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CLERK OF SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

LOANNA DELACRUZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

Petitioners SANDRA L.JAMES and MICHAEL  
CHANG ,

Petitioners,

vs.

GRACE SCHMIDT, Cupertino City Clerk;  
SHANNON BUSHEY, Santa Clara County  
Registrar of Voters; Does I-X, et al,  
Respondents/Defendants.

STEVEN M. SCHARF, ANNE BROOKE  
EZZAT, XIANGCHEN XU, and ARAVIND  
BALAKRISHNAN; DOES XI-XX  
Real Parties in Interest

Case No.: 16CV299134

ORDER RE: PETITION FOR PEREMPTORY  
WRIT OF MANDATE

The above-entitled matter came on for hearing before the Honorable Maureen A. Folan on September 2, 2016 in Department 8 of the above-entitled court.

1           **I. Factual and Procedural Background**

2  
3           Petitioners, Sandra James and Michael Chang, on behalf of the public interest, ask the  
4 Court to delete certain alleged false and misleading statements contained in the primary and  
5 rebuttal arguments submitted in support of Measure C, a ballot measure to be voted on by the  
6 voters in Cupertino on November 8, 2016. Real Parties in Interest (“Real Parties”), Steven  
7 Scharf, Anne Brooke Ezzat, Xiangchen Xu and Aravind Balskrishnan support the passage of  
8 Measure C and helped author the primary and rebuttal arguments at issue here in favor of the  
9 Measure.

10           The Ballot Label reads:

11           Shall an initiative ordinance be adopted amending Cupertino’s General Plan to limit  
12 redevelopment of the Vallico Shopping District, limit building heights along major mixed-  
13 use corridors, *increase to 45 feet the maximum building height in the Neighborhoods*,  
14 limit lot line coverages for large projects, establish new setbacks and building planes on  
15 major thoroughfares, and require voter approval for any changes to these provisions.  
16 (emphasis added)

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19           The primary argument in favor of Measure C reads:

20           What Measure C Does: *Maintains existing maximum building heights in all areas of*  
21 *Cupertino, including neighborhoods.* (emphasis added)

22  
23           In Rebuttal to the argument against Measure C, Real Parties stated:

24           “3. Fact: Measure C *locks in neighborhood heights at 30 feet*” (emphasis added)

25           “4. The Cupertino City Attorney studied the 16-page Measure C closely over 2 weeks  
26 and found *NO CHANGE to the 30 feet top building height in neighborhoods as shown*  
27 *in the City Attorney’s Impartial Summary prepared for voters.*” (emphasis added)

1           Petitioners contend these statements are false and/or materially misleading because, as  
2 reflected in the Ballot Title, itself, Measure C will “increase to 45 feet the maximum building  
3 heights in the Neighborhoods to 45 feet.”

4           Petitioners note that in *Committee Supporting Cupertino Citizens’ Sensible Growth*  
5 *Initiative (CCSGI) v. City of Cupertino* 16CV296322, some of the same arguments Real Parties  
6 now assert were made before Judge Zayner who denied the Petition for Writ of Mandate in that  
7 matter. The Petition for Writ of Mandate in *Committee Supporting Cupertino Citizens’ Sensible*  
8 *Growth Initiative (CCSGI) v. City of Cupertino* 16CV296322 questioned language in Measure C  
9 that indicated the proposed initiative would increase the height limits of buildings in  
10 “Neighborhoods” outside of the “Special Areas” to 45 feet. Petitioners also disputed language in  
11 the initiative that would limit the redevelopment of the Vallico Shopping Center area.

12           By order dated August 10, 2016, Judge Zayner found the proposed ballot question  
13 accurately states the nature of the Cupertino Citizens’ Sensible Growth Initiative (CCSGI),  
14 noting that the challenged language is factually correct, is not false, misleading or otherwise fails  
15 to comply with the Elections Code. Judge Zayner also found that “the plain language of the  
16 proposed initiative, considered within the context of the City’s General Plan and zoning  
17 delegations, does appear to effectively raise the maximum height limits of buildings within the  
18 Neighborhoods-whether that was or was not the intent of the drafters and proponents.” The  
19 Committee Supporting Citizens’ Sensible Growth Initiative filed a Petition for Writ of Mandate  
20 and Request for Stay with the Sixth District Court of Appeal challenging Judge Zayner’s order  
21 against them. The appellate court denied the Petition for Writ of Mandate and Request for Stay  
22 on August 23, 2016.

23           In further support of their position, Petitioners have directed the Court to page 24 of the  
24 March 2016 Elections Code 9212 Report on Proposed Initiative C which states in relevant part:

25           “Both the adopted General Plan and the City’s Zoning Ordinance establish a maximum  
26 height limit of 30 feet (or less) for the Neighborhoods. Accordingly, this provision of the  
27 Initiative increases the maximum height limit in Neighborhoods by fifty percent (50%)  
28 from 30 feet to 45 feet.”

1 Also, the City Attorney's Impartial Analysis of the measure, prepared pursuant to  
2 Elections Code Section 9280, mentions the increase. The Impartial Analysis notes:

3  
4 Measure C would generally modify the General Plan, including:

5 "Increasing the maximum building height from 30 feet to 45 feet inside the City's  
6 Neighborhoods(parts of the City that are outside the General Plan's "Special Areas")...--a  
7 50 percent increase..."

8  
9 In sum, Petitioners argue that the statements real parties in interest made to the effect that  
10 Neighborhood building heights would *not* exceed 30 feet is refuted by: 1) the plain language of  
11 Measure C; 2) the 9212 Report; 3) the City Attorney's Impartial Analysis 4) publically available  
12 analysis from the City's outside special counsel; 5) the Ballot Label; 6) Judge Zayner's ruling  
13 and the Sixth Appellate Court's refusal to overrule Judge Zayner's ruling on a Petition for Writ  
14 of Mandate and Request for Stay.

15  
16 Real Parties in Interest contend they should be allowed to opine on the "legislative  
17 history" behind Measure C. They argue that CCSGI specifically reconfirms existing height  
18 limitations in the "Neighborhoods" and claim that "Neighborhoods" are specifically indicated as  
19 one of nine types of "Special Areas" shown in the 2015 LU-1-Diagram. Real Parties reason that  
20 "Neighborhoods" cannot as a matter of basic interpretation be the subject of the ensuing  
21 provisions: "Outside of the Special Areas shown in Figure LU-1 building heights may not exceed  
22 45 feet." Real Parties assert the City Council considered "Neighborhoods" as a type of "Special  
23 Area" when adopting the general plan amendments and the 2014 general plan amendments. Real  
24 Parties further claim the alleged meaning of "Special Areas" in other chapters or earlier versions  
25 of the general plan and in the 9212 report is irrelevant. Finally, Real Parties argue their  
26 statements of opinion are constitutionally protected from legal challenge. They want an  
27 opportunity to provide supplemental briefing to address the complexities of the General Plan  
28 amendment.

1 Each side submitted Requests for Judicial Notice. Real Parties filed evidentiary  
2 objections to Petitioners' Request for Judicial Notice, specifically the 9212 Report and the City  
3 Attorney's Impartial Analysis, which the Court overrules. Petitioners' objection to the  
4 Declaration of Anne Ezzat is sustained. The Court sustains Petitioners' objections to the  
5 documents describing Sandra James and Michael Chang and their affiliation with Sand Hill  
6 Property Company as irrelevant. The Court otherwise grants the Requests for Judicial Notice.

7  
8 **II. Legal Arguments**

9  
10 Election Code Section 9295 subsection (2) states: "A peremptory writ of mandate or an  
11 injunction shall be issued only upon clear and convincing proof that the material in question is  
12 false, misleading or inconsistent with the requirements of this chapter, and that issuance of the  
13 writ or injunction will not substantially interfere with the printing or distribution of official  
election materials as provided by law."

14 Official voters' pamphlets are limited public forums the government provides so that the  
15 government can constitutionally preclude false or misleading statements which would otherwise  
16 be considered unlawful prior restraint. *Huntington Beach City Council v. Superior Court* (2002)  
17 94 Cal. App. 4<sup>th</sup> 1417, 1427. There is no First Amendment right to include false or misleading  
18 information in an initiative petition. *Clark v. Burleigh* (1992) 4 Cal. 4<sup>th</sup> 474, 488-495 as cited in  
19 *Huntington Beach* at p. 1427. However, because freedom of speech is still at stake, any  
20 restrictions the government imposes must be narrowly drawn. A peremptory writ of mandate  
21 shall only be issued upon clear and convincing proof the material in question is false, misleading,  
22 or inconsistent with the requirements of this chapter. *Huntington Beach* at p. 1428.

23 The question this Court must decide is whether petitioners have established by clear and  
24 convincing proof the following statements are false or misleading in the primary argument and  
25 rebuttal sections of the Measure C ballot:

26 What Measure C Does: ***Maintains existing maximum building heights in all areas of***  
27 ***Cupertino, including neighborhoods.*** (Emphasis added)  
28

1 “3. Fact: Measure C *locks in neighborhood heights at 30 feet*” (emphasis added)

2  
3 “4. The Cupertino City Attorney studied the 16-page Measure C closely over 2 weeks  
4 and found *NO CHANGE to the 30 feet top building height in neighborhoods as shown*  
5 *in the City Attorney’s Impartial Summary prepared for voters.*” (emphasis added)

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7  
8 In determining whether statements are false or misleading, courts look to whether the  
9 challenged statement is subject to verifiability, as distinct from “typical hyperbole and  
10 opinionated comments common to the political debate. *Huntington Beach supra citing San*  
11 *Francisco Forty-Niners v. Nishioka* (1999) 75 Cal. App.4<sup>th</sup> 637, 649. The Court is free to strike  
12 a statement that has been shown by clear and convincing evidence to be objectively untrue.

13 The Court finds, by clear and convincing evidence, that all three statements are false  
14 and/or misleading.

15 First, the plain language of Measure C makes it clear that building heights in  
16 Neighborhoods may be raised to a maximum height of 45 feet. The Court rejects real parties’  
17 argument that by adopting an updated version of Figure LU-1 in October, 2015, the City Council  
18 converted the “Neighborhoods” into a “Special Area” so that the height restrictions imposed on  
19 Special Areas would apply equally to Neighborhoods. Such an interpretation does not make  
20 sense. There is a purposeful distinction between Neighborhoods and Special Areas which  
21 Chapter 2 of the General Plan discusses in great detail. It is not plausible to conclude the City  
22 Council intended to thwart the General Plan’s distinction between Neighborhoods and Special  
23 Areas based on the updated version of Figure LU-1. Indeed, if the drafters of Measure C  
24 intended to convert Neighborhoods into a Special Area in October, 2015, it would have made no  
25 sense for them to include a statement in Measure C that “outside of the Special Areas shown in  
26 Figure LU-1, building heights may not exceed 45 feet.” And, if the Neighborhoods were a  
Special Area, the 45 foot height restriction would not apply anywhere at all.

27 Courts should not easily conclude that major and substantial statutory changes are  
28 facilitated through vague terms or ancillary provisions. *State Bldg. & Constr. Trades Council of*

1 Cal.(2008) 162 CA4th289,323. *In Re Christian S* (1994) 7 Cal. 4<sup>th</sup> 786, 782. “[A]n intention to  
2 legislate by implication is not to be presumed.” *First M. E. Church v. Los Angeles Co.* (1928)  
3 204 Cal. 201, 204; *Educational & Recreational Services, Inc. v. Pasadena Unified Sch. Dist.*  
4 (1977) 65 Cal.App.3d 775, 782. The Court does not believe the City Council would make such a  
5 radical change by amending a single map but making no changes to any of the rest of the General  
6 Plan, which Plan, extensively discusses in Chapter 2, the fundamental distinction between the  
7 two types of planning areas.

8 Second, the Court is not persuaded that the above statements are simply the opinions of  
9 Real Parties deserving of constitutional protection. The three statements at issue are presented as  
10 though they are “fact.”

11 Real parties try to bolster the alleged veracity of the third statement by implicating the  
12 Cupertino City Attorney and stating the City Attorney actually made a “finding” that there is NO  
13 CHANGE to the 30 feet top building height in neighborhoods as shown in the impartial  
14 summary prepared for voters. According to petitioners (and not refuted by Real Parties), the  
15 foregoing statement refers to the circulating title and summary prepared in November, 2015 to  
16 include on the initiative petitions during the circulation period. This statement did not contain  
17 any affirmative statement that heights would remain the same in the Neighborhoods. The  
18 statement mentioned that “In other areas of the City, the initiative: 1) prohibits building heights  
19 greater than 45 feet except in North Vallco Park and South Vallco Park within the Heart of the  
20 City Special Area.” From the Court’s review of the statement, there was no “finding” at all that  
21 there is no change to the 30 feet top building height in neighborhoods.

22 At best, this statement is taken out of context and it is misleading. The latest report from  
23 the City Attorney, which is the impartial analysis prepared pursuant to Election Code Section  
24 9280 for the November 8, 2016 election absolutely advises the voters of the height limit increase  
25 to 45 feet in Neighborhoods.

26 Voters would be subject to undue confusion if the Ballot Question and City Attorney’s  
27 Impartial Analysis expressly stated that Measure C would increase the maximum building height  
28 in Neighborhoods to 45 feet but the primary and rebuttal arguments state that there is a height  
restriction in the Neighborhoods of 30 feet. The Court cannot allow the factually inaccurate  
statements to stand. At the hearing of this matter, counsel for Real Parties argued that the voters

1 essentially should be confused by the differences between the Ballot Question on the one hand,  
2 and the Supporting and Rebuttal arguments on the other and claims the differences are part of  
3 free speech and democratic discourse. This Court disagrees. The primary and rebuttal  
4 arguments are phrased in such a way as to be presented as “fact”, rather than an “opinion.” This  
5 Court must draw the line between the two and strike language presented as factual when it is  
6 objectively false, as is the case here.

7 At the hearing, Mr. Perlmutter explained parts of his May 3, 2016 memo to the Court and  
8 explained under what circumstances governmental officials may have discretion to not allow  
9 buildings in Neighborhoods to be built to the maximum height of 45 feet if Measure C passed.  
10 While the jury may be out on whether the City of Cupertino could prohibit someone from being  
11 able to construct a building in Neighborhoods up to 45 feet upon the Passage of Measure C, it is  
12 clear that the City would not be able to cap or lock in all buildings in all Neighborhood to a  
13 maximum of 30 feet in height.

14 By clear and convincing evidence, all three of the subject statements are objectively  
15 untrue and inconsistent with the language of the Ballot Question and City Attorney’s Impartial  
16 Analysis for Measure C and are thus misleading and confusing. Measure C **does not** maintain  
17 existing (30 ft) maximum building heights in Cupertino neighborhoods and Measure C **does not**  
18 lock in neighborhood heights at 30 feet. Finally, the third statement is false because the City  
19 Attorney did not make a “finding” of NO CHANGE to the 30 feet top building height in  
20 neighborhoods.

21  
22 **IT IS HEREBY ORDERED THAT:**

23  
24 1. The following statement in the primary Argument in Favor of Measure C, set to be voted on in  
25 the City of Cupertino, is false and/or misleading and must be removed:

26 a. “What Measure C Does: ... Maintains existing maximum building heights in all areas of  
27 Cupertino, including neighborhoods.”  
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1 2. The following statements in the Rebuttal to the Argument Against Measure C, set to be voted  
2 on in the City of Cupertino, are false and/or misleading and therefore must be removed:

3 b. "FACT: Measure C locks in neighborhood heights at 30 feet."  
4

5 c. "The Cupertino City Attorney studied the 16-page Measure C closely over 2 weeks and found  
6 NO CHANGE to the 30 feet top building height in neighborhoods as shown in the City  
7 Attorney's Impartial Summary prepared for voters."  
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9  
10 3. Respondents SCHMIDT and BUSHEY, and all of Respondents' officers, agents, employees,  
11 service providers, and all others acting by, through, or in concert with Respondents, or at  
12 Respondents' direction, are ordered to refrain from including in the sample ballot and all other  
13 election materials for use this November the statements identified as false and/or misleading in  
14 Paragraphs 1 and 2 of this order.  
15

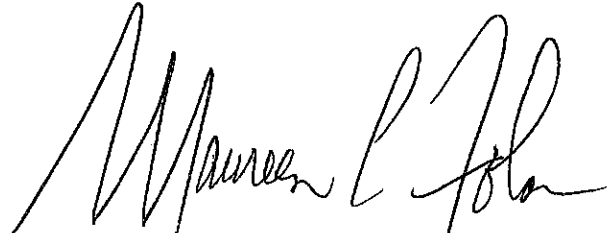
16  
17 4. Respondents SCHMIDT and BUSHEY, and all of Respondents' officers, agents, employees,  
18 service providers, and all others acting by, through, or in concert with Respondents, or at  
19 Respondents' direction, are ordered to instead print the primary Argument in Favor of Measure  
20 C and Rebuttal to the Argument Against Measure C, in the sample ballot and all other election  
21 materials for use this November, without the statements identified as false and/or misleading in  
22 Paragraphs 1 and 2 of this order.  
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25  
26 5. A peremptory writ of mandate thereon shall issue under seal of this Court.  
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1 6. Service of this peremptory writ of mandate ordered herein, and any notice of the entry thereof,  
2 may be effected by facsimile or e-mail upon the parties' counsel.  
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7 DATED: 9-2-16  
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MAUREEN A. FOLAN  
JUDGE OF THE SUPERIOR COURT