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19CV344912
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**

11 IN RE REFERENDUM PETITION
12 AGAINST CITY OF CUPERTINO
13 RESOLUTION NO. 18-085

Case No. 19CV344912

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
JOINT SUBMISSION ON AGREED
FACTS**

Code Civ. Proc. § 1138

Action Filed: March 20, 2019

Filed Concurrently with Joint Submission
on Agreed Facts; Declarations of Grace
Schmidt, Piu Ghosh, and Robert S.
Perlmutter

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1 INTRODUCTION

2 The parties to the Joint Submission on Agreed Facts filed concurrently herewith
3 respectfully request that this Court find that a referendum petition against a General Plan
4 Amendment adopted by City of Cupertino City Council Resolution No. 18-085 (the "GPA
5 Referendum") substantially complies with the Elections Code and should be presented to the
6 City Council for further action pursuant to the Elections Code. Although both the City Clerk of
7 the City of Cupertino and referendum proponents (parties Liana Crabtree and Better Cupertino
8 Action Committee, hereafter collectively "Better Cupertino") agree that the GPA Referendum
9 substantially complies with Elections Code requirements, an actual controversy has arisen
10 among the parties as to whether the City Clerk has authority to make this determination, as a
11 ministerial matter, absent judicial intervention. This Court has jurisdiction over this matter
12 pursuant to Code of Civil Procedure ("CCP") section 1138, and it has authority to enter the
13 order requested herein based on the accompanying Joint Submission on Agreed Facts.

14 The City Council adopted Resolution No. 18-085 in connection with its approval of the
15 Vallco Town Center Specific Plan Project ("Project"), which authorizes redevelopment of the
16 Vallco Mall with office, residential, and other uses.¹ Resolution No. 18-085 amended the City's
17 General Plan to replace prior provisions governing development of the "Vallco Shopping
18 District Special Area" with new provisions authorizing development of the "Vallco Town
19 Center Special Area." The Resolution also amended General Plan Table LU-1, which contains
20 "development allocations" establishing the maximum level of commercial, office, hotel, and
21 residential development allowed in the Vallco area and other parts of the City. As adopted by
22 the City Council on September 19, 2018, the amended version of Table LU-1 depicted deleted
23 development allocations in "strikethrough" (i.e., with red horizontal lines through previously
24 existing text), and new development allocations added by the Resolution in red underlined text.

25
26
27 ¹ The City also adopted two other resolutions and three ordinances in connection with the Vallco
28 Town Center development, some of which were also the subject of referendum petitions. None
of those other resolutions, ordinances, or petitions are at issue here.

1 Better Cupertino prepared and circulated a referendum petition challenging Resolution
2 No. 18-085. Due to an inadvertent error on the City’s part, however, the certified and attested
3 copy of Resolution No. 18-085 the City provided to referendum proponents omitted the
4 strikethrough lines from Table LU-1. The version of Table LU-1 in the GPA Referendum
5 similarly omits some of the strikethrough lines in Table LU-1 and contains other features not
6 found in the version of Table LU-1 considered and adopted by the City Council.

7 In a letter to the City Clerk dated December 6, 2018, counsel for Vallco Property Owner
8 LLC (“Vallco”)—the applicant for and prospective developer of the Vallco Town Center
9 project—claimed that the omission of strikethrough lines from Table LU-1 in the GPA
10 Referendum violated Elections Code section 9238(b)(2), which requires a referendum petition to
11 include the “text” of the challenged ordinance or resolution. Vallco therefore claimed that the
12 City Clerk had a duty to reject the GPA Referendum.

13 Informed by the Supreme Court’s guidance in *Costa v. Superior Court* (2006) 37 Cal.4th
14 986, the City Clerk believes the GPA Referendum substantially complies with the Elections
15 Code despite its “technical” noncompliance. Because referendum proponents were entitled to
16 rely on the certified version of Resolution No. 18-085 provided by the City, and because the
17 GPA Referendum adequately informed potential signers of the Resolution’s effects in any event,
18 the omission of strikethrough lines from Table LU-1 did not frustrate the underlying purposes of
19 the Elections Code’s “text” requirement. Better Cupertino agrees with the City Clerk’s analysis.
20 Although Vallco is not a party to the Joint Submission, Vallco’s counsel has informed the City
21 by letter dated March 18, 2019 that Vallco takes no position on whether the GPA Referendum
22 substantially complies with the Elections Code and will accept the conclusion of the Court.
23 Declaration of Robert S. Perlmutter (“Perlmutter Dec.”), Ex. B at 3.

24 An actual controversy has arisen, however, as to whether resolving the substantial
25 compliance question presented here exceeds the City Clerk’s ministerial authority to accept or
26 reject referendum petitions under the Elections Code. Better Cupertino believes that the City
27 Clerk should accept and process the GPA Referendum. Based on the advice of the City
28 Attorney, however, the City Clerk believes that in order to find this particular petition

1 substantially compliant, she would be required to make a quasi-judicial evaluation of documents
2 and evidence beyond the “four corners” of the GPA Referendum and the requirements of the
3 Elections Code. The City Clerk further believes that under the governing case law only the
4 courts—and not city clerks or other city officials—have the authority to make such
5 determinations. *See Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th
6 123, 127, 133-34; *see also Lin v. City of Pleasanton* (2009) 176 Cal.App.4th 408, 420-21. As
7 discussed below, the Court has jurisdiction to resolve this controversy on agreed facts pursuant
8 to CCP section 1138.

9 Redevelopment of the Vallco Mall is a matter of intense public concern in the City, and
10 the validity of the GPA Referendum plays a central role in this issue. Due to the present
11 controversy over the City Clerk’s authority, neither the City nor the public can move forward
12 without judicial intervention. The parties thus intend to appear *ex parte* at the first available
13 opportunity to respectfully request that this Court expeditiously resolve the matter by entering a
14 [Proposed] Stipulated Order declaring that the GPA Referendum substantially complies with the
15 Elections Code’s “full text” requirement.

16 JURISDICTION

17 Code of Civil Procedure section 1138 provides that

18 [p]arties to a question in difference, which might be the subject of a civil action,
19 may, without action, agree upon a case containing the facts upon which the
20 controversy depends, and present a submission of the same to any Court which
21 would have jurisdiction if an action had been brought; but it must appear, by
affidavit, that the controversy is real and the proceedings in good faith, to
determine the rights of the parties. The Court must thereupon hear and determine
the case, and render judgment thereon, as if an action were depending.

22 A “question in difference” for purposes of section 1138 is akin to an “actual case or
23 controversy” for purposes of declaratory relief under CCP section 1060. *See County of Colusa v.*
24 *Strain* (1963) 215 Cal.App.2d 472, 477.

25 Here, an actual case or controversy has arisen among the parties as to whether the City
26 Clerk has the authority to render a judgment, on the specific facts presented here, that the GPA
27 Referendum substantially complies with the “text” requirement of Elections Code section
28 9238(b)(2). Better Cupertino believes that the City Clerk should deem the GPA Referendum

1 compliant with Elections Code requirements and immediately present it to the City Council for
2 further action. *See* Perlmutter Dec., ¶ 8. The City Clerk believes, based on prevailing case law,
3 that determining substantial compliance here would require evaluation of evidence beyond the
4 “four corners” of the submitted petition, and thus would lie beyond her ministerial authority. *See*
5 *Alliance for a Better Downtown Millbrae*, 108 Cal.App.4th at 127. As that court explained, the
6 “discretionary evaluation of evidence, including evidence extrinsic to the [p]etition itself . . .
7 [where] reasonable minds could differ as to what inferences to draw from the evidence . . .
8 involves the sort of discretionary, adjudicatory decisionmaking reserved for judges and juries,”
9 not clerks. *Id.* at 134.

10 Because the controversy between the parties on this point is actual and concrete, this
11 Court “would have jurisdiction if an action” for declaratory relief “had been brought” by one of
12 the parties to the Joint Submission. CCP § 1138. Alternatively, the Court also would have
13 jurisdiction over an action between these parties for a writ of mandate. If the City Clerk were to
14 reject the GPA Referendum on the ground that she does not have ministerial authority to
15 determine that the petition substantially complies with the Elections Code, Better Cupertino
16 could file a mandamus action challenging the City Clerk’s determination pursuant to Elections
17 Code section 13314 and/or CCP section 1085. Accordingly, the Court may determine the case
18 and enter judgment as requested in the Joint Submission on Agreed Facts.

19 STATEMENT OF FACTS

20 The parties’ agreed statement of facts is set forth in the Joint Submission on Agreed Facts
21 filed concurrently herewith. For ease of reference, the following terms used in the Joint
22 Submission are defined again here:

23 • “Adopted Version” refers to Resolution No. 18-085 as considered and adopted by the
24 City Council on September 18 and 19, 2018. A copy of the Adopted Version is attached to the
25 Joint Submission on Agreed Facts as Exhibit A.

26 • “Certified Version” refers to Resolution No. 18-085 as printed by the City Clerk, signed
27 by the Mayor, certified by the City Clerk, and provided to referendum proponents on October 2,
28

1 2018. A copy of the Certified Version is attached to the Joint Submission on Agreed Facts as
2 Exhibit B.

3 • “GPA Referendum” includes Resolution No. 18-085 as reproduced in the referendum
4 petition against the Resolution submitted to the City Clerk on October 29, 2018. A copy of the
5 Resolution as it appears in the GPA Referendum is attached to the Joint Submission on Agreed
6 Facts as Exhibit C.

7 For the Court’s convenience, a composite exhibit detailing the differences among the
8 three versions of Table LU-1 also is attached to the Joint Submission on Agreed Facts as Exhibit
9 D.

10 STANDARD OF REVIEW

11 Where, as here, there is no dispute over the facts and the issue turns entirely on
12 interpretation of the Elections Code, the Court reviews the matter de novo. *See Alliance for a*
13 *Better Downtown Millbrae*, 108 Cal.App.4th at 129.

14 ARGUMENT

15 I. Substantial compliance with the Elections Code’s “full text” requirement is 16 sufficient.

17 The power of referendum is reserved to the voters by the California Constitution. Cal.
18 Const., art. II, § 11. Courts “apply a liberal construction” to the referendum power “in order that
19 the right be not improperly annulled,” and “[i]f doubts can reasonably be resolved in favor of the
20 use of this reserve power, courts will preserve it.” *Assembly v. Deukmejian* (1982) 30 Cal.3d
21 638, 652 (quotations and citations omitted).

22 Accordingly, the California Supreme Court has held that “substantial” compliance with
23 Elections Code requirements—as opposed to strict “actual” compliance—is sufficient to allow a
24 referendum to proceed to the ballot, so long as technical deficiencies do not mislead potential
25 signers, deprive them of critical information, or otherwise affect the integrity of the electoral
26 process “as a realistic and practical matter.” *Costa v. Superior Court* (2006) 37 Cal.4th 986,
27 1012-13 (emphasis in original). This is particularly the case where the deficiency was
28 inadvertent. *See id.* at 1029.

1 A referendum petition must include the “text” of the challenged resolution or ordinance.
2 Elec. Code § 9238(b)(2). The required “text” includes not only the actual resolution or ordinance
3 itself, but also any other documents attached to, or expressly incorporated by reference into, the
4 resolution or ordinance. *See Lin*, 176 Cal.App.4th at 419-20. The purposes of this “text”
5 requirement include reducing confusion, informing prospective petition signers regarding the
6 effect of the challenged resolution or ordinance, and providing voters with the information they
7 need to exercise their right of referendum intelligently. *Billig v. Voges* (1990) 223 Cal.App.3d
8 962, 966. As with other technical Elections Code requirements, the substantial compliance test
9 applies to the “text” requirement. *See, e.g., Defend Bayview Hunters Point Committee v. City*
10 *and County of San Francisco* (2008) 167 Cal.App.4th 846, 858 (“[I]f a petition omits required
11 material that is not essential to understanding the substance of the challenged ordinance, the
12 petition is still valid under the substantial compliance doctrine.”).

13 **II. The GPA Referendum substantially complies with the Elections Code’s “full text”**
14 **requirement.**

15 The GPA Referendum presents issues of both actual and substantial compliance with the
16 “full text” requirement. To the extent strikethrough lines were omitted from Table LU-1 in the
17 Certified Version provided by the City Clerk to referendum proponents, the GPA Referendum
18 *actually* complies with the “text” requirement by faithfully reproducing those portions of Table
19 LU-1 without strikethrough. The GPA Referendum also *substantially* complies with the “full
20 text” requirement because the effect of Table LU-1 is reasonably clear even without the
21 strikethrough lines. Moreover, the other modifications to Table LU-1 in the GPA Referendum
22 appear to have been made in a good-faith effort to improve readability and replace text along the
23 left-hand margin of Table LU-1 that did not print in the Certified Version.

24 **A. The inadvertent omission of strikethrough lines from Table LU-1 does not**
25 **require rejection of the GPA Referendum.**

26 **1. Referendum proponents were entitled to rely on the Certified Version**
27 **of Table LU-1 presented to them by the City Clerk.**

28 The City Clerk provided referendum proponents with a certified, attested copy of
Resolution No. 18-085 that inadvertently omitted strikethrough lines from Table LU-1 due to a

1 technical printing error. To the extent the GPA Referendum petition simply reproduced the table
2 provided by the City Clerk with the omitted strikethrough lines, the petition actually complied
3 with the “full text” requirement.

4 Referendum proponents should not be required to second-guess the accuracy of a
5 certified, attested, and true copy of a resolution provided by a city on request. *Lin v. City of*
6 *Pleasanton* is analogous. There, opponents of a development project sought to referend an
7 ordinance approving a development plan. 176 Cal.App.4th at 414. The ordinance attached and
8 specifically incorporated by reference two other exhibits, but neither attached nor incorporated
9 the actual development plan. *Id.* Referendum petitions against the ordinance followed the same
10 format: they included the text of the ordinance itself and the two exhibits, but did not include a
11 copy of the development plan. *Id.* The project developer sued, claiming omission of the
12 development plan violated the “text” requirement. *Id.* at 417. The Court of Appeal disagreed,
13 holding that referendum petitions need not include documents mentioned in an ordinance, but
14 neither attached to nor expressly incorporated by reference therein. *Id.* at 420-21. Treating such
15 documents as part of the ordinance’s “text” would “place an unreasonable burden on referendum
16 proponents in ascertaining the requisite contents of their petition.” *Id.* at 422. Accordingly, the
17 court held “there was literal compliance” with the Elections Code; as such, the court declined to
18 consider whether the petition also substantially complied. *Id.* at 420 & fn. 3.

19 *Lin* places the burden of producing a complete and accurate ordinance or resolution on
20 the City, not on referendum proponents. Here, referendum proponents requested and were given
21 the Certified Version, which due to an inadvertent printing error did not accurately reflect the
22 Adopted Version. Just as the *Lin* court found referendum proponents should not be required to
23 include documents not attached to or incorporated by reference in an ordinance, referendum
24 proponents here should not have been required to investigate, uncover, and include in their
25 petition any version of Table LU-1 other than the one that appeared in the Certified Version
26 provided to them by the City Clerk. As in *Lin*, requiring proponents to uncover and correct the
27 City’s error would impose an “unreasonable burden” on the constitutional right of referendum.
28

1 Moreover, courts have declined to invalidate referendum petitions where proponents
2 reasonably relied on public officials' advice and representations. *See, e.g., Assembly v.*
3 *Deukmejian* (1982) 30 Cal.3d 638, 651 (declining to invalidate referendum petition asking for
4 signers' address "as registered to vote" rather than "residence address" where Secretary of State
5 had used "as registered to vote" in sample petition forms and had previously accepted similar
6 petitions without challenge); *Committee for Sewer Referendum v. Humboldt Bay Wastewater*
7 *Authority* (1978) 77 Cal.App.3d 117, 124, *disapproved on other grounds by Citizens Against*
8 *Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 227, fn. 10 (holding proponents of
9 referendum against wastewater authority bonds substantially complied with place-of-filing
10 requirements where petitions were filed with the County Clerk, at the County Clerk's direction,
11 rather than the office of the wastewater authority). Referendum proponents here similarly should
12 not be punished for relying on the City's Certified Version in preparing the GPA Referendum.

13 Accordingly, because the omission of strikethrough lines from Table LU-1 in the GPA
14 Referendum resulted from proponents' reasonable reliance on the City's representation that the
15 Certified Version was correct, this aspect of the GPA Referendum should be found in actual—
16 rather than merely substantial—compliance with the "full text" requirement.²

17 **2. Omission of strikethrough lines did not undermine the purposes of the**
18 **"full text" requirement.**

19 Even if proponents' reliance on the Certified Version did not establish actual compliance,
20 the GPA Referendum would substantially comply with the "full text" requirement because
21 omission of the strikethrough lines, in the context of the GPA Referendum as a whole, did not
22 cause the petition to mislead or misinform potential signers.

23 An "inadvertent, good-faith human error" will not invalidate a petition unless, "as a
24 realistic and practical matter," it undermines the integrity of the electoral process or frustrates
25 the underlying purpose of statutory requirements. *Costa*, 37 Cal.4th at 1027-28. In *Costa*,
26 proponents prepared two versions of a statewide initiative, the latter of which they sent to the

27 _____
28 ² As discussed below, aspects of Table LU-1 in the GPA Referendum that differ from the
Certified Version must be evaluated for substantial compliance.

1 Attorney General for preparation of a title and summary. *Id.* at 997. However, they inadvertently
2 printed petitions containing the text of the *earlier* version of the initiative along with the title and
3 summary prepared for the *latter* version. *Id.* at 999. Despite clear constitutional and statutory
4 provisions requiring that the version of an initiative submitted for preparation of a title and
5 summary be the same version circulated for signatures, *id.* at 1012-13, the Supreme Court
6 declined to invalidate the petitions. The differences between the two versions of the initiative,
7 although substantive, “did not adversely affect the accuracy or completeness of the Attorney
8 General’s ballot title and summary with regard to the version of the measure that was
9 circulated.” *Id.* at 1024. Accordingly, the measure “did not mislead the public or otherwise
10 frustrate or undermine the purposes underlying” constitutional and statutory requirements, and
11 thus substantially complied with those requirements. *Id.* at 1028. The discrepancies were
12 inadvertent, and there was no evidence the initiative proponents intentionally circulated a
13 version of the initiative that differed from the version for which the title and summary was
14 prepared. *Id.* at 1028.

15 *Costa* strongly supports a finding of substantial compliance here for two reasons. First,
16 the GPA Referendum’s omission of strikethrough lines from Table LU-1 resulted directly from
17 the City’s inadvertent omission of those same strikethrough lines in the Certified Version of
18 Resolution No. 18-085 provided to the referendum proponents by the City Clerk. There is no
19 evidence that referendum proponents intentionally omitted the strikethrough lines for their own
20 purposes; rather, they relied on the Certified Version of Table LU-1, which itself inadvertently
21 omitted the strikethrough.

22 Second, the omission of strikethrough lines did not frustrate the purposes of the “text”
23 requirement. Viewed in the context of the entire GPA Referendum, the changes made to Table
24 LU-1 are clear enough without the strikethrough. The obvious purpose of Resolution No. 18-
25 085, as accurately reproduced in Exhibit GPA-1 to the GPA Referendum, was to remove all
26 General Plan provisions related to the “Vallco Shopping District” Special Area and replace them
27 with provisions governing development of the “Vallco Town Center” Special Area. Joint
28 Submission, Ex. C at 5, 6, 7, 15.

1 Viewed in this context, the effect of the changes to Table LU-1 is clear, even in the
2 absence of strikethrough lines. The red underlined text is obviously new text, while the dark
3 blue text is clearly from the prior version of the General Plan. Because all references to the
4 “Vallco Shopping District” have been removed and replaced with references to the “Vallco
5 Town Center,” it is clear that development allocations previously applicable to the “Vallco
6 Shopping District” in the table are no longer effective. Moreover, Table LU-1 is described
7 elsewhere in the GPA Referendum as identifying “the maximum development potential for the
8 site” for both “Tier 1” and “Tier 2” development under the “Vallco Town Center Specific Plan.”
9 Joint Submission, Ex. C at 15. Given this explanation, a reader of the whole petition would
10 understand that the red, underlined development allocations for “Vallco Town Center Tier 1”
11 and “Vallco Town Center Tier 2” in the second row of Table LU-1 are the maximum
12 development allocations *for the entire Vallco site*, and that the prior allocations—in blue text—
13 could no longer be effective. The omitted strikethrough lines might have made this even more
14 clear, but they are not essential to an understanding of the table.

15 Finally, should the GPA Referendum go to the voters, the City will have an opportunity
16 to prepare ballot materials containing the correct Adopted Version of Table LU-1, further
17 ameliorating any potential effect on the electoral process. *See Costa*, 37 Cal.4th at 1025
18 (discovery of discrepancy before printing of ballot materials allowed officials to make necessary
19 revisions); *Chase v. Brooks* (1986)187 Cal.App.3d 657, 662 & fn. 4 (ballot materials included
20 exhibit improperly omitted from referendum petition and thus “adequately informed the
21 electorate of the breadth and complete contents of the challenged ordinance”). The parties intend
22 to submit a [Proposed] Stipulated Order expressly requesting that this Court order the City to
23 make the Adopted Version available to voters in connection with any referendum election.

24 Accordingly, as a “realistic and practical matter”—which is the standard that the
25 Supreme Court directed be used in *Costa*, 37 Cal.4th at 1012-13—the GPA Referendum’s
26 inadvertent omission of strikethrough lines was unlikely to confuse or mislead potential
27 referendum signers or deprive them of essential information, and thus did not frustrate the
28

1 underlying purposes of the “full text” requirement. The GPA Referendum accordingly should be
2 found in substantial compliance with the Elections Code in this respect.

3 **B. Referendum proponents’ additional changes to Table LU-1 do not undermine**
4 **the purposes of Elections Code requirements.**

5 As discussed in the Joint Submission, the version of Table LU-1 in the GPA Referendum
6 differs from the table as it appears in both the Certified Version and the Adopted Version,
7 beyond the omission of strikethrough lines. Moreover, the parties agree that these changes were
8 intentional rather than inadvertent.

9 The Supreme Court in *Costa*, while excusing inadvertent good-faith errors, cautioned that
10 “[v]ery different considerations would come into play” if a proponent “attempted to manipulate”
11 the petition process. 37 Cal.4th at 1029. Here, however, there is no evidence that any of the
12 additional changes to Table LU-1 in the GPA Referendum resulted from an “attempt to
13 manipulate” the process.

14 Rather, these additional changes appear to be good-faith efforts to address further the
15 inadvertent printing errors in the Certified Version. A small amount of text along the left-hand
16 margin of Table LU-1 in the Certified Version fell outside the printable area of the page, and
17 thus was obscured in the hard copy of the Certified Version provided to referendum proponents.
18 Several differences in the GPA Referendum Version reflect efforts to restore this obscured text.
19 For example, in the left-hand column of the second row of the table, proponents replaced the
20 words “Shopping District” with “Town Center”; in the Certified Version, in contrast, the words
21 “Vallco,” “Town,” and “Center” were all cut in half. *Compare* Joint Submission, Ex. C at 9 *with*
22 *id.*, Ex. B at 9. The result of this change is not misleading, but rather entirely accurate and
23 informative, as it reflects the purpose of the General Plan amendment as a whole: to replace the
24 “Vallco Shopping District” with the “Vallco Town Center.”

25 Similarly, in the left-hand column of the bottom row of the table in the Certified Version,
26 the word “With” (preceding the phrases “With Vallco Town Center Tier 1” and “With Vallco
27 Town Center Tier 2”) was largely obscured. Joint Submission, Ex. B at 9. The GPA Referendum
28 replaced both phrases with the words “With VTC Tier 1 and “With VTC Tier 2.” Schmidt Dec.,

1 Ex. C at 9. The meaning of “VTC” is clear in the context of numerous references to “Vallco
2 Town Center,” and the change improves rather than detracts from the readability of Table LU-1.

3 Courts have readily found substantial compliance where minor deviations from typeface
4 or printing requirements did not affect the substantive meaning of a petition’s text. *See, e.g.,*
5 *Ruiz v. Sylva* (2002) 102 Cal.App.4th 199, 214-16 (finding recall petitions printed in varying
6 type, including boldface and underline, substantially complied with requirement that notice of
7 intention prepared by recall proponents and answers filed by officials targeted for recall be
8 printed in uniform type to ensure equal emphasis); *California Teachers Association v. Collins*
9 (1934) 1 Cal.2d 202, 203-04 (holding initiative petition substantially compliant where title
10 printed on second and subsequent pages of petition appeared in 12-point rather than required 18-
11 point type). As in those cases, the minor changes here were highly unlikely to confuse or
12 mislead prospective signers.

13 Finally, proponents also added some strikethrough lines to a footnote in Table LU-1 that
14 did not appear in the Certified Version. Joint Submission, Ex. C at 9 (striking footnote
15 applicable to “Vallco Shopping District”). To the extent this change shows proponents may have
16 been aware of inaccuracies in the Certified Version, it simply suggests they did not correct *all* of
17 the City’s inadvertent errors—errors that, under *Lin*, they had no duty to correct in any event.

18 To the extent that there are any reasonable doubts about whether the foregoing changes
19 satisfy the “substantial compliance” standard, the case law mandates that those doubts must be
20 resolved in favor of the referendum power. *Assembly of State of Cal. v. Deukmejian* (1982) 30
21 Cal.3d 638, 652; *see also Costa*, 37 Cal.4th at 1027-28 (to invalidate an initiative or referendum
22 petition based on “inadvertent, good-faith human error” would be inconsistent with
23 “fundamental constitutional interests” of petition signers). In sum, despite several minor
24 deviations, the GPA Referendum substantially complies with the “full text” requirement.

25 **III. Judicial determination of the GPA Referendum’s “substantial compliance” is**
26 **necessary.**

27 Judicial resolution of this dispute is essential because the status of the GPA
28 Referendum—and thus of the Vallco Town Center Project—cannot be resolved without it.

1 Although the parties agree that the GPA Referendum substantially complies with Elections Code
2 requirements, they disagree as to the extent of the City Clerk’s authority to determine substantial
3 compliance on the facts presented here. Better Cupertino believes that the City Clerk should
4 simply accept and process the GPA Referendum. The City Clerk, however, reached her
5 conclusion that the GPA Referendum substantially complied with Elections Code requirements
6 only after evaluating and drawing inferences from extrinsic evidence and additional facts
7 regarding how the strikethrough lines came to be omitted. *See* Declaration of Grace Schmidt, ¶¶
8 19, 22-27; Declaration of Piu Ghosh, ¶¶ 5-18, 22-23.

9 The City Clerk thus believes that determining substantial compliance on these facts not
10 only lies beyond her ministerial authority, but also involves functions *exclusively* reserved to the
11 courts. *Alliance for a Better Downtown Millbrae*, 108 Cal.App.4th at 134 (the “discretionary
12 evaluation of evidence, including evidence extrinsic to the [p]etition itself . . . [where]
13 reasonable minds could differ as to what inferences to draw from the evidence . . . involves the
14 sort of discretionary, adjudicatory decisionmaking reserved for judges and juries,” not clerks.);
15 *see also Costa*, 37 Cal.4th at 1012-13 (courts will find “substantial compliance” with statutory
16 requirements and uphold electorate’s right to vote on a measure where discrepancies do not
17 realistically threaten integrity of electoral process), 1022 (evaluating “the significance of the
18 differences” between two versions of initiative petition submitted to Attorney General’s office in
19 light of judicial precedent), 1028 (concluding discrepancies did not undermine purposes of
20 statutory or constitutional provisions and finding substantial compliance).

21 This controversy is thus properly before the Court. The City Clerk and Better Cupertino
22 agree on the operative facts and the result—and simply disagree on whether the City Clerk can
23 achieve that result on her own. Vallco, the owner of the property and the sponsor of the general
24 plan amendment at issue, has informed the City that it does not believe is a necessary or
25 appropriate party to this action and has stated in writing that “it takes no position of the merits of
26 substantial compliance here and will accept the conclusion reached by th[is] court.” Perlmutter
27 Decl., Exh. B at 3. Accordingly, entry of the [Proposed] Stipulated Order—which the parties
28

1 intent to submit ex parte at the first available opportunity—is the most efficient and fair way to
2 resolve the controversy.

3 **CONCLUSION**

4 For the foregoing reasons, the parties respectfully request that this Court enter the
5 [Proposed] Stipulated Order to be submitted ex parte at the first available opportunity.

6 DATED: March 20, 2019

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14 DATED: March ~~20~~, 2019

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