



CITY ATTORNEY'S OFFICE

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3223 • FAX: (408) 777-3366
CUPERTINO.ORG

By Electronic Mail

Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
Email: Advice@fppc.ca.gov

Subject: Request for Formal Advice Regarding Potential Conflict of Interest

Dear Commission Staff:

I am the City Attorney for the City of Cupertino, a general law city. I have been authorized by Cupertino Vice Mayor Liang Chao to seek a formal conflict of interest opinion pursuant to Government Code Section 83114(b) and 2 Cal.Code.Reg. § 18329(b).

This request seeks advice regarding Vice Mayor Chao's duties under the Political Reform Act related to future City decisions involving a proposed mixed-use development project located within the City of Cupertino. Vice Mayor Chao's real property, which is also her personal residence, is located 939 feet from the nearest edge of the project site. The project site itself is approximately 58 acres consisting of 13 parcels. Therefore, the majority of the Vallco project site is beyond 1,000 feet from the Vice Mayor's property.

The facts regarding the project, Vice Mayor Chao's financial interest in her home, and the numerous types of future City decisions that could affect the proposed development project are set forth below.

Factual Background

I. Proposed Development of the Vallco Shopping Mall

The Sand Hill Property Company and Vallco Property Owner, LLC (collectively, "Sand Hill") are interested in developing a mixed-use project in the City, most of which would be located on the site of the Vallco Shopping Mall ("Vallco site"). The mall at the Vallco site was initially built in the 1970s, operating for years with four anchor stores and many

shops and restaurants. Sand Hill purchased the Vallco site in 2014 and many businesses have since left the site. The current businesses include a fitness center, a bowling alley, an indoor ice rink, and a restaurant.

Sand Hill's proposed development at the Vallco site is one of the most significant developments in the City in recent years. Sand Hill is currently pursuing two project proposals with the City: (1) a "streamlined" application process under California Senate Bill 35 ("SB 35 Project"), and (2) a more traditional land use approval process pursuant to a Specific Plan proposal ("Specific Plan Project"). Information comparing the two projects has been prepared by City staff and can be found near the bottom of the page on the City's website at <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco>.

A. The SB 35 Project

1. Senate Bill 35

SB 35 was signed by Governor Jerry Brown on September 29, 2017 and became effective January 1, 2018. SB 35 amended provisions of the California Government Code with the intent of addressing California's housing shortage.

SB 35 imposes a streamlined ministerial review and approval process for certain affordable housing projects on cities and counties that, according to the State, have not made sufficient progress toward meeting their affordable housing goals for above-moderate and lower income levels. The California Department of Housing and Community Development determined the City is subject to SB 35 streamlining for very-low and low-income housing projects.

Projects that qualify for SB 35 streamlining are exempt from environmental review under the California Environmental Quality Act ("CEQA"). Further, the SB 35 approval process does not allow public hearings; only design review or public oversight is allowed, which must be objective and strictly focused on assessing compliance with criteria required for streamlined projects as well as objective design review of the project.

Projects that elect to take advantage of this process must submit an SB 35 application to the appropriate city or county. If it is determined that particular project is eligible for the streamlining process, SB 35 specifies the timeframes within which the municipality must make a final decision on the application. The Legislative Counsel's summary of SB 35 can be found at

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB35

2. Sand Hill's SB 35 Application

On March 27, 2018, Sand Hill submitted an SB 35 application for a proposed project ("SB 35 Project") that would include 2,402 housing units, 1.8 million square feet of office space and 400,000 square feet of retail. The application provides that 1,201 units would be affordable to very-low and low-income households. Specific information about the SB 35 application can be found at <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco-sb-35-application>.

On June 22, 2018, the City issued a letter to Sand Hill determining that the Application met the eligibility criteria established under SB 35 and requested additional information to allow the City to continue processing the Application. On September 21, 2018, prior to the Vice Mayor's election to the council, the City approved the Application. Sand Hill has begun some preliminary general work not specific to either approach, such as the first phase of demolition.

3. Litigation Challenging the City's SB 35 Determination

In June 2018, a petition for writ of mandate was filed in Santa Clara Superior Court challenging the City's determination that Sand Hill's SB 35 application was eligible for that law's streamlined approval process. On October 16, 2018, an amended petition was filed to also challenge on numerous grounds the City's September 21, 2018 approval of the Sand Hill SB 35 application, and seeking to invalidate that approval. The City has retained outside counsel to represent the City in the litigation, subject to management and oversight by the City Attorney.

Since elected and out of an abundance of caution pending a determination by the FPPC in response to this request, Vice Mayor Chao has abstained from participation in any decisions related to the litigation challenging the SB 35 application.

B. The Specific Plan Project

In addition to pursuing a development project under SB 35, Sand Hill also sought approval to develop the Vallco site through a more "traditional" land use approval process.

The Specific Plan Project would include a total of 2,923 units, with 2,668 of those units being located on the Vallco site. It would have 1,750,000 square feet of office space, 400,000 square feet of retail, and 191 hotel rooms. Information about the Specific Plan Project has been prepared by City staff and is available at <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco>.

On September 18, 2018, the City Council took of the following actions to approve the Specific Plan Project:

1. Adopted a Resolution certifying the Final Environmental Impact Report (“EIR Resolution”);
2. Adopted a Resolution approving General Plan amendments required to implement the Specific Plan for the Vallco site (“General Plan Resolution”);
3. Adopted a Resolution approving the proposed Vallco Town Center Specific Plan, and associated clarifying/supplemental language (“Specific Plan Resolution”);
4. Conducted the first reading of an ordinance to “Allow Adoption and Implementation of Vallco Town Center Specific Plan” (“Specific Plan Ordinance”);
5. Conducted the first reading of an ordinance “Rezoning the Parcels within the Vallco Special Area” (“Rezoning Ordinance”); and
6. Conducted the first reading of an ordinance “Approving a Development Agreement by and Between the City of Cupertino and Vallco Property Owner LLC for the Development of Vallco Town Center.” (“Development Agreement Ordinance”).

On October 2, 2018, the City Council approved on second reading – and thus enacted – the three ordinances listed above. Vice Mayor Chao, who was not elected until November 6, 2018, did not participate as a city council member in any of these decisions.

1. Referendum Petitions Challenging the Specific Plan

On October 29, 2018, opponents of the Specific Plan Project filed four separate referendum petitions with the Cupertino City Clerk’s Office challenging (1) the General Plan Resolution, (2) the Specific Plan Resolution, (3) the Rezoning Ordinance and (4) the Development Agreement Ordinance. On December 6, 2018, the County Registrar of Voters determined that each of the four referendum petitions contained a sufficient number of valid signatures to qualify for the ballot. On February 13, 2019, the City Clerk rejected one of the referendum petitions as procedurally defective. On February 19, 2019, the City Clerk will be requesting that the City Council authorize her to initiate litigation to determine whether a second referendum “substantially complies” with the Elections Code and should be presented to the City Council.

Pursuant to California Elections Code section 9241, the City Council must either repeal each of the legislative actions challenged by a valid referendum petition or submit those actions to the voters for approval. Unless and until they are ultimately approved by City voters, each of the legislative actions challenged by a valid referendum petition is suspended from becoming effective.

In short, the qualification of the referenda for the ballot has put the Specific Plan Project on hold for the foreseeable future. However, the City Council must make a decision whether or not to repeal the legislative actions challenged by valid referendum petitions or submit them to the voters.

Since elected and out of an abundance of caution pending a determination by the FPPC in response to this request, Vice Mayor Chao has abstained from participation in any decisions related to the referendum petitions.

2. Specific Plan Litigation

On October 31, 2018, litigation was filed relating to the City's actions approving the specific plan. That litigation challenges the validity of the Rezoning Ordinance and the Specific Plan Ordinance ("Specific Plan Litigation"). The City has also retained outside counsel to represent the City in the litigation, subject to management and oversight by the City Attorney.

Since elected and out of an abundance of caution pending a determination by the FPPC in response to this request, Vice Mayor Chao has abstained from participation in any decisions related to the Specific Plan Litigation.

II. Vice Mayor Chao

Vice Mayor Chao was elected to the Cupertino City Council at the November 6, 2018 election. She assumed office on December 6, 2018, and was elected Vice Mayor by her colleagues on the same date.

A. Residential Property

The Vice Mayor owns her home, which is located 939 feet from the nearest edge of the Vallco Project development site. The home is valued well over the threshold for a financial interest in real property.

Vice Mayor Chao's residence is located in a cul-de-sac (see Exhibit 1) and is separated from the project site by three blocks of residential homes. The Vice Mayor's neighborhood is separated from the project site by a concrete wall. The wall prevents access to the Vallco site from the west side of the project and neither plan currently contemplates removal of the wall. The wall is in fact a condition of the prior development at the Vallco site. In order to remove the wall, Sand Hill would need to apply for a separate discretionary permit with a separate approval process. Therefore, any change to this feature would be a separate, future governmental decision and is not part of any of the pending governmental decisions related to the SB 35 project or the Specific Plan Project.

Stevens Creek Boulevard is the nearest major thoroughfare and is a six to eight lane street with numerous businesses already located on both sides of the street, including ones currently operating on the project site (e.g., Bay Club Cupertino and Starbucks).

The Vice Mayor's residence is a two-story, single family home. The front faces southeast and the back faces northwest. As a result, three second story windows face towards the Vallco project site – one bedroom window and two bathroom windows, with the bedroom window being the largest of the three (see Exhibit 2 for the view from the bedroom window).

B. Better Cupertino

On January 23, 2019, attorneys for Vallco Property Owner LLC prematurely submitted a letter purporting to respond to the instant request.¹ Curiously, the "Factual Background" section of this Vallco letter focused largely on the Vice Mayor's alleged *political* activities—prior to her election to the City Council—in connection with the Better Cupertino organization. However, the Vice Mayor has received no compensation from Better Cupertino and she currently does not hold a position with the organization. Therefore, this entity is not a financial interest to the Vice Mayor and is irrelevant to whether she has a disqualifying conflict of interest under the Political Reform Act. Moreover, as the California Supreme Court has explained, the type of political activities she participated in as a member of Better Cupertino are precisely the types of activities that city council members are expected to engage in under our system of government. *City of Fairfield v. Superior Ct.*, 14 Cal. 3d 768, 779 (1975) (explaining that similar activities "would *not* disqualify [two council members] from voting on" a major development project) (emphasis added).

III. Details Regarding Potential Impact of The Development of the Vallco Site on Vice Mayor Chao's Residence

Since the Vice Mayor's property is 61 feet shy of the threshold to presume no material financial effect resulting from any decisions related to the Vallco site, the City thought it prudent to seek an expert opinion on any potential impacts of either the SB 35 Project or the Specific Plan Project based on the criteria contained in Regulation 18702.2 for property within the 500 foot to 1,000 foot radius.

The appraiser retained by the City has over 30 years of experience with appraisals in the San Francisco Bay Area, including Silicon Valley, is a Member of the Appraisal Institute (MAI) and is licensed as a California Certified General Real Estate appraiser. The appraiser selected is a neutral party, with no relationship with the Vice Mayor or Sand Hill and no prior involvement with the Vallco project.

¹ January 23, 2019, letter from Sean Welch of Nielsen Merksamer to FPPC. Mr. Welch subsequently acknowledged via email to FPPC staff that the letter was prematurely submitted and requested that it be considered "in reference to that forthcoming request for advice" from the City.

The appraiser was asked to assess the impacts on the Vice Mayor's property based on the criteria for assessing materiality found in Regulation 18702.2. These criteria were assessed based on the version of the regulation adopted at the Commission's January 17, 2019 meeting because that will be the language in effect at the time Commission staff renders advice on this request and will be the standard going forward. There is no need to assess these issues under the prior regulatory language since the Vice Mayor has abstained from participation in all matters related to Vallco since elected. Nevertheless, we understand that the analysis would be the same under the prior version of the regulation, since the same factors would be considered for her property.

The findings received from the appraiser are summarized later in this document along with the applicable standard for ease of digesting this information in context.

Questions Presented

We request advice on behalf of Vice Mayor Chao on the following questions:

1. SB 35 Application

Given the ministerial nature of decisions under SB 35, it is not anticipated that the City Council will be involved in making any governmental decisions regarding Sand Hill's SB 35 Project. It is possible, however, that staff may periodically provide updates at City Council meetings.

What are the Vice Mayor's duties under the Political Reform Act regarding such interactions with staff and potential discussions among City Council members related to Sand Hill's SB 35 Project? Does the answer to this question change once the SB 35 Litigation has been resolved?

2. SB 35 Litigation

During the course of the SB 35 Litigation, it will be necessary for the City Council to meet with its counsel in closed session, as authorized by the Brown Act, to discuss and provide direction regarding the defense and resolution of this litigation. May the Vice Mayor participate in decisions regarding the City's defense and resolution of this litigation?

3. Specific Plan Referendum Petitions

It is anticipated that in early 2019, the City Council will decide whether to repeal the legislative actions challenged by the referendum petitions or submit those actions to the voters for approval. If the City Council chooses the latter course, the City Council will then be required to call an election for a particular date.

May the Vice Mayor participate in the City's decisions to either repeal the legislative actions or submit them to the voters? Also, in the event that the City Council authorizes the City Clerk to

*proceed with litigation over one of the referendum petitions, may the Vice Mayor participate in subsequent decisions regarding that litigation?*²

4. Specific Plan Litigation

During the course of the Specific Plan Litigation, it will be necessary for the City Council to meet with its counsel in closed session, as authorized by the Brown Act, to discuss and provide direction regarding the defense and resolution of this litigation.

May the Vice Mayor participate in decisions regarding the City's defense and resolution of this litigation? Also, in the event that the City Council authorizes the City Clerk to proceed with litigation over one of the referendum petitions, may the Vice Mayor participate in closed session updates and subsequent decisions regarding that litigation?

5. Future City Actions on the Specific Plan Project

If the legislative actions involving the Specific Plan are submitted to and approved by the voters, the project applicant will likely then submit subsequent permit applications to the City, at least one of which will be subject to approval by the City Council. Other future decisions regarding the Specific Plan Project may be appealed to the City Council, or otherwise subject review by the Council.

Given the Vice Mayor's ownership interest in her home and its proximity to the Vallco site, what are her duties under the Political Reform Act regarding City's decisions to approve or deny such permits? What about other future City Council actions related to the Specific Plan Project?

6. Alternative Specific Plan Projects

It is possible that the City will be asked to consider alternative Specific Plan proposals. These alternative proposals may take a more moderate approach to development of the Vallco site. The more moderate nature of such an alternative proposal would likely mean that there are similar or possibly lesser impacts than those identified under the current Specific Plan Project.

Given the Vice Mayor's ownership interest in her home and its proximity to the Vallco site, what are her duties under the Political Reform Act regarding future, more moderate Specific Plan proposals? For purposes of this question only, please assume impacts of the alternative proposals are similar or lesser than the impacts discussed in this letter with regard to the SB 35 Project and the Specific Plan Project,

² The Council will decide whether to authorize this litigation on February 19, 2019. Vice Mayor Chao will not participate in that decision. If filed, the litigation will focus largely on the ministerial duties of the City Clerk.

Analysis

To assist FPPC staff and facilitate a prompt response, my office, with the assistance of outside counsel, has prepared the following analysis of whether Vice Mayor Chao would be disqualified from decisions involving the Vallco site.

Government Code section 87100 provides that no public official at any level of state or local government “shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “Financial interest” includes “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (Cal. Gov. Code § 87103.) In order for the conflict of interest to exist, it must be “*reasonably foreseeable* that the decision will have a *material financial effect, distinguishable* from its effect on the *public generally.*” (Id.)

It is clear that Vice Mayor Chao is a public official subject to the Act’s conflict of interest provisions and that she has a financial interest in her home. As such, whether she would be permitted to participate in decisions involving the Vallco site depends on whether those decisions have a reasonably foreseeable material effect on her interest in her home that is distinguishable from the effect on the public generally.

A. Foreseeability Standard

Vice Mayor Chao’s real property is not explicitly involved in any of the governmental decisions at issue in this advice request, therefore foreseeability is not presumed. The standard for decisions not explicitly involved in a governmental decision provides that impacts on her real property are only considered “foreseeable” if the financial effect “can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.” (2 CCR § 18701(b).) The regulation provides a number of factors to consider in determining whether any financial effect is foreseeable.

B. Materiality Standard

Regulation 18702.2, as amended by the Commission on January 17, 2019, provides that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property is material when the governmental decision has certain enumerated impacts. Relevant to this situation, the impacts for property located between 500 and 1000 feet of the subject of the governmental decision are considered material if the decision would change the parcel’s (1) development potential; (2) income producing potential; (3) highest and best use; (4) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels or air quality; or (5) market value.

Whether or not this materiality threshold is met is necessarily a factual inquiry based on the nature of the public official's property and the nature of the governmental decision at hand. While prior advice letters are helpful to understanding how these factors are applied generally and may be applied in this circumstance, they are not dispositive. The materiality determination for other public officials with property beyond 500 feet or based on the magnitude of a particular project in a different community do not dictate the outcome for the Vice Mayor here because the analysis must necessarily look at the factors contained in Regulation 18702.2 and a conclusion must be reached as to any impacts of the Vallco projects on the Vice Mayor's residential property after taking into consideration all relevant facts.

This is illustrated by some of the prior advice cited in the January 23, 2019, letter submitted by counsel for Sand Hill. While the cited advice letters determine the materiality standard is met based on the facts provided in those letters, the facts provided in those letters are distinguishable from those involving the Vice Mayor and the Vallco project. For example: (1) the *Ihrke* Advice Letter, A-16-092 deals with a vacant and undeveloped property that was developed into a mixed use development, whereas here there is an existing development with some businesses and additional businesses in the surrounding area that will be converted to a new development; (2) the *Chopra* Advice Letter, A17-127 addressed significant parking impacts based on the character of the community, whereas here there are less than significant parking impacts; and (3) the *Kokotaylo* Advice Letter, A-17-234 was based simply on broad statements confirming impacts. The remaining advice letters cited by Sand Hill are, if anything, even more distinguishable.

By contrast, there are prior advice letters with facts more analogous to those here which conclude that the materiality standard is not met (e.g., *Ennis* Advice Letter, A-16-143 and A-16-152 (similar facts related to distance from the project, impacts on parking, traffic, noise and odors; impacts on view and traffic are distinguishable.)). Ultimately, whether materiality is satisfied here must be determined by assessing the actual impacts that the SB 35 Project or the Specific Plan Project would have on the Vice Mayor's property based on the criteria provided for in Regulation 18702.2.

Given the fact-specific nature of these types of conflict questions, the Vice Mayor and the City Attorney's office determined that the most prudent course of action would be to obtain an expert opinion on the impacts the Vallco projects may have on the Vice Mayor's property and to obtain an opinion from the Fair Political Practices Commission, an unbiased and nonpartisan agency, to ensure the Vice Mayor's compliance with Section 87100.

To facilitate application of this materiality standard, the following information was gathered by the City, including information and conclusions from the appraiser retained to assist with this analysis.

1. Development Potential

The Vice Mayor's real property is already developed with a single family home, which is in keeping with the character of all surrounding properties. This single family home is located in a residential neighborhood with homes of similar age and quality. The appraisal received by the City concludes that it is highly unlikely that the development potential of the property would change in any way as a result of either Vallco project.

2. Income Producing Potential

The Vice Mayor's real property is a single family home, and there is no for-profit business conducted from the home. The property serves as Vice Mayor Chao's residence and no portion of the property is currently being rented out. According to the appraiser, an impact on income producing potential is highly implausible given other rental market factors considered.

3. Highest and Best Use

There is no impact the Vallco project could have on the highest and best use of the Vice Mayor's real property. The property is already being put to the highest and best use available under the current zoning for the area (R1-7.5, which is single-family residential), and there is nothing to indicate that this established neighborhood will be rezoned in connection with the Vallco project or in the foreseeable future.

4. Character of the Parcel

Traffic: According to the appraisal received by the City, traffic levels at the Vice Mayor's property are unlikely to change because the property is located on a quiet cul-de-sac that connects to a residential street (Wheaton Drive). Visitors to the Vallco site are unlikely to drive onto the Vice Mayor's street, because it is a cul-de-sac and, as described in Section II.A, above, they cannot access the Vallco site from the west side due to an existing concrete wall, which would be retained, and a lack of entrances on that side of the Vallco site.

The January 23, 2019 letter from Sand Hill's attorney asserts (without any specific citation) that the Environmental Impact Report (EIR) for the Specific Plan Project "discusses potentially significant [traffic] impacts to the neighborhoods directly west of the project," and appears to imply that this somehow would cause a material financial impact on the Vice Mayor's residence that is distinguishable from the Project's impact on the public generally. See Jan. 23, 2019, Ltr from Sean Welch to FPPC at 7.

As a preliminary matter, we would note in response that prior FPPC advice letters tend to focus on traffic impacts on the public official's street and in the official's immediate

neighborhood. The City's appraiser concluded that there would be no such impacts from either Vallco Project here.

The EIR states that the Vallco project would cause increased traffic on major thoroughfares, including Stevens Creek Boulevard, which could result in some "cut-through" traffic in neighborhoods surrounding the Vice Mayor's residence.³ However, the EIR finds this traffic intrusion impact to be "less than significant."⁴ In addition, the project contains a condition of approval that requires monitoring of cut-through traffic and implementation of traffic calming improvements if needed as determined by the City's Public Works Department. Whether the Vice Mayor's neighborhood will be subject to said monitoring will be determined in the future when conditions of approval for project development are established.⁵

Nevertheless, should the FPPC determine that impacts on the nearest thoroughfare impact materiality, additional information is provided related to the impacts on the public generally in Section C below.

Parking: According to the appraisal received by the city, development of the Vallco site under either plan will not have an impact on parking for Vice Mayor Chao's residence. The home is located in a cul-de-sac in a residential area, meaning those parking there will likely be other residents and their guests, not visitors to the Vallco project. Given the distance to the Vallco site, and the facts that there are no entrances to the site from the west and that there is a concrete wall barrier to the site, it is unlikely that anyone wishing to access the developed Vallco site will park in the Vice Mayor's neighborhood. Furthermore, both projects provide for additional parking, thereby further reducing the risk of an impact on parking in the nearby residential neighborhoods. Finally, although the EIR concluded that there would be no significant parking intrusion impact on adjacent neighborhoods, the EIR also states that the project contains a condition of approval with respect to parking which requires monitoring of parking in surrounding neighborhoods and implementation of a parking permit program to minimize neighborhood parking intrusion should it be determined to be necessary by the City's Public Works Department. Whether the Vice Mayor's neighborhood will be subject to said monitoring will be determined in the future when conditions of approval for project development are established.⁶

³ The EIR analyzed the Specific Plan Project, not the SB 35 Project which was a ministerial approval and, therefore, is not a 'project' subject to CEQA. Pub. Resources Code § 21080(b)(1). Nevertheless, the analysis in the EIR approximates the impacts of the SB 35 project because the amount of development that is permitted under the SB 35 Project is similar to the amount of developed in the approved Specific Plan Project. A comparison of the two plans prepared by the city is available here:

<https://www.cupertino.org/home/showdocument?id=22962>.

⁴ EIR, p. 326. All EIR documents are available on City's website under "Vallco Specific Plan Archive" available here: <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco/vallco-specific-plan-archive>

⁵ EIR, p. 326.

⁶ EIR, p. 326. This condition applies only to the Specific Plan Project.

Intensity of Use: There is no impact on intensity of use because the Vice Mayor's residence will remain a single-family home and her neighborhood will remain residential. The Vallco projects will not change these facts. The Vallco site itself is already developed. While the proposed projects would change the character of that development, that change has no impact on the character of the Vice Mayor's residential property or immediately surrounding neighborhood, which is located on the other side of the wall separating Vallco from the neighborhood.

Noise: Given the distance from the Vallco site, it is unlikely that there will be any increases in noise at the Vice Mayor's residence as a result of the redevelopment and increased activity under either project. This conclusion is supported not only by the distance of the Vice Mayor's residence from the Vallco site, but also by the concrete sound-wall type barrier separating the Vice Mayor's neighborhood from the project, and the fact that there is already plenty of existing commercial activity in the area, some of which is already closer to the Vice Mayor's residence. The Vice Mayor's property is outside the area that would experience significant noise impacts as show in EIR Figure 3.13-2, because the noise levels would remain below 60 dBA.⁷ Thus, the project will not result in noise impacts for the Vice Mayor's property.

Air Quality: The EIR does not identify any localized impact to the Vice Mayor's property. The project will contribute to air quality impacts at the San Francisco Bay Air Basin level, which will impact the entire City of Cupertino and beyond.⁸ The appraisal report also found an impact unlikely due to the regional nature of air quality and the nature of the project itself not having a "smoke stack" type source of pollution that would have more localized impacts.

Privacy: The appraiser found it unlikely that the Project would have any impact on privacy due to the fact that the towers built under either project will be more than 1,000 feet from the Vice Mayor's property. In addition, the Vice Mayor's house is located between her backyard and the Vallco site, so the backyard will retain its privacy.

View: View is the only area where the appraiser found an impact on the Vice Mayor's property under either project. Due to the height of the proposed buildings in both projects and the lack of existing similar high-rise buildings in Cupertino, the new buildings under either the SB 35 Project or the Specific Plan Project will be visible from the Vice Mayor's property. While they may not be immediately visible from the Vice Mayor's one west facing window at this time, if the tree was substantially pruned or removed in the future the buildings would be visible. Likewise, the buildings will be visible from the Vice Mayor's property while outside the residence. A discussion of the impacts on view for other residential properties in Cupertino is discussed below in

⁷ EIR, p. 212.

⁸ EIR, pp. 60-68 and 81-83 (air basin impacts), 69 (localized CO impacts would be less-than-significant), 70-75 (impacts on sensitive receptors within 1,000 feet would be less-than-significant).

Section C, Public Generally.

5. Fair Market Value

The appraiser found no impact on the fair market value of the Vice Mayor's property under either project. Home values in the City of Cupertino are driven by forces beyond a single project within the city boundaries, even a large project such as the Vallco proposals, given the job market (including the location of Apple's headquarters) and the City's location in the Bay Area. As a result, the appraiser concluded that the demand for housing in Cupertino is much broader and deeper than this single project could influence. Likewise, there is already significant residential and commercial property in the area such that the characteristics of the surrounding area would not be drastically changed. As such, it is unlikely that the value of the Vice Mayor's property would be impacted by either Vallco project.

C. Public Generally

If a public official determines that she has a financial interest in a governmental decision and a material effect on that interest is foreseeable, the next inquiry is whether the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally. (2 CCR § 18700(d)(3).) If the answer is yes, there is no conflict and the official may participate in the decision. (*Id.*)

"A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment." (2 CCR § 18703(a).) Relevant to this request, a significant segment of the public is at least twenty-five percent (25%) of all residential real property in the City of Cupertino.

In addition to assessing any impacts on the Vice Mayor's property, the appraiser was asked to assess whether any impacts he found would have a substantially similar impact on twenty-five percent or more of other residential properties in the City of Cupertino. Based on a determined view impact area and available census data, the appraiser confirmed that well over twenty-five percent of residential properties in the City would have a similar impact on their view. This analysis is supported by an analysis of the residential properties in the TAZ zones identified as falling within the view impact area identified by the appraiser.

As noted above, it is our understanding from past advice letters that the FPPC tends to focus on traffic impacts on the public official's street and in the official's neighborhood, rather than from thoroughfares that are further away. The City's appraiser concluded that there would be no traffic impacts on the Vice Mayor's street. The EIR for the

Specific Plan Project did conclude that the Project would have potential impacts on Stevens Creek Boulevard, which is the closest thoroughfare to the Vice Mayor's home.

Should the FPPC view increased traffic on Stevens Creek Boulevard as creating a material financial effect on the Vice Mayor's residential property, this impact warrants consideration of the Project's impacts on the City of Cupertino as a whole. The EIR found a significant cumulative traffic impact within the study area, which City Planning staff estimate is an approximate seven to eight mile radius around the Vallco site. The EIR concluded that there would be significant cumulative impacts on 17 intersections throughout the study area, 8 of which are in Cupertino.⁹ While this radius is not limited to the City of Cupertino, the portion of the study area located within the city does include over 25% of the residential property units in the City of Cupertino, which indicates that at least this portion of the residential properties would have a substantially similar traffic impact.

Summary

We have carefully reviewed and described all material facts that we are aware of at this time. Based on the facts provided, we request an advice letter from the Commission's legal division about whether the Vice Mayor can participate in the governmental decisions identified above. It appears that the only clear impact on the Vice Mayor's property as a result of either project is an impact on her views that would not affect the value of her residence. Specifically, the towers associated with both Vallco proposals — which are more than 1,000 feet away — would be visible from her residence. As noted above, a significant segment of residential properties in the City will have similar impacts on their views as a result of the towers proposed under both Vallco projects. Thus, in our view, it appears that the Vice Mayor may be able to participate in decisions regarding the Vallco site based on the public generally exception.

The appraiser determined that there would be no increased traffic on the Vice Mayor's cul-de-sac as a result of either version of the project. The EIR also found that the potential for cut-through traffic in the Vice Mayor's neighborhood was less than significant. Based on the EIR's findings regarding the Specific Plan Project, both versions of the project would result in increased traffic on Stevens Creek Boulevard and other thoroughfares in the City. However, the EIR also documented that these increased traffic impacts are likely to be felt throughout large segments of the City (and surrounding jurisdictions) given the number of impacted intersections. Based on this information, it appears that neither plan has a material financial effect on the Vice Mayor's residential property due to impacts on traffic. However, even if the traffic impacts on Stevens Boulevard were determined to be material, it appears the Vice Mayor may be able to participate regarding the Vallco site based on the public generally exception.

⁹ EIR, pp. 359-361.

If the legal division is of the view that any other impacts on the Vice Mayor's property may disqualify her, we would appreciate being alerted to that fact so that we may collect and provide additional information which may be relevant to the public generally exception in order to ensure that the Vice Mayor has a comprehensive opinion on which she can rely.

Should you have any additional questions about the information provided or need additional information to render your opinion, please do not hesitate to contact me.

Thank you for timely assistance in this matter.

Sincerely,

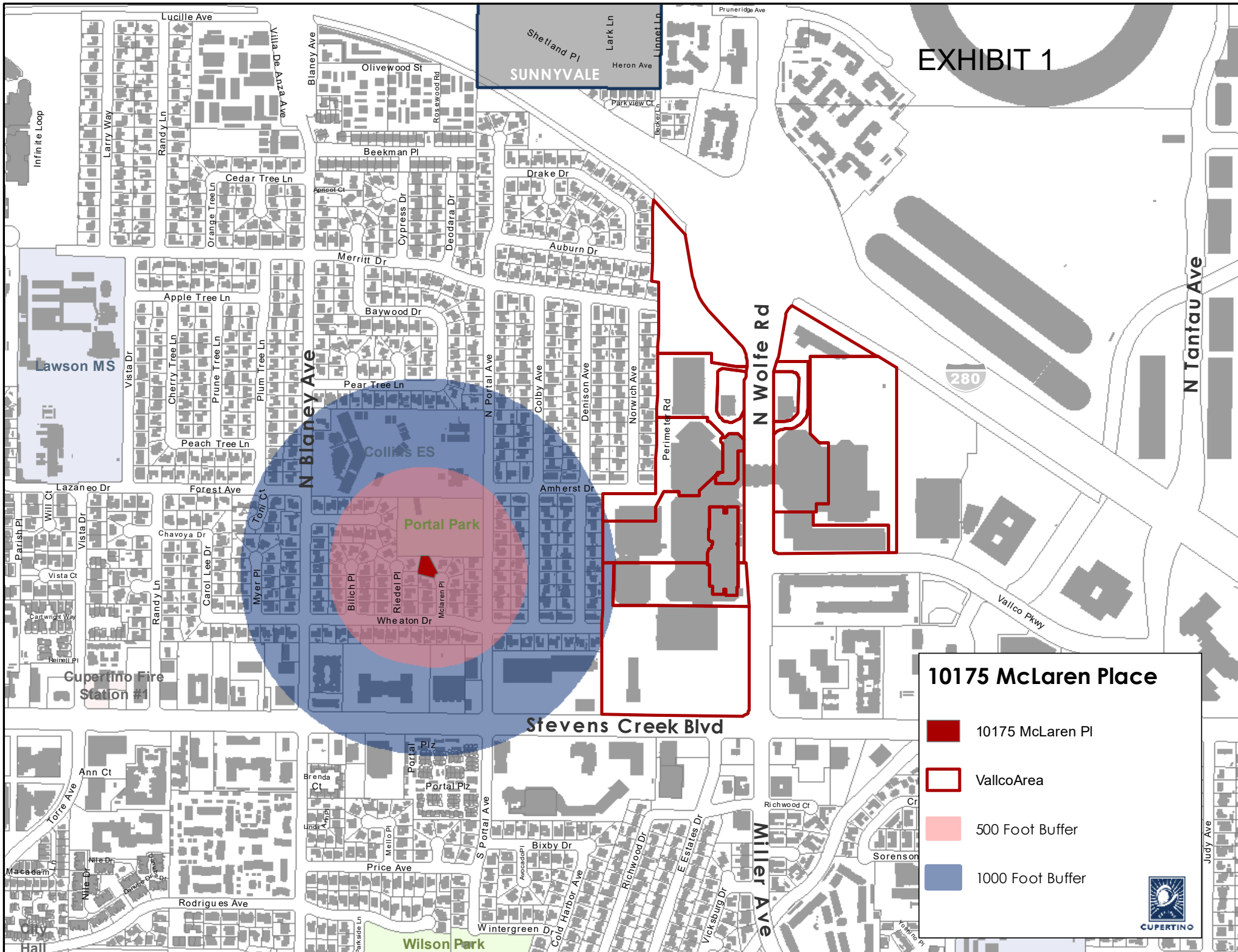
A handwritten signature in blue ink, appearing to read "H. Minner". The signature is stylized and cursive.

Heather Minner
City Attorney





Enclosure

cc: Vice Mayor Liang Chao

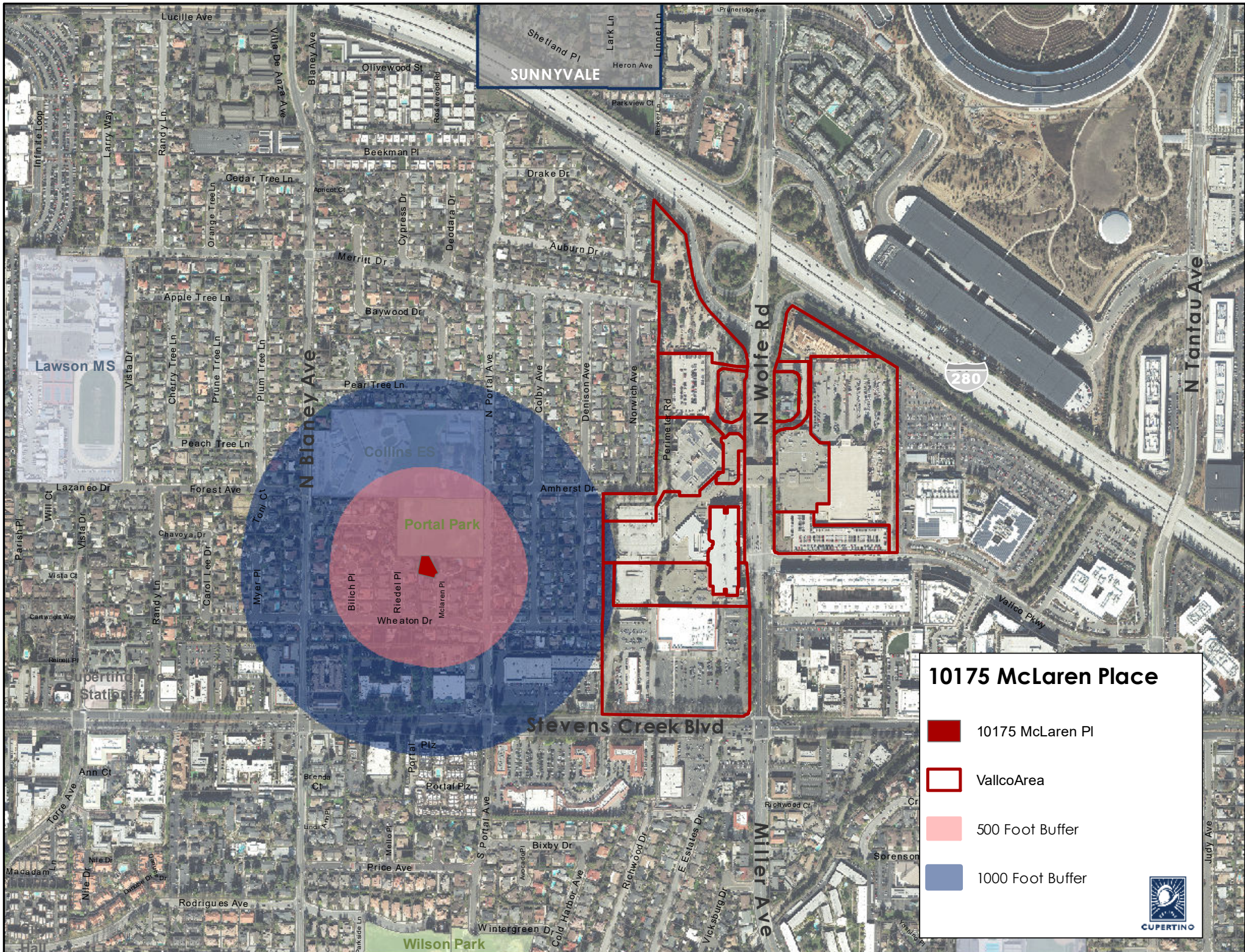
EXHIBIT 1



10175 McLaren Place

-  10175 McLaren Pl
-  Vallco Area
-  500 Foot Buffer
-  1000 Foot Buffer





SUNNYVALE

Lawson MS

Portal Park

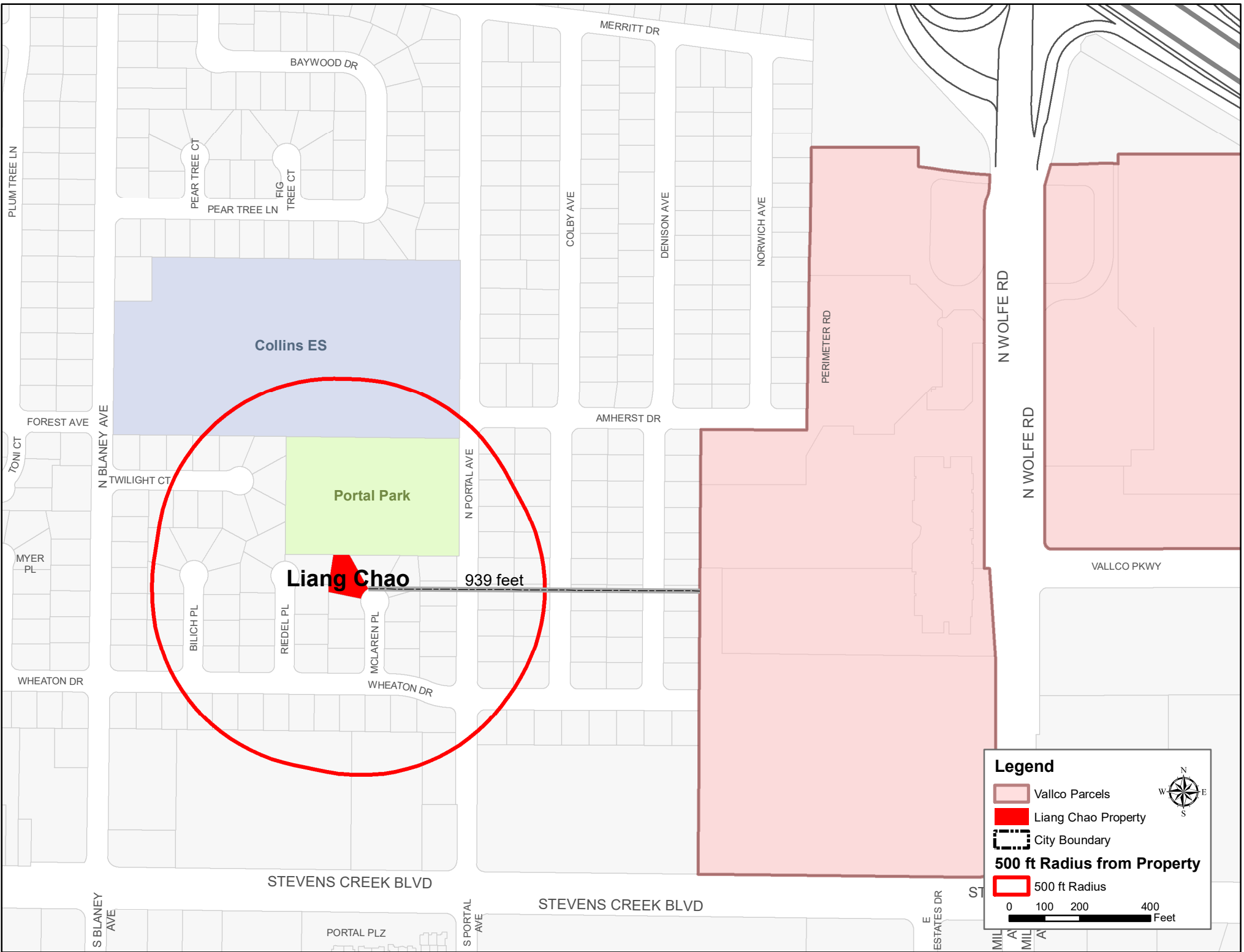
Stevens Creek Blvd

Wilson Park

10175 McLaren Place

- 10175 McLaren Pl
- VallcoArea
- 500 Foot Buffer
- 1000 Foot Buffer





Collins ES

Portal Park

Liang Chao

939 feet

Legend

- Valco Parcels
- Liang Chao Property
- City Boundary
- 500 ft Radius from Property

500 ft Radius from Property

500 ft Radius

0 100 200 400 Feet




EXHIBIT 2

