

## **APPENDIX 2**

### **SECTION-BY-SECTION DESCRIPTION AND SUMMARY OF INITIATIVE**

This Appendix to the 9212 Report summarizes and describes each part of the Initiative. It was prepared by the City Attorney's office and outside counsel with the assistance of City planning staff. The full text of the Initiative is set forth in Appendix 1A.

The Initiative states that it seeks to achieve its stated purposes by amending various provisions of the City of Cupertino's *General Plan (Community Vision 2015-2040)*. California law requires each city and county to adopt and maintain a "general plan" that establishes permissible land uses and maximum development densities and intensities for all properties within that jurisdiction. A city's general plan effectively serves as its living "constitution" for all future land use decisions. Under state law, and in the absence of an initiative providing otherwise, a city council can amend the general plan up to four times per year.

The Initiative's proposed amendments to Cupertino's General Plan are described below in Part III. Where helpful to show the changes made by the Initiative, this summary adopts the Initiative's practice of showing proposed deletions to the existing General Plan in ~~strike through~~ and new language inserted by the Initiative in underline.

#### **I. Part I. TITLE (Page 1 of the Initiative)**

Part I of the Initiative sets forth the title proposed by the Initiative proponents: "Cupertino Citizens' Sensible Growth Initiative." As is often the case, this title differs from the official title prepared by the City Attorney pursuant to Elections Code section 9203, which requires the City Attorney to prepare "a true and impartial statement of the purpose of the proposed measure in such language that the ballot title shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure."

The City Attorney's official ballot title reads as follows: "Initiative amending Cupertino's General Plan to limit redevelopment of the Vallco Shopping District, limit building heights and lot coverages in areas throughout the City, establish new setbacks and building planes on major thoroughfares, and require voter approval for any changes to these provisions."

The City Attorney's full ballot title and summary for the Initiative is set forth in Appendix 1B.

## **II. PART II. FINDINGS (Page 1 of the Initiative)**

Part II of the Initiative sets forth the Initiative’s proposed “findings,” which summarize the proponents’ rationale for why the Initiative is needed at this time. Further information regarding the proponents’ reasons for proposing the Initiative are set forth in the Notice of Intent to Circulate Petition that the proponents submitted when they requested the official title and summary. The Notice of Intent is reproduced in Appendix 1C.

If the Initiative is adopted, these findings could help guide the City Council, or the courts in the event of a legal challenge, in determining how to interpret and apply any ambiguities in the provisions set forth in the Initiative.

## **III. PART III. PURPOSE (Pages 1-2 of the Initiative)**

Part III of the Initiative sets forth its three purposes, which are to:

1. “control the intensity of new development by setting general citywide limits on building heights, setbacks, building planes and lot coverage in Cupertino that will provide long-term direction”;
2. “preserve and enhance the Vallco Shopping District for retail, hotel, dining and entertainment commercial uses”; and
3. “require that changes or exceptions to those limits and uses be presented to and approved by the voters of Cupertino.”

Like the “findings” in Part II, these stated purposes could help guide the City Council, or the courts in the event of a legal challenge, in determining how to interpret and apply any ambiguities in the General Plan amendments set forth in the Initiative. The City Council, however, has broad discretion to interpret any ambiguities in the General Plan and to balance competing policies, goals, and provisions of the General Plan, whether adopted by the Initiative or otherwise. *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 513-16.

The Initiative seeks to achieve these purposes by amending various provisions of the General Plan.

## **IV. PART IV. GENERAL PLAN AMENDMENTS (Pages 3-15 of the Initiative)**

This is the heart of the Initiative, which sets forth the proposed changes to the General Plan. The amendments are contained in four “sections” corresponding to the four chapters of the General Plan that the Initiative would amend.

## A. Section 1 (Pages 2-3 of the Initiative)

This section amends the portion of Chapter 1 of the General Plan that sets forth the existing General Plan's overall purpose. Among other things, it inserts the following new text: "[C]hanges made through this Initiative are intended to modify and supersede any [existing provisions of the General Plan] that might otherwise conflict with amendments" proposed by the Initiative, and directs that the rest of the General Plan shall be conformed to the Initiative. The Initiative also adds a directive that, in interpreting the General Plan, "priority be given to ensuring that the provisions enacted or reenacted by the 2016 voter initiative be followed and implemented to the fullest extent possible." Part VI of the Initiative contains similar language giving priority to the provisions enacted by the Initiative.

To the extent that this language elevates the provisions proposed by the Initiative over other provisions of the General Plan, a court might find that it is unlawful. *See Sierra Club v. Kern County* (1981) 126 Cal.App.3d 698, 703-08 (holding that a similar provision constituted an unlawful "precedence clause" and was therefore "void" and not permitted under the State Planning and Zoning law). On the other hand, a court could interpret this provision as simply promoting internal general plan consistency. *See Pala Band of Mission Indians v. San Diego County* (1997) 54 Cal.App.4<sup>th</sup> 565, 577 (holding that *Kern County* did not render invalid an initiative that did not create any general plan consistencies, and stating that initiative provisions giving a county board of supervisors authority to fix any such inconsistencies appear to be lawful).

Also, as of the date of this Report, two other initiative measures ("Other Measures") have been proposed in Cupertino that may conflict, at least in part, with this Initiative.<sup>1</sup> If this Initiative passes and one or both of the Other Measures also passes and

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<sup>1</sup> The official titles for these two measures are: (1) "Initiative amending Cupertino's General Plan and Heart of the City Specific Plan to: (1) allow 280,000 square feet of office space, 200 hotel units, and 270 residential units, and a height limit of 88 feet for a mixed-use development project at the Cupertino Oaks Shopping Center ("Property"); (2) exempt the Property from some development standards; and (3) require the City to promptly process and approve an application for a project that includes specified community benefits and is consistent with the terms of the proposed initiative" (*referred to in this Appendix as "the Oaks Initiative"*) (2) "Initiative adopting the Vallco Town Center Specific Plan to (1) provide that the Vallco Shopping District Special Area ("Area") contains a mixture of residential, office, retail, civic and education uses; (2) require any development to fund or provide community benefits such as transit, schools, a green roof, and recycled water; and (3) grant the property owner initial entitlements to develop in accordance with the Initiative and establish a process for future approvals; and (footnote continued on next page)

receives more votes, then a court would need to first determine whether and which provisions conflict. If the provisions can be harmonized, both will be given effect. However, any provision in this Initiative that conflicts with a provision in one of the Other Measures that received more votes would not take effect. In the absence of a valid “competing measure” clause to the contrary, the general rule is that if provisions of two ballot measures conflict, and if both measures are passed at the same election, the provisions of the measure with the highest affirmative vote shall prevail. Cal. Const. Art. II, § 10(b); Elections Code § 9221; *see Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744, 770.

## **B. Section 2 (Page 3 of the Initiative)**

This section of the Initiative is one of several provisions that change the City’s vision for, and policies governing, future use and development of the Vallco Shopping District Special Area. It amends the provision in Chapter 2 of the General Plan that sets forth the “Vision” for the Vallco Shopping District Special Area. Specifically, it removes the current General Plan text envisioning this area as a “new mixed-use ‘town center’” and replaces it with language calling for the area to provide a “unique and memorable shopping, dining and entertainment experience.”

## **C. Section 3 (Pages 3-11 of the Initiative)**

This section amends several provisions in General Plan Chapter 3, the Land Use and Community Design Element. As the current General Plan explains, Chapter 3 “is the keystone” of the General Plan. “It unifies and informs the other Elements by providing an overall policy context for future physical change.”

Many of the changes made by this section relate primarily to the Vallco Shopping District Special Area (“Vallco”), but others apply citywide or just to certain areas of the City. Where a particular change affects both Vallco and other areas of the City, this summary will first identify the impacts on Vallco and then describe the impacts on other areas of the City.

### **1. Amendments regarding “Economic Vitality” (Page 3 of the Initiative)**

In the subsection of Chapter 3 entitled “Economic Vitality,” the Initiative makes the following change: “The General Plan ~~includes more office growth~~ recognizes the need to retain balanced growth to support a strong fiscal revenues and a stable tax

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(footnote continued from previous page)

making related amendments to Cupertino’s General Plan and Municipal Code” (*referred to in this Appendix as the “Vallco Initiative”*)

base.” This change is consistent with the Initiative’s other provisions, discussed below, that remove the 2,000,000 square feet of additional office space currently allocated to the Vallco area.

## **2. Amendments regarding Table LU-1, Citywide Development Allocation Between 2014-2020 (Pages 3-4 of the Initiative)**

To provide for balanced future growth and development and in order create a more complete community, the General Plan allocates future development potential by land use type (i.e., commercial, office, hotel, and residential) to different planning areas within the City. These “allocations” are set forth in Table LU-1 of the General Plan and assigned by “Planning Area.” The General Plan provides that “some flexibility may be allowed for transferring allocations among Planning Areas,” and it also directs that Table LU-1 be maintained and updated to ensure that the allocations for various land uses adequately meet city goals.

The Initiative amends several of the allocations in Table LU-1 and also limits the City Council’s ability to make further changes to the allocations for the Vallco site, as follows:

**For Vallco:** The Initiative deletes (1) the 2,000,000 square feet of future office development allocated to Vallco; and (2) the 389 units of future residential development allocated to Vallco. Two hundred and forty-three (243) of the residential units are effectively “reallocated” to other areas of the City, but the 2,000,000 square feet of office space is not reallocated. Other provisions of the Initiative provide that the roughly 1.2 million square feet of existing commercial development at Vallco must be maintained as a “minimum,” and also as the maximum. In addition, the Initiative deletes two footnotes from Table LU-1 that encourage prompt submission of a proposed Specific Plan for the comprehensive redevelopment of the Vallco site by a master developer. The language proposed for deletion states: ~~Buildout totals for Office and Residential allocation within the Vallecito Shopping District are contingent upon a Specific Plan being adopted for this area by May 31, 2018. If a Specific Plan is not adopted by that date, City will consider the removal of the Office and Residential allocations for Vallecito Shopping District. See the Housing Element (Chapter 4) for additional information and requirements within the Vallecito Shopping District.~~

**For Other Areas:** 150 units of future residential development are allocated to the North Vallco Park Special Area and 93 future residential units are allocated to the Heart of the City Special Area. The Initiative also adds an asterisk (\*) to each of these allocations—and to the accompanying citywide total allocations—stating that they “may be changed through the normal general plan amendment process.”

**Citywide:** The above changes are also reflected in the Citywide total development allocations. Thus, with the changes made by the Initiative, the total

available future development allocations Citywide would be: 798,917 sq. feet of commercial development; 553,826 sq. feet of office development; 313 hotel rooms or units; and 1,736 residential units.

**Voter Approval required for certain future amendments to the development allocations shown in Table LU-1:** Under the adopted General Plan, allocations may be shifted within different Planning Areas. *See, e.g.*, Strategy LU-1.2.1. In addition, the City Council may amend any of the allocations in Table LU-1 pursuant to the provisions of the State Planning and Zoning Law that allow up to four amendments to a city’s general plan each year. Part VIII of the Initiative—which states that “Except as otherwise indicated herein, this Initiative may be amended or repealed only by the voters at a City election”—would limit the Council’s ability to make such amendments.

The implication of this voter approval language for the allocations *expressly* removed or added to Table LU-1 by the Initiative is clear: The allocations deleted from the Vallco site may not be readopted without voter approval; likewise, the reallocated residential units for the North Vallco Park and Heart of the City Special Areas may be amended by the City Council through the “normal general plan amendment process” (i.e., without voter approval), as indicated by the asterisks added by the Initiative.<sup>2</sup>

For the other allocations set forth in Table LU-1—which are neither added nor deleted by the Initiative—it is not clear whether the Initiative’s voter approval requirements apply. It should be noted that the Initiative does *not* state that it is readopting or reenacting Table LU-1 as a whole. Instead, it states (at the bottom of page 3) that “Table LU-1: . . . is amended by the additions and strikeouts shown below.” Since the other allocations in Table LU-1 were not reenacted, it appears that the voter approval requirement in Part VIII of the Initiative does not apply to these other allocations except to the extent that some other provision of the Initiative expressly references them.<sup>3</sup>

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<sup>2</sup> It appears that the Initiative proponents may have inadvertently omitted an asterisk from the 553,826 sq. feet of office development they show as available Citywide. This is because they included an asterisk for the 9,470,005\* sq. feet of office development projected at “buildout” of the General Plan in 2040. The 553,826 square feet allocated as “available,” however, is derived simply by subtracting the existing square footage of “current built” office development from the 9,470,005\* buildout figure. It necessarily follows that the 553,826 sq. feet should have an asterisk as well.

<sup>3</sup> The only instance of this identified by the City is the Initiative’s amendment to Strategy LU-19.1.4. As explained in more detail below, the Initiative amends this strategy to require that a minimum of 1.2 million square feet of commercial use be maintained at Vallco. This is about the same amount of commercial square feet that Table LU-1 shows as currently existing at (and allocated to) Vallco.

This interpretation appears to best effectuate the purposes of the Initiative and, in light of the ambiguity, the City Council most likely would have the discretion to interpret the Initiative in this way. *See, e.g., San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 521 (“[T]he settled rule [is] that where [a general plan] is ambiguous, courts should give it “a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical and that will lead to a wise policy rather than mischief or absurdity.”); *see id.* at 513-15, 521-24. In addition, although it is the intent of the voters—rather than the Initiative proponents—that would guide any court in construing this language, the website of the Initiative proponents contains several statements reflecting this same understanding. *See, e.g.,* <http://www.ccsensiblegrowth.org/#!/what-will-it-do-or-not-do/uln5w> (stating that the Initiative “WILL NOT take away City Council’s ability to increase citywide office allocation, residential allocation or hotel or retail allocation”).

### **3. Amendments regarding the General Plan’s Community Form Diagram and Land Use Map (Pages 5-7 of the Initiative)**

The Initiative adds a new Policy LU-3.0, which provides, among other things, that:

- *“The maximum building heights and densities for the special areas shown in the Community Form Diagram (Figure LU-1) shall not be exceeded.”* With two exceptions, this provision would essentially lock in place the existing building heights and densities for the eight “Special Areas” identified in the existing General Plan Community Form Diagram. The two exceptions are: (1) the Vallco Shopping District Special Area, which a separate provision of the Initiative (New Policy LU-19.2 on page 11 of the Initiative) reduces to a maximum of 45 feet; and (2) the density changes set forth in the final sentence of this policy.<sup>4</sup> Voter approval would be required to increase any of the heights or densities in these nine Special Areas.
- *“Outside of the Special Areas shown in Figure LU-1, building heights may not exceed 45 feet.”* The only areas of the City that are “outside of the Special Areas” are the parts of the City that the

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<sup>4</sup> The final sentence in new Policy LU-3.0 states that the Community Form Diagram shall be “conformed” to “the density changes identified in Footnotes (a) through (c) in the new Table HE 5.5 [previously Appendix B Table 5.5] as shown in *Section 3* of this Part IV.” There is no Table HE 5.5 in the referenced “Section 3,” which is not italicized in the Initiative. However, the referenced Table HE 5.5 does appear in Section 4 of the Initiative. *See* page 15 of this Appendix, below.

General Plan defines as Neighborhoods.<sup>5</sup> The existing General Plan—as well as the City’s Zoning Ordinance—establish 30 feet as the maximum building height for the neighborhoods. Accordingly, this provision would increase the maximum building height of the City’s Neighborhoods by 15 feet, to 45 feet. Voter approval would be required to increase building heights above 45 feet in any of the Neighborhoods.

- *“For any project of over 50,000 sq. ft. of building area, maximum lot coverage shall not exceed 70%.”* This policy means that, for any project over 50,000 sq. ft, the City Council could not approve a project that would cover more than 70% of the lot.
- *“No provision allowing additional height or density, modifying maximum lot coverage, building plane, or minimum setback to relax the standards set forth in this General Plan, other than those mandated by state law, shall be allowed.”* This amendment—which applies citywide—would generally lock in place the General Plan’s existing standards (as modified by the Initiative) for maximum building height and density, maximum lot coverage, building plane, and minimum setback. This provision would thus require voter approval for any increase in the specified maximum (or decrease in the specified minimum) standards, “other than those mandated by state law.”

The “other than mandated by state law” exception appears to provide a safety valve to allow the City Council to relax the specified standards where a specific provision of State law—for instance the various State law provisions requiring cities to provide for their regional fair share of housing—would require such a relaxation. The courts have upheld similar provisions. *See, e.g., Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1265-66.

However, as explained in the Report, the language of this provision does not appear to allow the City to grant any variances from these specified building standards in the absence of a specific state law provision requiring one. The provision of the State Planning Law

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<sup>5</sup> As Chapter 2 of the General Plan explains, for planning purposes, the City is organized “into 21 distinct Planning Areas, divided into two categories: 1. **Special Areas** that are expected to transition over the life of the General Plan and 2. **Neighborhoods** where future changes are expected to be minimal.”



*authorizing* variances does not mandate that a city grant a variance even where the strict application of buildings standards would deprive the owner of a specific property “of privileges enjoyed by other property in the vicinity and under identical zoning classification.” See Gov’t Code § 65906 (providing that variances “shall be granted only when” such circumstances are present). The California Supreme Court has long held that the granting of a variance is discretionary, not mandatory. *Metcalf v. Los Angeles County* (1944) 24 Cal.2d 267, 272; *Rubin v. Board of Directors of City of Pasadena* (1940) 16 Cal.2d 119, 125-26; Cf. *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301, 308, 313-20 (upholding denial of variance and permit where initiative had banned the granting of any non-conforming uses, including variances).

- *The General Plan’s Community Form Diagram and Land Use Map “shall be conformed to the requirements set by” this policy and other specified requirements set forth elsewhere in the Initiative.* This directive to amend the Community Form Diagram and Land Use Map to comport with these specific directives seems to come within the conformity authorization upheld in *Pala Band of Mission Indians v. San Diego County* (1997) 54 Cal.App.4<sup>th</sup> 565, 577 n.8. See Part IV.A of this Appendix.

#### **4. Amendments regarding building heights, setback ratios, setbacks, and building planes (Pages 8-9 of the Initiative)**

The Initiative modifies existing General Plan Policy LU-3.2 and adds new policies LU-3.2.1 through LU-3.2.6 to add provisions relating to building heights, setback ratios, setbacks, and building planes. The Initiative states that these modifications are made “[i]n order to assure the retention and enforcement of City guidelines not currently included in the General Plan.” Where these new policies apply only to one or more areas of the City, those areas are indicated below in **bold**.

New Policy LU-3.2.1 provides that, “[i]n any area where an increase in the maximum building height is granted in exchange for ground floor retail, no more than 1 square foot of additional floor area above the otherwise-applicable height limit may be allowed for every 1 square foot of ground floor retail. In any such exchange, all ground floor retail must be fully accessible to the public during operating hours.” This appears to be an entirely new policy rather than an existing City guideline. This new policy would apply to the **South Vallco Park Planning Area** because that is the only area of the City where the existing General Plan allows for an increased building height to be granted in exchange for ground floor retail.

New Policy LU-3.2.2 provides that “Rooftop mechanical equipment and utility structures other than cell phone transmission antennae, but no other structures of building features, may exceed stipulated height limitations shown in Figure LU-1 if they are enclosed, centrally located on the roof and not visible from adjacent streets.” This policy essentially specifies what rooftop equipment will be excluded from the City’s calculation of a buildings height. The non-underlined portion of this policy is set forth as a footnote in the existing General Plan’s Figure LU-1 (Community Form Diagram).

New Policy LU-3.2.3 adds to the General Plan setback requirements for both sides of **North De Anza Boulevard** that are currently included in the North De Anza Conceptual Plan for the west side of that boulevard only. This policy requires a minimum of (1) 50 feet of landscaped setback from the curb line; or (2) a minimum square footage of front yard landscaping equal to what would be achieved under the 50 foot setback, with a minimum setback of 35 feet.

New Policy LU-3.2.4 applies specifically to the **Stevens Creek Boulevard Subarea** in the **Heart of the City Special Planning Area**. The Heart of the City Specific Plan requires a 26 foot landscape easement from the face of curb and a minimum 35 foot setback from the face of curb (nine feet from the required landscape easement). The Initiative incorporates this specific plan requirement as a new General Plan policy. Also, the following existing General Plan standards that appear as footnotes in Figure LU-1 are added as General Plan policies:

A 1:1 (i.e., 1 foot of setback for every 1 foot of building height) slope line setback requirement for development along Stevens Creek Boulevard from Highway 85 to Perimeter Road;

A 1.5:1 slope line setback requirement for development on the north side of Stevens Creek Boulevard from Perimeter Road to the eastern city boundary; (**NOTE:** The setback requirement for the segment between Perimeter Road and N. Wolfe Road would be a new requirement. The setback requirement for the segment from N. Wolfe Road and the eastern city boundary is an existing requirement.)

A 1:1 slope line setback requirement on the south side of Stevens Creek Boulevard from Perimeter Road to the eastern City boundary. These are all existing “step backs” or “setback ratios” already in the General Plan except the portion within the Vallco Shopping District.

New Policy LU-3.2.5 adopts a 1.5:1 slope line setback requirement for development of property along **Homestead Road** between Linnet Lane and Swallow Drive from the Homestead Road curb line. This same requirement is essentially already incorporated within the footnotes in Figure LU-1 (Community Form Diagram).

New Policy LU-3.2.6 converts an existing footnote in Figure LU-1 into a new policy requiring a 1:1 slope line setback requirement for development of any property along an arterial/boulevard street, “[u]nless specified” otherwise in the new policies set forth above.

With respect to the **City Center Subarea**, the Initiative modifies existing Strategy LU-16.1.3, Building form. Specifically, it adds the words “step-downs and setbacks” to define the transition from taller buildings to the scale of the surrounding area.

## **5. Amendments regarding the Vallco Shopping District Special Area. (Pages 9-11 of the Initiative)**

This section of the Initiative sets forth major changes to the vision for revitalizing the Vallco Shopping District Special Area that is set forth in the General Plan adopted by the City Council in December 2014. Among other things, the Initiative:

- removes the language in the City’s goals and policies for calling for the “complete redevelopment of the existing Vallco Fashion Mall into a vibrant mixed use ‘town center’” and restates the City’s goal as to “preserve and enhance the Vallco Shopping District as a local and regional retail, hotel, dining and entertainment commercial” destination
- prohibits residential and office uses (consistent with the changes to Table LU-1, discussed above, that deleted the 2,000,000 square feet of office use and 389 residential units allocated to the site)
- restricts building heights to a maximum of 45 feet; and
- increases the minimum square footage of retail/dining/entertainment uses from 600,000 to 1,200,000 square feet.

The Initiative deletes in its entirety several “strategies” reflecting the City Council’s determination that redevelopment of the area “will require a master developer in order to remove the obstacles to the development of a cohesive district” and that “complete redevelopment of the site [is necessary] to ensure that the site can be planned to carry out the community vision.”

The Initiative amends the existing General Plan policy requiring a Specific Plan be created prior to any development of the Vallco site to require that such a Specific Plan also be created prior to any “significant changes in use” on the site.

It also amends the existing General Plan strategy governing open space at the Vallco site to delete language calling for a central town square and replace it with “ground-level open space areas”

**6. Amendments regarding North Vallco Park Special Area (Page 11 of Initiative)**

The Initiative amends Policy LU-20.3, Building form, for the North Vallco Park Special Area, changing “should” to “shall” in the following two sentences: “Buildings ~~should~~ shall transition to fit the scale of the surrounding area. Taller buildings ~~should~~ shall provide appropriate transitions to fit into the surrounding area.” As detailed below in Section 4, the Initiative also adds 150 new residential housing units to this Special Area.

**D. Section 4 (Pages 11-15 of the Initiative)**

This section of the Initiative amends several provisions in the Housing Element, which is Chapter 4 of the General Plan. State law requires that every housing element contain an inventory of potential housing sites that can accommodate the city’s fair share of regional housing needs.<sup>6</sup> The City’s fair share for the current housing element cycle has been determined to be 1,064 housing units.

The Housing Element contains two lists of “Priority Housing Element Sites” that can accommodate the City’s share of regional housing needs. Scenario A, the preferred scenario, includes Vallco as a housing site. Scenario B, the contingency plan to be used in the event Vallco cannot be rezoned for housing, removes Vallco as a priority site and transfers the units assigned to Vallco to other sites located in the City’s North Vallco, Heart of the City, and Homestead Special Areas.

The changes made by this section of the Initiative primarily concern eliminating Scenario A and replacing it with Scenario B.

**1. Amendments regarding “Overview of Available Sites for Housing” (Page 11 of the Initiative).**

The Initiative modifies the language of this section to reflect the elimination of Scenario A and its replacement with Scenario B.

The Initiative states that the designated sites shown in Scenario B can accommodate infill development of up to 1,386 housing units rather than the 1,400 units that could be accommodated in Scenario A. Since Cupertino’s share of the regional

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<sup>6</sup> Also known as Regional Housing Needs Allocation, or RHNA.

housing need is 1,064 units, the reduction of 14 units on the designated sites does not materially affect Cupertino's ability to meet the regional need.

The Initiative and summarizes these changes as follows:

[T]he City must follow its contingency plan to meet the RHNA, known as Scenario B and (discussed further in General Plan Appendix B). Scenario B would involve the City removing Vallco Shopping District from its inventory of available sites for housing, adding other mere priority sites to the inventory, and also increasing the density/allowable units on some of the other priority sites.

This part of the Initiative eliminates Scenario A from the Housing Element itself and it also references General Plan Appendix B, S "the Housing Element Technical Report," which is part of the General Plan and "provides detailed background information to meet all requirements of State Housing Element law." (Page HE-4.) However, the Initiative does not make conforming changes in Appendix B to be consistent with the Initiative. Thus, if the Initiative is adopted, Appendix B would continue to state that Scenario A is the preferred alternative and Scenario B is a contingency plan. Since this is inconsistent with the changes made to the Housing Element by the Initiative, the Initiative will create an internal inconsistency in the General Plan.

However, the Initiative directs the City to revise all other provisions of the General Plan "to make them conform with the provisions of this Initiative." In the event that the Initiative is challenged in court, it is likely that a court would construe this language as authorizing the City Council to revise the background information contained in Appendix B to be consistent with the policies established by the Initiative. *See Pala Band of Mission Indians v. San Diego County* (1997) 54 Cal.App.4<sup>th</sup> 565, 577 n.8.

## **2. Amendments Regarding Figure HE-1, Priority Housing Element Sites; and Table HE-5, Summary of Priority Housing Sites (pages 11-14 of the Initiative).**

The Initiative deletes from the Housing Element existing Figure HE-1, a map entitled "Priority Housing Element Sites: Scenario A," and replaces it with a similar map (Figure B-8, Appendix B, page B-148) entitled "Priority Housing Element Sites: Scenario B," which is to be relabeled Figure HE-1. The Initiative also deletes from the Housing Element Table HE-5: "Summary of Priority Housing Element Sites to Meet the RHNA-Scenario A," and replaces it with a similar table (Appendix B, page B-153) entitled Table 5.5: "Summary of Priority Housing Sites: Scenario B," which is to be relabeled as Table HE-5.

The Initiative's replacement of existing Table HE-5 (Scenario A) with a new Table HE-5(Scenario B) has the following effects:

**Total Realistic Capacity.** Priority housing sites designated in Scenario A can realistically accommodate 1,400 residences. Priority sites designated in Scenario B can realistically accommodate 1,386 residences. Since Cupertino's share of the regional housing need totals 1,064 units, the reduction of 14 units by the Initiative does not materially affect Cupertino's ability to meet the regional need.

**Location of Priority Housing Sites.** The Initiative removes the Vallco Shopping District as a priority housing site. It adds two priority housing sites: Glenbrook Apartments, located in the Heart of the City Special Area, with the capacity for 58 net new units; and Homestead Lanes, located in the Homestead Special Area, with the capacity for 132 units. Scenario B also increases the maximum density of The Hamptons, located in the North Vallco Park Special Area, from 85 units per acre to 99 units per acre and increases its capacity for net new units from 600 to 750. Scenario B increases the maximum density of The Oaks Shopping Center from 30 units per acre to 35 units per acre and increases its capacity from 200 to 235 units.

By special area, the changes are as follows. Scenario B removes 389 units from the Vallco Shopping District; adds 132 units to the Homestead Special Area; adds 150 units to the North Vallco Park Special Area; and adds 93 units to the Heart of the City Special Area.

**Need for Additional Rezoning or General Plan Amendments.** Notes (a) and (b) to Table 5.5 state that a general plan amendment and zoning change will be needed to allow increased density on site B1 (The Hamptons) and site B2 (The Oaks).

By replacing Scenario A with Scenario B, the Initiative amends the General Plan to allow increased density at The Hamptons and at The Oaks. No additional zoning amendments will be needed. Both sites are zoned P with a residential designation (P (Res)) for The Hamptons and P(CG, Res) for The Oaks). The P (Planned Development) zone provides that for sites with a residential designation listed as a Priority Housing Site in the Housing Element, residential development that does not exceed the number of units designated for the site is a permitted use. (Cupertino Municipal Code Section 19.80.030(F)(2).) Consequently, no zoning amendment will be required.

Similarly, the Initiative designates the Homestead Lanes site as having a density of 35 units per acre; no zoning change will be required to increase the density on the site, despite the statement in footnote (c) of the table. However, because the site's existing zoning does not allow residences (zoning of P(CG) and P(Rec, Enter), rezoning

will be required to allow residential uses, as discussed further in Sections D.3 and D.4 below.<sup>7</sup>

**Ability to Modify Community Form Diagram Regarding Hamptons, Oaks, and Homestead Lanes Sites.** New Policy LU-3.0 in the Initiative states that the Community Form Diagram shall be “conformed” to “the density changes identified in Footnotes (a) through (c) in the new Table HE 5.5 [previously Appendix B Table 5.5].”

Footnotes (a) through (c) refer to The Hamptons, The Oaks, and Homestead Lanes sites. This provision of new Policy LU-3.0 is apparently intended to allow at least the density limits shown in the Community Form Diagram to be increased for these three sites to conform with the densities shown in Scenario B. It is not clear if Policy LU-3.0 was also intended to allow height limits to be increased if necessary to accommodate the increased densities on the sites. However, because Scenario B in the existing Housing Element did not propose any height increases to accommodate the increased densities, most likely it was not intended to allow height increases on these sites.

**Other Implications of Designating Sites as Housing Element Sites.** If a site is shown in the Housing Element to accommodate a portion of the City’s regional housing need, the City must make findings if it proposes to approve a project with fewer units than shown in the Housing Element. In that case, the City must demonstrate that adequate sites remain to meet the City’s fair share of the regional need at all income levels, or must designate alternative sites to meet that need. (Gov’t Code §65863.) If the Initiative is adopted, this requirement will apply to any proposal to construct or approve fewer units than are shown in the “Summary of Priority Sites: Scenario B.”

### **3. Amendments Regarding Implementing Strategies – Strategy 1, Land Use Policy and Zoning Provisions, fifth bullet point (page 15 of the Initiative).**

The Initiative removes all statements from Housing Element Strategy 1 regarding the adoption of a specific plan for the Vallco Shopping District to permit 389 housing units and makes associated changes regarding Scenario B. The changes to this Strategy have the following effects:

**General Plan and Zoning Designations.** The Initiative states that the General Plan and zoning designations will allow the densities shown in Scenario B on the priority housing sites. As explained in Section D.2 above, it is correct that, if the Initiative is adopted, the

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<sup>7</sup> Note that the table above does not accurately show the existing zoning of Homestead Lanes, which is zoned P(CG) and P(Rec, Enter). The existing General Plan permits both commercial and residential uses (C/R).

General Plan and zoning designations will allow the densities shown in Scenario B for the priority housing sites.

**Deletion of Language Describing Scenario B.** The Initiative deletes language stating that Scenario B: (a) adds two additional sites to the inventory (Glenbrook Apartments and Homestead Lanes) and (b) adds an increased number of permitted units at The Hamptons and The Oaks. However, the deleted language accurately describes Scenario B.

**Removal of Timeline for Rezoning.** The Initiative deletes language stating that if the specific plan and rezoning for Vallco are not adopted within three years of Housing Element adoption, or by May 31, 2018, the City will hold hearings to consider adoption of Scenario B. The Initiative states that Homestead Lanes will need to be rezoned to “allow residential uses by right at a minimum density of 20 units per acre” but contains no date by which this must be accomplished.

Under State law, all rezonings required to designate adequate housing element sites must be accomplished “no later than three years after...the date that the housing element is adopted,” unless a one-year extension is provided. (Gov’t Code §§ 65583(c)(1)(A), 65583(f).) The Initiative does not state that the rezoning of Homestead Lanes will be accomplished within the three- to four-year period required by State law. (See also discussion of timing in Section D.4 below.)

**‘By Right’ Zoning of Homestead Lanes.** The Initiative states that any rezoning of Homestead Lanes will “allow residential uses by right at a minimum density of 20 units per acre.”

The phrase “use by right” is defined by state law to mean that the City may not require any discretionary review for residences on the Homestead Lanes site that would be subject to the California Environmental Quality Act (CEQA). The City may require design review approval for the residences, but any design review approval is also not subject to CEQA. (Gov’t Code § 65583.2(i).) This provision means that, after any required rezoning is completed for Homestead Lanes, the City may only require design review approval for residences, and residential development will not be subject to CEQA or other discretionary approvals.

#### **4. Elimination of Table Regarding Strategy 1 (pages 15-16 of the Initiative).**

The Initiative deletes the following table from Strategy 1:



|                        |  |
|------------------------|--|
| Responsible Agencies:  | Cupertino Department of Community Development/ Planning Division   |
| Time Frame:            | Ongoing; Adopt Specific Plan and rezoning for Vallco by May 31, 2018; otherwise, conduct public hearings to consider adoption of “Scenario B” of sites strategy. |
| Funding Sources:       | None required  |
| Quantified Objectives: | 1,064 units (178 extremely low-, 178 very low-, 207 low-, 231 moderate- and 270 above moderate-income units)   |

State law requires that each of the actions identified in the Housing Element must have a “timeline for implementation.” (Gov’t Code § 65583(c).) The Housing Element must also “include an identification of the agencies and officials responsible for the implementation of the various actions.” (Gov’t Code § 65583(c)(7).) The rezoning of the Homestead Lanes site must be accomplished “no later than three years after...the date that the housing element is adopted,” or by May 31, 2018, unless a one-year extension is provided. (Gov’t Code §§ 65583(c)(1)(A), 65583(f).)

Since the entire table following Strategy 1 has been deleted, the Housing Element as modified by the Initiative will contain no timeline for implementing any of the actions contained in Strategy 1, will not identify the agencies and officials responsible for implementing the actions contained in Strategy 1, and will not commit to rezoning the Homestead Lanes site by May 31, 2018. Therefore Strategy 1 will not contain all of the content required by the housing element statute.

The deletion by the Initiative of the table following Strategy 1 also will remove all quantified objectives for housing at specified income levels. The quantified objectives included in the deleted table show that Strategy 1 can accommodate the City’s entire share of the regional need at each income level. The quantified objectives for the other strategies in the City’s Housing Element do not show how the City will meet the regional need.

A city cannot take an action inconsistent with, or preempted by, state law. Cal. Const. Art. XI, § 7. An initiative amendment must conform with all formal requirements and may not lack any of the content specified by statute for the mandatory elements of the general plan. *See DeVita v. County of Napa* (1995) 9 Cal.4<sup>th</sup> 763, 796 n.12. If a general plan amendment is “substantively deficient, then it may be challenged

on that basis.” *Id.* Substantial compliance with state housing element law “means actual compliance in respect to the substance essential to every reasonable objective of the statute,” as distinguished from ‘mere technical imperfections of form.’” *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4<sup>th</sup> 1174, 1185.

In *Friends of Aviara v. City of Carlsbad* (2012) 210 Cal.App.4<sup>th</sup> 1103, 1113, the Court of Appeal ordered Carlsbad to adopt a timeline for completing a program shown in its housing element but did not require Carlsbad to vacate its adoption of its housing element. If a court were to find that the absence of a timeline, responsible agency, and quantified objectives for Strategy 1 are inconsistent with state law, it would have discretion to mandate a variety of remedies. *See DeVita*, 9 Cal. 4<sup>th</sup> at 796 n.12 (citing *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 103-04). Under *Friends of Aviara*, a court would likely order the City to correct the deficiencies in the Housing Element rather than directing that the entire Initiative be invalidated.

#### **V. PART V. EXEMPTION FOR CERTAIN PROJECTS (Page 16 of the Initiative)**

This Part of the Initiative states that the Initiative shall not apply to any development project that has obtained, prior to the Initiative’s effective date, a vested right pursuant to state law. This Part appears to be designed to insulate the Initiative from a legal claim that it constitutes an unconstitutional “taking” or otherwise violates the property owner of a landowner or developer that has already obtained a legal right to proceed with a specific development project. The courts have found that similar clauses in other land use initiatives generally preclude any claim that the initiative, on its face, constitutes an unconstitutional taking in such circumstances. *See Shea Homes Limited Partnership v. Alameda County* (2003) 110 Cal.App.4<sup>th</sup> 1246, 1266-67. Instead, any development project that obtained a vested right to develop prior to the Initiative’s effective date would—to the extent of that vested right—be fully exempt from the Initiative.

#### **VI. PART VI. EFFECTIVE DATE, PRIORITY, AND CONSISTENCY (Page 16 of the Initiative)**

This Part of the Initiative states that it shall become effective immediately upon the certification of the election results. This statement conflicts with the Elections Code, which provides that an adopted initiative “shall go into effect 10 days after that date.” Elections Code § 9217. A court would almost certainly conclude that the Elections Code governs the effective date of the Initiative.

This Part also directs the City to revise and amend all other provisions of the City’s ordinances, plans, and law, within six months “to make them conform with the

provisions of this Initiative” and provides that “until such time” as these changes are made, “the provisions of this Initiative shall prevail over any conflicting provisions.”

Most land use initiatives contain somewhat similar “conformity” provisions authorizing and directing the governing city council or board of supervisors to implement the measure’s terms. As noted above, to the extent that this provision simply directs that the City implement the Initiative and revise subordinate laws to conform with the General Plan, it appears to be valid. *See Pala Band of Mission Indians v. San Diego County* (1997) 54 Cal.App.4<sup>th</sup> 565, 577 n.8.

However, to the extent that it elevates the General Plan provisions proposed by the Initiative over other provisions of the General Plan, a court might find that it creates an could unlawful precedence clause. *See Sierra Club v. Kern County* (1981) 126 Cal.App.3d 698, 703-08.

As discussed in Part III(A) of the Report, this conformity provision could also require the City to amend various provisions of the City’s Zoning Ordinance and other planning documents.

## **VII. PART VII. SEVERABILITY (Page 16 of the Initiative)**

This Part of the Initiative contains a standard “severability” clause, similar to those found in most laws. This clause is designed to protect the rest of the Initiative if one or more provisions are held invalid by a court.

## **VIII. PART VIII: AMENDMENT OR REPEAL (Page 16 of the Initiative)**

This Part of the Initiative states that, except as indicated therein, no provision of the Initiative may be amended without voter approval. As detailed on pages 6-7 above, this provision appears to apply only to the provisions of the General Plan that are adopted, amended, or deleted by the Initiative. It does not apply to the development allocations in Table LU-1 that the Initiative leaves unchanged. The effect of this language is discussed in Part IV.A. of this Appendix and in Part III.A.6 of the 9212 Report.