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Via Electronic Mail Only

Mayor Jean Mordo
and Members of the City Council
Los Altos City Hall
1 North San Antonio Road
Los Altos, CA 94022 |

Re: Los Altos Protect Our Parks and Public Lands Initiative

Dear Mayor Mordo and Members of the City Council:

On behalf of the Committee for Yes on the above-referenced initiative,[1] I write to address and correct certain statements in the 9212 Report regarding the initiative that was posted on the City's website on Saturday. On behalf of the Committee, I also urge the Council to adopt the Initiative at its meeting tonight pursuant to Elections Code section 9215 or, if it chooses not to do so, to place the measure on the November 6, 2018 ballot, as required by law.

The Committee appreciates the time and effort that staff put into preparing the 9212 Report. As I have discussed with the City Attorney, the Committee concurs in many of the Report's conclusions. The Committee also appreciates that Council members and members of the public have questions about the Initiative's intent and effect. The Committee is concerned, however, that some of the public statements made by City officials about the Initiative do not reflect—and cannot be reconciled with—the plain language of the Initiative and its express statements of purpose.

In this regard, the Committee wishes to underscore at the outset the Initiative's stated purpose, which "is to provide Los Altos residents a voice in protecting

[1] The full name of the Committee is Committee for Yes on 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, FPPC ID Number 1405097.

public parks, *public* open space lands, and other significant *City-owned* properties." Initiative, Section 1(A) (emphasis added). As the Initiative also expressly states, it "accomplishes this effect by requiring voter approval for actions that would alter the public character of these lands … The Initiative does *not* apply to private property." Section 1(B) (emphasis added). As further explained in Section 1(C)(5), "The Initiative applies *only* to actions that would *significantly* impact the public character of lands owned by the City of Los Altos." It does so by requiring "voter approval for actions that would effectively privatize these shared spaces." *Id.*

The Committee believes that the General Plan amendments proposed by the Initiative are clear on their face. However, to the extent the City believes there is any ambiguity in these terms, an unbroken line of cases and canons of statutory construction requires the City to construe these terms in light of the express findings and statements of purpose quoted above.

With that background in mind, the remainder of this letter addresses the Committee's specific concerns with the 9212 Report and past public statements made by certain Council members.

1. The Initiative's reference to the "list of permitted uses the General Plan permits" refers to the uses permitted under the General Plan's land use element.

Government Code section 65302(a) requires the land use element of every city's general plan to "designate[ ] the general location and extent of the uses of land" for all land within that city. This required designation of permitted uses is what the Initiative refers to when it requires voter approval for any change in the list of permitted uses. *See* Initiative, Policy 1.A1(a).

The 9212 Report at several points questions whether the City's General Plan "actually include[s] a list of permitted uses for each land use designation." *See, e.g.*, 9212 Report at 3, 9. However, as the 9212 Report correctly points out, the General Plan includes both: (1) a Summary Description of each land use designation (in Table LU-1); and (2) a more detailed description of each land use designation that lists permissible uses as required by the Government Code.

Thus, for instance, the General Plan's description of the Public and Institutional land use designation states:

> The Public and Institutional land use designation provides for governmental, institutional, academic, group residence, church, community service uses and lands, utilities, easements, rights-of-way and City-owned parking facilities.

In the Committee's view, these two lists in the General Plan comprise the list of permitted uses referred to in the Initiative (and required by Government Code section 65302(a)).

2. The Initiative will not have any impacts on—or require voter approval for—church uses, sale or transfer of church lands, or re-designation of church or other privately owned land for other uses.

We understand that concern has been raised regarding whether the Initiative would require voter approval if a church or other private property owner wished to sell or lease its land, use that land for other purposes, or re-designate that land for other purposes. The answer is No. The Initiative provisions requiring voter approval for sale, lease, or transfer of lands designated for Parks, Other Open Space, or Public and Institutional apply *only* to "property owned by the City." *See* Policy 1.A.1(b)(i)-(ii). Likewise, the initiative provision requiring voter approval to change the designation of any properties so designated applies only to "property owned by the City." *See* Policy 1.A.1(b)(iii).

The Initiative also requires voter approval to change the list of permitted uses for the three specified land use designations. *See* Policy 1.A.1(a). But those permitted uses are quite broad under the General Plan and already allow for numerous private uses. *See, e.g.,* General Plan at page 10. Moreover, if the owner of a private property with one of these designations wished to use the property for some other use or purpose, the Initiative does not require voter approval for, or otherwise limit, that property owner's ability to ask the City to re-designate its land to some other land use designation permitting such use.

In short, as explained in the Initiative's findings (Section 1.C.5), the narrow reach of Policy 1.A1 is intentional. The Initiative's intent is to require voter approval for actions that would impact public use of and access to *City-owned* lands, not to affect what private owners wish to do with their property

The 9212 Report largely recognizes that private property owners are not impacted by the Initiative. *See, e.g.,* 9212 Report at 7 (acknowledging that "privately owned, vacant parcels…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") (emphasis added). The standard practice for a property owner wishing to change the permitted use of its land is not to seek a general plan amendment changing the uses allowed for *all* lands throughout the City with that land use designation, but rather to change the land use designation for that particular property. As discussed above, the Initiative does not require voter approval for any such re-designations of private property.

3. All Public Parking Plaza parcels in the Downtown Business District are designated as "Public and Institutional" on the General Plan Land Use Map and thus are subject to the Initiative's voter approval requirement.

The 9212 Report states that Public Parking Plazas 1 and 2, as well as portions of Public Parking Plazas 3 and 6, are designated Downtown Commercial and thus are not—or may not be—subject to the Initiative's voter approval requirements for lands designated Public and Institutional. *See* 9212 Report at 8-9. However, the General Plan's land use map on its face designates all public parking plazas in the entire Downtown Business District as Public and Institutional.

Accordingly, the Public and Institutional designation is the governing land use designation for all public parking plazas in the entire Downtown District. *See Orange Citizens for Parks and Recreation v. Superior Court* 2 Cal. 5th 141, 156 (2016). To the extent that the City has any documentation that the City intended to apply some other designation to portions of these public parking plazas, we hereby request copies of those documents pursuant to the Public Records Act. Even if such documents exist, however, it is the designation on the current land use map that controls. *Id.* at 156-57.

4. The Initiative does not require voter approval for public works projects that require access to City-owned property unless the project involves the "lease or other disposition of that property" for private use.

As detailed above, the purpose and effect of the Initiative is to require voter approval for actions that would "significantly impact the public character" of City-owned lands by "effectively privatiz[ing] these shared spaces." *See, e.g.,* Initiative, Section 1(C)(5).

The 9212 Report nonetheless states that the Initiative would require voter approval for any "easement or license to be given to public works contractors, projects, government agencies, or private contractors for projects that *require access* longer than

180 days." 9212 Report at 9 (emphasis added). The Committee strongly disagrees with this statement, for several reasons.

First, we believe that this language cannot be reconciled with the plain text of the Initiative. The Initiative does not require voter approval for agreements that merely provide for "access" to public lands for public works (or other) construction projects. Instead, it requires voter approval for "the sale or transfer of that property" or for "the lease or *other disposition* of that property." Initiative, Policy 1.A1(b) (i)-(ii) (emphasis added). An access agreement is not a lease or other disposition of property. And even if an access agreement could be construed as a "license," the term license is used only in the parenthetical phrase that modifies "other disposition." Thus, while some licenses *could* constitute a "disposition of property," not every license will do so.

In this regard, we note that the City has broad discretion to draft access agreements, including licenses, to achieve its intended goals, and the label applied to a particular agreement is not controlling. *See Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36 (1994) ("Ultimately, the label given to GWBC's 'interest' is of little importance. Arrangements between landowners and those who conduct commercial operations upon their land are so varied that it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole these relationships as 'leases,' 'easements,' 'licenses,' 'profits,' or some other obscure interest in land devised by the common law in far simpler times. Little practical purpose is served by attempting to build on this system of classification. … 'Modern decisions tend to construe leases and the rights and obligations ensuing therefrom in accordance with general contract principles.'"). Rather, the question is whether the agreement, however it is styled, constitutes a "disposition of property" within the meaning of the Initiative.

Second, where the access agreement is for the purpose of constructing a public works project on municipal property, that agreement is necessarily in service of the public-serving use of the property and thus would not come within the Initiative's voter approval requirement for dispositions that would cause "significant changes" to city-owned land. Initiative, Goal 1.A.

Finally, to the extent there is any ambiguity on this issue, the Initiative must be interpreted in light of, and to further, the Initiative's stated purposes. *See Prof. Eng'rs in Cal. Gov. v. Kempton* (2007) 40 Cal. 4th 1016, 1037; *Westly v. Bd. of Admin.* (2003) 105 Cal. App. 4th 1095, 1109-1111 (interpreting constitutional phrase in light of initiative's "statement of purposes and intent and findings which are part of its enactment"); *see also* Initiative, Section 7 ("This Initiative shall be broadly construed in order to achieve its purpose.").

5. The Initiative's "vested rights" provision exempts lease renewals for any "ongoing activity" that has obtained, as of the Initiative's effective date, a "vested right pursuant to State law."

The 9212 Report recognizes that any automatic extension of a pre-existing lease would be exempt from the Initiative's voter approval requirement. 9212 Report at 12. It questions, however, whether this exemption would apply where the City has sole discretion whether to renew the lease. In the Committee's view, the plain language of the Initiative provides that such renewals would likewise be exempt as long as the lease is for the same "ongoing activity" for which the lessee had a vested right at the time the Initiative took effect.[2]

Section 4(A) of the Initiative expressly provides that "The Initiative *shall not apply* to prohibit any development project or ongoing activity that has obtained, as of the Effective Date of this Initiative, a vested right pursuant to State law." Thus, if an individual or entity has obtained a vested right for an "ongoing activity" as of that date, no voter approval is required to continue that ongoing activity thereafter, even if it requires a discretionary renewal of the lease. If, however, the lease-holder or the City wishes to expand or change that activity, then voter approval could be required.

6. The Initiative fully complies with state and federal laws regarding wireless installations.

The Committee agrees with the 9212 Report's conclusion that the Initiative complies with federal and state laws regarding wireless installations. In our view, this issue is straightforward. The Initiative's voter approval requirements apply to City sales, leases, or other dispositions of City-owned properties (subject to the stated exceptions and exemptions). As the owner of City lands, the City has the right to decide not to sell or lease lands to wireless providers, just like any other property owner, and laws

[2] For the record, the Committee disagrees with the 9212 Report's statement that vested property rights are created by federal law, rather than state law. To the contrary, whether a property right exists is a matter of state law. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (noting "the basic axiom that '[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Federal constitutional law can, of course, affect whether a vested property right has been improperly impaired.

regarding wireless installations do not limit those decisions. (This is what the 9212 Report refers to as the City acting in its propriety capacity.) *See, e.g., Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist.*, 498 F.3d 1031, 1040-41 (9th Cir. 2007) (preemption does not apply when a local government acts in its proprietary capacity).

However, the Initiative's voter approval requirements *do not* apply when the City acts in a regulatory capacity to issue permits, for the simple reason that a permit is not a sale, lease, or other disposition of property. Moreover, to the extent that City regulatory actions could somehow be construed as requiring voter approval under the Initiative—and in our view, they cannot—then to the extent that requiring voter approval would conflict with federal or state law, Section 4 of the Initiative would exempt that particular regulatory activity from the Initiative's voter approval requirement.

Should members of the City Council have any questions about this matter, I would be happy to discuss those with the City Attorney.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Robert "Perl" Perlmutter

cc: Christopher Diaz, City Attorney
Clients

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