

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 3/20/2019 7:56 PM
Reviewed By: Yuet Lai
Case #19CV344912
Envelope: 2652973**

1 ROBERT S. PERLMUTTER (State Bar No. 183333)
2 KEVIN P. BUNDY (State Bar No. 231686)
3 ANDREW P. MILLER (State Bar No. 324093)
4 SHUTE, MIHALY & WEINBERGER LLP
5 396 Hayes Street
6 San Francisco, California 94102
7 Telephone: (415) 552-7272
8 Facsimile: (415) 552-5816
9 Perlmutter@smwlaw.com
10 bundy@smwlaw.com
11 amiller@smwlaw.com

12 Attorneys for CITY CLERK OF CITY OF
13 CUPERTINO

14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16
17 **COUNTY OF SANTA CLARA**

18 IN RE REFERENDUM PETITION
19 AGAINST CITY OF CUPERTINO
20 RESOLUTION NO. 18-085

Case No. 19CV344912

**DECLARATION OF GRACE
SCHMIDT**

Code Civ. Proc. § 1138

Action Filed: March 20, 2019

Filed Concurrently with Joint Submission
on Agreed Facts; Memorandum of Points
and Authorities; Declarations of Piu Ghosh
and Robert S. Perlmutter

21 I, Grace Schmidt, declare as follows:

22 1. I am the City Clerk for the City of Cupertino and, in that official capacity, a party
23 to the “question in difference” in this action pursuant to Code of Civil Procedure section 1138. I
24 have personal knowledge of the facts set forth herein, except as to those stated on information
25 and belief, and as to those, I am informed and believe them to be true. If called as a witness, I
26 could and would competently testify to the matters stated herein. I submit this declaration in
27 support of the Joint Submission on Agreed Facts filed concurrently herewith.
28

1 2. I have held the position of City Clerk since May 2012. Prior to serving as City
2 Clerk, I served as the Acting City Clerk from January through May 2012, and Deputy City Clerk
3 from February 2001 to January 2012.

4 3. In my official capacity as City Clerk, I serve as the Elections Official for the City,
5 pursuant to Elections Code section 320. In that capacity, it is my responsibility to receive
6 materials from referendum proponents and to review and process those materials in accordance
7 with the Elections Code.

8 4. My official duties as City Clerk also include certifying and maintaining official
9 copies of resolutions and ordinances adopted by the City Council.

10 5. I am familiar with the process by which official copies of resolutions and
11 ordinances adopted by the City Council are created. Generally, staff in the responsible City
12 department will prepare a draft of the ordinance or resolution for the City Council's
13 consideration. That draft ordinance or resolution is included in the agenda packet for the City
14 Council meeting at which the ordinance or resolution will be considered. Changes to a draft
15 ordinance or resolution may be proposed by way of a "desk item" prepared by City staff and
16 submitted at the public hearing.

17 6. After the City Council votes to adopt the ordinance or resolution, staff in the
18 responsible City department typically prepare a final version of the ordinance or resolution that
19 incorporates any changes to the draft ordinance or resolution made by the City Council in
20 response to a "desk item" or otherwise. The final ordinance or resolution and any attached
21 exhibits are compiled electronically by City staff and transmitted to me. I then review these
22 documents to the best of my ability. Following that review, my staff adds dates and votes to the
23 signature block and assembles and prints official copies of resolutions and ordinances and any
24 attached exhibits from the final electronic documents. After one final review by me, my staff
25 then provides those official copies to the Mayor for signature and my attestation.

26 7. To the best of my recollection, I and other City staff followed the process
27 described above in creating the official copy of Resolution No. 18-085 and the two exhibits to
28 that resolution (Exhibits GPA-1 and GPA-2), which are at issue in this litigation.

1 8. The City Council considered three draft resolutions and three draft ordinances
2 related to the Vallco Town Center Specific Plan Project at a public hearing on September 18,
3 2018. Among those draft resolutions and ordinances was a draft of Resolution No. 18-085,
4 including Exhibits GPA-1 and GPA-2. A true and correct copy of Draft Resolution No. 18-085
5 is attached as Exhibit A to the Joint Submission on Agreed Facts filed concurrently with this
6 declaration.

7 9. After hearing public comment on the draft resolutions and ordinances, including
8 Draft Resolution No. 18-085, the City Council adjourned and continued the meeting to
9 September 19, 2018. The City Council voted to adopt Resolution No. 18-085 on September 19,
10 2018. There were no “desk items” submitted at the hearing proposing any changes to Draft
11 Resolution No. 18-085, Exhibit GPA-1, or Exhibit GPA-2. The City Council did not propose or
12 adopt any changes to Draft Resolution No. 18-085, Exhibit GPA-1, or Exhibit GPA-2 during the
13 hearing.

14 10. After the City Council meeting, I waited for staff in the Planning Department to
15 prepare the final electronic version of Resolution No. 18-085 and Exhibits GPA-1 and GPA-2. I
16 do not recall exactly how long it took for Planning Department staff to prepare the final
17 documents. Because there were multiple documents comprising the Resolution, I asked
18 Principal Planner Piu Ghosh to assemble the documents in a “Final Action” folder.

19 11. To the best of my recollection, Principal Planner Piu Ghosh prepared the final
20 electronic versions of Resolution No. 18-085 and Exhibits GPA-1 and GPA-2 and placed them
21 in a “Final Action” folder. I printed an original hard copy of Resolution No. 18-085 and Exhibits
22 GPA-1 and GPA-2 from that “Final Action” folder for the Mayor’s signature.

23 12. At some point prior to October 2, 2018, opponents of the Vallco Town Center
24 Project requested certified copies of Resolution No. 18-085 and other resolutions and ordinances
25 related to the project from my office. I do not recall the exact date on which this request was
26 made. I reviewed my calendar entries when preparing this declaration, and I found an entry for
27 October 2, 2018, indicating an appointment with one of the project opponents. I believe that this
28

1 appointment was for the purpose of obtaining certified copies of resolutions and ordinances for
2 use in preparing referendum petitions.

3 13. The Mayor signed the original hard copy of Resolution No. 18-085 on October 2,
4 2018. I attested to the same copy of Resolution No. 18-085 on the same date. I retained the
5 signed, attested original of Resolution No. 18-085 in a three-ring binder in which I maintain
6 original, signed hard copies of all City Council resolutions.

7 14. On that same date, October 2, 2018, I made another copy of Resolution No. 18-
8 085 from the original signed by the Mayor and retained in the three-ring binder. I stamped this
9 subsequent hard copy with a certification stamp, certifying that the document was a true and
10 correct copy of the original on file in my office, and signed the certification statement.

11 15. To the best of my recollection, I provided that certified hard copy to referendum
12 proponents on the afternoon of October 2, 2018. I scanned the certified hard copy before
13 providing it to referendum proponents. A true and correct copy of that scanned document,
14 containing Resolution No. 18-085 and Exhibits GPA-1 and GPA-2 as provided to referendum
15 proponents, is attached as Exhibit B to the Joint Submission on Agreed Facts filed concurrently
16 with this declaration.

17 16. On October 29, 2018, a group of individuals including Liana Crabtree delivered to
18 my office several boxes containing four sets of signed referendum petitions, including a
19 referendum petition against Resolution No. 18-085. I am informed and believe that Ms. Crabtree
20 and the other individuals who delivered the petitions are affiliated with Better Cupertino Action
21 Committee.

22 17. The referendum proponents also provided me with one unsigned, spiral-bound
23 "sample" copy of the referendum petition against Resolution No. 18-085. I compared the
24 unsigned "sample" copy of the referendum petition with the signed sections of the referendum
25 petition and determined that the documents were identical except for the signatures affixed to
26 the signed sections of the referendum petition. A true and correct copy of the "sample"
27 referendum petition is attached as Exhibit C to the Joint Submission on Agreed Facts filed
28 concurrently with this declaration.

1 18. As required by the Elections Code, I and other City staff conducted a “raw count”
2 of the signatures on the referendum petition against Resolution No. 18-085 and determined that
3 the petition contained a sufficient number of unverified signatures to warrant signature
4 verification. I accepted the petition for filing on October 30, 2018. On October 31, 2018, I
5 caused the petition to be transferred to the Santa Clara County Registrar of Voters for signature
6 verification and a final count of valid signatures.

7 19. I received a letter dated December 6, 2018, from an attorney representing Vallico
8 Property Owner, LLC contending that General Plan Table LU-1, part of Exhibit GPA-1 to
9 Resolution No. 18-085, as reproduced in the referendum petition did not contain strikethrough
10 identifying the portions of Table LU-1 deleted by the Resolution. According to the letter,
11 elimination of the strikethrough lines made it impossible to understand the effect of the
12 Resolution on the General Plan. The letter concluded that the petition failed to meet the
13 requirements of the Elections Code and demanded that I, in my capacity as City Clerk, reject the
14 petition and refuse to take any action on it. A true and correct copy of the December 6 letter is
15 attached as Exhibit E to the Joint Submission on Agreed Facts filed concurrently with this
16 declaration.

17 20. The Registrar determined that the referendum petition against Resolution No. 18-
18 085 contained sufficient valid signatures to qualify for the ballot. As required by the Elections
19 Code, I certified the sufficiency of the signatures on the petition to the City Council at its
20 December 18, 2018 meeting.

21 21. At that same City Council meeting on December 18, 2018, I also informed the
22 City Council of the claims raised in the December 6 letter from Vallico’s attorney.

23 22. I investigated the claims in the December 6 letter in cooperation with the City
24 Attorney. Pursuant to my investigation, I compared the versions of Table LU-1 in the Draft
25 Resolution considered and adopted by the City Council, the certified Resolution I provided to
26 referendum proponents, and the referendum petition itself. I also consulted with other City staff
27 in the planning and information technology departments, reviewed other documents in my files,
28 and reviewed relevant software settings on my computer.

1 23. As a result of my investigation, I concluded that due to default software settings
2 on my computer affecting how PDF documents are printed, the original of Resolution No. 18-
3 085 that I printed for the Mayor's signature inadvertently omitted strikethrough lines from the
4 body and footnotes to Table LU-1 that appear in the draft of Resolution No. 18-085 considered
5 and adopted by the City Council. I further concluded that due to other default software settings
6 on my computer affecting how PDF documents are printed, portions of the text along the left-
7 hand margin of Table LU-1 in the original of Resolution No. 18-085 I printed for the Mayor's
8 signature fell outside the printable area of the page and were not reproduced. I further concluded
9 that the certified copy of Resolution No. 18-085 that I provided to referendum proponents
10 contained these same inadvertent errors.

11 24. I am informed and believe that the persons who prepared and circulated the
12 referendum petition against Resolution No. 18-085 relied on the certified copy of the Resolution
13 that I provided on October 2, 2018, and that contained the inadvertent errors described above.

14 25. Following my investigation, I now believe that I understand how these inadvertent
15 errors occurred. I use Adobe Acrobat Pro DC to view and print PDFs. When I go to the "File"
16 menu and select "Print," I do not change any of the default settings. In the far right portion of
17 the "Print" dialog box there is a section labeled "Comments and Forms." The drop-down menu
18 in this section of the "Print" dialog box on my computer is set by default to print "Documents."
19 In my research, City technical staff showed me that I can change this setting to print
20 "Documents and Markups." My settings, however, default to "Documents."

21 26. Based on my investigation and to the best of my recollection, I believe that my
22 default printer settings were set to print only "Documents" rather than "Documents and
23 Markups" when I printed the original of Resolution No. 18-085 for the Mayor's signature. At
24 the time I printed the original, I was not aware that there were notations recognized by the
25 software only as "Markups" in Table LU-1 in Exhibit GPA-1 to the Resolution. I have never
26 changed that setting before, and it always defaults to print only "Documents."

27 27. Based on my investigation and to the best of my recollection, I believe that my
28 default printer settings also caused the original of Resolution No. 18-085 to print at a scale that

1 resulted in a small amount of text along the left-hand margin of Table LU-1 falling outside the
2 printable area of the page.

3
4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct.

6 Executed on this 19th day of March, 2019, at Cupertino, California.

7
8
9
10 By: 
11 GRACE SCHMIDT

12 City Clerk, City of Cupertino

13 1096592.6