

December 6, 2018

**VIA EMAIL AND FIRST CLASS MAIL**

Grace Schmidt, City Clerk  
City of Cupertino  
Cupertino City Hall, 10300 Torre Avenue  
Cupertino, California 95014

Re: Referendum of City of Cupertino Resolution No. 18-085

Dear Ms. Schmidt:

We are writing on behalf of Vallco Property Owner, LLC regarding the referendum (the "Referendum") of City of Cupertino Resolution No. 18-085, titled "A Resolution of the City Council of the City of Cupertino Approving a General Plan Amendment to Development Allocations, the General Plan Land Use Map and Development Standards Related to the Vallco Town Center Special Area" (the "General Plan Amendment"). On October 30, 2018, we submitted a Public Records Act request for a blank copy of the Referendum petition. We received your response to our request on November 9, 2018, and have reviewed the petition for compliance with the mandatory requirements of the California Elections Code.

In short, the Referendum petition fails to provide the full and accurate text of the resolution being referred, as required by the California Elections Code. This failure to comply with the Elections Code unlawfully deprived signers of the statutorily required information necessary to intelligently exercise their electoral rights. The Referendum petition is therefore facially defective and cannot be certified.

**1. The Referendum Petition Failed to Include the Full Text of the Ordinance in Violation of Elections Code section 9238.**

The Referendum petition plainly fails to comply with section 9238 of the California Elections Code, which mandates that the "full text" of a municipal referendum be included in a petition circulated for voter signatures. The General

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Plan Amendment indicates what changes are being made to the General Plan by showing additions in underline and deletions in ~~strikethrough~~. Page LU-13 of the General Plan Amendment contains a critically important table, titled “Table LU-1: Citywide Development Allocation Between 2014-2040.” In Table LU-1, the General Plan Amendment makes *significant* alterations to the development allocations for Vallco, reducing the square footage allocated to office by up to 1,250,000 square feet, and increasing the number of units allocated to residential development by as much as 2,543 units (or more than 7.5 times the number of residential units previously allocated). These changes are shown by striking out the current development allocations, and replacing them with new allocations in underlined text. Significantly, these key changes to the development allocations are not shown or otherwise discussed elsewhere in the GPA Resolution. In short, the amendments contained in Table LU-1 are arguably the most significant change to the City’s General Plan.

As shown in Exhibit A hereto, however, Referendum proponents failed to faithfully reproduce the General Plan Amendment as adopted by the City Council, and the Referendum petition circulated for voter signatures completely *omitted* the strikethroughs of the current allocations. As such, signers had absolutely no way to determine how the allowable uses for the Vallco property were changing. They were left completely in the dark.

A long line of California cases have struck down initiative and referendum petitions that failed to comply with the formatting provisions of the Elections Code, especially those such as section 9238, which is intended to provide information to petition signers. (See, e.g., *Mervyn’s v. Reyes* (1998) 69 Cal.App.4th 93, 104-05 [relying on an “unbroken line of initiative and referendum cases covering the period 1925 to 1998” to strike down a petition for failing to include the full text of the measure].) Moreover, where, as here, a referendum petition fails to comply with the statutory requirements, local elections officials have the *ministerial duty* to reject the petition and must refuse to take any action on it. (*Id.*; see also *Billig v. Voges* (1990) 223 Cal.App.3d 962, 968-69 [“a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a *ministerial function* involving no exercise of discretion”].)

For example, in *Chase v. Brooks* (1986) 187 Cal.App.3d 657, proponents of a referendum petition against a rezoning ordinance included references to a city map number and reclassification of the property affected, but failed to attach a

related exhibit which contained the legal description of the property affected. The Court of Appeal held that proponents were required to faithfully reproduce the exhibit in their petition. Accordingly, having failed to comply with the “full text” requirement, the petition was illegal. (*Id.* at 663; see also *Mervyn’s, supra*, 69 Cal.App.4th at 97-98 [“The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion”]; *Creighton v. Reviczky* (1985) 171 Cal.App.3d 1225, 1232 [invalidating petition because it “failed to provide the electors with the information [] they needed in order to exercise intelligently their rights under the referendum law”].)

Even far less egregious violations of the full text requirement have produced the same result. In *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, a referendum petition challenging an ordinance altering a land use designation in a city’s general plan merely misstated the title of the ordinance by inadvertently omitting three words. (*Id.* at 1338-40.) The Court of Appeal invalidated the referendum petition for failing to technically or substantially comply with the full text requirement. In misstating the correct title of the ordinance, the Court held, the petition failed to adequately inform voters which land was involved and thereby deprived them of vital, mandatory information. (*Id.* at 1340-41 [“[I]t is the responsibility of the petition proponents to present a petition that conforms to the requirements of the Elections Code”].)

Here, the ~~strikethroughs~~ and underlines on the Development Allocation table were the *only* way for potential signers to know that the General Plan was being amended to *significantly* reduce the amount of commercial office space planned for the Vallco area of the City, and replace it with at least 1,645 units of much needed housing. Yet the strikethroughs of the *current* allocations are completely absent, leaving signers with no way to determine which allocations are going away and which allocations are replacing them. To the contrary, the information provide provided to the voters was completely nonsensical.

These changes were not merely technical edits. Rather, they provide critical information about a central component of the General Plan Amendment. “Better Cupertino”—the group responsible for circulating the Referendum petition—has been vocal in its opposition to the transformation of Vallco into an alleged “office complex.” It is completely misleading for this group to oppose proposed development at Vallco because it includes “too much office,” and “worsens the

housing shortage,” and then fail to provide potential signers with information showing that the proposed Vallco Town Center development would actually *reduce* the amount of office currently allowed at Vallco by more than *half*. In fact, Referendum proponents falsely told potential signers that the project would still include 2 million square feet of office. (See Exhibit B.)

Furthermore, the housing crisis in the Bay Area is a topic of serious concern for many voters, and it is reasonable to assume that many would be reluctant to sign a Referendum petition if they knew that the resolution being referred provided for an additional 1,645 to 2,534 units of housing for Cupertino residents. By failing to show the changes being made to the residential housing allocations, this critical information was withheld from potential signers.

As clearly illustrated by the cases discussed above, failure to provide signers with the complete and accurate text of the resolution being referred fails to satisfy the clear legislative purpose of the full text requirement. This is a plain, direct, and facial violation of the Elections Code. The Referendum petition must be rejected.

**2. City Clerks Have a Ministerial Duty to Reject an Initiative Petition that Fails to Comply With the Requirements of the Elections Code.**

Pursuant to the Elections Code and well-established case law, where, as here, a referendum petition fails to comply with mandatory statutory requirements, local elections officials have the *ministerial duty* to reject the petition and must refuse to take any action on it. (See, e.g., *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969 [clerks have a ministerial duty to reject a petition that facially violates the statutory requirements of the Elections Code].) California courts have not wavered on this point:

[C]lerks throughout the state are mandated by the constitution to implement and enforce the statute’s procedural requirements. *In the instant case, respondent had the clear and present ministerial duty to refuse to process appellants’ petition because it did not comply with the procedural requirements.*

(*Id.* [upholding clerk's rejection of petition for omitting a portion of the measure's full text (emphasis added)]; see also *Myers v. Patterson* (1987) 196 Cal.App.3d 130, 136 [rejecting argument that clerk could in any way waive proponents' statutory violation: "Defendant's duties as city registrar include the *ministerial* function of ascertaining whether the procedural requirement for submitting an initiative measure have been met" (internal quotations omitted)].)

When faced with petition errors and omissions, the clerk must not be put in a position where she must make a judgment call, resort to her own discretion, or rely on extrinsic evidence regarding the petition's alleged compliance with the law:

If, according to appellants, a petition must be accepted regardless of its compliance with the statute, then the statute is unenforceable. . . .

Therefore, a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a ministerial function involving no exercise of discretion.

(*Billig, supra*, 223 Cal.App.3d at 968-69 [rejecting the flawed argument that a clerk can simply ignore petition errors (underscoring added)]; see also *Ley v. Dominguez* (1931) 212 Cal. 587, 602 [the "duties and powers of the city clerk in reference to his examination of referendum petitions ... is purely ministerial and not judicial" (underscoring added)].)<sup>1</sup>

Based on the foregoing, it is without question that the Referendum is not entitled to be processed for the ballot or to otherwise be acted upon. (See, e.g., *Billig, supra*, 223 Cal.App.3d at 969.) Given that the City's duties in this respect are purely ministerial, the City has no authority to excuse proponents' failure to comply with the law. To the contrary, the City is obligated, *as a matter of law*, to

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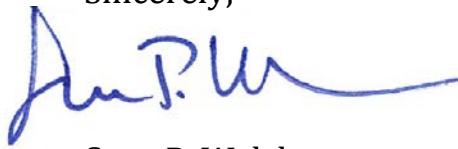
<sup>1</sup> See also *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501-02 ["A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exist. Discretion, on the other hand, is the power conferred on public functionaries to act officially according the dictates of their own judgment" (underscoring added)]. Thus, there is simply no room for discretion or judgment on the part of the clerk when reviewing the petition.

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reject this defective Referendum in order to avoid the waste of taxpayer funds and protect the integrity of the electoral process.

Thank you for your prompt attention to this letter. Please note that we reserve all rights in connection with this matter. I can be reached at (415) 389-6800. If I am not available to speak with you, please speak to Hilary Gibson, who is working with me on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sean P. Welch", with a long horizontal flourish extending to the right.

Sean P. Welch

SPW/pas

cc: Rocio Fierro, City Attorney  
Mayor Darcy Paul and City Council

# **EXHIBIT A**

Table LU-1 on page LU-13 in City of Cupertino Resolution No. 18-085:

Table LU-1: Citywide Development Allocation Between 2014-2040												
	commercial (s.f.)			office (s.f.)			hotel (rooms)			residential (units)		
	current built (Oct 7, 2014)	buildout	available	current built (Oct 7, 2014)	buildout	available	current built (Oct 7, 2014)	buildout	available	current built (Oct 7, 2014)	buildout	available
Heart of the City	1,351,730	214,5000	793,270	2,447,500	2,464,613	17,113	404	526	122	1,336	1,805	469
Vallico <sup>*</sup> Tier 1	1,207,774	600,000	-	-	750,000	750,000	148	339	191	-	2,034	2,034
Town Shopping District <sup>**</sup> Tier 2	1,207,774	485,000	-	-	2,000,000	2,000,000	148	339	191	-	389	389
Center District <sup>**</sup> Tier 2	1,207,774	485,000	-	-	1,500,000	1,500,000	148	339	191	-	2,923	2,923
Homestead	291,408	291,408	-	69,550	69,550	-	126	126	-	600	750	150
N. De Anza	56,708	56,708	-	2,081,021	2,081,021	-	123 <del>126</del>	123 <del>126</del>	-	49	146	97
N. Vallico	133,147	133,147	-	3,069,676	3,069,676	-	315 <del>123</del>	315 <del>123</del>	-	554	1154	600
S. De Anza	352,283	352,283	-	130,708	130,708	-	315 <del>123</del>	315 <del>123</del>	-	6	6	-
Bubb	-	-	-	444,753	444,753	-	-	-	-	-	-	-
Monta Vista Village	94,051	99,698	5,647	443,140	456,735	13,595	-	-	-	828	878	50
Other	144,964	144,964	-	119,896	119,896	-	-	-	-	18,039	18,166	127
Major Employers	-	-	-	109,935	633,053	523,118	-	-	-	-	-	-
With Vallico Town Ctr Tier 1	3,632,065	3,823,208	-	8,916,179	10,220,005	1,303,826	1,116	1,429	313	21,412	24,939	3,527
Citywide	3,632,065	4,430,982	798,917	8,916,179	11,470,005	2,553,826	1,116	1,429	313	21,412	23,294	1,882
With Vallico Town Ctr Tier 2	3,632,065	3,708,208	-	8,916,179	10,970,005	2,053,826	1,116	1,429	313	21,412	25,828	4,416

Table LU-1 in the Referendum Petition of City of Cupertino Resolution No. 18-085:

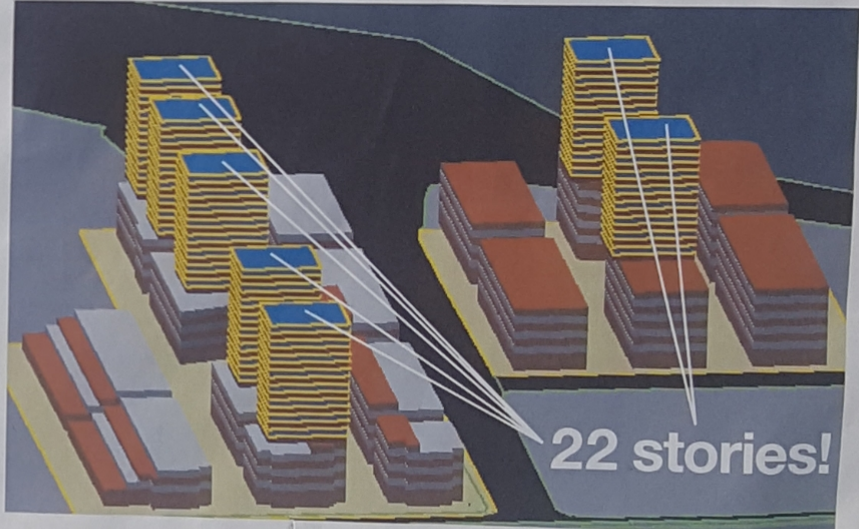
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Center <sup>**</sup> Tier 2	1,207,774	485,000	-	-	1,500,000	1,500,000	148	339	191	-	2,923	2,923
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Major Employers	-	-	-	109,935	633,053	523,118	-	-	-	-	-	-
With VTC Tier 1	3,632,065	3,823,208	-	8,916,179	10,220,005	1,303,826	1,116	1,429	313	21,412	24,939	3,527
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With VTC Tier 2	3,632,065	3,708,208	-	8,916,179	10,970,005	2,053,826	1,116	1,429	313	21,412	25,828	4,416



# **EXHIBIT B**

Minimum Public (on ground)	6.0
Open Space (Acres)	

# The 2018 Vallco plan is *much* worse than what we voted down in 2016 as Measure D.



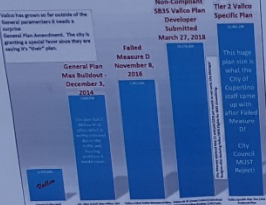
- Still hiding buildings up to 9 stories under green roof
- Adding 13 stories *above* the green roof!
- Went from 800 to 2,400 apartments
- Still with almost 2,000,000 sq. ft. of office
- Retail reduced *again* by 1/3
- We'll say it again: *seven 22-story buildings!!!*

## BETTER CUPERTINO

- *Informed, empowered residents who are engaged in civic matters*
- *Transparency and accountability in local and regional government*
- *Sensible growth aligned with the needs and interests of a majority of residents*

web: [bettercupertino.org](http://bettercupertino.org) • newsletter: [bettercupertino.org/contact](http://bettercupertino.org/contact) • support: [bettercupertino.org/donate](http://bettercupertino.org/donate)

**Total Square Feet At Vallco**



The 2018 Vallco plan is *much worse* than what we voted down in 2016 as Measure D.



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**BETTER CUPERTINO**

*Informed, empowered residents who are engaged in the process. Transparency and accountability in local and regional government. Seriously, growth aligned with the needs and interests of a majority of residents.*

Out-of-town Paid Disrupters

SERVING THE DEVELOPER



Now it's *this*: *All Tier 2 in No Green Roof*

