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VIA E-MAIL and FEDEX

Cupertino City Council
10300 Torre Avenue
Cupertino, California 95014
citycouncil@cupertino.org

Re: August 20, 2019 City Council Meeting, Public Hearings Item # 11
General Plan Amendments for Vallco Fashion Mall Site

Dear Mayor Scharf and City Council Members,

This firm represents Vallco Property Owner, LLC ("VPO"), which owns the 50.82-acre site of the former Vallco Fashion Mall (the "Vallco Site" or the "Site"). VPO was recently notified that the City was considering amendments to the general plan and zoning map (the "Amendments") that would, among other things, severely limit the development of housing and altogether eliminate the development allocation for office uses on the Vallco Site. Because of the grave doubts raised by Planning Commissioners Fung and Takahashi, the proposed resolutions to recommend the adoption of the Amendments failed. Those Amendments are now due to be considered by the City Council.

The misgivings expressed by two long-serving Planning Commissioners about the intent and effect of the Amendments were justified. If the Amendments are adopted, and the currently-entitled SB 35 project does not proceed on the Vallco Site, the City will have placed itself at serious risk. For example:

- The Department of Housing and Community Development ("HCD") has made plain that the City's Housing Element will not be compliant with state law.
- The Amendments will expose the City to hundreds of millions of dollars of damages to VPO (plus attorneys' fees).
- The General Plan amendment unlawfully requires another, unknown *future* General Plan amendment.

- The changes to zoning will have citywide impacts that have not been studied and would impact many other properties.

- The Amendments violate the California Environmental Quality Act.

Indeed, in the event that the SB 35 project is blocked, the best case, albeit improbable, scenario for the City is that the Amendments are deemed valid — and the City is saddled, for the foreseeable future, with a blighted 50-acre parcel with an unusable, partially-demolished mall on it. This is a rushed effort that, as the Planning Commission has confirmed, has nothing to do with an actual planning exercise. Rather, the sole purpose of the Amendments is to ensure that *nothing* will be developed at the Vallco Site, in the unlikely event that Friends of Better Cupertino, with the City's support and assistance, prevails in its challenge to the SB 35 project.

I. The City Failed to Provide Proper Notice for This Meeting, and It Is Repressing Public Participation.

Where the City proposes to substantially amend a general plan, it must grant a 45-day comment period to a slew of other public agencies, including the County of Santa Clara, the school district, and the State Water Resources Control Board.[1] (Gov. Code § 65352.) In addition, when the City proposes to amend its general plan *in any respect*, it must notify certain Native American tribes, and provide them 90 days to request consultation, and then additional time if consultation is requested. (Gov. Code § 65352.3.) Further, although the City has been careful to not propose any changes to the Housing Element, the effect of the changes require modifications to the Housing Element to maintain "horizontal consistency," which triggers review by HCD. As far as we can tell, the City did not comply with any of these notice provisions.

Rather, at least as to the requirement that the City provide Native American tribes the opportunity to conduct, the City has tried weakly to "work around" the statutory requirements as it pushes through the Amendments. The City is proposing to adopt a new General Plan policy (which was not presented to the Planning Commission) that requires coordinating with "applicable Native American tribal representatives following approval of development in the Vallco Shopping District Special Area to ensure appropriate cultural sensitivity training is provided to all contractors prior to the start of ground-disturbing activities." Of course, this is an

[1] It goes without saying that amending a General Plan to remove two million square feet of office space and to allow by-right housing development with no design review is "substantial".

empty solution that will not mitigate the cultural impacts of any future project; the City requiring consultation *after* the General Plan is amended does not comply with the statute, which requires the consultation to occur "prior to" any amendment.

Even setting aside the City's failure to comply with these notice requirements, the Planning Commissioners pointed out that the best that could be said of the City's process for the Amendments is that it met the bare minimum required for legal compliance. That might be legal government process, but it is not good, or even acceptable, government process. The redevelopment of the Vallco Site has been the major land use, planning, and community issue in Cupertino for at least five years. The City undertook a multi-year general plan process, then a specific plan process that resulted in the certification of an environmental impact report and approval of a specific plan, which was then subject to a referendum and repealed. Hundreds, if not thousands, of community members participated in years of planning, charettes, campaigning, and organizing about how to address the site. For its part, VPO contributed approximately $4 million to the City's recent specific plan process (to pay for consultants, lawyers, and others, as well as staff time). During these years of community planning and negotiation, the office use allocation was one of the most hard-fought issues.

With that background, it is shocking that the City Council would instruct City staff to hastily and covertly prepare the Amendments, without soliciting any input from the actual property owner. It is appalling that the City Council would consider adopting the Amendments, with only the minimum compliance with notice requirements, and almost no community participation. It is a disservice to City residents to consider the Amendments in the middle of summer, while many residents are away, and on the fastest schedule that the Planning Commission and City Council can muster. The City only sent 96 notices to neighboring Cupertino households within 300 feet of the Vallco Site,[2] even though residents from across all parts of the City participated in the prior processes, and the redevelopment of Vallco will affect all City residents, perhaps for generations to come.[3]

[2] Compare this with the citywide notice requirement that applies if a property owner seeks a General Plan amendment. In both instances, the effect is the same: amendment of the General Plan; but the City believes it can hold itself to a different standard and take advantage of a "loophole" in the notice provisions that allows it to notify only a small percentage of City residents.

[3] When the FPPC opined that Vice Mayor Chao be permitted to participate in certain decisions about the SB 35 litigated, the basis of its opinion was that the redevelopment of the Vallco Site is so significant

Vice Mayor Chao and Councilman Willey campaigned on a platform of "transparency." They complained that former City Council members failed to conduct City business in a forthright way that allowed for maximum public participation.[4] Indeed, at *this meeting*, at the recommendation of Vice Mayor Chao and Councilman Willey, the City Council will consider proposals to increase the notice requirements for development proposals. But the Amendments raise the question of whether this Council is in fact interested in transparency or simply rather the *appearance* of transparency, in the event that transparency is not politically convenient. In any event, the Amendments lay bare their actual agenda: if there is an opportunity to kill development at the Vallco Site, it should be undertaken swiftly, before City residents have an opportunity to understand what the City Council proposes to do or, heaven forfend, oppose it.

The only plausible reason to undertake the Amendment process in such a hasty and covert way is to deprive those who would oppose the Amendments from having a full opportunity to participate in the process. A project for the Vallco Site has already been approved under SB 35. The Amendments are inconsistent with the approved SB 35 project, and, as the City has correctly confirmed, the Amendments will not give the City any grounds to block or alter the SB 35 project. Friends of Better Cupertino—the political benefactors of Mayor Scharf, Vice Mayor Chao, and Councilpersons Willey and Paul — and Planning Commissioner Kitty Moore have sued the City to block the SB 35 project, but that matter is not scheduled to be heard by the Superior Court until October. Even if that were a legitimate basis for requiring hasty action, which it is not, there is no urgency to the Amendments. The City is nevertheless moving forward, as quickly as it can, without necessary consultation with technical experts or the actual property owner, and with scant notice to the public.

II. The City Council Can Only Consider the Resolutions That Were Presented to the Planning Commission.

In an effort to try to "repair" defects that were identified by VPO and the Planning Commission, the City has generated additional proposals for the City Council to consider that were not presented to the Planning Commission. Most significantly, the "Tribal Coordination" policy, and the proposals (and recommendations) for specific

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that its effects may be felt by a broad range of Cupertino residents, many of whom live beyond the 300-foot radius from the Vallco Site that was used to notice these meetings.

[4] In fact, Councilman Willey recently complained about a perceived inadequacy in the notice given for the Cupertino Village hotel project, even though that project will have a far narrower impact than the Vallco Project and the Amendments.

siting of the 13.1 acre residential site were not presented to the Planning Commission. The City Council is prohibited from acting on these items, and they must "first be referred to the planning commission for its recommendation." (Gov. Code, § 65356.)[5]

III. If the City Adopts the Amendments, and the SB 35 Project Does Not Proceed, the City's General Plan Will Be Non-Compliant With State Law.

A. The General Plan Will Not Contain an Adequate Housing Element.

HCD has already warned the City that if the SB 35 project does not proceed, the City will be out of compliance with mandatory housing requirements.[6] Enforcing compliance with housing requirements against recalcitrant municipalities that are trying to block or delay residential development is a priority for HCD.[7] The Amendments make the City's non-compliance with state law more acute. Cupertino's militantly anti-affordable-housing reputation is not accidental. It is deserved, even if its public officials have become more savvy about disguising their true purpose.

The City's General Plan must include a Housing Element that identifies "adequate sites for housing." (Gov. Code § 65583.) A Housing Element is not compliant simply because the City designates "every unoccupied mote" within its boundaries as available for "residential development," but the inventory needs to include sites that are "actually" available. (*Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1111.) The Vallco Site, in particular, is identified as a "Priority Housing Element Site" in the General Plan's Housing Element, and it must therefore be "suitable and available for residential development." "Suitable and available" means that there is a "realistic and demonstrated potential" to develop the allotted number of residential units during the planning period. (Gov. Code § 65583(a)(3).) The City must provide information showing that the site will "actually" be suitable for residential development during the planning period, and that the site will accommodate the amount of development attributed to it. (Gov. Code §§ 65583.2(b), 65583(c).).

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[5] In fact, the *only* "recommendation" from the Planning Commission is that the City Council adopt a height limit for the Vallco Site. As to the balance of the Amendments, the resolution to recommend them failed, and there is therefore no recommendation for the City Council to act on.

[6] On August 2, 2019, HCD issued a letter to the City stating that compliance with state law was contingent on the City proceeding with either the Specific Plan project (which was repealed by the City) or the SB 35 project. If neither proceeds, the City's housing element will be non-compliant.

[7] HCD recently sued the City of Huntington Beach after its housing element fell out of compliance.

The Housing Element must also contain a program that sets forth a schedule of actions during the planning period that, among other things, will "remove governmental . . . constraints to the . . . development of housing." (Gov. Code § 65583(c)(2).) The City's obligation to demonstrate the potential of its priority housing sites to accommodate residential development is even more acute now, more than halfway through the current planning period, since there is relatively little time left for the housing to be produced.

All four Planning Commissioners commented that they had insufficient information to determine whether it would be "actually" feasible to develop the Vallco Site if the Amendments are adopted. Prior to the Planning Commission meeting, VPO submitted a preliminary report from the Concord Group ("TCG"), illustrating the infeasibility of future development pursuant to the Amendments. In response, the City commissioned a "preliminary financial feasibility assessment" by Hausrath Economics Group ("Hausrath"), which purports to show that it would be feasible to develop the Vallco Site (or, at least, 13.1 acres of the Site). Hausrath purports to show that if the $400+ million[8] development of the 13.1 acre residential parcel, alone, goes *exactly* according to Hausrath's projection, then that portion of the Site would have a $1 million residual value. Of course, Hausrath ignores the remaining 37 acres of the Site (to which the Amendments impute a colossal negative residual value by *mandating* infeasible new retail development) and, as to the 13.1 acres, assumes that a developer would assume all of the risks attendant to the residential development for such a paltry, razor-thin upside. But even Hausrath's conclusion that the 13.1 acres could generate a nominal residual value is implausible and wrong.

Hausrath's preliminary assessment is rebutted by *four* other in-depth feasibility reports, two of which were commissioned by the City: 2018 reports by Economic & Planning Systems ("EPS") and TCG, a 2019 TCG report, and a feasibility analysis by Strategic Economics ("SE") prepared just last month for an August 13, 2019 Planning Commission meeting.[9]

In 2018, the City engaged EPS, an economic feasibility consultant, to study the Vallco Site.[10] The EPS study recognized that office would be an "essential" economic

[8] Excluding land costs. All Hausrath cost assumptions come from the 2018 EPS report.

[9] The 2019 SE report is Exhibit A to this letter.

[10] The 2018 EPS report is Exhibit B.

component of any large project on the Vallco Site.[11] Also in 2018, TCG prepared an economic feasibility report in connection with VPO's 2018 SB 35 application.[12] Among other things, that report describes the effect of certain aspects of the Amendments, and the portions of the General Plan that will remain un-amended, on the feasibility of developing the Site. Specifically, the City proposes to eliminate office uses, but will retain costly, non-revenue generating elements required by the General Plan, including the requirement that the Site largely be re-used as a shopping center.

According to both TCG and EPS, in order for development of a minimum of 600,000 square feet of retail, as required by the Amendments, to be feasible, it must be sufficiently subsidized by other revenue-generating land uses. Indeed, in 2018, TCG concluded that requiring the Site to absorb 600,000 square feet of retail is an "unrealistic scenario" and anything more than 400,000 square feet of retail would result in extraordinarily high (i) 'carry' costs and operating losses and (ii) lease transaction and construction costs. Per EPS, in order for a minimum of 600,000 square feet of retail to be "in the realm of financial feasibility," the City would need to entitle — and allow "by right" — a minimum additional development program of 1,779 residential units (with no more than 15% affordable[13]) and 750,000 square feet of office.

These 2018 conclusions are consistent with the SE Report concerning the feasibility of proposed changes to the City's BMR program that was prepared for the City and submitted just last week to the Planning Commission for its August 13, 2019 meeting. SE evaluated the feasibility of retail development and supported the TCG and EPS conclusions:

> *The financial feasibility analysis shows that retail developments are not financially feasible under current market conditions.*

[11] Consistent with the EPS report, Commissioners Fung and Takahashi both understood that the removing office use will make the Vallco Site "undevelopable."

[12] The 2018 TCG report is Exhibit C.

[13] We understand that the City is currently studying updates to the affordable housing requirements and that the Housing Committee has suggested that the City should consider increasing the percentage to 20% or even 25%, and disallow payment of an in-lieu fee. If adopted, those proposals would render any development even more challenging than assumed by EPS.

The SE report also acknowledged the challenge in residential development today, determining inclusionary apartment projects to be infeasible as well:

> *The results from the feasibility analysis show that rental development in Cupertino cannot feasibly provide BMR units on-site under current market conditions. . . .*

In other words, according to SE, an apartment project with *any* BMR units is not feasible. The Amendments would require VPO to include 15 percent BMR.[14]

Notwithstanding their conclusion that most forms of development other than office use are infeasible in today's market, SE (and EPS in 2018) concluded that for-sale residential is *potentially* feasible. Accordingly, in order to substantiate the Amendments, Hausrath was forced to solely underwrite an inclusionary condominium development, effectively limiting the use of the 459 housing units to for-sale only.[15]

Even these bleak feasibility outlook suggested by the SE and EPS reports were too optimistic. Attached to this letter is a more comprehensive report prepared by TCG, analyzing the feasibility of the Amendments.[16] Using inputs provided by Hello Housing,[17] TCG corrected two major inputs by Hausrath that are wildly inaccurate. First, Hausrath assumed (as did EPS) that BMR units would be sold for an average

[14] The SE report also point to other material defects in the Hausrath report. For example, Hausrath assumed $42,609 in Permits and Fees per market-rate unit, and $33,609 per BMR unit. The SE Report assumed current "City Fees" to be $59,655 per unit on a blended basis in a 15% BMR condominium project. Correcting this element, alone, results in a negative swing in Hausrath's report of more than $8 million. This is only one of many items that are inaccurate, or not accounted for, in the Hausrath report. Any one of them would immediately erase Hausrath's residual value conclusion.

[15] Hausrath failed to account for the additional risks attendant to condominium development that any reasonable developer would take into account, and which makes Hausrath's $1 million residual value even more absurd. For example, condominium developers carry a 10-year tail of construction defect liability. In addition, Developers of condominium projects are also far more susceptible to market volatility – if the project is released during a recession, then the developer has to bear that impact when it brings the units to market, whereas a rental project has the ability and time horizon to weather a recession.

[16] The TCG report is Exhibit D to this letter.

[17] Hello Housing is the organization that the City engaged to manage its BMR housing program.

price of $835,000, but the correct projection is only $482,000.[18] Second, Hausrath also assumed (again, as did EPS) that construction costs would be only $349 per foot, but a more reasonable, and current, projection is $486 per square foot. When those two inputs are corrected, the residual value of developing the 13.1 acres[19] plummets by nearly $140 million. The effect of these corrections, separately and together, is depicted in Exhibits 1A, 1B, and 1C to the TCG report.

And, of course, that nearly $140 million negative residual value does not account for additional design and improvements required, or logistics necessitated, by the Amendments that will only serve to increase the cost of development and further impair feasibility.[20] TCG also studied two scenarios that analyzed feasibility of the entire Site (Exhibits 1D and 1E to the TCG report).

In new General Plan Section LU-19.2, the Amendments require the 13.1-acre residential project to carry such major Site-wide improvements as the creation of a "Town Center layout" and "high quality public realm" and a new "street grid" internal to the Site and major improvements to Stevens Creek Boulevard and Wolfe Road to include new features such as bike lanes, wide sidewalks, street trees, and improved pedestrian intersections. The 13.1-acre project will also require VPO to incur the lion's share of the "Site Costs" (i.e., demolition, site work, open space improvements, and right-of-way and backbone and utility infrastructure) for the entire 50.8-acre Site implemented up-front, as a part of the 13.1-acre project, not the 26% proportionate share that Hausrath unrealistically estimates in their analysis.

LU-19.3 goes on to impose significant design and construction burdens on the 37-acre portion of the development by requiring such things as "complete redevelopment" of the Site, a new street network, transit facilities, off-site bike/ped connections and improvements, substantial open space, high-quality architecture, gateway features, hidden parking, and neighborhood buffers, to name a few. This only

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[18] Indeed, SE projected an average BMR unit price of $375,431.

[19] TCG assumed development of 390 market rate condominiums, 69 below market rate condominiums, and 25,000 square feet of retail.

[20] The TCG report incorporated many elements of the prior Hausrath and EPS reports, purely for the purpose of simplifying the analysis, even though those elements make the feasibility conclusion more rosy than it should be. In other words, if *every* element in the Hausrath report were corrected, rather than just the most major ones, TCG's residual value conclusion would be even lower. Much of the data necessary to correct those other elements is located in the technical appendix to the TCG report.

adds to the substantial value loss suffered by the remaining 37 acres as a result of the Amendments' completely infeasible land use designation. It requires little study to see that the 37-acre development is also infeasible.

The Hausrath report is a purely cynical exercise, calculated to provide the City Council with a fig leaf to allow it to proceed with the Amendments. That is political showmanship, not good governance. Every plausible analysis – including the SE report submitted to the Planning Commission last week – points the same direction: if the Amendments are adopted, no project could pencil on the Vallco Site, regardless of whether one looks only at the 13.1 acres or at the entire Site, whether the 13.1 acre portion is developed with rental housing or condos, or any other variation permitted by the Amendments. The City's strategy is a classic anti-housing maneuver: list a site on the inventory that it knows with certainty will never be developed in the manner that the City has advertised.[21] But the Legislature has made clear that inventories must contain sites on which the allotted residential development is reasonably probable. Where there are governmental constraints, the City must set forth a program of actions to remove such constraints. These Amendments do the opposite. They will kill the prospect of any redevelopment of the Vallco Site and will cause the City's General Plan to violate state law.[22]

B. The City Is Out of Compliance With Its Housing Element.

As HCD set forth in its August 2 letter, the City is not in compliance with its Housing Element. As the HCD Letter explains, the City committed in its Housing Element to either adopt a Specific Plan by May 31, 2018, that allows at least 389 units on the Vallco Site, or allocate units to Priority Housing Element Sites. By rescinding the Specific Plan and not pivoting to Scenario B, and instead taking action that will

[21] Planning Commissioner Wang trotted out a "pro-housing" spin on the Amendments that is patently baseless. Commissioner Wang claimed that the Amendments will allow Vallco to put shovels in the ground immediately if it wants to build housing. Commissioner Wang ignored the fact that the Amendments do not delete from the General Plan references to a "complete redevelopment" of the Vallco Site, including the creation of an entire street grid, and a variety of other components that will require a massive planning effort, and could preclude the piecemeal development of exclusively residential portions of the Site. And, of course, Commissioner Wang ignored the existence of the SB 35 project, which includes development of 2,402 residential units, 1,201 of which are affordable. That project is being challenged in Court.

[22] If the City approves the Amendments, the Site should be removed from the Housing Element inventory, and replacement sites must be identified. The City must provide the proposed amendments to the Housing Element to HCD for review and comment.

ensure that no housing will be developed on the Site, the City is out of compliance with its Housing Element. If the City desires to pursue this third path, it must also amend its Housing Element to make it consistent with this amended Land Use Element. Of course, to do so would require review and approval by HCD, a process the City now apparently wants to avoid. Without amending the Housing Element, the entire General Plan suffers from a lack of "horizontal consistency."

HCD's letter also confirms the folly of the path on which the City has now embarked. According to HCD, the only reason the City is not currently in violation of its housing obligations is because of the approved SB 35 project. If Friends of Better Cupertino, with the City's assistance, prevails in the lawsuit challenging the SB 35 project, then the "housing element will no longer demonstrate adequate sites to accommodate the RHNA" and that this "may result in revocation of the City's housing element compliance."[23] HCD also warned that in such case, it may notify the Attorney General's Office, which has authority to bring an enforcement action. So if the true intent is—as Commissioner Wang claims—to gain "leverage" in the event Friends of Better Cupertino prevails, the Amendments will have the opposite effect. They will put the City directly in the Attorney General's crosshairs.

C. The General Plan Amendment Unlawfully Requires a Subsequent General Plan Amendment.

The City runs afoul of other aspects of state law governing general plans. One of the Amendments' more unusual (and unlawful) features is that they require a *future* General Plan amendment:

> Create a Vallco Shopping District Specific Plan and *a related General Plan amendment* prior to any development on the ~~site~~ portion of the site with the Regional Shopping designation, which shall seek to provide substantial additional housing opportunities at the site, and that lays out the land uses, design standards and guidelines, and infrastructure improvements required.

The current, un-amended General Plan requires the adoption of a specific plan prior to development of the Vallco Site. This is a commonplace method by which to "phase" the planning of a large development; the specific plan must be consistent with

[23] In theory, if VPO opted not to proceed with the SB35 project (for example, as a result of obstacles created by the City), the City will not be in compliance with its Housing Element. In other words, if the City wants to avoid being sued by the State, it should be doing everything to assure that the SB 35 project gets built, instead of working with Friends of Better Cupertino to block it.

the General Plan. The City is turning this method on its head—the Amendments propose to amend the General Plan to say that prior to development of the Vallco Site, the City "shall" adopt *another* General Plan amendment.

There is no way to even guess what that further amendment might be, or what it might require or allow. It is patently illegal to amend the General Plan in this manner. A city's general plan is its most important land use planning document. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 570–71 (1990).) It is the "constitution for all future development." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 540.) All "subordinate" planning documents (like specific plans and zoning) must be consistent with it.

The Government Code sets out a number of requirements for a legally adequate General Plan, but the most fundamental one is that the General Plan include a "comprehensive, long-term" plan for the physical development of the City. (Gov. Code § 65300.) That requirement is carried forward in several "elements." The Amendments propose to amend the land use element, which is "the central framework for the entire plan and is intended to correlate all land use issues into a set of coherent development policies." (Barclay & Gray, *California Land Use & Planning Law*, at 13 (36th ed. 2018).) The land use element must include:

> the proposed general distribution and general location and extent of the uses of the land for housing . . . [and]
>
> a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan.

(Gov. Code § 65302.)

Courts enforce compliance with these minimal requirements. (*Camp v. Mendocino County* (1981) 123 Cal.App.3d 334, 348 (a general plan must show "substantial compliance with the statutory requirements").) Failure to comply will invalidate the General Plan, and a court may enjoin a city from taking other actions (like approving subdivisions) until the document is compliant. (Gov. Code § 65755.) Failure to provide population density and building intensity renders a general plan inadequate. (*Twin Harte Homeowners Association v. City of Tuolumne* (1982) 138 Cal.App.3d 664, 699.)

The Amendments violate all of these general plan requirements. The Amendments are neither "comprehensive" nor "long term" because they contemplate that future residential development will be determined by *another* General Plan amendment, at some point in the future. The Amendments are a temporary placeholder, where development is contingent on some future action.

The Amendments also fail to include the land use regulations for the Vallco site, including the distribution, location, and extent of the land for housing. The Amendments simply contemplate that a future amendment will "provide substantial additional housing opportunities." Further, the fact that a future amendment will add "substantial" housing means that the General Plan, if the Amendments are adopted, will not include the actual standards of population density for whatever development may be permitted by the future amendment. The General Plan should be a stable vision for the City's future, not a document that says "we'll figure it out later."

Finally, even if one were to set aside all of these violations, this City Council cannot obligate a future City Council to undertake a legislative action, which is why the General Plan must always be comprehensive, and not rely on future City Councils to take any particular action.

A leading land use treatise advises that a city, when assessing its General Plan, should be able to affirmatively answer to the following questions: "Does it serve as a yardstick? Can one take an individual parcel and check it against the plan and then know which uses would be permissible?" (*California Land Use & Planning Law*, at 33.)

Here, the answer is clearly no. This shoddy work shows the City's true intentions. The City is not going through a legitimate planning exercise that will help the community and property owner understand the future uses of Vallco, and to actually achieve any meaningful economic benefit from its property. Instead, as Planning Commission Chair Wang said, it is simply seeking to gain "leverage" in the event the City "loses" the lawsuit.

IV. <u>The Amendments Downzone the Vallco Site's Housing Capacity.</u>

The City is marketing the Amendments by claiming that they simply remove office use while otherwise maintaining the status quo with regard to the Site's housing capacity. That is false. Even if one were to assume that redeveloping the Site is economically feasible without the office use, the Amendments actually reduce the housing capacity of the Site.

At present, there are 389 residential units specifically allocated to the Vallco Site, and there is no specific area on the Site where they must be placed. But that figure is not a maximum, because the General Plan allows the City to allocate units from other parts of the City to the Vallco Site through approval of a conditional use permit and without any amendment to the General Plan. The limitation on the number of residential units is actually governed by the General Plan's density limit of 35 units per acre, which generates an actual maximum of 1,778 units.

By reducing the portion of the Site that can be used for residential from 50 acres to 13.1 acres, but maintaining the density limit, the City has reduced the Site's housing capacity to only 459 units.

This is simply another example of the City's sham disclosures about the actual effect of the Amendments. But it is more than a sham disclosure; it is illegal. State law requires that whenever the number of housing units that could be developed on a site is reduced, that reduction must be based on findings that the limitation promotes the public health, safety, and welfare of the City. (Gov. Code § 65863.6.) Here, of course, the City has failed to make any such findings. Nor could it. The downzoning is unlawful.

V. The City Council Cannot Identify a 13.1-Acre Portion of the Vallco Site that Should Be Zoned for Residential.

One of the Amendments proposes that the City Council identify a 13.1-acre portion of the Vallco Site where the 389 residential units will be developed. If this were a proper planning exercise, the City would have studied where it made the most sense to place the residential and non-residential portions of the site, and would study the traffic, aesthetic, noise, and other impacts that would flow from that decision. Indeed, the Government Code requires that a staff report with recommendations, and the basis for those recommendations, be provided whenever a City considers rezoning a parcel of 10 acres or more. (Gov. Code § 65804.)

Here, the Amendments were rushed, and none of that was done. No technical reports were prepared. City staff made no recommendation to the Planning Commission as to where that 13.1-acre portion should be set, or even if it should be a single portion, rather than being divided into two or more portions of the Site that would total 13.1 acres in total size. The draft resolution before the Planning Commission simply identified a number of parcels that could be rezoned, but it does not even state the size of each nor whether any would add up to precisely 13.1 acres.

While the Planning Commissioners failed to come to any decision, they were unanimous on one point: they lacked sufficient expertise and information to ascertain where the 13.1-acre portion(s) should be set.

The Staff Report for the City Council meeting includes four "potential alternative locations" for the residential use with only a cursory explanation of the differences between the locations. These "potential alternative locations" were not, but should have been, presented to the Planning Commission. The Staff Report does not provide a specific recommendation to the Council on a preferred location. The City Council—whose members have no real estate or property development experience—also lacks the expertise to do so without sufficient study of the potential sites, or a recommendation from staff, technical experts, or the Planning Commission.

If the City is going to reduce the area where residential is allowed, it must provide some staff recommendation to guide the City Council's decision, and to allow members of the public and the property owner to comment. Instead, the City Council is being asked to make a decision with minimal information, and no guidance from actual professionals who would understand the scope of the task at hand. There is no justification for slogging ahead with this critical decision in an informational vacuum.

If the City Council chooses to disregard these problems, and decides that it ought to select that 13.1-acre portion or portions of the Site to zone for residential development, the City's failure to solicit public participation will become even more problematic. The 2014 EIR studied the allocation of 800 residential units on the Vallco Site, but it presumed that the sites could be placed throughout the Site, and did not study the impact of confining the residential units to only a fraction of the Site. As Planning Commissioner Fung pointed out, based on his rough view of the Vallco Site, the only portion of the Site that might be suitable for placement of the 13.1 acres would be the section that directly abuts other residences. The owners and residents of those homes, and other Cupertino residents, would surely want to understand how concentrating housing on the portion of the Vallco Site closest to them will affect traffic on adjacent streets, and understand any other impacts that may result from this decision.

The City also fails to consider the implications of its arbitrary selection of potential residential sites. The City ignores parcel lines and the fact that the City prohibits construction over parcel lines. It is unclear whether the city intends to saddle the property owner with awkward setbacks from lot lines in the middle of the residential sites, or whether it will require a subdivision map to change the parcels to conform to

the eventual residential site. The proposed potential allocations could also create split-zones, and the City does not have a split-zone ordinance that clarifies how development standards are interpreted for such parcels.

Finally, the siting of the 13.1 acre residential site will govern how the remainder of the Site is developed, and the City has not yet studied what those impacts may be, from a feasibility or environmental perspective (or any other). LU-19 is the section of the Land Use Element that addresses the Vallco Site. It imposes a host of requirements, many of which only really make sense when there is a "complete redevelopment" of the Site. For example, LU-19 requires "a central town square on the west and east" sides of Wolfe Road, and requires that the Site's development be interspersed public recreational and gathering spaces.

The 13.1 acre residential site will be subject to only a few of those Development Standards, but the rest of the Site remains subject to all of them (limits on above-ground parking, neighborhood buffers, etc.). The City has not studied whether creating the 13.1 residential site will make it *impossible* to develop the remaining portions of the Vallco Site in a manner consistent with the Development Standards, or whether certain of the location options are preferable to others. For example, Location B would make it virtually impossible to develop the remainder of the Site in a manner consistent with the Development Standards. The City has not given these considerations any thought, at all.

VI. The Amendments Include Arbitrary Land Use Regulations That Will Affect Developments Other Than Vallco.

A. The City Has Illegally Singled Out the Vallco Site for a Restrictive Zoning Designation.

The Amendments remove the "Commercial/Residential/Office" designation for the Vallco Site, and replace it with two new land use designations: "Regional Shopping" and "Regional Shopping/Residential." The "Regional Shopping" designation is not found in any other land use designation. Singling out this site for a General Plan designation that is not found anywhere else in the city, without furthering any stated purpose, and against the wishes of the property owner is arbitrary, discriminatory, and against the law. (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256.)

The City has not provided any justification for why this site should be subject to a more restrictive designation, especially when all technical experts—EPS, SE and TCG—have confirmed that retail development must be subsidized or is not feasible. This restriction is even more dubious, given the City's claim that it desires to reduce traffic and greenhouse gas emissions, because retail often generates a significantly greater volume of traffic than residential or office.[24]

In addition, the new "Tribal Coordination" policy applies only to the Vallco Site. There is no rational reason for singling out the Site in this manner.

B. <u>The Amendments to the Zoning Code Will Fundamentally Alter the City's Approach to Planned Development and Will Complicate Development Across the City.</u>

The Amendments do not comply with City procedures for changes to the Zoning Code. For example, there are no proposed factual findings for the zoning change of the 13.1 acres of the Vallco Site to P(R3,CG). But City residents should also understand that these proposed changes to the Zoning Code will likely affect development across the City, not just at the Vallco Site. The changes are ambiguous, and will leave developers and property owners unclear about which development standards might apply to their properties. These (presumably) unintended consequences are yet another result of the lack of scrutiny, diligence, and care that was taken in preparing the Amendments.

According to the Municipal Code, Planned Development ("PD") zoning is "intended to provide a means of guiding land development . . . that is uniquely suited for planned coordination of land uses and to provide for a greater flexibility of land use intensity and design because of accessibility, ownership patterns, topographical considerations, and community design objectives." (Cupertino Mun. Code § 19.80.010.) PD zoning does not set uniform development standards to sites with a particular designation. It sets site-specific standards. In other words, the site is "planned" for a specific development, and the zoning standards conform to that plan.

Not surprisingly, in order to accomplish this planned zoning, rezoning to a PD district requires significant planning, generally through the preparation and adoption of a "conceptual development plan." This document effectively becomes the zoning and

[24] Planning Commissioner Fung described exactly this traffic pattern in the July 30 hearing. Retail creates a greater overall volume of traffic, albeit at hours that are more dispersed than office.

sets all the development standards. It must include a general description of the proposed uses, proposed traffic-circulation system, a topographical map of the site and neighboring properties, and a landscaping plan. (Cupertino Mun. Code § 19.80.040.A.) Further, when approving a PD rezoning, in addition to making the findings applicable to all rezonings, the City must make findings about the conceptual development plan, including about its consistency with the General Plan, and must confirm that the plan "provides for an organized and unified system of land uses and land use intensities which would be compatible with the surrounding neighborhood" and that it would "not create undue and unreasonable traffic congestion in the area." (Cupertino Mun. Code § 19.80.040.B.)

None of this has been done. There is no conceptual development plan. Staff has not prepared any of the findings required. No one even knows where the 13.1-acre site is that will be rezoned.[25] The City cannot ignore its own Municipal Code and the mandatory process that it sets forth for PD zoning.

In apparent recognition of this flaw, the City attempted to address it by committing an even greater sin: the Amendments propose to revise the Municipal Code provisions applicable to PD zoning generally. However, as one might have guessed would occur, the proposed revisions are unclear, and may affect zoning across the City, not just at the Vallco Site.

Section 19.80.030 specifies how uses for PD zones are determined. Subsection F gives specific direction on uses for certain mixed-use residential areas (for example, for Priority Housing Sites, residential development that does not exceed the number of permitted units "shall be a permitted use"). With regard to development standards, Section 19.80.030 says that they are established together with the "conceptual and definitive plans" for the project. (Cupertino Mun. Code § 19.80.030.E.) The next section then describes what must be included in a conceptual plan and the findings required for approving one. (Cupertino Mun. Code, § 19.80.040.) In sum, section 19.80.030 governs how uses are established, and section 19.80.040 addresses development standards.

The City now proposes to up-end and confuse the orderly process of how PD zones have historically been established and entitled. The Amendments propose to retitle Section 19.80.030 as "Establishment of Districts-Permitted and Conditional Uses

[25] It would be impossible for staff to create a "topographical map of the site and the neighboring properties."

and Development Standards," even though Section 19.80.040 governs development standards. The Amendments then make three changes to Section 19.80.030: (1) sites listed under Section 19.80.030(F) are exempted from preparing a conceptual development plan; (2) the newly created, as-yet-unidentified 13.1-acre portion of Vallco that will be the designated site for the 359 residential units is added to Subsection (F); and (3) "[d]evelopments which are not subject to discretionary approval by the City" (in other words, developments subject only to ministerial approval) must "comply with the development standards of the underlying zoning district." But the proposed zoning amendment is silent about development regulations applicable to discretionary approvals. Apparently, no conceptual plan will be required for Subsection (F) listed sites, but there is no guidance about what development regulations would apply. Further, Subsection F includes many other sites, not just Vallco, such as the Monte Vista Village Special Area. The Amendments provide no guidance about how the City will treat already-approved conceptual plans for these other sites.[26]

If the intent of the Amendments is to require the development standards for projects listed in Section 19.80.030(F) to comply with the "underlying zoning," then that would, for example, change the zoning for all of Monte Vista Village. This would be a significant change to zoning throughout the City.

It appears that the City's intent is to rezone 13.1 acres of Vallco to allow a mix of residential and commercial uses. But because there is no general mixed-use zoning district, the only option was to use the planned development designation. The problem then became that PD districts require a conceptual plan, which was impossible to create in the compressed timeframe demanded by City Council. So, rather than taking the time to do so, the City now proposes to simply eliminate the "planned" aspect of a series of sites, including Vallco, which undermines the entire purpose of having PD zoning districts. There is no justification for forcing the Amendments forward without adequate notice to City residents who are likely interested in, and affected by, the development of the impacted sites.

[26] No notice of the Planning Commission meeting was given to the owner of the Monte Vista Village Special Area, or the residents who live in proximity to it.

VII. The Amendments Cannot Proceed Without Environmental Review.

A. The City Must Prepare and Certify a Supplemental EIR.

Approval of the Amendments will also violate the California Environmental Quality Act ("CEQA"). CEQA requires the City to analyze and disclose the environmental impacts that a "project"[27] may cause. City staff believe that the Amendments were already analyzed and disclosed as part of the 2014 Environmental Impact Report that the City prepared as part of prior General Plan amendments (the "2014 EIR"), and that no further analysis is required. That conclusion is wrong. A supplemental report must be prepared under either of the following conditions:

> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report[, or]
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.[28]

Both of these conditions apply to the Amendments. In 2014, the Vallco Mall was 85% occupied. The General Plan amendments proposed in 2014 were intended to facilitate and encourage redevelopment of the Vallco site to "create a new 'downtown' for Cupertino," and the 2014 EIR analyzed the reasonably anticipated impacts from that change.

Today, the Vallco Mall is almost completely vacant. A portion of the Vallco Mall has been demolished. The currently-proposed amendments will prohibit office uses on the site, even though office use was one of the central uses contemplated in the 2014 EIR. The current amendments will block redevelopment of the Vallco Site and will have the opposite effect of the amendments that were proposed in 2014. The

[27] A "project" for CEQA purposes means an activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is undertaken by a public agency, or requires discretionary approval from such an agency. (Pub. Res. Code § 21065.)

[28] Pub. Res. Code, § 21166.

Mall's newly vacant condition will be prolonged by these new amendments, perhaps indefinitely.

The protracted vacancy of such a large property will cause blight to surrounding properties, because, if the City and Better Cupertino have their way, those properties will be directly adjacent to a partially or completely demolished, fenced-off, completely vacant, former mall site. As Planning Commissioner Takahashi pointed out, the Amendments will turn the Vallco Site into a "ghost town." Urban decay and all of its typical symptoms—multiple long-term vacancies, dumping, graffiti and vandalism, abandoned vehicles, etc.—can be expected if the Vallco Site is not redeveloped to some productive use in the near future.

Because the possibility of blight was not analyzed at all in the 2014 EIR and there is sufficient evidence to support a "fair argument" that the Amendments will cause blight, a supplemental EIR must be prepared that studies at least that issue. (*Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2017) 11 Cal.App.5th 596, 608.[29]) The 2018 EPS report, the 2019 SE report, and the TCG report are exactly such evidence. Those reports show that if the Amendments are adopted, a centrally-located, 50-acre parcel in the City will remain the site of a vacant and partially or wholly demolished mall for the foreseeable future—an outcome that was never contemplated in the 2014 EIR. The public is entitled to know that urban decay and blight are reasonably likely outcomes of these General Plan amendments, to understand the severity of those impacts, to understand whether the City intends to make any effort to mitigate that impact, and to be presented with alternatives to the General Plan amendments and all of the other disclosures that are required by CEQA.

The Response to Comments prepared for the City council meeting claims that "there is no substantial evidence that the uses cannot be developed on the site." But the EPS, TCG, and SE reports provide exactly that evidence.

In addition to the blight-inducing aspects of the Amendments, they also presage the possibility of development that could exceed the scope of what was studied in the 2014 EIR. The Amendments require a subsequent amendment or amendments to the

[29] *San Mateo Gardens* concerned a project that was approved after a mitigated negative declaration. The 2015 General Plan was approved after certification of an EIR, but the EIR contained no analysis of blight. Therefore, for purposes of this potentially significant environmental impact, the state of public disclosure is as if there had been a negative declaration: no analysis at all. Even if the more substantial evidence standard applies, all of the available evidence points to the need to study the potential impacts of a protracted vacancy.

General Plan that will provide "substantial additional housing opportunities." Such development is a reasonably foreseeable consequence of the Amendments, and the City must determine whether providing the anticipated "substantial additional housing opportunities" will cause environmental impacts that were not studied in the 2014 EIR.

B. <u>The Residential Development Requires a Project-Specific Analysis.</u>

The 2014 EIR is a "program EIR," and "does not evaluate the impacts of individual projects under the General Plan." According to that EIR, "subsequent projects will require a separate environmental review." The Amendments do authorize such a project on the Vallco Site – development of 389 residential units.

The 2014 EIR studied the allocation of 800 residential units throughout the Vallco Site. It did not study the impact of concentrating the residential units on a currently unidentified fraction of the Site. When a program EIR is used, an agency must later prepare a project EIR if there is evidence to support a fair argument that the project may have significant environmental impacts. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319.) No one has yet analyzed or disclosed the traffic or other impacts that might result from that concentration. And because residential development is now "by-right" there will be no additional opportunities for the City to conduct further environmental review or to impose additional conditions of approval. It is also unclear whether, and how, the City could impose any mitigation measures on the by-right development.[30]

The City also failed to analyze the potential impacts of by-right development at the proposed potential locations. The specific location of the development is critical to understanding the circulation and impacts to specific intersections. The location of residential developments is also important to understand the air quality impacts, and

[30] If the residential development is, in fact, "by-right," then these complications arise. But it is far from clear that the Amendments actually create a "by-right" residential development opportunity. The Amendments do not specify what development standards may apply to the 13.1 acre residential site, but we assume that the R3 development standards are "imported" by the P(CG/R3) zoning designation. Some of those development standards are subjective, and would require the City to exercise discretion when authorizing the residential development, which conflicts with the entire premise of "by-right" development. In addition, PD districts (like the one proposed to be created by the Amendments) require a development permit, but "by right" development should not require any such permit. The Amendments therefore create "vertical inconsistency," where the zoning will be inconsistent with the General Plan, and a situation of great uncertainty as to which development standards will apply, and how City staff should treat any proposal to develop the 13.1 acre residential site.

specifically whether implementation of the project would expose sensitive receptors to substantial concentrations of air pollution.

C. The Municipal Code Amendments Affect Other Sites Throughout the City, Impacts of Which Must Be Studied.

As described above, the amendments to the Planned Development zoning impact other planned development districts, including all planned development districts in Monte Vista and all residential planned development districts. The City cannot proceed with the Amendments without analyzing those impacts. As a matter of good governance, it would also presumably want input from the owners of those properties.

D. Effect on General Plan Mitigation Measures Was Not Analyzed.

Even if, as the City's EIR addendum claims, the Amendments simply reduce the impacts of the previously analyzed redevelopment of the Vallco Site, the City should have studied whether the mitigation measures should also be reduced. The CEQA Guidelines require mitigation to bear a reasonable relationship to the impacts of the project. The presumed reduction in transportation impacts could render some of the proposed transportation improvements required by the General Plan EIR mitigation unnecessary, and it would be illegal for the City to require the property owner to provide or pay for such improvements. Moreover, if the impacts are reduced, but the required mitigation measures are not, the feasibility of development becomes even more bleak, and the measures no longer have any nexus to the impacts.

VIII. The Amendments Constitute an Unconstitutional Taking of Vallco's Property.

The Amendments restrict the vast majority of the 50-acre Site to retail use only, even though that use must be subsidized to be developed. The City has not offered any justification for such a restriction, except to say that it is "temporary" and the City plans to change it again in the future. That violates the requirement that a General Plan provide a comprehensive, long-term vision for the City, and Vallco certainly cannot count on the City to amend the General Plan again to provide for an economically viable development in light of the City's overt hostility to developing Vallco into any productive use.

The Fifth Amendment protects property owners against having to bear the burden of using their property in a manner that, in fairness, should be subsidized by

the entire community. (*Armstrong v. United States* (1960) 364 U.S. 124.) The City's actions disregard these protections, placing unreasonable restrictions on the property that render any development infeasible. These actions amount to both a regulatory taking under *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, and a total taking under *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003.

A. The Amendments Meet the Requirements of a Regulatory Taking for which the City Is Liable.

A government action that unreasonably reduces the value of property, even on a temporary basis, can make the City liable to the owner for the lost value. (*Lockaway Storage v. Cty. of Alameda* (2013) 216 Cal.App.4th 161, 184.) A court will evaluate three factors to determine the City's liability. (*Avenida San Juan Partnership v. City of San* Clemente, 201 Cal.App.4th 1256 (2011)

First, the court will evaluate the economic impacts of the Amendment on the value of the Vallco Site. The Amendments render the Vallco Site functionally undevelopable in the manner that VPO intended. VPO need not show that it no longer is able to make any use of the property, or that every economically feasible use is lost. (For example, any evidence that the City may muster showing that the Vallco Site might be economically feasible as a mobile home park, or a collection of single-family homes, is irrelevant.) Rather, VPO need only show that it is unable to pursue the use that it reasonably intended: a large, mixed-use development with significant residential, office, and retail uses. (*Lockaway*, 216 Cal.App.4th at 185.)

Second, a court will evaluate the extent to which the Amendments interfere with VPO's economic expectations. VPO reasonably expected that it would be able to proceed with the type of development that it intended to pursue. Indeed, under a prior City Council, a specific plan was approved for the Site that would have fulfilled those expectations. As Planning Commissioner Fung recognized, under the Amendments, roughly 37 acres of the Vallco Site will be rendered completely unusable. The City own numbers value land in Cupertino at $10 million per acre. Rendering 37 acres *valueless* contravenes any reasonable economic expectation, and the City's own figures will set the "floor" for any damages award to Vallco.

Finally, a court will evaluate the "character" of the Amendments. The "character" of the Amendments is punitive and designed to kill the prospect of redeveloping the Vallco Site in the event that VPO is unable to proceed with the SB 35

project. In *Lockaway*, the County of Alameda was adjudged liable for a regulatory taking and attorney's fees, because the "character" of its actions constituted a "showstopping u-turn" on a property owner's development plans, a description that applies equally here.

B. The Amendments Amount to a Total Taking of the Property.

Under *Lucas*, a land use restriction that deprives a property of all economically beneficial use amounts to an unconstitutional taking of property. Here, the Concord report demonstrates that the Amendments are so restrictive that any development would result in a financial loss to the developer, even without accounting for the cost of the land. And as discussed above, the City has provided little to no justification for this deprivation. The City must therefore compensate the property owner for the loss in value.

IX. The Amendments Are Abusive, Arbitrary, and Discriminatory.

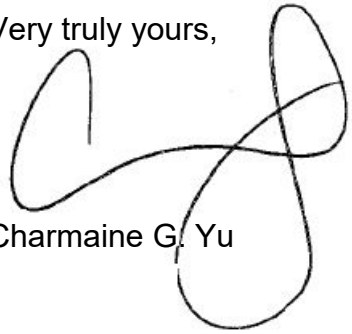
The City Council must exercise its authority for the benefit of its constituents. It cannot wield its power in an arbitrary and discriminatory manner, to punish VPO, to try to run it out of town, or for any other improper purpose. There are no circumstances warranting the adoption of the Amendments, nor has the City prepared appropriate analyses to understand the effect of the Amendments. The only purpose of the Amendments is to destroy the possibility that VPO can redevelop its property. The Amendments are therefore abusive, arbitrary, and discriminatory, and, if adopted, will be set aside. (*Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330; *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256.)

X. Vice Mayor Chao Must Continue to Recuse Herself From Discussion and Decision on The Amendments.

Because Vice Mayor Chao lives within 1,000 feet of the Vallco Site, she is required to recuse herself from all deliberation and voting on these Amendments. The FPPC's letter on Vice Mayor Chao's recusal relied on the size of the project since such a large project would have impacts to at least 25% of the City's population. Although we continue to disagree with that analysis, it does not apply and provides no legal protection here because the Amendments propose to materially reduce the size of any

project on the Site.[31] Vice Mayor Chao recused herself from the prior discussion on the Amendments. She should do the same when the Amendments come before Council.

Very truly yours,



Charmaine G. Yu

CGY:mwa

cc: Deb Feng, City Manager (via e-mail: manager@cupertino.org)
Heather Minner, City Attorney (via e-mail: Minner@smwlaw.com)
Department of Housing and Community Development, Division of Housing Policy Development (via e-mail: compliancereview@hcd.ca.gov)

[31] The letter states that the FPPC assumes that the facts are "complete and accurate" and says that if the underlying facts change, additional advice must be sought.