Party shall, upon execution of this Agreement, provide the other Party with the names, description of individual duties to be performed, and email addresses of all individuals, including but not limited to the Party's employees, agents and subcontractors, that could be substantively involved in "making a governmental decision" or "serving in a staff capacity and in that capacity participating in making governmental decisions or performing duties that would be performed by an individual in a designated position," (2 CCR 18701(a)(2)), as part of the Party's service to the other Party under this Agreement. Each Party shall immediately notify the other Party of the names and email addresses of any additional individuals later assigned to provide such service under this Agreement in such a capacity. Each Party shall immediately notify the other Party of the names of individuals working in such a capacity who, during the course of the Agreement, end their service to the Party providing notice.~~

~~If the disclosure provisions of the Political Reform Act are applicable to any individual providing service under this Agreement, each Party shall ensure that all such individuals identified pursuant to this section understand that they are subject to the Act and shall conform to all requirements of the Act and other laws and regulations listed in this subsection including, as required, filing of Statements of Economic Interests within 30 days of commencing service pursuant to this Agreement, annually by April 1, and within 30 days of their termination of service pursuant to this Agreement.~~

~~**11.212. Authority**~~

Each individual executing this Agreement on behalf of a Party represents that he or she is duly authorized to execute and deliver this Agreement on that Party's behalf.

13-12. Assignment, Delegation, Subcontracting

Neither Party may assign any of its rights, delegate any of its duties, or subcontract any portion of its work or business under this Agreement without the prior written consent of the other Party, which such other Party may withhold in its sole and absolute discretion. No assignment, delegation, or subcontracting shall release a Party from any of its obligations or alter any of its obligations to be performed under the Agreement.

134. Governing Law, Jurisdiction, and Venue

This Agreement shall be construed and its performance enforced under California law. In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara or, if federal jurisdiction is appropriate, exclusively in the United States District Court for the Northern District of California, in San Jose, California.

154. Waiver

No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. Any waiver granted by a Party must be in writing, and shall apply to the specific instance expressly stated.

165. Notice

Any notice required to be given by either Party, or which either Party may wish to give, shall be in writing and served either by personal delivery or sent by certified or registered mail, postage prepaid, addressed as follows:

———If to COUNTY:

County of Santa Clara
Public Health Department
Sara H. Cody, MD
Health Officer and Public Health Director
976 Lenzen Avenue
San Jose, CA 95126

———If to CITY:

City of Cupertino
City Manager's Office
Pamela Wu
City Manager
10300 Torre Avenue
Cupertino, CA, 95014

With a copy to:
Count of Santa Clara Public Health Department
Contracts and Compliance Unit

976 Lenzen Avenue, Second Floor
San Jose, CA 95126

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail. Either Party may designate a different person and/or address for the receipt of notices by sending written notice to the other Party.

167. Third Party Beneficiaries

This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

178. Entire Agreement

This document represents the entire Agreement between the Parties with respect to the subject matter hereof. All prior negotiations and written and/or oral Agreements between the Parties with respect to the subject matter of this Agreement are merged into this Agreement.

189. Amendments

This Agreement may only be amended by a written instrument signed by the Parties.

1209. Survival

The rights and duties under the following provisions shall survive the termination or expiration of this Agreement: Section 8 – Indemnification and Insurance; Section 10 – Monitoring/Records; Section 11 – Conflicts of Interest; and Section 14 – Governing Law, Jurisdiction, and Venue, and in any instrument, certificate, exhibit, or other writing attached hereto and incorporated herein.

2120. Severability

If any term, covenant, condition, or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the terms, covenants, conditions, and provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

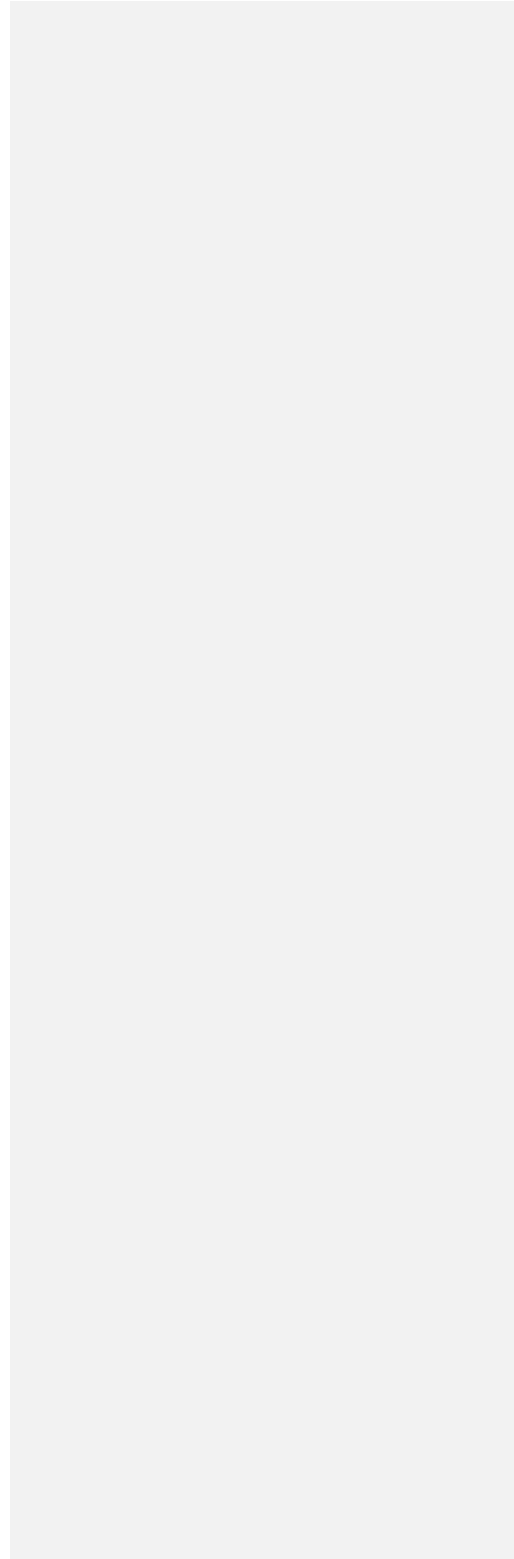
2221. Contract Execution

Unless otherwise prohibited by law or City or County policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term “electronic copy of a signed contract” refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed contract in a portable document format. The term “electronically signed contract” means a contract that is

executed by applying an electronic signature using technology approved by the Parties.

23. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.



IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates written below.

Signed:

County of Santa Clara:

City of Cupertino

Gene Clark
Chief Procurement Officer

Date

Pamela Wu
Cupertino City Manager

Date

Approved as to Form
and Legality:

Attest:

Jenny Lam
Deputy County Counsel

Date

Kirsten Squarcia
Cupertino City Clerk

Date

Approved:

Approved as to Form:

Sara H. Cody, MD
Health Officer and Public Health
Director

Date

Christopher Jensen
Cupertino City Attorney

Date

Approved:

Tina Cordero
CSCHS Chief Fiscal Officer

Date

Exhibits to this Agreement:

Exhibit A: Scope of Work

EXHIBIT A

COUNTY OF SANTA CLARA AND CITY OF CUPERTINO TOBACCO RETAIL PERMIT PROGRAM – DESCRIPTION OF ROLES BY AGENCY

County of Santa Clara

Department of Environmental Health

- ~~1. Send out~~ Provide permit applications to all new retailers selling tobacco products in the City of Cupertino and issue permits to eligible applicants on an annual basis.
- ~~4.2. Ensure all~~ existing tobacco retailers selling tobacco products in the City of Cupertino and issue permits to eligible applicants retail permits that meet and maintain eligibility requirements are renewed on an annual basis.
- ~~2.3.~~ Maintain database tracking system for all permitted tobacco retailers.
- ~~3.4.~~ Provide list of permitted tobacco retailers to Public Health Department and ~~County Sheriff's Office~~ City of Cupertino on an annual basis or more frequently as requested.
- ~~5.~~ Collect required permit fees.
- ~~6.~~ Meet with all related personnel to: (1) coordinate enforcement strategy; and (2) develop/maintain policy and procedure for enforcement.
- ~~4.~~
- ~~7.~~ Conduct at least one annual inspection of tobacco retailers to ensure compliance with local, state, and federal laws (except sales to ~~minors~~ underage individuals).
- ~~8.~~ Meet with all related personnel as necessary to: (1) coordinate post compliance check strategy; and (2) next steps for violations.
- ~~5.~~
- ~~9.~~ Conduct follow up inspections, including for complaints received by the public, if necessary, for ensuring compliance with the tobacco retail permit ordinance. Provide and promote a clear process for the public to file and track complaints for potential violations of the tobacco retail permit ordinance.
- ~~10.~~ Respond to requests for information from Cupertino tobacco retailers and the public regarding requirements under the tobacco retail permit ordinance.
- ~~6.~~
- ~~7.11.~~ Keep records of inspection outcomes for each tobacco retailer and provide annual inspection report summaries to a single point of contact at the Public Health Department.
- ~~12.~~ Take ~~appropriate~~ enforcement action, as appropriate, to address if a violation is not corrected.
- ~~13.~~ Notify the City of Cupertino when Notice of Violations (NOVs) are issued as a result of violations of the ordinance.
- ~~14.~~ Issue NOVs per Ordinance and ensure the tobacco retailer corrects violations and executes all required corrections identified in the NOV.
- ~~8.~~
- ~~9.~~ Coordinate with the County Sheriff's Office when violations of sales to minors occur in order to take the appropriate enforcement action (may include fines and suspension of permit).
- ~~10.15.~~ Coordinate with the Office of County Hearing Officer as appropriate on hearings, including to supply information on violations where an appeal is requested.

Public Health Department

1. Provide initial list of tobacco retailers to Department of Environmental Health to send out permit applications.

Formatted: Font color: Auto, Ligatures: None

Formatted: Normal, No bullets or numbering

Formatted: Font: (Default) Times New Roman, Ligatures: None

Formatted: Font: (Default) Times New Roman, Ligatures: None

Formatted: Font: (Default) Times New Roman, Ligatures: None

Formatted: Indent: Left: 0.24", No bullets or numbering

2. Obtain lists from California Department of Tax and Fee Administration ~~and Cupertino Business Licensing Office*~~ to establish current list of tobacco retailers and monitor for any new retailers.
3. Provide on-going technical assistance to Department of Environmental Health on ordinance requirements. This may include trainings for inspectors, research on flavored and emerging products, and development of educational materials for tobacco retailers.
- ~~3.4.~~ Map any new retailers to ensure they meet eligibility requirements related to distance from schools, distance from existing tobacco retailers, and that under the ordinance the retailer meets all other eligibility requirements.
5. Notify the Department of Environmental Health and Cupertino Business Licensing Office* if a business seeking is ineligible for a tobacco retail permit is deemed ineligible by the County due to the ordinance requirements, including attaching any relevant documentation supporting the basis for business ineligibility (e.g. maps of business location; documentation of pharmacy license status; copies of 3 or more NOV's issued in a 60-month period.
- ~~4.6.~~
- ~~5.7.~~ Proactively engage the business community so that they are aware of the TRL ordinance (e.g., effective date, requirements, fines/penalties) as appropriate.
6. Respond to requests for information from Cupertino tobacco retailers and the public regarding requirements under the Tobacco Retail Permit ordinance.
7. Meet with all related personnel to: (1) coordinate enforcement strategy; and (2) develop/maintain policy and procedure for enforcement.
8. Meet with all related personnel as necessary to: (1) coordinate post-compliance check strategy; and (2) next steps for violators.
- 9.8. Coordinate with the Office of County Hearing Officer as appropriate on hearings.
- ~~10.9.~~ Provide an annual update to appropriate Cupertino staff on enforcement and compliance activities and outcomes for the program.

County Sheriff's Office

1. Conduct undercover decoy operations targeting tobacco retailers; to ensure compliance with sales of tobacco products to underage individuals laws. Prior to performing operations, notify Department of Environmental Health of planned operation dates.
2. Issue citations for any violations of tobacco sales to underage individuals laws (e.g. PC § 308(a), Cupertino Municipal Code Chapter 5.50, CA Business and Professions Code § 22958), violations of PC § 308(a).
3. Immediately notify the County (Department of Environmental Health and Public Health) on outcomes of enforcement operations within 3-5 days of the performed operation. Provide copies of all documentation associated with the violation: a copy of the citation, written reports/records, or any additional evidence of violation (e.g. receipts, photo copies of the product) to the Department of Environmental Health, particularly when violations of PC § 308(a) occur.
4. Provide documentation for the violation, including a copy of the citation, any additional report, written record, or evidence of violation to the Department of Environmental Health and Public Health.
- 5.4. Provide enforcement report summaries to a point of contact at the Public Health Department and Department of Environmental Health. Coordinate with the Office of County Hearing Officer and County Counsel as appropriate on appeals hearings.

City of Cupertino

Business Licensing Office *

- ~~1. Route business licensing applications for any new tobacco retailers to a designated contact at the County Public Health Department to determine permit eligibility. Any business that sells tobacco products is subject to the requirements under the Tobacco Retail Permit ordinance.~~
- ~~2. Route new and renewal applications to County Public Health and Environmental Health to ensure there has not been a change in ownership at the business.~~

City Manager's Office

1. Publish information on the City of Cupertino's website on the TRP ordinance, for example: where tobacco retailers can get more information on the requirements for selling tobacco in Cupertino, and how the public can file a complaint or request more information about the TRP ordinance.
- ~~1. Provide information on the City of Cupertino's website where tobacco retailers can get more information on the requirements for selling tobacco in Cupertino.~~
2. Act as a resource to other cities that may be interested in a similar partnership with the County.
3. Update ordinance as needed in collaboration with City Attorney and the County Counsel's Office/Departments.

~~*Business Licensing Office is a program within the Finance Division, which is within the Administrative Services Department in Cupertino.~~