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Los Altos, California 94022-3087

## MEMORANDUM

**DATE:** June 12, 2018  
**TO:** Los Altos City Council  
**FROM:** City Staff  
**SUBJECT:** 9212 REPORT ON PROPOSED INITIATIVE

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### **Background:**

At its May 22, 2018 meeting, the Los Altos City Council received a Certificate of Sufficiency of Initiative Petition for a General Plan amendment measure regarding Parks, Open Space and Public/Institutional properties. City Council unanimously ordered a report pursuant to California Elections Code Section 9212(a), to assess the effect of the proposed Initiative.

### **Overview of Ballot Initiative**

#### *Title:*

Initiative General Plan Amendment Measure Requiring Voter Approval of the Sale, Lease or Certain Changes in Use of Certain Land Designated as “Parks”, “Other Open Space” or “Public and Institutional” in the City’s General Plan

#### *Ballot Summary:*

This measure amends the City of Los Altos General Plan to add a voter approval requirement for significant changes to land with a General Plan land use designation of “Parks”, “Other Open Space”, or “Public and Institutional”. If this measure is approved, majority voter approval would be required for any of the following:

- (1) Any change in the list of uses the General Plan allows on land with a “Parks”, “Other Open Space” or “Public and Institutional” land use designation;
- (2) The sale or transfer of City-owned land with a “Parks”, “Other Open Space” or “Public and Institutional” land use designation;
- (3) The lease or other disposition (including granting of a license or easement) of City-owned land with a “Parks”, “Other Open Space” or “Public and Institutional” land use designation for longer than one hundred eighty (180) calendar days in any one calendar year; or
- (4) Changing City-owned land with a “Parks”, “Other Open Space” or “Public and Institutional” land use designation to another land use designation, except that

re-designation of “Public and Institutional” land to a “Parks” designation shall not require voter approval.

The measure exempts the following City-owned parcels from the voter approval requirements above:

- (1) Any City-owned parcel (or group of similar contiguous parcels) that totals 7,500 square feet in size or less with a General Plan land use designation of “Public and Institutional”;
- (2) The lease or other disposition of subsurface real property interests (i.e., easements) for utility or similar purposes that do not interfere with surface use except during construction or maintenance.

The measure authorizes the City Council to grant limited exceptions to the voter approval requirements when the City’s action is necessary to comply with state or federal housing law. This measure requires majority voter approval. If approved, this measure may be amended or repealed only by another vote of the people.

**Provisions of California Elections Code Section 9212(a)**

Section 9212 of the California Elections Code allows the City Council the opportunity to obtain a report on the impacts of the Initiative as they pertain to eight specific areas. California Elections Code Section 9212 provides:

- a) During the circulation of the petition, or before taking either action described in subdivisions (a) and (b) of Section 9214, or Section 9215, the legislative body may refer the proposed Initiative measure to any city agency or agencies for a report on any or all of the following:
  - 1) Its fiscal impact.
  - 2) Its effect on the internal consistency of the city’s general and specific plans, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.
  - 3) Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs.
  - 4) Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.
  - 5) Its impact on the community’s ability to attract and retain business and employment.
  - 6) Its impact on the uses of vacant parcels of land.
  - 7) Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.
  - 8) Any other matters the legislative body requests to be in the report.

The Code further indicates that this report must be presented to the City Council no later than 30 days after the election official certifies the sufficiency of the petition to the City. The certificate of sufficiency was presented to the Council on May 22, 2018.

## Analysis

This Initiative proposes to change the language in the City’s 2002-2020 General Plan, primarily the Open Space and Conservation & Community Facilities Element, with conforming amendments throughout the General Plan.

To evaluate the impacts on City-owned real property and its current and future real property transactions, staff compiled and reviewed lists of various properties currently owned by the City, as well as various property transactions, including the lease of City property, in which the City is currently engaged. These lists were analyzed against the language provided in the proposed Initiative.

The impacts provided under California Elections Code §9212(a) were then analyzed.

### *Real Property Types Subject to Initiative*

The proposed Initiative specifies that voter approval is needed for significant changes to City-owned property with the land use designations (1) Parks, (2) Other Open Space or (3) Public and Institutional, with some exemptions.

The City of Los Altos’ 2002-2020 General Plan summarizes those land use designations as follows:

Land Use	DUs or FAR/Net Acre		Summary Description of Land Use Designation
	Maximum	Anticipated	
<b>Open Space Land Uses</b>			
Parks	0.4:1	0.1:1	Publicly owned and dedicated parkland.
Other Open Space	0.6:1	NA	Open space for the preservation of natural resources, managed production of resources, outdoor recreation, and protection of health and public safety.
<b>Public/Quasi-Public Facilities Land Uses</b>			
Public and Institutional	0.6:1	0.35:1	Governmental, institutional, academic, group residence, church, community service uses, easements, rights-of-way, facilities of public and private utilities, and parking.

The Initiative states that voter approval would be required for any changes in the list of uses the General Plan permits for parcels with a land use designation of “Park”, “Other Open Space” or “Public and Institutional”, but the General Plan does not actually include a list of permitted uses for each land use designation. Staff believes the intent of the Initiative is to require voter approval for any changes to the *Summary Description of Land Use Designation*, as shown in the table above, or to the Land Use Designation descriptions in the text of the General Plan, beginning on Page 10 of the Land Use Element.

The Initiative exempts from the voter approval requirement any parcel owned by the City that is 7,500 square feet in size or smaller with a General Plan land use designation of Public and Institutional, unless the aggregate square footage of contiguous parcels with this designation exceeds 7,500 square feet, in which case, the voter approval requirements would apply. The Initiative also exempts the lease or other disposition of a subsurface interest in real property for utility or similar

purposes that does not interfere with the surface use of the property other than initial construction or subsequent maintenance. This exception does not apply to lands with a land use designation of “Parks” or “Other Open Space” regardless of the size of the parcel.

The Initiative grants the City Council authorization to grant exception to the voter approval requirements where necessary to comply with state or federal law governing the provision of housing, provided it meets certain requirements.

*Impacts Analysis Provided by California Elections Code §9212(a)*

Staff considered the language provided in the proposed Initiative, the types of real property the City currently owns or could own in the future, and the types of real property transactions into which the City has entered in determining the impacts under the provisions of the California Elections Code.

**Fiscal Impacts [California Elections Code §9212(a)(1)]**

California Elections Code §9212(a)(1) allows for an analysis regarding the fiscal impacts of the proposed measure.

The potential fiscal impact of this proposed measure largely centers around the cost to conduct an election should the City desire to take an action that falls under this measure. Potential costs of each election range from approximately \$50,000 (if held during a November or even year election) to as much as \$500,000 (if held during a stand-alone special election in which the City’s measure is the only item on the ballot).

In addition, there is a potential fiscal impact with regards to the sale or lease of surplus property, particularly if the measure limits the City’s ability to sell or lease land or to enter into a public/private partnership. Without a specific project or proposal however, there is no manner of determining exactly what the impact could be.

**Consistency with General Plan and Housing Element [California Elections Code §9212(a)(2)]**

California Elections Code §9212(a)(2) allows for an analysis regarding the proposed measure’s effect on the internal consistency of the city’s general and specific plan, including the housing element, the consistency between planning and zoning, and the limitations on city actions under Section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

Internal Consistency of the City’s General and Specific Plans, Including Housing Element

A review of the Initiative as drafted does not reveal an impact to the internal consistency of the City’s General Plan, including the Housing Element, or Specific Plans.

Section 65008 - Discrimination Prohibited

It does not appear that the Initiative would result in the City discriminating against a residential development proposal or subdivision application, or against a residential project that serves a certain age class or income class because the Initiative focuses on City-owned land with land use designations (Park, Other Open Space and Public and Institutional) that are not intended to provide for residential housing.

Chapter 4.2 (Section 65913) - Housing Development Approvals

It does not appear that the Initiative would limit the City's ability to approve housing developments because it focuses on City-owned land with land use designations (Park, Other Open Space and Public and Institutional) that are not intended to provide for residential housing. However, this Initiative could limit the City's ability to amend the General Plan Land Use Map if a City-owned property is identified as an appropriate location to provide housing (affordable, workforce or market rate). In addition, the City's Housing Element does not identify any City-owned sites, within the identified land use designations, "Park", Other Open Space" or "Public and Institutional", as necessary to meet the City's housing targets or as housing opportunity sites, under the current Housing Element Cycle.

Chapter 4.3 (Section 65915) - Density Bonus and Other Incentives

It does not appear that the Initiative would limit the City's ability to approve housing developments requesting a density bonus and/or other incentives or waivers because the Initiative focuses on City-owned land with land use designations (Park, Open Space and Public and Institutional) that are not intended for residential housing. Generally, private developments on sites zoned for housing (single-family or multi-family) or mixed-use are the type of projects that seek a density bonus and/or incentives or waivers, and this Initiative would not apply to this category of projects.

**Land Use and Housing [California Elections Code §9212(a)(3)]**

California Elections Code §9212(a)(3) allows for an analysis regarding the proposed measure's effect on the use of land, the impact on the availability and location of housing, and the ability of the City to meet its regional housing needs.

The Initiative could potentially limit the City's ability to amend the General Plan Land Use Map if a City-owned property is identified as an appropriate location for housing opportunities. For example, a City-owned parking lot parcel in Parking Plaza North has been identified as a potential affordable housing opportunity site in the Downtown Los Altos Visioning effort because of its size and opportunity to help achieve a jobs / housing balance and the identified Vision for the Downtown. The development of affordable housing on sites like this are in line with the Housing Element Goal of "*Striving to maintain a variety of housing opportunities by location and housing type.*"

Although City lands are not identified as housing opportunity sites in the General Plan, maintaining flexibility for the consideration of housing on City-owned properties does provide opportunities to address affordable housing needs as called for in the Housing Element (2015-2023 Cycle), which has been certified by the State of California. In the future, especially during the next Housing Element update cycle (to start before 2023), if additional sites are needed to meet future Regional Housing Need Allocations (RHNA) assigned to the City by the State, the Initiative could impact the ability of the City to identify the lands needed to support the RHNA numbers and may well impact the ability of the State to certify a new Housing Element. The lack of a Certified Housing Element could have impacts on the City's ability to consider and permit other types of development in the future.

The Initiative does authorize the City Council to grant exceptions to the voter approval requirements where necessary to comply with state or federal law governing the provision of

housing, including but not limited to affordable housing requirements. This exception applies only if the City Council first makes the following findings:

- (1) A specific provision of state or federal law requires the City to accommodate the housing that will be permitted by the exception;
- (2) The exception permits no greater intensity than that necessary to accommodate the required housing; and
- (3) An alternative site that is not subject to the voter approval requirements in the Initiative is not able to satisfy the specific state or federal law.

#### **Infrastructure Impacts [California Elections Code §9212(a)(4)]**

California Elections Code §9212(a)(4) allows for an analysis regarding the proposed measure's effect on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.

The proposed Initiative could have an impact on the ability to fund infrastructure improvements to the extent the underlying infrastructure was considered a covered property under the measure. Without a specific project or proposal however, there is no manner of determining exactly what the impact could be and how the initiative may or may not apply to a particular transaction.

It is undetermined if the Initiative would have any significant impacts of infrastructure costs directly on residents or businesses. The potential exists that should the City be unable to sell or transfer a covered property with infrastructure costs that were becoming burdensome, the City could look into establishing a funding mechanism such as a landscaping or lighting district, community facilities district, or other type of parcel assessed revenue mechanism that assesses property owners for the upkeep of that property.

#### **Business Attraction, Retention, and Employment [California Elections Code §9212(a)(5)]**

California Elections Code §9212(a)(5) allows for an analysis regarding the economic development impacts of the measure. Specifically, the Code identifies the "impact on the community's ability to attract and retain business and employment."

As there are many variables that influence the economic development of a city, it is difficult for staff to quantify the impacts of the proposed Initiative on business attraction, retention, and employment.

#### **Vacant Land [California Elections Code §9212(a)(6)]**

California Elections Code §9212(a)(6) allows for an analysis regarding the impact on the uses of vacant parcels of land.

Land use decisions in Los Altos are shaped by the community's desire to preserve and protect its unique character and existing land use patterns. The City's land use approach is to maintain a favorable balance of land uses, ensure land use compatibility, and direct growth

and redevelopment in a manner that is economically viable and in keeping with the existing character of the community. Achieving and maintaining a balance of land uses can ensure fiscal stability and also create a desirable community in which people can live, work, shop, and recreate.

Los Altos is a developed community with little opportunity for additional growth or major land use changes. Future growth will occur with development of the few remaining vacant parcels and the redevelopment of currently developed parcels. The City-owned vacant land inventory includes some parcels located within residential zoning districts but with a Park or Open Space land use designation. These parcels would be subject to the Initiative if the City were to take the specified actions that would trigger voter approval.

Other privately owned, vacant parcels with the designated land uses specified in the proposed Initiative throughout the City are not impacted by the Initiative unless one of these owners wanted to seek to broaden the uses allowed under the designated General Plan land use category which would require voter approval.

### **Agricultural Lands, Open Space, Traffic Conditions, Business Districts and Revitalization Areas [California Elections Code §9212(a)(7)]**

California Elections Code §9212(a)(7) allows for an analysis regarding the impact on agricultural lands, open space, traffic conditions, existing business districts, and developed areas designated for revitalization. Each of these areas is addressed below.

#### *Agricultural Lands*

Los Altos no longer has any prime agricultural lands covered under the Williamson Act. The Civic Center Campus parcel is designated as Public and Institutional land and does include the fruit-bearing, heritage apricot orchard. The Civic Center Campus would be subject to the proposed Initiative.

#### *Open Space*

The City owns and maintains 45.45-acres of developed parks, approximately 1.49-acres per 1,000 residents. The parks system is comprised of 11 parks, one trail, one nature preserve and one open space property. Of these properties, the Hetch Hetchy Trail is owned by the City and County of San Francisco while Montclair Park is leased from Cupertino Union School District.

In addition to dedicated parkland, the City owns several other, significantly sized parcels that serve as open space, such as Woodland Library, or the intersection of Springer Road and El Monte Avenue.

One of the main goals of the Initiative is “to protect and expand its parks and open spaces.” If the Initiative were adopted, it could serve to maintain open space for the enjoyment of the community by requiring the public to vote on whether open space should be converted to another use.

#### *Traffic Conditions*

Traffic congestion is typically managed through city rights-of-way. The Initiative does not

address rights-of-way and staff's analysis indicates they would not be covered under the Initiative.

*Business Districts*

There are seven primary commercial areas in Los Altos, including Downtown, El Camino Real, Loyola Corners, Rancho Shopping Center, Village Court, Woodland Plaza and Foothill Crossing. Four of these districts include property with the land use designations that are covered under the proposed Initiative, but only one of them contains property that is owned by the City of Los Altos. The covered property is described below.

Shopping District	Number of covered parcels	Land Use Designation	Current Use	City-Owned
Downtown	8	Public & Institutional	Parking Plazas	Yes
El Camino Real	1	Public & Institutional	Bridgepoint Senior Care Facility	No
Loyola Corners	7	Public & Institutional, Other Open Space	CalWater, USPS, US Bank, Private owner	No
Rancho Shopping Center	1	Other Open Space	Private owner	No
Village Court	--	--	--	--
Woodland Plaza	--	--	--	--
Foothill Crossing	--	--	--	--

*Developed Areas Designated for Revitalization*

The City does not currently have any developed areas that are designated for revitalization.

**Other Matters Requested by City Council [California Elections Code §9212(a)(8)]**

At its May 22, 2018 meeting, the City Council also directed staff to address the items below.

**Potential impact on current leases**

The proposed Initiative contains vested-rights and ongoing-activity language in Section 4 that potentially exempts any person with a “vested right pursuant to State law.” If a contract is executed prior to the Initiative taking effect, it should fall under the exemption of the Initiative. Any automatic extension of a lease should also fall under this exemption, as well as any option to renew, provided that option is exercised at the lessee’s sole discretion. However, where a renewal, extension, or amendment depends on the sole discretion of the City, the exemption language is unclear, as there would be no “vested right.” The Initiative’s language is unclear as to exactly what conditions must be satisfied in order for existing leases to be exempt or included.

Exhibit A contains a list of all existing City leases on lands covered by the Initiative.

**A listing of all City-owned land**

See Exhibit B for a list of all covered property that will be subject to the proposed Initiative.



For clarification purposes, Public Parking Plazas 1 and 2 (South of Main Street, between First and Third Streets), have General Plan Designation solely of Downtown Commercial, and thus would not be subject to the requirements of the Initiative. Portions of Public Parking Plazas 3 and 6 are designated as both Downtown Commercial and Public and Institutional. Any change in use or activity in Plaza 3 or 6, would most like be subject to the voter approval requirement, even if the activity or change in use were solely contained within the Downtown Commercial portion of the parcel due to the fact that another portion of the parcel is designated as Public and Institutional.

The City does own additional parcels of land, but those would not be subject to the proposed Initiative as those properties are not currently designated Park, Other Open Space, or Public and Institutional in the General Plan.

### **The effect on non-City-owned land**

The Initiative states that voter approval would be required for any changes in the list of uses the General Plan permits within the following land use designations: (1) Parks, (2) Other Open Space, or (3) Public and Institutional.

However, because the General Plan does not include a list of permitted uses for each land use designation, staff believes the intent of the Initiative is to require voter approval for any changes to the *Summary Description of Land Use Designation*, as shown on Page 3 of this report, or to the Land Use Designations in the text of the General Plan, beginning on Page 10 of the Land Use Element.

The sale, transfer, lease, or other disposition of non-city-owned property would not require voter approval.

### **What future actions would require voter approval?**

The following actions would require voter approval:

- (1) Any change to the list of uses that the general plan permits in the Parks, Other Open Space, or Public and Institutional land-use designations.
- (2) Any sale or transfer of any city-owned real property that is designated by the general plan as Parks, Other Open Space, or Public and Institutional.
- (3) Any lease, license, easement or “other disposition” of city-owned real property that is designated by the general plan as Parks, Other Open Space, or Public and Institutional if the “disposition” is for more than 180 days out of a calendar year. (Multiple short “dispositions” to people acting in concert count as one.)

*This would subject any easement or license to be given to public works contractors, other government agencies, or private contractors for projects that require access longer than 180 days. This would also subject any lease of any city property that lies within one of these three designated areas to voter approval if the lease is for more than 180 days.*

- (4) Any re-designation of city-owned property that is currently designated by the

general plan as Parks, Other Open Space, or Public and Institutional, except for re-designation from Public and Institutional to Parks.

**The timeline for placing any future items on a ballot**

Elections Code §9222 authorizes the legislative body of the City to submit a measure to the voters. This may be done at either a Regular or Special Election. The election must be called, by resolution, no less than 88 days before the election.

The Elections Code states that all elections are to be held on Tuesdays and establishes the following election dates:

- (1) Second Tuesday in April of even-number years
- (2) First Tuesday after the first Monday in March of odd-number years
- (3) First Tuesday after the first Monday in November of each year
- (4) First Tuesday after the first Monday in March of even-number years (either traditional ballot or mail only)
- (5) First Tuesday after the first Monday in May of each year (Mail ballot only)
- (6) Last Tuesday in August of each year (Mail ballot only)

The above list does not account for measures which qualify for the ballot through the Initiative petition process (such as the measure in question). In these instances, a special election may be called on any Tuesday, provided it is done so at least 88 days in advance. It is not anticipated that this provision of the Elections Code would apply to measures required by the passage of this Initiative.

A table of when elections could be held in the next two years and those dates in which the election would need to be called by is below.

<b>Election Date</b>	<b>Deadline to call election (88 days)</b>
March 5, 2019	December 7, 2018
May 7, 2019 (Mail only)	February 8, 2019
August 27, 2019 (Mail only)	May 31, 2019
November 5, 2019	August 9, 2019
March 3, 2020	December 6, 2019
April 14, 2020	January 17, 2020
May 5, 2020 (Mail only)	February 7, 2020
August 25, 2020 (Mail only)	May 29, 2020
November 3, 2020	August 7, 2020

**“Vested rights” as defined by the State of California and the Initiative’s implications on those rights**

Meaning of “Vested Right”

The proposed section 4.A states that “[t]his Initiative shall not apply to prohibit any development project or ongoing activity that has obtained ... a vested right pursuant to State law.” However, vested rights arise under both state *and federal law*, and the law

recognizes both a “vested right” and a “fundamental vested right” and distinguishes between them, a distinction that is not addressed in the Initiative.

A vested right for land-use purposes is a property right — born of federal and state constitutional and common law principles of due process, as well as, in some cases, of state statute — which protects a developer or property owner from being subject to newly enacted land-use regulations.<sup>1</sup> On its face, the exemption in the Initiative for “a vested right pursuant to State law” appears to be limited to just vested rights that are created by California law, and not the U.S. Constitution, yet much, if not most, of the vested rights doctrine was developed under the U.S. Constitution.

Generally, though, a vested right for land-use purposes under State law is created through one or more of the following three methods:

- By common law,
- By development agreement, or
- By vesting tentative map.

*By common law.* “California courts have consistently held that a developer’s right to complete a project as proposed does not vest until (1) a valid building permit, or its functional equivalent, has been issued, and (2) the developer has performed substantial work and incurred substantial liabilities in good faith reliance on the permit.”<sup>2</sup> The issuance of a grading permit and the performance of work in reliance on that grading permit gives the permittee a vested right to complete the grading under the rules in place at the time the permit was issued — but it does not give the permittee a vested right to build a structure or to do anything else beyond the grading itself. The permittee must obtain the equivalent of a building permit and start work in reliance on it before it has a vested right to construct the building.<sup>3</sup> There is no vested right in an existing general plan use designation, existing zoning, or in the build-out of an approved subdivision map, nor is there a vested right to expand a nonconforming use.<sup>4</sup>

*By development agreement.* The California Legislature provides the opportunity for additional vesting rights through the State’s Development Agreement Law.<sup>5</sup> A developer and city may negotiate and create a customized vested right by contract, but that right remains subject to state and federal laws.

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<sup>1</sup> See *Aries Dev. Co. v. California Coastal Zone Conserv. Comm’n* (1975) 48 Cal.App.3d 534; *Transcentury Props., Inc. v. State* (1974) 41 Cal.App.3d 835, 844; *Urban Renewal Agency v. California Coastal Zone Conserv. Comm’n* (1975) 15 Cal.3d 577, 583; *State v. Superior Court* (1974) 12 Cal.3d 237, 250 (“concept of vested rights is rooted in the Constitution”).

<sup>2</sup> CEB, *supra*, §16.2, citing *Avco*, *supra*, at 791; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309; *Mountain Defense League v. Board of Supervisors of San Diego County*, *supra*; CCP §1094.5; and quoting *Mountain Defense League v. Board of Supervisors of San Diego County* (1977) 65 Cal.App.3d 723, 730 n6.

<sup>3</sup> *Avco*, *supra*, at 793.

<sup>4</sup> *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301, 318 (expand nonconforming use); *Hafen v. County of Orange* (2005) 128 Cal.App.4th 133, 143 (final subdivision map); *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016 (general plan designation); *Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1081 205 CR 298 (same); *Gilliland v. County of Los Angeles* (1981) 126 Cal.App.3d 610 (existing zoning).

<sup>5</sup> Cal. Gov. Code §§ 65864–65869.5.

*By vesting tentative map.* The Legislature also provides a vested right through a vesting tentative tract map, but as with a development agreement, the right remains subject to state and federal laws.<sup>6</sup>

#### Implications for the Initiative

With regard to the Initiative petition, the vested-rights and ongoing-activity language would likely apply to exempt the following:

- Any development project where a developer has obtained a vested right.

As noted above, this is limited under the common law to situations where a developer has been issued a building permit and has performed substantial work and incurred substantial liabilities in good faith reliance on that permit.

A developer can obtain a vested right to develop through a development agreement. A developer can also obtain a vested right through a vesting tentative map.

- Any executed lease or executed purchase and sale agreement.

A person can acquire a contractual right under an executed purchase-and-sale agreement or lease before the Initiative takes effect, which might give the person a “vested right pursuant to State law” in the fundamental-vested-right/on-going activity sense. Thus, any contract that is executed before the Initiative takes effect should fall under the exemption in the Initiative. Arguably, any automatic extension of a lease should fall under the exemption, too, as would any option to renew that is held by the lessee, to be exercised at lessee’s sole discretion. However, it is less clear whether a renewal option that depends on the city’s sole discretion would be exempt or whether an amendment to an existing lease or purchase-and-sale agreement would be exempt, as there would be no “vested right” to the discretionary extension or to the new terms. It might be argued that the language regarding “on-going activity” would apply to ensure any lease is renewed or extended if there is an on-going activity at the property, but it is unclear based on the plain language in the Initiative.

#### **Does size of lease, size of parcel, or size of easement trigger the vote?**

The size of the parcel is what will trigger a vote as the Initiative provides a clear exception to the voter approval requirement for any parcel, or group of adjacent parcels, that is 7,500 square feet or smaller and has a land use designation of Public and Institutional. Therefore, the voter-approval requirement does not apply to the sale, conveyance, lease, license, easement, or “other disposition” of a city-owned parcel (or group of adjacent parcels) that is 7,500 square feet or smaller with a Public and Institutional land use designation.<sup>7</sup> This exception does not apply to lands with a land use designation of “Parks” or “Other Open Space” regardless of the size of the parcel.

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<sup>6</sup> Cal. Gov. Code §§ 66498.1-66498.9.

<sup>7</sup> Initiative, SEC. 2, adding Policy 1.A2 (b)(i).

Subsurface leases, easements, etc., are not subject to the voter approval requirement regardless of the size of the parcel or group of parcels.<sup>8</sup>

**Are there any state or federal laws regarding wireless installations that would limit or complicate the Initiative ordinance’s restrictions on the sale, leasing, and change of use of city-owned property that is designated in the general plan as (1) Parks, (2) Other Open Space, or (3) Public and Institutional?**

The Initiative voter-approval requirement raises questions about potential conflicts with state or federal law, or both, that are designed to facilitate the deployment of wireless cell towers on public property. These would involve licenses, easements, leases, or some combination of the three and would almost certainly be for longer than 180 days. The extent and likelihood of these kinds of conflicts will depend on the facts of each case.

The stated intent of the Initiative is to protect land owned by the City of Los Altos with a General Plan land use designation of (1) Parks, (2) Other Open Space, or (3) Public and Institutional by requiring voter approval for:

- (1) Changes in the list of permitted uses for those land use designations;
- (2) Sale or transfer of the City-owned property;
- (3) Long-term lease or other disposition of City-owned property (including license or easement); and
- (4) Re-designation of City-owned property to a different land use designation.

Items 1 and 4 appear to attempt to restrict the exercise of the City’s regulatory authority. Items 2 and 3 appear to attempt to restrict the exercise of the City’s proprietary authority. The distinction is important because federal and state telecommunications law applies differently to the actions of the City under these two different authorities.

Under Section 4, the Initiative would not apply (1) to any “development project or ongoing activity that has obtained” as of the effective date of the Initiative “a vested right pursuant to state law”; and (2) to the extent its application would “violate the constitution or laws of the United States or the State of California.”<sup>9</sup> To the extent the Initiative would make it more difficult for the City to comply with other state or federal telecommunications law, it appears Section 4 would resolve this concern by expressly exempting such application of the Initiative. Further, as described below, many applicants submitting wireless applications have a “vested” right to deploy in public rights of way under California law.

As examples of existing restrictions, regarding personal wireless facilities, federal and

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<sup>8</sup> Initiative, SEC. 2, adding Policy 1.A2 (b)(ii).

<sup>9</sup> Notice of Intent at 5.

state law imposes procedural and substantive rules on the city’s regulatory authority regarding application processing and denial. For instance, 17 U.S.C. Section 332(c)(7) requires local authorities to act on such applications within a “reasonable” period of time.<sup>10</sup> In 2009, the FCC established “presumptively reasonable periods” for local action on a wireless communications facility siting application—typically referred to as the “shot clocks.”<sup>11</sup> In California, an application is at risk of being “deemed granted” if the City fails to meet the FCC shot clock deadline.<sup>12</sup> Other federal law preempts local authority to disapprove “eligible facilities requests” (collocations or modifications of existing wireless facilities that are not “substantial” within the meaning of the FCC regulations). If those requests are not approved within 60 days, they too may be “deemed granted” under FCC rules.<sup>13</sup> Further, when acting in its regulatory capacity, a local government cannot regulate the “placement, construction, and modification of personal wireless service facilities” where such regulation has the effect of actually or effectively prohibiting service.<sup>14</sup> Under California law, “telephone” companies have state franchise rights to use public rights of way pursuant to Cal. Pub. Util. Code Section 7901 (“Section 7901”). This franchise right has long been considered a “vested right”<sup>15</sup> and has been interpreted in case law to apply to both wireline and wireless companies.<sup>16</sup>

### Regulatory Authority

The City acts in its regulatory capacity when it changes the permitted uses for land use designations and when it re-designates property. For these and other regulatory actions, it does not appear the Initiative would cause the City to fall out of compliance with federal or state telecommunications law.

#### 1. *Changes in the list of permitted uses for land use designations*

Under Section 2(a) of the Initiative, a “vote of the people” would be required for “any change in the list of uses the General Plan permits within the following land use designations: (1) Parks, (2) Other Open Space, or (3) Public and Institutional.

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<sup>10</sup> 47 U.S.C. Section 332(c)(7)(B)(ii).

<sup>11</sup> See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 25 FCC Rcd 11157 (F.C.C. 2010); *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (F.C.C. 2009).

<sup>12</sup> Cal. Gov. Code Section 65964.1.

<sup>13</sup> A third wireless shot clock was established by the FCC in an order interpreting a law enacted by Congress in 2012, called the Spectrum Act and codified as 47 U.S.C. section 1455(a). *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, et al., 30 FCC Rcd. 31 (WTB 2014).

<sup>14</sup> 47 U.S.C. Section 332(c)(7). Further, 47 U.S.C. Section 253(a) provides that: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

<sup>15</sup> *Pacific Bell Telephone Co. v. City of Walnut Creek* (N.D. Cal. 2006) 428 F.Supp.2d 1037, 1048, citing *Los Angeles County v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 385. Section 7901 has long been interpreted as a statutory grant of a franchise to telephone companies to use and place “telephone lines” in public rights-of-way, and “to erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines...” *County of Los Angeles v. General Tel. Co.* (1967) 249 Cal.App.2d 903, 904.

<sup>16</sup> *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587-8 ; *GTE Mobilenet of Cal. Ltd. v. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103. These parties typically demonstrate their franchise rights under Section 7901 by furnishing a Certificate of Public Convenience and Necessity (“CPCN”) or Wireless Identification Registration (“WIR”) issued by the California Public Utilities Commission (“CPUC”).

Because it is not clear that wireless use is permitted for Parks and other Open Space Lands, there is a chance those supporting the Initiative would argue that the City needs to seek a vote before acting on (in its regulatory capacity) a permit in those zones allowing wireless use. Under the Land Use Element of the General Plan, the “Parks” and “Other Open Space” designations are broadly described, and do not mention wireless.<sup>17</sup> The Los Altos Municipal Code provides little additional guidance, since under Section 11.12.030 the ordinance governing “commercial personal wireless service facilities” nonetheless does not apply to facilities “regulated by the [CPUC].” It is not clear therefore whether approving a wireless facility would be a “change of use” of those lands, and there is a risk that the Initiative may be interpreted as requiring the City to seek a vote before approving wireless facilities on land with those designations. It is also possible the Section 4 exemptions would not immediately apply in this case, since it is difficult to discern when involving a “vote of the people” would abrogate the state franchise right vested under Cal. Pub. Util. Code 7901 or violate federal law.

The City likely can show wireless use would not change the use of “Public and Institutional” land, since the Land Use Element specifies that “Public and Institutional” land includes “rights of way.” First, the Land Use Element provides that Public and Institutional land is designed for, among other things, “facilities of public and private utilities” and “community service uses,” which could include wireless.<sup>18</sup> Next, considering the City has been processing wireless facility applications in public rights of way for many years, it would seem likely the City could successfully demonstrate wireless use is within the character of this designation.

#### *4. Re-designation of City-owned property in Parks, Other Open Spaces, or Public and Institutional land to a different land use designation*

Under the Initiative, a “vote of the people” must be taken before City-owned property in Parks, Other Open Spaces, or Public and Institutional land is re-designated (except for the re-designation of any property designated Public and Institutional to Parks).<sup>19</sup>

While this may hinder the City’s urban planning goals, it has no immediate implications with respect to telecommunications compliance. To the extent it may in the future, Section 4 would likely apply.

#### Proprietary Authority

The City sells, transfers, leases, licenses, and otherwise disposes of City-owned land as a proprietor. When the City exercises its proprietary authority, it is unlikely the Initiative could conflict with telecommunications law. The Initiative, however, may

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<sup>17</sup> See General Plan, Land Use Element, at 10 (defining “Parks”); *id.* (defining “Other Open Space”). We note that Under Los Altos Municipal Code Section 9.24.030, wireless activities are not expressly prohibited in parks, and “commercial activities...for which permits have been issued by the city may be permitted in parks.”

<sup>18</sup> General Plan, Land Use Element, page 6.

<sup>19</sup> Notice of Intent, Section 2, Policy 1.A1.b(i)-(iii).

have other implications for telecommunications infrastructure in the community, as explained below.

2. *Long-term lease, license, or other “disposition” of City-owned property.*
3. *Sale or transfer of City-owned property.*

Under the Initiative, a “vote of the people” must be taken before City-owned property designated as Parks, Other Open Spaces, or Public and Institutional is sold, transferred, leased or disposed.<sup>20</sup>

With regard to a sale of City-owned property designated as Parks, Other Open Spaces, or Public and Institutional, the plain language of the Initiative petition would prevent the City from selling any land to a wireless provider without obtaining voter approval. The same would apply in order for the City to lease City-owned property with those same land use designations to a wireless provider. However, any sale or even a lease of City property to a wireless provider would not be subject to state or federal telecommunications laws as the City would be acting in a proprietary capacity.

The City has a strong argument that its decisions regarding particular parcels of City-owned property—even if a public park—are proprietary and an exercise of the Initiative would not result in an obvious violation of federal or state law. Generally, any property a local authority owns—including public parks—is managed in the local authority’s proprietary role to sell or lease. The 9th Circuit has held that a local government acting as a proprietor can, just like a private property owner, “refuse to agree to permit a wireless carrier to erect a cellular tower on its private property.”<sup>21</sup> Indeed, not every local or state government function is a regulation.<sup>22</sup> Where the City of Los Altos acts in its “proprietary” authority—as opposed to its “regulatory” authority—it is not subject to federal laws that would otherwise force the City to consider a wireless facility deployment proposal.<sup>23</sup> A state or local government may participate in the market (or choose not to) just as a private person and manage its “purely proprietary interests ... where analogous private conduct would be permitted” without being limited by the preemption doctrine.<sup>24</sup> Even if issues did arise, Section 4

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<sup>20</sup> Notice of Intent, Section 2, Policy 1.A1.b(i)-(iii).

<sup>21</sup> *T-Mobile West Corp. v. Crow* (D. Ariz., Dec. 17, 2009, No. CV08-1337-PHX-NVW) 2009 WL 5128562, at \*15 (ASU acted in its proprietary capacity where it selected a single exclusive DAS vendor on the Tempe Campus because the decision was specific to a certain portion of property—and was not a broader rule or “regulation”—and did not otherwise restrict consumers’ choice of personal wireless services), citing *Sprint Spectrum L.P. v. Mills* (2d Cir. 2002) 283 F.3d 404, 417-420. A state action is considered proprietary in either of two circumstances: First, “if it essentially reflects the governmental entity’s own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances;” and second, “if the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.” *Crow* at \*15, citing *Engine Mfrs. Ass’n*, 507 U.S. at 1021.

<sup>22</sup> *Engine Mfr.’s Ass’n v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1041.

<sup>23</sup> *Building & Constr. Trades Council v. Associated Builders & Contractors* (1993) 507 U.S. 218, 226-27.

<sup>24</sup> *Boston Harbor*, 507 U.S. at 231-32; *Omnipoint Communications, Inc. v. City of Huntington Beach* (C.D. Cal., Oct. 8, 2009, No. CV0903777RGKSSX) 2009 WL 10659756, at \*4; see also *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, et al., 30 FCC Rcd. 31, paras. 237-240 (WTB 2014), citing *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”).



would apply to exempt the particular sale or transfer.

With regard to poles in the City’s public right-of-way, it seems unlikely that the Initiative would impact the City’s ability to permit wireless facilities in public rights of way, including on municipally-owned poles that the City controls in its proprietary capacity. Specifically, it seems unlikely that issuing a wireless permit is tantamount to a “lease or other disposition of property” within the meaning of Section 2, Policy 1.A1.b(ii)—and therefore no vote would be required under the Initiative for wireless permitting activity since a permit is a regulatory permission to engage in an activity on land, and does not convey a property interest in the underlying property.<sup>25</sup> This would still be the case even if the City “owns” the public right of way.<sup>26</sup> Even if issues did arise, Section 4 would apply to exempt the particular disposition of the land.

**Attachments:**

1. Exhibit A: Existing City Leases
2. Exhibit B: City-owned Property Impacted by Proposed Initiative

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<sup>25</sup> See, e.g., *Cox Communications PCS, L.P. v. City of San Marcos* (S.D. Cal. 2002) 204 F.Supp.2d 1272, 1281 (holding that a wireless carrier has a “contract with the state” for lines it has already built under Section 7901, but its rights under federal telecommunications laws are not “property or liberty” rights “protected by the Constitution.”)

<sup>26</sup> Although unlikely, if a permit is considered a “disposition” of property, problems would arise under federal and state telecommunications law. In such a circumstance, the Petition could still require a vote of the people before a wireless permit or approval is issued. Since the City has limited authority over telecommunications installations in the public rights of way and therefore is subject to state and federal law while processing related applications for personal wireless service facilities, it is easy to imagine a scenario where securing a “vote of the people” would derail processing efforts and cause the City to miss an application processing deadline—at which point the application would be “deemed granted.”

# Existing City Leases

# Exhibit A

Lessee	Initial Date	Expiration Date	Location of Property	Notes	General Plan Designation
Bus Barn Stage Company	6/26/2012	6/25/2018 Agreement auto-renews annually	Civic Center	Use of theater at Hillview Park	Public and Institutional
Festival of Lights Association	11/1/1992	11/1/2042	707 Fremont Avenue	Lease of a portion of a storage building at City's Municipal Service Center	Public and Institutional
First Church of Christ, Scientist	11/7/1960	11/7/2064	Lincoln Park	Lease of off street parking at Lincoln Park	Park
Los Altos Community Foundation	11/1/2005	Until terminated	181 Hillview Avenue	Lease and operation of Neutra Cottage	Public and Institutional
Los Altos Historical Museum Association	6/10/2005	Until Terminated	Civic Center	Operations agreement for History Museum	Public and Institutional
Los Altos-Mountain View Children's Corner, Inc.	7/1/2017	3/31/2019	Civic Center	Lease of a portion of Hillview Community Center	Public and Institutional
Los Altos School District	12/12/2000	11/30/2020	707 Fremont Avenue	Lease of Corporation Yard	Public and Institutional
Santa Clara County Library District	9/9/2014	6/12/2032	Civic Center	Lease of Main Library	Public and Institutional

<b>Lessee</b>	<b>Initial Date</b>	<b>Expiration Date</b>	<b>Location of Property</b>	<b>Notes</b>	<b>General Plan Designation</b>
Santa Clara County Library District	9/9/2014	7/22/2029	Grant Road	Lease of Woodland Library	Public and Institutional
Santa Clara County Central Fire Protection District	12/17/1996	12/31/2026	1) Fremont Rd/ McKenzie Park; and 2) Almond Avenue	Lease of two fire stations	Public and Institutional
Santa Clara County Central Fire Protection District	4/9/2012	6/30/2021	Almond Avenue	Sublease of Almond Fire Station to Rural/Metro for ambulance services	Public and Institutional
Silicon Valley Regional Interoperability Authority	4/4/2008	4/4/2028	Civic Center	License agreement for emergency communications tower	Public and Institutional
Ye Old Towne Band	5/15/2009	Until Terminated	Shoup Park	Lease of Garden House Shed at Shoup Park	Park

# City Owned Properties Impacted by Proposed Initiative

# EXHIBIT B

Location	Land Use (GP)	Lot Size (ft2)	Current Use
Next to 2019 Fallen Leaf Lane	Open Space; Single Family, Small Lot	2000	Bike path
1 N San Antonio Rd	Public and Institutional	206598	Civic Center Campus- City Hall, PD, LAYC, Orchard
1 N San Antonio Rd	Public and Institutional	562987	Civic Center Campus- Library, Bus Barn, Soccer/Baseball fields, Hillview Community Center
Grant Rd /Fremont Ave	Park	10685	Corner parcel/Power pole/ utility boxes
Grant Rd /Fremont Ave	Park	94080	Corner parcel/public art
N Springer Rd/ El Monte Ave	Park	17868	Corner parcel/public art/stormwater/sidewalk
S Springer Rd/ Paco Dr	Single Family, Small Lot; Open Space	2105	Corner parcel/Stop sign
10 Almond Ave	Public and Institutional	39287	Fire station
1575 Holt Ave	Park	172996	Grant Park
Portland Ave/Miramonte Ave	Open Space; Park	203924	Heritage Oaks Park
Lincoln Park- bounded by Foothill/Lincoln/University/Edith	Park	193406	Lincoln Park
Along University Ave	Park	30536	Parking for Lincoln Park
1285 Fremont Ave	Park	97556	Marymeade Park
707 Fremont Ave	Park; Public and Institutional	352411	McKenzie Park
1st St	Downtown Commercial	46258	Parking Plaza 1
2nd St	Downtown Commercial	46695	Parking Plaza 2
3rd St	Downtown Commercial; Public and Institutional	88401	Parking plaza 3
1st St	Public and Institutional	24833	Parking plaza 4
2nd St	Public and Institutional	25994	Parking plaza 5
State St	Public and Institutional; Downtown Commercial	25296	Parking plaza 6
1st St	Public and Institutional	45454	Parking plaza 7
2nd St	Public and Institutional	51213	Parking plaza 8
4th St	Public and Institutional	7874	Parking plaza 9
4th St	Public and Institutional	25234	Parking plaza 10
482 University Ave	Park; Open Space	5341	Redwood grove
482 University Ave	Open Space; Park	59192	Redwood grove
482 University Ave	Park; Open Space	170381	Redwood Grove
401 Rosita Ave	Park	249163	Rosita Park
400 University Ave	Open Space; Park	10018	Shoup Park
400 University Ave	Open Space; Single Family, Small Lot; Park	156176	Shoup Park
647 N San Antonio Rd	Public and Institutional	15675	San Antonio Center/Tiny Tots
2 N San Antonio Rd	Park	30926	Village Park
1975 Grant Road	Public and Institutional	63828	Woodland library