MEMORANDUM

TO: Robert Westmeyer, County Counsel of Napa County

FROM: Arthur F. Coon, Nadia L. Costa and Sean Marciniak, Miller Starr Regalia

RE: Legal Analysis of Angwin General Plan Initiative

DATE: July 9, 2012

At the request of Napa County Counsel Robert Westmeyer, we have prepared the following legal analysis of the Angwin General Plan Initiative, with the understanding that it will be transmitted to the County's Board of Supervisors as part of the report prepared pursuant to Elections Code § 9111.

I. EXECUTIVE SUMMARY

In April 2012, certain citizens of Napa County ("Proponents") proposed the Angwin General Plan Initiative ("Initiative" or "Angwin Initiative"). This Initiative proposes to amend the County of Napa's General Plan to curtail future development in the Angwin area, among others. Specifically, the Initiative states that it would:

- Amend the Angwin Land Use Map, as shown in attached Exhibit B to the Initiative, to redesignate certain areas from Urban Residential to Agriculture, Watershed and Open Space ("AWOS") and Public-Institutional ("PI") designations.

- Amend the County's Land Use Map, as shown in attached Exhibit D to the Initiative, to incorporate the changed General Plan designations for Angwin.

- Amend the Agricultural Preservation and Land Use Element to modify standards that apply to lands designated as PI throughout the County to prohibit further subdivision of parcels.

- Amend the Agricultural Preservation and Land Use Element to modify standards that apply to lands in the Angwin area designated as AWOS to allow for the "modernization and expansion" of an existing sewage treatment facility.

The proposed Initiative has a number of potential legal flaws which could form the basis of litigation challenges if it were enacted. These potential legal defects are summarized as follows:

- The Initiative's permanent prohibition of subdivisions in PI-designated lands is likely preempted, in whole or in significant part, by the Subdivision Map Act, and other state laws governing subdivisions, and there is a significant likelihood this provision of the Initiative would be invalidated if challenged on this basis.

- The Initiative's permanent prohibition of subdivisions in PI-designated lands effectively creates a non-uniform, parcel-by-parcel minimum lot size that is

arbitrary and arguably violates the State Planning and Zoning Law's statutory uniformity requirement, and there is a significant likelihood this provision of the Initiative would be invalidated if challenged on this basis.

- The Initiative may constitute "spot zoning" and violate equal protection rights guaranteed to local property owners, and there is a significant likelihood the Initiative is legally defective, at least in part, on this basis.

- The Initiative may be misleading regarding the extent of its impact on the County's future exercise of its police power to achieve broad land use planning objectives. If the scope of the Initiative were held to encompass the entirety of the Land Use Map, thus permanently restricting the County's future exercise of its police power authority to amend its Land Use Map in any way without a further vote of the people, there would be a strong likelihood it is legally defective. If this is not the case, as the Proponents' attorney has indicated in a post-submittal letter intended to clarify the intent (see Appendix A), and the Initiative is thus construed to "lock in" only the amended portions of the Map, this potential legal defect will be avoided.

- Certain parts of the Initiative, on their face, technically violate California Initiative Law's prohibition of "indirect" legislation and the use of precedence clauses. Whether a significant legal defect exists on this basis, however, depends on whether the Initiative creates internal inconsistencies in the County's General Plan. While there is some potential for internal inconsistency (see Appendix B), much depends on how the County's Board interprets existing policies in its General Plan. On the basis of available evidence, there is only a weak possibility that the Initiative would be held legally defective on this basis.

- The Initiative may, in its future application, give rise to claims of discrimination against Pacific Union College, including that the Initiative violates the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"; see analysis of RLUIPA, attached as Appendix C). At this time, there appears to be insufficient evidence to support a viable challenge on this basis, but the possibility of future litigation exists.

Given these potential defects, if the Initiative is enacted by the Board, or is placed on the ballot and passes, a number of consequences could ensue. The Initiative could subject the County to lawsuits from property owners claiming they are being arbitrarily and unlawfully precluded from subdividing, using, or changing the designated uses of their properties, and the Initiative would likely be partially invalidated on this basis. The Initiative may engender lawsuits based on claims of discrimination and, if and when Pacific Union College (which is affiliated with the Seventh Day Adventist Church) submits a development proposal on affected parcels in the future, a lawsuit based on claims that the prohibition of subdivisions substantially burdens religious exercise, if that is the case.

As a general matter, the Board's ability to bring a pre-election challenge to the Initiative is limited. Assuming the Initiative substantially complies with the procedural and substantive requirements of the Elections Code for local initiatives, the Board generally may not withhold an initiative from the ballot since its legal duty to either enact or place a qualifying initiative on the ballot is considered ministerial. Thus, even though the Board may conclude that all or a portion of the Initiative is likely or potentially invalid, and that it will not enact the measure, the Initiative generally must be placed on the ballot; this is

particularly true where, as here, the Initiative measure contains a severance provision and at least portions of it would likely survive legal challenge.

II. BACKGROUND AND OVERVIEW OF ANGWIN INITIATIVE

This Initiative proposes to amend the County of Napa's General Plan to limit further development in the Angwin area, with the stated purposes of protecting "large tracts of agricultural and open space land from urban development" and to "recognize the desire of residents to preserve their rural community." Specifically, the Initiative would:

- Amend the Angwin land use map as set forth in attached Exhibit B to the Initiative, redesignating various parcels from Urban Residential to AWOS and to PI.

- Amend the County's Land Use Map as set forth in attached Exhibit D to the Initiative. (This proposed change could conceivably, through the effect of the law governing the initiative process, "lock in" the entire reenacted version of the Land Use Map and thus render any future changes to the Map subject to a voter approval requirement. This would potentially restrict, in a severe manner, the exercise of the County's police power to regulate land use in areas throughout the County, including but not limited to actions to address housing issues and other changing needs of and conditions in the community. The Proponents' attorney has indicated in a post-submittal letter that it is not the intent of the Initiative to operate this way, and that this will be further clarified in ballot materials.)

- Amend the Agricultural Preservation and Land Use Element to modify standards that apply to lands designated as PI throughout the County to prohibit further subdivision of parcels.

- Amend the Agricultural Preservation and Land Use Element to modify standards that apply to lands in the Angwin area designated as AWOS to allow for the "modernization and expansion" of an existing sewage treatment facility.

Other relevant provisions include a number of "savings clauses" as follows:

- The Initiative states that it would "maintain affordable housing overlay zoning, which allows significant affordable housing development in Angwin."

- The Initiative states that nothing therein "shall be construed or applied to prevent the County from complying with its housing obligations under State law." Specifically, the Initiative would permit the Board, without voter ratification, to approve a change of the amendments in the Initiative for the sole purpose of complying with the County's housing obligations if the Board (1) makes a finding that "such a change is necessary to comply with the County's housing obligation and there is no suitable land available elsewhere in the County that may be used to satisfy that obligation, and (2) makes such a change only to the extent necessary to comply with the applicable State law housing obligations."

- The Initiative provides that all discretionary and ministerial entitlements for use shall not be approved or issued unless consistent with the policies and provisions of this Initiative, except "as otherwise required by state or federal law."

- The Initiative states that it "shall not apply to any development project or ongoing activity that has obtained, as of the effective date of the Initiative, a vested right pursuant to state or local laws."

- The Initiative states that it shall not be interpreted to apply to any property or land use that is beyond the initiative power.

- The Initiative states that it shall not be applied to preclude the County's compliance with State laws governing second units or the use of density bonuses.

III. Legal Analysis

A. Is The Angwin Initiative Or Any Portion Thereof Preempted By The Subdivision Map Act Or Other California Laws Governing Regulation Of Subdivisions?

We conclude the Initiative potentially conflicts with the Subdivision Map Act in two ways:

(1) The Initiative's application to publicly-owned properties may be expressly preempted by statutes in the Subdivision Map Act that exempt from its mapping requirements transactions involving such properties; and

(2) The Initiative's total and permanent prohibition on the subdivision of all existing parcels or lots in the PI designation may conflict with: (a) the Map Act's statutory language limiting and establishing the parameters of the authority of localities to regulate subdivisions; (b) the legislative purposes of the Subdivision Map Act, which seek to ensure the uniform application of land use planning and zoning rules and applicable procedures to the subdivision of land; and (c) Planning and Zoning Law statutory restrictions on local agency interim urgency ordinance authority to deny applications for subdivision approvals and other land use entitlements.

1. *Relevant Case Law/Statutes.*

The Subdivision Map Act (the "Map Act;" Gov. Code, §§ 66410-66499.37) is a general law of the State of California that vests in a county the power to regulate and control the initial design and improvement of subdivisions within its boundaries. (Gov. Code, § 66411.) However, the Map Act sets forth certain mandates that a county must follow for subdivision processing, with the goals of encouraging orderly community development; ensuring areas within a subdivision that are dedicated for public purposes will be properly improved so as not to become an undue burden on the community; and protecting the public and individual transferees from fraud and exploitation. (61 Ops. Cal. Atty. Gen. 299, 301 (1978); 77 Ops. Cal. Atty. Gen. 185 (1994); *see also* Gov. Code, § 66451.)

A city or county cannot adopt regulations that are contrary to specific provisions of the Map Act. The California Constitution prohibits counties from exercising their police power to enact ordinances that conflict with provisions of general state law. (Cal. Const., art. XI, § 7.) "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*" (Cal. Const., art. XI, § 7, emph. added; *Sierra Club v. Napa County Board of Supervisors, et al*. (2012) 205 Cal.App.4th 162, 172; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747.) It is well-established that this limitation applies to measures adopted either by the city

council or by the voters directly. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 774-777; *see also Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675; *Galvin v. Bd. of Sup.* (1925) 195 Cal. 686, 692.)

"Local agencies may … adopt regulations involving matters covered by the Map Act, as long as they are not inconsistent with it." (*Griffin Dev. Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 261.) "[T]he party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149; *Sequoia Park Associates v. County of Sonoma* (2009) 176 Cal.App.4th 1270.) In *facial* challenges, this burden is particularly high: "Facial challenges to legislation are the most difficult to successfully pursue because the challenges must demonstrate that '"no set of circumstances exist under which the law would be valid."' [Citation.]" (*Sierra Club v. Napa County Bd. of Supervisors, supra,* 205 Cal.App.4th at 173, quoting *T.H. v. San Diego Unified School District* (2004) 122 Cal.App.4th 1267, 1281.) "Thus, the moving party must establish that the challenged legislation inevitably is in total, fatal conflict with applicable prohibitions." (*Id*.; *see also Building Industry Assn. of Central California, supra,* 190 Cal.App.4th at 590, 593.)

Courts "have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.'" (*Big Creek*, *supra*, 38 Cal.4th at 1149-1150.) Courts "presume, absent a clear indication of preemptive intent from the Legislature, that such [local] regulation is *not* preempted by state statute." (*Id*.) This is consistent with the principle of statutory construction providing "it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Id*.) In acknowledging an analogous well-settled federal law presumption against preemption, the Supreme Court approvingly noted the "presumption applies both to the existence of preemption and to the scope of preemption." (*Id*. at 1150.)

For purposes of establishing a local law conflicts with state law and is preempted, a conflict may be shown where a local ordinance ***duplicates, contradicts***, or enters an area ***fully occupied*** by general law, either expressly or by legislative implication. (*Morehart, supra,* 7 Cal.4th at 747.) Preemption may be express or implied:

- Express preemption. A local law may not contravene the express command of a statute. (*Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal.App.3d 497, 505; *see Griffis v. County of Mono* (1985) 164 Cal.App.3d 414; *Whisman v. San Francisco Unified Ch. Dist.* (1978) 86 Cal.App.3d 782.)

- Implied preemption. "In determining whether the Legislature has preempted by implication, a court looks to the whole purpose and scope of the legislative scheme. There are three tests for implied preemption:

    - (1) The subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;

    - (2) The subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or

- (3) The subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." (*Morehart, supra,* 7 Cal.4th at 751.)

In this case, it would appear the most relevant legal standards are those for express preemption and the second basis for implied preemption (i.e., the Map Act addresses relevant areas of the regulation of subdivisions sufficiently so as to clearly indicate such regulation addresses areas of paramount state concern and that no further or additional local action outside its established parameters will be tolerated).[1]

2. *Application Of Preemption Analysis To Angwin Initiative.*

As indicated, the Initiative's prohibition on further subdivision within the PI designation appears to conflict with the Map Act in two ways: (1) the Initiative's application to *publicly-owned* properties may be expressly preempted by statutes in the Map Act that exempt from its mapping requirements transactions involving such properties; and (2) the *total prohibition* may conflict with (a) statutory language that limits the authority of localities to regulate subdivisions; and (b) the over-arching legislative purpose of the Map Act, which seeks the uniform application of rules and procedures to the subdivision of land.

a. *Provisions Of Angwin Initiative That May Be Preempted.*

Those provisions of the Initiative at issue include the following:

- The Initiative's stated purposes appear directly to contemplate changes to publicly-owned as well as privately-owned parcels with the PI designation, and include: "Apply the same appropriate General Plan land use designations and principles in the Angwin area as applied in the rest of Napa County..." and to "[a]mend the text of the General Plan's Agricultural Preservation and Land Use Element to ensure no further subdivision of Public-Institutional parcels...." (§ 2. A., B. [Declaration of Purpose], emph. added.)

- Section 3. D. (of the "General Plan Amendments" section of the proposed Angwin Initiative), on its face, amends the provisions of the General Plan's Agricultural Preservation and Land Use Element that set forth standards for lands designated as PI. While some of these PI lands are owned by private parties, including but

[1] The first implied preemption test would appear to fail because, though the Map Act does "occupy the field" as to many aspects of the subdivision of property (e.g., *Codding Enterprises v. City of Merced* (1974) 42 Cal.App.3d 375, 378 [interpreting statute in earlier version of Map Act as not "intended to preempt the authority of a charter city to control land development within its boundaries *except as to subdivisions,*" emph. added]), it also expressly allows for *consistent* local regulation. For example, Government Code section 66411 expressly delegates to localities control over the initial design and improvement of subdivisions, meaning the regulation of subdivisions is not, at least in all respects, "exclusively" a matter of state concern. The third implied preemption test would appear not to be met because the Initiative does not appear to have disproportionate adverse effects on "transient" citizens, but, rather, concerns property owners, developers, and residents.

not limited to Syar Industries and Pacific Union College, the remaining parcels are owned by public entities that include the State of California, the County of Napa, and the Napa Sanitation District.

- As it currently exists, the General Plan states a policy that minimum lot size is "[n]ot applicable" and that: "In Angwin, further parcelization is permitted to support the college's education mission and reconfiguration of existing parcels is permitted to comply with Policy AG/LU 66." Under the proposed Initiative, the latter language would be stricken and the minimum lot size provision revised to state as follows: "Not applicable. ***No further subdivision of parcels is permitted***." (Added text in italics.) [2]

Because it prohibits any further subdivision of land, the proposed Initiative effectively imposes a new "Minimum Parcel Size" restriction in all areas of the County designated PI on a *parcel-by-parcel* basis, making the *existing* size of each parcel the *de facto* minimum; thus, whether the parcel is a fraction of an acre or several hundred acres in size, and regardless of permitted or actual uses or neighboring parcel sizes, the parcel cannot be further reduced in size by subdivision.[3]

b. ***Provisions Of Angwin Initiative Prohibiting Subdivisions May Be Expressly Preempted By Map Act.***

The Map Act provides for an exemption for certain "subdivisions" undertaken by public bodies. For instance, the Map Act provides that "[a]ny conveyance of land to ***or from*** a governmental agency, public entity, public utility, or subsidiary of a public utility for rights-

[2] There do not appear to be any exceptions to this proposed rule prohibiting any further subdivision in PI lands. For instance, the proposed Angwin Initiative does *not* include the text of or summarize AG/LU 66, which states: "The County supports the ongoing operation of Angwin Airport (Parrett Field), including any improvements approved by the Federal Aviation Administration with the AV zoning district." Presumably, previously permissible subdivisions that would accommodate Angwin Airport improvements (e.g., transfer of a navigation easement or right-of-way or acquisition of open space in an approach zone to accommodate expanded operations) are no longer permitted under the Initiative's plain language.

[3] It is possible, where adjoining parcels are under common ownership or owned by cooperative owners, that some parcel sizes could be changed to below the existing sizes by lot line adjustments within the parameters of the Map Act's exclusion (Gov. Code, § 66412(d)) and County's local lot line adjustment ordinance (Chapter 17.46 of Title 17 of Napa County Code). Lot line adjustments are not "subdivisions," and are expressly excluded from regulation under the Map Act where they are made "between four or fewer existing adjoining parcels, where the land taken from one parcel is added to an adjoining parcel, and where a greater number of parcels than originally existed is not thereby created, if the lot line adjustment is approved by the local agency, or advisory agency." (Gov. Code, § 66412(d).) The possibility of reducing some individual parcel sizes by this means does not affect our conclusion that the Angwin Initiative effectively establishes minimum parcel size on a parcel-by-parcel basis, any more than the possible availability of a variance would undermine the general efficacy and applicability of a minimum lot size regulation, or the possible availability of a density bonus or second unit approval would undermine the general efficacy and applicability of general plan or zoning density limits. In brief, there are significant practical and legal obstacles to adjusting lot lines, and new parcels (i.e., a greater number) can never be created by such approvals.

of-way shall not considered to be a division of land for purposes of computing the number of parcels" necessary for mapping purposes. (Gov. Code, § 66426.5; *see* Gov. Code, § 66428(a)(2) [parcel map generally not required for government agency conveyances].) Under the statute's plain language, conveyances of land to or from governmental agencies are thus generally exempt from the Map Act's mapping requirements.

The Initiative's facial, total prohibition of any further subdivision of lands designated PI, which contains no exclusion or exception for lands owned by governmental agencies (such as the County or others), *conflicts* with the Map Act's *exemption* of public conveyances from its relevant regulatory requirements. Simply put, the Initiative would entirely prohibit subdividing governmental agency parcels through conveyances that the Map Act expressly allows to occur as exempt from its relevant and comprehensive regulatory strictures.

c. *Provisions Of Angwin Initiative Prohibiting Subdivision Of Land May Be Expressly Or Impliedly Preempted By Other Provisions Of The Map Act.*

While courts may be reluctant to infer legislative intent to preempt a field, there appears to be a viable claim that the Initiative's total prohibition of subdivisions in the lands designated PI, in itself, is preempted by the Map Act, making this provision of the Initiative void in its application to any PI lands, whether publicly or privately owned. First, the Map Act provides that, while a local agency may *condition* a subdivision on various bases, it cannot enact more restrictive provisions, nor can it modify procedures prescribed by the Map Act absent statutory authorization. An outright prohibition of subdivision would seem to be a more restrictive provision than the Map Act provides, as well as an unauthorized modification of relevant Map Act procedures. Second, the stated purposes of the Map Act could also be read to preclude an agency from enacting a blanket ban on subdivisions.

Addressing the first issue, Government Code section 66411 authorizes local agencies to regulate the initial design and improvement of subdivisions for which the Map Act "requires a tentative and final or parcel map." For "other subdivisions," the local agency may not set forth regulations that are "*more restrictive* than the regulations for those subdivisions for which a tentative and final or parcel map are required by this division." (Gov. Code, § 66411, emph. added.) Thus, the plain language of section 66411 provides a ceiling on the extent to which a locality may regulate those subdivisions deemed by governing state law to have the greatest potential impacts on orderly development and the environment; thus, it can be inferred that local restrictions may be no more onerous than restrictions set forth in or expressly authorized by the Map Act.

The Map Act imposes numerous restrictions on subdivisions. (*See, e.g.,* Gov. Code, §§ 66490, 66491 [requiring preliminary soils reports], §66473.7 [requiring verification of water supply on certain tentative maps].) Moreover, the Map Act authorizes a local agency to regulate the physical requirements in a subdivision plan and the configuration of the entire subdivision (*see* Gov. Code, § 66411 [local agency may regulate "initial design and improvement" of subdivisions], § 66418 [defining "design"]; 59 Ops. Cal. Atty. Gen. 128, 132-136 (1976)), and impose conditions that ensure the agency can provide the services necessary to accommodate the new occupants expected to use a proposed subdivision (*see, e.g., Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 361; Gov. Code, § 66477 [authorizing condition to require dedication of land or payment of

fee for park or recreational purposes]; § 66479 [agency may impose requirement that real property within subdivision be reserved for parks, fire stations, libraries, and other public uses]; § 66484 [agency may impose fee to defray costs of constructing bridges].) There appears to be no provision in the Map Act that permits or contemplates the outright prohibition of subdivisions or that authorizes a city or county to enact a ban on subdivisions. [4]

A ban on subdivisions appears to be "more restrictive" than the regulations expressly set forth in the Map Act, and accordingly a ban would be inconsistent with the Map Act. (*See* Gov. Code, § 66411; *Friends of Lake Arrowhead, supra,* 38 Cal.App.3d 497.)

Another Map Act statute relevant to the express/implied preemption analysis is Government Code § 66451, which provides:

> The procedures set forth in this chapter shall govern the *processing, approval, conditional approval or disapproval and filing of tentative, final and parcel maps and the modification thereof.* Local ordinances may modify such procedures *to the extent authorized by this chapter.*

(Gov. Code, § 66451, emph. added.) The Map Act's relevant "procedures" in its referenced Chapter 3 include: time limits for acting on map applications and related restrictions on denial authority (§§ 66451.1, 66451.4, 66452.1-66452.4); limits on map processing fees (§ 66451.2); hearing notice requirements (§ 66451.3); exclusive rules for local-agency initiated merger of contiguous parcels (§§ 66451.10-66451.24; *see* § 66451.22 [exempting Napa County to extent specified from "Map Act's implied preemption of local ordinances that may require merger of parcels that do not meet current zoning and design and improvement standards…."]); and procedures for filing and processing tentative and vesting tentative maps (§ 66452), inter alia. None of the provisions of Chapter 3 expressly or impliedly authorize a local ordinance modification of

[4] "Regulation and control of the *design* and *improvement* of subdivisions are vested in the legislative bodies of local agencies." (Gov. Code, § 66411.) The term "design" includes "lot size and configuration." (Gov. Code, § 66418.) The term "regulate" means "to control, direct, or govern according to a rule, principle, or system," or "to make uniform, methodical, or orderly, etc." (*Webster's Dictionary of the English Language, Unabridged*, p. 1522 (1977).) While a local agency may clearly "regulate" the initial design and improvement of subdivisions through the review and conditioning or denial of subdivision applications, the Map Act's language does not sanction or contemplate an outright ban on the subdivision of land. The Planning and Zoning Law does provide for the adoption by a public agency's legislative body, by four-fifths vote as an urgency measure, of an "interim ordinance prohibiting any *uses* that may be in conflict with a contemplated general plan, specific plan, or zoning proposal[.]" (Gov. Code, § 65858(a), emph. added.) Such authorized ordinances are of short duration, with the statute providing for limited extensions (*id.*, §§ 65858(a), (b)); further, such ordinances may not be adopted absent findings "that there is a current and immediate threat to the public health, safety or welfare, and that the approval of additional subdivisions, use permits, variances building permits, or any other applicable entitlement for use … would result in that threat…." (*Id.,* § 65858(c), emph. added.) As discussed further below, in Section III A, 2 d., this statutory provision governing temporary local prohibitions of subdivisions and other land use entitlements provides additional support for the conclusion that the Angwin Initiative's total permanent ban on subdivisions in PI lands would be held unlawful and invalid if enacted and challenged.

these procedures so as to entirely *prohibit* the filing, processing or approval of subdivision maps; as discussed further below, other statutory and case law governing subdivision processing and approval would also appear to preclude a total ban on subdivisions such as the Angwin Initiative contemplates. (*See* Gov. Code, § 65858; *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 Cal.App.4th 1410, 1417-1420.)

The overall purposes of the Map Act also could be interpreted to preclude a local agency from banning subdivisions. Preliminarily, the Map Act contemplates that local agencies' authority over subdivisions extends to *regulating* them to ensure, inter alia, they are consistent with local planning regulations, not to *prohibiting* them altogether. As the Supreme Court has observed:

> The Subdivision Map Act (Act) gives local agencies authority to *regulate* subdivision development within their boundaries. (§ 66411.) *The agencies exercise their authority by reviewing maps of a proposed subdivision*. A tentative map must, among other things, be consistent with either the local general plan or an existing specific plan. (§§ 66473.5, 66474.) Generally, a final map must be approved if it substantially complies with a previously approved tentative map (§ 66474.1.) and meets the requirements applicable to the subdivision when the tentative map was approved (§ 66473).

(*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 276, emph. added; *id*. [further noting Map Act permits a subdivider to file a vesting tentative map whenever the Act requires a tentative map, in order to grant the subdivider additional protection].) In other words, according to the Court, the Map Act envisions a local agency's regulatory role regarding subdivisions primarily as that of a map-reviewer, exercising discretion to condition, approve or deny in the context of adjudicatory decisions on individual map applications, rather than that of a map-prohibitor acting in a legislative capacity. This circumscribed regulatory role is closely tethered to assuring consistency of approved maps with governing land use plans that are enacted by the local agency acting in its legislative capacity. Such a "map-by-map" regulatory role as is described by the Supreme Court is inconsistent with local legislation broadly dispensing with the subdivision process altogether, regardless of considerations of any proposed map's consistency with the local agency's adopted land use plans.

Other authorities confirm that the general purpose of the Map Act legislation is to provide for uniform procedures in subdividing lands. (*See California Coastal Comm'n v. Quanta Inv. Corp.* (1980) 113 Cal.App.3d 579, 589; Gov. Code, §§ 66433-66443, 6555-66450.) It also is meant to encourage orderly community development (*see* Gov. Code, § 66411; *Pratt v. Adams* (1964) 229 Cal.App.2d 602, 606; *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549) and ensure consistency of design and improvement with applicable local standards for development type and density, public health, and other environmental concerns (*see* Gov. Code, §66474(c)-(g)).

While valid "[m]inimum lot size restrictions facilitate [these] purpose[s]" (62 Cal.Atty.Gen.Ops. 140, 141 (1979), citing *Clemons v. City of Los Angeles* (1950) 56 Cal.2d 95, 100), the Angwin Initiative's non-uniform restrictions undermine them. The Initiative appears arbitrary and unreasonable, due to its complete lack of any tether to

sound land use planning principles, insofar as it effectively rezones parcels designated PI on a parcel-by-parcel basis, restricting them to their existing sizes and configurations. By effectively declaring the "minimum" lot size of all PI parcels to be "whatever now exists," without offering any rational basis for the myriad new development standards and related regulations it thus effectively creates on a parcel-by-parcel basis, the Initiative adopts a "land use plan" that subjects every affected parcel to *different* lot size requirements. Such action is not based on a uniform land use plan of the type which has traditionally been held to support minimum lot size restrictions. (*See Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 961; *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 778.)

We have been unable to locate any California case law supporting a total, permanent ban on subdivision within a land use designation. In *Metro Realty v. El Dorado County* (1963) 222 Cal.App.2d 508, the court upheld a *temporary* legislative prohibition of subdivisions; however, the court placed particular emphasis in its decision on the fact that the ordinance there involved was a *temporary urgency ordinance* effective only pending the completion of a water development/conservation plan. (*Id*. at 513, 515-516; s*ee also State of California v. Superior Court* (1974) 12 Cal.3d 237 [noting numerous cases upholding validity of interim zoning ordinances, characterizing *Metro* as "proscription of subdivision"]; *Building Industry Legal Defense Foundation*, *supra*, 72 Cal.App.4th 1410 [validity of urgency ordinances by local agencies faced with immediate threats of development].) With regard to the Angwin Initiative, there is no evidence or indication of any study or plan in the works with which immediate development through subdivision approvals might interfere, nor does there appear to be any actual "threat" of immediate subdivision; rather, the total, permanent prohibition of subdivisions in the PI designation is, itself, the Initiative's "land use plan."

Therefore, we believe there is a compelling legal argument that the Angwin Initiative's proposed permanent ban on subdivisions is preempted both by virtue of language in the Map Act that sets limitations on the extent to which a local agency may regulate subdivisions, and by virtue of the stated purposes of the Map Act, as elucidated by authoritative case law.

d. ***Provisions Of Angwin Initiative Prohibiting Subdivisions May Be Expressly And Impliedly Preempted By The Planning And Zoning Law Governing Interim Agency Ordinances As Applied To Subdivisions And Other Land Use Entitlements.***

As noted above, the Planning and Zoning Law also contains express restrictions on local agency authority to prohibit subdivision applications and approvals. While these are contained in a statute governing interim urgency ordinances, their content, tenor and judicial interpretation shed light on the preemptive effect of the Map Act and the correspondingly limited reach of exceptions to that preemptive effect. Government Code § 65858 provides in part:

> (a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance

prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. That urgency measure shall require a four-fifths vote of the legislative body for adoption. The interim ordinance shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.

(b) Alternatively, an interim ordinance may be adopted by a four-fifths vote following notice pursuant to Section 65090 and public hearing, in which case it shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may by a four-fifths vote extend the interim ordinance for 22 months and 15 days.

(c) The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare. In addition, any interim ordinance adopted pursuant to this section that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing may not be extended except upon written findings adopted by the legislative body, supported by substantial evidence on the record, that all of the following conditions exist:

. . . .

(d) Ten days prior to the expiration of that interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.

(e) When an interim ordinance has been adopted, every subsequent ordinance adopted pursuant to this section, covering the whole or a part of the same property, shall automatically terminate and be of no further force or effect upon the termination of the first interim ordinance or any extension of the ordinance as provided in this section.

> (f) Notwithstanding subdivision (e), upon termination of a prior interim ordinance, the legislative body may adopt another interim ordinance pursuant to this section provided that the new interim ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances different from the event, occurrence, or set of circumstances that led to the adoption of the prior interim ordinance.
>
> . . . .

(Gov. Code, § 65858(a)-(f), portions omitted indicated by ellipses.)

As observed by the Court of Appeal, this statute "allows a city [or county] to adopt an interim ordinance that prohibits any *uses* which may be in conflict with a general plan [under consideration or study]…[a]nd … expressly provides that a city [or county] shall not adopt an interim ordinance unless it makes a finding that the *approval* of additional subdivisions … or other entitlements would result in a current and immediate threat to the public safety, health, or welfare." (*Building Industry Legal Defense Foundation, supra,* 72 Cal.App.4th at 1412.) Given the statute's express language, the Court held it did *not* permit a city to "adopt an interim ordinance that prohibits the *processing* of development applications, such as a tentative subdivision map." (*Id.*)

In reaching this conclusion, the Court relied in part on the *preemptive effect* of the Map Act's provisions governing the processing and approval of maps by cities and counties:

> The Subdivision Map Act … provides that, "Regulation and control of the design and improvement of subdivisions are vested" in the city. (Gov. Code, § 66411.) It goes on to provide that, "The procedures set forth in this chapter shall govern the *processing*, approval, conditional approval or disapproval and filing of tentative, final and parcel maps and the modification thereof." (Gov. Code, § 66451[ ].) Given that the Map Act has established a comprehensive procedure for processing development applications, and nothing in it allows a city to prohibit the processing of a tentative subdivision map that is complete (*see Griffis v. County of Mono* (1985) 163 Cal.App.3d 414, 425 [where Legislature has intended that city may modify Map Act procedures it has said so "in no uncertain terms"]), a city cannot use an interim ordinance as a backdoor method to modify the rules. [Citations.]

(*Building Industry Legal Defense Foundation, supra,* 72 Cal.App.4th at 1417, emph. in orig.)[5]

[5] The Court noted that the City's interim ordinance "also [ran] into problems with [action deadlines in] at least two other statutes[,]" i.e., the Permit Streamlining Act (Gov. Code, § 65943(b)) and CEQA (Pub. Resources Code, § 21151.5), but "[g]iven that the interim ordinance [ran] afoul of the Map Act" it stated it "need not discuss its relationship with these other statutes." (*Id.* at 1417, fn. 5.) While these same problems would arise with

The Court also noted that Government Code § 65858(c) provides that a city (or county) "'shall not adopt' an interim ordinance unless it finds 'there is a current and immediate threat to the public health, safety, or welfare, and that the *approval* of additional *subdivision*s, use permits, variances, building permits, or any other applicable entitlement for use … would result in that threat to public health, safety, or welfare.'" (*Id.* at 1417-1418, second emph. added.) In essence, the Court viewed § 65858 as a limited legislative "carve out" to the Map Act's broad preemptive effect, allowing, subject to numerous strict limitations and conditions, an agency's enactment of a temporary moratorium on subdivision *approvals*, thought not on other related procedures and actions governed by the Map Act. (*See* Gov. Code, § 66451.)

While it is obviously not intended as merely an *interim* law, we nonetheless find it significant that the Angwin Initiative contains none of the limitations, findings or "due process"-type protections statutorily required to adopt an interim ordinance *temporarily* prohibiting the *approval* of subdivisions pending action on a land use plan under consideration. The Initiative seeks *permanently* to prohibit in all PI-designated lands the approval of subdivisions – i.e., the "processing, approval, conditional approval or disapproval and filing of tentative, final and parcel maps" (Gov. Code, § 66451) – even though nothing in the Map Act (or the Permit Streamlining Act, CEQA, or the Planning and Zoning Law) authorizes such a far-reaching and drastic modification of the Map Act's "comprehensive procedure[s]" governing such subdivision-related actions.

It is beyond dispute that permanent land use restrictions trigger greater concerns as to their reasonableness and impact on property rights than do merely temporary ones. (E.g., *Metro Realty*, *supra*, 222 Cal.App.2d at 516 ["A temporary restriction upon land use may be (and we feel *is* under the facts here) a mere inconvenience where the same restriction indefinitely prolonged might possibly metamorphize into oppression."].) It is thus likely, given the plain language of Government Code § 65858, its detailed and comprehensive scope (which notably nowhere authorizes either indefinite extension of a "temporary" moratorium or adoption of a permanent moratorium on the development entitlements it addresses), and its relationship to the Map Act's plain language and comprehensive scheme (as explained by the *Building Industry* Court), that a court would hold § 65858, in conjunction with the Map Act, occupies the field of local agency subdivision approval moratoria. We conclude that if the law precludes a city or county from prohibiting the *processing* of a subdivision application even on a temporary basis, then a strong argument exists that *a fortiori* a city or county cannot in perpetuity prohibit the *making and granting* of such applications, as the Angwin Initiative purports to do.

3. *Conclusion.*

A local agency may not adopt an ordinance that conflicts with the provisions of the Map Act and it may not modify the Map Act's comprehensive procedures for filing, processing and approving maps unless expressly authorized by the Map Act to do so. Here, despite the burdens of proof involved and the courts' general reluctance to infer legislative intent to preempt a field, there is significant legal risk that the proposed Angwin Initiative's subdivision ban may be held to conflict with preemptive provisions of the Map Act and other law, and therefore held to be invalid. First, insofar as the Initiative applies to publicly-owned properties, it may be expressly preempted by statutes in the Map Act that

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the Angwin Initiative here, and further support this memo's analysis and conclusions, in order to not unduly expand the length and scope of this analysis, we (like the *Building Industry* Court of Appeal) merely note these issues here.

exempt transactions involving such properties from map approval requirements. Second, the Initiative's prohibition on subdivisions may be held to expressly or impliedly conflict with comprehensive statutory language that has been interpreted to limit the authority of localities to the review, conditioning, approval and denial of subdivision applications on meeting planning and other standards for orderly development – and not to sanction their outright proscription. The proposed ban on subdivisions also may impliedly be preempted by the overarching legislative purpose of the Act, which seeks to ensure the uniform application of rules and procedures to the subdivision of land, as such a prohibition would effectively lead to, among other things, a myriad of parcels governed by different land use regulations concerning minimum lot size. Finally, the Initiative's proposed permanent subdivision ban also appears to be preempted by and to conflict with other law governing subdivisions, i.e., the provisions of the interim urgency ordinance statute found in the state Planning and Zoning Law (Gov. Code, § 65858), and relevant case law.

B. Does The Angwin Initiative Violate Statutory Requirements That Zoning Shall Be *Uniform* For Each Class Or Kind Of Building Or Use Of Land Throughout Each Zone?

The proposed Angwin Initiative may also violate other requirements in the Government Code which provide that zoning regulations must be uniform in their treatment of land uses within a given zoning designation.

Government Code section 65682 provides: "All such [zoning] regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones." In applying this rule of uniformity, the court in *Neighbors In Support of Appropriate Land Use v. County of Tuolemne* (2007) 157 Cal.App.4th 997, 1008, explained this statute recognizes that "a zoning scheme is like a contract" in that "each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." Moreover, the "uniformity requirement is like an enforcement clause, allowing parties to the contract to challenge the burdens unfairly imposed on them or benefits unfairly conferred on others." (*Id.*) Accordingly, the court in *Tuolemne* invalidated a commercial use in an agricultural district where the County approved it solely on the basis of a development agreement, placing the subject land in a "class by itself," since no zoning provision otherwise permitted the use. (*Id.* at 1010.)

Courts have upheld minimum lot size zoning restrictions only where based on a comprehensive land use plan and uniformly imposed throughout the zone. (*See Ross*, *supra*, 1 Cal.App.4th at 961; *Hamer*, *supra*, 59 Cal.2d at 778.) As explained above, the proposed Initiative would effectively declare the "minimum lot size" of all PI parcels to be "whatever now exists," creating a myriad of non-uniform zoning regulations that are unique to each parcel affected and not based on any comprehensive plan. That is, each affected parcel would be in a "class by itself," subject to its own minimum lot size requirements. There is significant legal risk that such a land use regulatory framework would be held to be arbitrary and to violate the statutory uniformity requirement for a zoning ordinance under Government Code section 65682.

C. Does The Initiative Constitute Illegal Spot Zoning And/Or Violate Equal Protection Rights Guaranteed To Local Property Owners?

There exists a viable argument that the Initiative constitutes illegal spot zoning and may raise equal protection challenges, as set forth below.

1. *An Initiative May Not Exceed An Agency's Police Power Or Violate The Constitution.*

If the content of an initiative violates either the state or federal constitution, the initiative is invalid. For instance, an initiative that violates the due process or equal protection rights of affected property owners will not survive judicial scrutiny. (*Building Indus. Ass'n v. City of Carmillo* (1986) 41 Cal.3d 810, 824.) A city's "authority under the police power is no greater than otherwise it would be simply because the subsequent rezoning was accomplished by initiative." (*Arnel Development Co. v. City of Costa Mesa* [*"Arnel"*](1981) 16 Cal.App.3d 330, 337.)

2. *The Initiative May Constitute Discrimination / Illegal Spot Zoning.*

An initiative exceeds an agency's police power, and is invalid, where its provisions constitute arbitrary and discriminatory zoning. Spot zoning[6] is a type of discriminatory zoning ordinance, and occurs where "a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of larger area devoted to other uses." (*Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536.)

One of the leading opinions addressing the impropriety of spot zoning is *Arnel Development Co. v. City of Costa Mesa.* In that case, the Court of Appeal reviewed the validity of an initiative ordinance that rezoned certain properties to allow for only single family development, effectively precluding the approval of a pending development proposal that sought to introduce multi-family units. (*Arnel, supra,* 16 Cal.App.3d at 335.)

In determining whether an agency exceeds its authority, courts have acknowledged it can be difficult to show discrimination has occurred, holding that a city's exercise of its constitutionally-derived police power is subject to substantial deference from the judicial branch. (*Arcadia, supra,* 197 Cal.App.4th at 1536.) Where a zoning ordinance is attacked on this basis, the usual test is whether or not the ordinance bears a substantial and reasonable relationship to the public welfare. (*Arnel, supra,* 16 Cal.App.3d at 336.) The ordinance is invalid only if it is arbitrary, discriminatory, and bears no reasonable relationship to a legitimate public interest. (*Arcadia, supra,* 197 Cal.App.4th at 1536.)

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[6] The California Supreme Court characterized the temporary "proscription of subdivision" upheld in *Metro Realty* (discussed *supra* at Section III.A.2.c) as an "interim zoning ordinance." (*State of California*, *supra*, 12 Cal.3d at 515.) While not a zoning action in name, the Angwin Initiative nevertheless effectively establishes traditional zoning restrictions, such as minimum parcel size. Even to the extent the Initiative is not a "zoning ordinance," the distinction likely is meaningless. While the court decisions addressing discrimination largely concern zoning ordinances, there does not appear to be anything in these decisions that would create a "loophole," allowing local agencies to exceed their police power so long as the restriction is not encompassed in an ordinance proper. Accordingly, whatever the nominal form of the land use restriction, the following analysis of the propriety of "spot zoning" likely would apply.

While courts pay deference to municipal action under the "reasonable relationship" test, courts may, in establishing discrimination, investigate the motive behind a legislative act. The California Supreme Court, in considering allegations of spot zoning specifically, has held that "[w]hen the zoning ordinance appears to subject a property owner to a special restriction not applicable to similarly situated adjacent property, courts will conduct a more searching inquiry into the reasons and motives of the legislative body to determine if the zoning was arbitrary and discriminatory." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900.)[7]

By effectively declaring minimum lot sizes to be whatever lot sizes currently exist, the Initiative, while facially addressing a broad area, could be construed as "spot zoning" each of the parcels within its target area and subjecting each existing lot to a land use regulation that is significantly different from the regulations affecting other lots in the vicinity.

Though it often is difficult to show an ordinance is arbitrary, the proposed Initiative here is highly unusual in that it would effectively establish and freeze minimum lot size zoning on a parcel-by-parcel basis without any attention to whether the existing lot sizes will serve the needs of the public welfare in the future. There is no analysis to this end in the Initiative, and no effort to ensure the proposal results in a uniform development scheme. Therefore, a viable legal argument exists the Initiative is arbitrary and in excess of the County's police power.

3. *The Angwin Initiative May Violate Equal Protection Rights of Affected Owners.*

Hand-in-hand with a discrimination claim, a challenger to the Initiative could argue that it violates the right of affected owners to equal protection of the law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7(a).) Equal protection rights require that persons who are similarly situated with respect to a law must be treated alike under the law. (*Las Lomas Land Co., LLC v. City of Los Angeles* (2990) 177 Cal.App.4th 837, 857.)

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[7] The California Supreme Court reached this holding based, in part, on the holding of the court in *Arnel* that the "principle limiting judicial inquiry into the legislative body's police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance. (*Ehrlich, supra,* 12 Cal.4th at 900; *Arnel, supra,* 16 Cal.App.3d at 336.) Despite the California Supreme Court's interpretation, a court of appeal recently held the court in *Arnel* "considered motive only because it found no other purpose for the ordinance." (*Arcadia, supra,* 197 Cal.App.4th at 1358; *cf. Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1205 [trial court reviewed evidence of ulterior motive despite finding legitimate purpose motivating initiative].) It is unclear whether this aspect of the appellate court's opinion in *Arcadia* would survive scrutiny in light of the California Supreme Court's *Ehrlich* decision. Moreover, the *Arcadia* court appears to have made other erroneous conflations that would undermine its opinion's continued vitality. (*See id.* at 1358 [applying test designed for ordinance having impact on regional interest to ordinance affecting only local interest].) The opinion in *Arcadia* also is distinguishable, arguably, in that the ordinance under review, a growth management provision, was on its face generally applicable, and did not constitute spot zoning (*Arcadia, supra,* 197 Cal.App.4th at 1356), whereas the Court's decision in *Erlich* concerned a regulation that more obviously created a "spot zone." (*Ehrlich, supra,* 12 Cal.4th at 900, 911.)

"In areas of social or economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are 'plausible reasons' for [the government] action, our inquiry is at an end." (*Arcadia, supra,* 197 Cal.App.4th at 1534-35 [quotations and citations omitted].) In other words, a plaintiff "must show that the difference in treatment was so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." (*Id.* at 1535 [quotations and citations omitted].)

If a suspect class is involved, the court may evaluate the ordinance under a strict scrutiny standard, looking to see whether there is a compelling state interest, and that the ordinance is narrowly drawn to further this interest and employs the least restrictive means possible.

Again, viable legal arguments exist that the Initiative was arbitrarily conceived. Such a determination would support a claim that there is no "plausible reason" for the Initiative, and that it thus violates equal protection rights of property owners even under the most lenient standard of review. That said, there is a chance that the Pacific Union College, insofar as it functions as a religious institution, and insofar as it may demonstrate either that (a) a disproportionate amount of its real property is affected by the Initiative; or (b) that the proponents of the Initiative have a discriminatory animus,[8] can show that it is a disparately-impacted suspect class, thus calling for a stricter standard of review. At this time, there is no evidence of a disparate impact or discriminatory motive, but it is important to be aware of these risks should additional facts develop.

Overall, there exists a significant legal risk that the Initiative may be held to violate equal protection rights guaranteed by the State and United States Constitutions.

D. Is The Angwin Initiative Misleading And/Or Illegal In Restricting The County's Exercise Of Its Police Power?

The proposed Initiative would amend the Napa County Land Use Map "as set forth in Exhibit D," which is a map from the General Plan that includes all of Napa County and has been revised. Meanwhile, Section 8 of the proposed Initiative, without apparent qualification, provides that "this initiative may be amended or repealed only by the voters of the County of Napa." Though the proposed Initiative focuses on certain parcels and General Plan designations (e.g., AWOS and PI), the inclusion of a map showing the entirety of the County raises the possibility that the Initiative intends, through its re-adoption of the Land Use Map in whole, that any future amendments to the map would require approval of the electorate.

According to a letter from their legal counsel (see Appendix A), that is not the intent of the Initiative's Proponents, and they intend to clarify this in the election materials. However, the present ambiguity creates, at the least, some legal risk that the Initiative is either

[8] In determining motive, a court likely would focus on the intentions of the "proponents of the initiative," and not the collective electorate. (*Arnel, supra,* 16 Cal.App.3d at 335.) This distinction matters insofar as Initiative proponents might argue a court should focus on the intent of the electorate, as it does would in determining the meaning of ambiguous language in a statute. (*See Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850-851; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.)

misleading, or worse, that it severely restricts the County's exercise of its police power in ways that could pose serious conflicts with its legal obligations to, for example, update the General Plan Housing Element, and otherwise to respond with flexibility to changing conditions.

1. *An Initiative Cannot Be Misleading.*

Courts have found an initiative or referendum petition invalid because it contained a materially misleading or inadequate short title or failed to contain the full text of the enactment. (*See, e.g., Mervyn's v. Reyes* (1998) 69 Cal.App.4th 93, 99-104, and cases cited; Elec. Code, § 9201.) "[T]he type of defect that most often has been found fatal is the failure of an initiative or referendum petition to comply with the statutory requirement of setting forth in sufficient detail the text of the proposed initiative measure or of the legislative act against which the referendum is brought 'so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion.'" (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1016, fn. 22, citing *Mervyn's, supra,* 69 Cal.App.4th at 99.)

While we have not found a case exactly on point, the above authorities indicate that a reviewing court may treat confusing or otherwise misleading text in an initiative as a deceit upon the electorate, and could hold it invalid.

2. *An Initiative Provision Cannot Impair An Essential Legislative Function And/Or Rise To The Level of A Constitutional Amendment.*

In the event that the Proponents failed to clarify in ballot materials their intent not to preclude any future amendments to the County's Land Use Map without voter approval, or if a court construed the Initiative to so operate, more serious problems with its validity would arise. An initiative cannot interfere with the efficacy of an essential governmental power. (*Newsom v. Bd. of Sup.* (1928) 205 Cal. 262, 271-272 [initiative cannot impair power to grant a franchise]; *Simpson v. Hite* (1950) 36 Cal.2d 125, 134 [initiative cannot impair power to site a courthouse]; *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1324, 1331 [initiative cannot impair management of financial affairs and implementation of public policy declared by prior measure]; *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466, 470 [initiative cannot impair power to tax].)

Courts appear somewhat hesitant to find that restrictions on general land use planning constitute the impairment of an essential function. The California Supreme Court in *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 769-699, held that an initiative was valid where an agricultural land use designation could be changed during a 30-year period only by a majority vote of the electorate. The Court held that it could not "discern a design in the planning law to limit the operation of Election Code section 9125 [providing that initiative provision only could be repealed by electorate vote] in prohibiting a supervisorial repeal of initiatives." (*Id.* at 797.)

However, the initiative at issue in *DeVita*, known as Measure J, is distinguishable from the situation present here. Measure J concerned a single land use designation for a limited duration, whereas the proposed Initiative arguably could be interpreted to freeze the entirety of the County's Land Use Map *ad infinitim*, save for amendment by vote of the

electorate. Such a measure may qualify as a "constitutional," as opposed to "legislative" enactment, and thus remain outside the scope of the initiative power. (*Id.* at 799 [initiative cannot amend charter or have effect of creating charter].) Indeed, the Supreme Court concluded that Measure J was valid because it amended "*a portion* of the land-use element of the County's general plan – a legislative act" and provided "formal, *limited* voter approval requirements as a means of implementing that restriction." (*Id.*, emph. added; *see Citizens for Jobs, supra,* 94 Cal.App.4th at 1327 [initiative that broadly limits power of future legislative bodies to carry out their duties, pursuant to either a governing charter or own inherent police power, should not be considered legislative measures, but constitutional provisions that are outside scope of initiative power]; *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95, 102-105 [initiative could not prohibit charter city from selling or leasing real property without voter approval].)

It is not clear how a court would address an initiative that delegated to the electorate all authority to approve any general plan amendment, but there remains significant legal risk that ***if*** the proposed Initiative were construed to effect this type of broad proscription on future legislative acts by the County (including its ability to update its Housing Element), it would be declared invalid to that extent. Given the Proponents' recent representations that they will in the ballot materials clarify their intent that the Initiative not so operate, however, the legal risk of invalidation on this ground appears small.

E. Does The Angwin Initiative Violate California Initiative Law's Prohibition Of "Indirect" Legislation Or The Use Of Precedence Provisions?

On its face, the Initiative purports to require the County to amend its General Plan in unspecified respects to ensure consistency with the amendments actually specified in the Initiative. (Initiative, §§ 5B, 5D.) These provisions raise the issues whether the Initiative is invalid, in whole or in part, through the use of impermissible "indirect legislation" directives or "precedence" clauses.

1. *Relevant Case Law.*

While it is well-established that the land use element of a general plan may be amended by initiative (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 779, 795-96), the initiative power is limited by the California Constitution to the enactment of "statutes," i.e., *direct* legislation. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 575-76.) Thus, a "proper amendment" to a general plan by initiative must "make[ ] a specific change to a specific portion of the General Plan." (*Id.* at 576.) Attempts to *indirectly* legislate by initiative, such as directing a city council to amend the city's general plan to reflect the "concepts" stated in an initiative measure, are invalid exercises of the initiative power. (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1510.)

In the seminal *Marblehead* case, a developer (Marblehead) brought a facial challenge to an initiative measure enacted by the City of San Clemente, which purported to amend the city's general plan. (*Id.* at 1506.) The lower court granted a writ invalidating the measure and the Court of Appeal affirmed on the ground that it was "an improper exercise of the electorate's initiative power because rather than amending the general plan, it directs the city council to do so." (*Id.*) The initiative purported to mandate achievement of certain standard traffic LOS levels before plan amendments and approvals, zone changes, or

map approvals could be granted, with certain exceptions, but did not propose specific legislation effectuating these concepts; rather, it provided in pertinent part that: "Upon the effective date of this initiative, the general plan of the City shall be deemed to be amended to contain these concepts and enforced as such by the City….The City shall within six (6) months revise the text of the general plan and other ordinances to specifically reflect the provisions of this amendment and ordinance." (*Id.* at 1507, fn. omitted.) While the people's reserved initiative and referendum powers are "liberally construed in favor of their exercise[,]" (*id.* at 1509), they are nonetheless limited to the adoption or rejection of statutes, and "an initiative which seeks to do something other than enact a statute … is not within the initiative power reserved by the people." (*Id.,* quoting *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 714.)

In rejecting the initiative before it, the *Marblehead* court made several observations underscoring the nature of the measure as prohibited "indirect" legislation, which are relevant here:

- "The actual amendment of the general plan is left to the city council." (*Id.* at 1510.)

- "Which elements of the general plan are affected and how the substantive terms of Measure E are to be incorporated into these elements is unexplained." (*Id*.)

Further, the Court indicated the initiative was flawed due to its potential introduction of internal consistencies into the general plan, while burdening the city council to work out a resolution of the same with no specific direction or guidance:

> The city council could not simply append Measure E to the existing plan. Government Code section 65300.5 declares "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." No element of the general plan may take precedence over the provisions of other elements. (*Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704, 708.) Thus, a review of the entire general plan would be required to determine which elements need to be altered.

(*Id.* at 1510.)

The Court stopped short of holding that a general plan amendment initiative could not direct the city council to revise existing *zoning* to render it consistent with a general plan amendment, but found the flawed initiative before it was not so limited:

> While it might be argued the electorate could amend a general plan and direct the city council to revise the city's zoning ordinances to comply with it, Measure E goes beyond that. It directs the city council to amend both the general plan and the zoning ordinances. This type of measure is not within the electorate's initiative power.

(*Id.* at 1510.)

In *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, the Court of Appeal appeared to limit the application of *Marblehead* in upholding (with the exception of a single severable section) an initiative measure that amended San Diego County's general plan to designate a site known as "Gregory Canyon" for use as a privately-owned solid-waste facility. (*Id.* at 570.) The initiative there at issue (Proposition C) contained both "direct" and "indirect" proposed legislation. (*Id.* at 576-578.) Its primary operative sections — Sections 7A and 7B — amended the General Plan and Zoning Ordinance, respectively, in *direct* fashion:

> … Section 7A amends the General Plan; it does not rely on future legislative action. This is accomplished by language directing that the land use element of the General Plan be changed to permit a previously impermissible land use (waste disposal) in a particular area (Gregory Canyon). Section 7A provides the land use element and all relevant community plans and maps "shall be amended to designate the Gregory Canyon site Public/Semi-public lands with a Solid Waste Facility Designator." *This is a proper amendment as it makes a specific change to a specific portion of the General Plan*. …

(*Id.* at 576, fn. omitted, emph. added.)

The Court further stated:

> Likewise, Section 7B specifically amends the zoning ordinance to create a new zoning classification applicable to the Gregory Canyon site. This is a proper amendment since it makes a specific change to the Zoning Ordinance. The fact that the initiative did not cite to the particular ordinance number where the amendment will be located does not invalidate the initiative. We are unaware of any authority requiring that an initiative specify the particular numerical section that will contain the proposed amendment.

(*Id.* at 577.)

The Court next addressed the effect of Sections 7C and 7D.[9] As to those sections, the Court reasoned:

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[9] Sections 7C and 7D read as follows:

> "C. Amendments to Other County Ordinances and Policies.
> "All other County ordinances, rules, and regulations which constitute legislative acts shall be amended as necessary to accommodate the Project as set forth in this initiative.
> "D. County Cooperation.
> "The County of San Diego shall cooperate with the Applicant whenever possible in issuing permits and approvals so that the Project can proceed in a timely fashion."
> "The County of San Diego is hereby authorized and directed to amend other

> While Sections 7C and 7D do not propose "direct" amendments to the laws or to the General Plan, *Marblehead* does not provide a basis for invalidating these sections. The proposed general plan amendments in *Marblehead* did not state how *any* specific element of the general plan would be changed. Rather, the San Clemente initiative required the city council to make amendments as necessary to promote land use "concepts" identified in the initiative. *Marblehead* stated the voters could not propose such unspecified amendments to the San Clemente general plan because such vague mandate is [sic] inconsistent with the purpose of a general plan, to serve as an "integrated, internally consistent and compatible statement of policies. …" [Citations.]
>
> Here, the voters said precisely how the General Plan is to be amended – Section 7A changes the land use element to designate the Gregory Canyon Site for use as a solid waste facility. *Sections 7C and 7D merely tell the County to enact any necessary amendments to ensure the General Plan amendment will take place. Such enabling legislation promotes, rather than violates, the requirement that a general plan reflect an integrated and consistent document. Further, on this record there is no basis to believe any amendment to the General Plan would be necessary since there is no evidence Proposition C creates an inconsistency in the plan.*

(*Id.* at 577, fn. and citations omitted, emph. added.)

In a footnote, the Court attempted to distinguish and harmonize prior authority as follows:

> Because there are no inconsistencies on the face of the plan, *Pala*'s reliance on *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698 is unavailing. In *Sierra Club*, the county adopted a land use element that was inconsistent with the general plan's open space element. [Citation.] The county recognized the inconsistencies, but "[b]ecause of a lack of time" did not attempt to make the elements

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elements of the General Plan, sub-regional plans, community Zoning Ordinance, and other ordinances and policies affected by this initiative as soon as possible and in the manner and time required by State Law to ensure consistency between this initiative and other elements of the County's General Plan, sub-regional and community plans, Zoning Ordinance and other County ordinances and policies." (*Id.* at 575, fn. 6.)

The language of the last paragraph of Section 7D quoted by the *Pala* Court is essentially identical to the language of Section 5D of the "Implementation" section of the Angwin Initiative. However, as noted in the discussion that follows, the distinction is that the *Pala* initiative specifically provided for all general plan changes that needed to be made as a result of the measure; this is arguably not the case with the Angwin Initiative.

> consistent and instead inserted a clause stating that the land use element would take precedence over other general plan elements. [Citation.] The court held this "precedence clause" was improper and could not be used to cure conflicts within a general plan. Here, unlike in *Sierra Club*, there is no evidence of an inconsistency or that Section 7 requires the land use element to take "precedence" over the other elements.

(*Id.* at 577-578, fn. 8, citations omitted.)

The *Pala Band* Court further declined to read past precedents as barring "indirect" legislation of the type before it, distinguishing *American Federation of Labor v. Eu, supra,* 36 Cal.3d 687 as invalidating an initiative which directed adoption of a mere policy "resolution" rather than a "statute" (*id.,* at 577-578):

> Section 7C does not ask the board of supervisors to adopt a resolution – it tells the legislative body to enact any necessary *laws* to permit the "Project" to take effect. Section 7D likewise tells the legislative body to enact any needed General Plan or Zoning Ordinances to ensure consistency with the Sections 7A and 7B amendments. Neither *Marblehead* nor *American Federation of Labor* can fairly be read as prohibiting the voters from exercising such powers.

(*Id.* at 578, fn. omitted.)

Pala Band's reasoning in this respect is highly questionable. While subsequent cases have cited *Pala Band* in support of general propositions to the effect that the initiative power is to be liberally construed with an eye to upholding that reserved power, none has followed its reasoning or holding on the "direct/indirect" or "precedence clause" issues. In fact, the Fourth District has more recently distinguished *Pala Band* in a way that appears to *minimize* and limit its pronouncements on those topics:

> …[T]he cases chiefly relied upon by the Proponents are distinguishable here. In both *Pala, supra,* 54 Cal.App.4th 565 and *San Mateo, supra*, 38 Cal.App.4th 523, the initiative measures upheld made substantive amendments to land use provisions of a county's general plan or equivalent, to implement affirmative policy statements. *In Pala, supra, 54 Cal.App.4th 565 this court found the initiative measure was a proper amendment to the general plan that did not rely on future legislative action. Instead, it made a specific change to a specific portion of the general plan.* (*Id.*, at p. 756.)

(*Citizens For Jobs & The Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1330, emph. added [affirming judgment invalidating initiative measure that did not directly amend the general plan or provide substantive policy, but, rather, impermissibly interfered with essential government functions and county's fiscal management powers, involved matters of statewide concern, impermissibly affected local legislative authority delegated

by the federal and state governments, and imposed administrative restrictions making it difficult for county's board to carry out already-established base reuse policy].)

Still more recent authority has reaffirmed the vitality of *Marblehead* and *American Federation of Labor v. Eu* in prohibiting initiative measures that "are in the nature of resolutions that declare policies without providing the specific laws to be enacted." (*See, e.g., Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 784.)

It is difficult to completely reconcile the disparate strands of thought that led to the *Pala Band* court's conclusions. There are strong arguments to be made that *any* initiative attempting to effect "indirect" legislation amending the general plan to achieve internal consistency or effectuate a "precedence clause" subordinating other elements to the directly-amended element in the event of a conflict is impermissible. *Pala Band* itself is expressly limited to situations where "there is no basis to believe any amendment to the General Plan would be necessary" because there is no evidence that the initiative at issue creates any internal inconsistency. (*Pala Band*, *supra*, 54 Cal.App.4th at 577.)

2. *Implications For The Angwin Initiative.*

Those portions of the Angwin Initiative in Sections 5B and D directing the County to amend its *general plan* (as distinguished from its inferior specific plan, zoning and other enactments) to ensure consistency with the Initiative's General Plan amendments are arguably invalid and constitute an impermissible "precedence clause" and/or "indirect" legislation *on their face*. Moreover, they are invalid and ineffective to the extent that the evidence shows the "direct legislation" parts of the Angwin Initiative actually create any internal general plan inconsistency.

Recognizing that the Angwin Initiative's Proponents can plausibly argue their measure's language is essentially "approved as to form" by the *Pala Band* decision, it appears the best reading of that decision is that it strives to uphold the exercise of the initiative power where the following elements are present: (1) the initiative accomplishes its *primary* purposes through "direct" legislation that amends specific parts of specific plans and ordinances; (2) the initiative does not state broad policies and then direct the legislative body to do the "heavy lifting" by drafting and enacting specific legislation to carry them out; and (3) to the extent the initiative contains some directives to the local legislative body to enact "indirect legislation," such as "enabling legislation" or legislation to achieve consistency, those directives must either (a) affect only *inferior* zoning or other enactments, or (b) if they purport to affect other provisions of the *general plan*, there cannot be evidence of an *actual* internal general plan-inconsistency created by the direct legislation. Where there is such an inconsistency created by an initiative, it is unlikely a court would hold that it is permissible for the initiative to direct the legislative body to undertake comprehensive general plan review and enactment of other, unspecified general plan amendments to the extent needed to "cure" the inconsistency.

As discussed in Appendix B to this memorandum, although the proposed Initiative arguably *may* conflict with various policies in the General Plan, depending on how the County Board of Supervisors is inclined to interpret provisions of the General Plan that are not affected by the Initiative, there is no evidence at this time of any fatal inconsistency. Absent evidence of actual internal general plan inconsistency that would be created by the Angwin Initiative's "direct" legislation provisions (i.e., those contained in its Section 3), the argument that portions of Sections 5B and D violate the proper scope of the initiative

power, and are therefore invalid, is weak, and in light of the *Pala Band* decision, would not likely support any claim of invalidity.

F. Does The Initiative Prevent The County From Complying With Its Obligations Under State Housing Laws?

Amending a jurisdiction's general plan by initiative, particularly its housing element, in a manner that may impair the jurisdiction's ability to comply with its housing obligations under state law arguably is curtailed on the premise that the Legislature has occupied the field of housing. (*See* Section III.A.1, *supra* [principles of preemption].) For example, the Legislature has unequivocally declared that availability of low-income housing is an area of statewide concern. Government Code section 65580 states, "[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order." Further, in exercising their authority to regulate subdivisions under the Map Act, local agencies must, inter alia, "[c]onsider the effect of ordinances adopted and actions taken by [them] with respect to the housing needs of the region in which the local jurisdiction is situated." (Gov. Code, § 65913.2(b).)

The detailed statutory framework set out regarding the required substantive contents of a jurisdiction's housing element, as well as the comprehensive scheme by which it is updated, reflects this recognition that the availability of housing is a matter of statewide concern, and that cooperation between government and the private sector is critical to attainment of the State's housing goals. Repeatedly, the courts have recognized "as common knowledge" the State's preemption of the area of promoting construction of low cost housing. (*See, e.g.*, *Building Indust. Ass'n v. City of Oceanside* (1994) 27 Cal. App. 4th 744, 750; *Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dept.* (1985) 175 Cal. App. 3d 289, 306; *Bruce v. City of Alameda* (1985) 166 Cal. App. 3d 18, 21-22.)

The issue of preemption is perhaps most stark when an *initiative* seeks to amend or otherwise re-adopt a jurisdiction's housing element specifically — as opposed to other portions of the general plan that may affect housing — thereby triggering the need for voter approval for any future changes. Government Code sections 65588 and 65585 require periodic review and revisions to the Housing Element; if voter approval for changes were required, this could be construed as preventing the County from complying with its statutorily mandated duties. (*See also DeVita*, *supra*, 9 Cal. 4th at 793 n. 11 [in *dicta*, lending support for the notion that, unlike the land use element, the housing element cannot be amended by initiative].)

However, this preemption argument does not appear applicable to the Angwin Initiative since it does not propose any specific amendments to the County's Housing Element, nor does it appear to require any amendments to the Housing Element to eliminate obvious internal inconsistencies. Therefore, voter approval would not be necessary to amend the Housing Element in the future, and thus the Initiative would not be held invalid by a court as preempted on this basis.

In reaching this conclusion, we are cognizant that it might conceivably be argued that the Initiative's provisions impinge on the County's ability to comply with its obligations under

State Housing Element Law and therefore should be invalidated on that basis. The Initiative prohibits subdivisions in certain areas and modifies land use designations on specific properties from Urban Residential to AWOS and PI in Angwin, which is arguably considered one of the more urbanized areas in unincorporated Napa County. Accordingly, it might conceivably be argued that the Initiative imposes a significant additional regulatory barrier on housing and constrains the County's ability to satisfy its regional housing needs allocation (RHNA) obligations in the future by reducing the availability of suitable sites for housing.[10]

Notwithstanding the foregoing, we do not believe such arguments would be meritorious, because such concerns are largely unripe and speculative, and we do not view such speculative arguments as rising to the level necessary to raise a housing law violation. The Initiative appears relatively narrowly tailored in a manner sufficient to avoid a successful legal challenge to its validity on this basis. First, it does *not* seek to modify the two sites in Angwin that the County's current Housing Element is relying on to contribute to satisfying its RHNA obligations. (*See* General Plan, H-36, Figure H-1-2).) Second, it contains several "savings clause" provisions that appear to be expressly designed to avoid potential housing law non-compliance issues by permitting the County to proceed with approval of affordable housing proposals in the event and to the extent required to satisfy its state law obligations.

Accordingly, while the Initiative would, perhaps, reduce the County's flexibility in terms of how it satisfies its RHNA obligations, now and in the future, there is no evidence that the Initiative's provisions would prevent the County from complying with State Housing Element Law.[11]

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[10] The Initiative states that it shall not be applied to preclude the County's compliance with State laws governing second units or the use of density bonuses. There is an argument that this provision conflicts with State Density Bonus Law. Typically, an applicant will look to the applicable General Plan and zoning designations for purposes of deciding what constitutes the "maximum density" otherwise permitted, and then base a density bonus off of this figure. If no further subdivision is permitted under any circumstances, questions arise as to how an applicant that proposes to develop an otherwise qualifying project can be permitted to build. While, under State Density Bonus Law, an inconsistency as it relates to density does not, in and of itself, trigger the need for a General Plan amendment, a General Plan provision that entirely prohibits any subdivision is arguably different in character. These concerns are eliminated, of course, if the Initiative's subdivision prohibition is invalidated on other legal grounds and severed from the Initiative's remaining provisions.

[11] The obvious caveat to this conclusion is that, if the Initiative were to be construed as re-adopting the entire Land Use Map, as discussed more fully in Section III.D,2, *supra* — thereby triggering the need for voter approval for *any* future change to the Land Use Map in perpetuity — there would be a strong legal argument that such a voter approval requirement so substantially impinges on the County's ability to make any changes to facilitate housing production and comply with its obligations under state law, that the Initiative should be held invalid for this reason. If the County were found to be in violation of state housing laws, any person can bring a writ of mandate to enforce compliance. (Gov. Code, § 65751.) Penalties for non-compliance can include a court suspending the County's authority to approve discretional entitlements (Gov. Code, §§ 65755(a)(2), (3)) or issue ministerial permits (Gov. Code, § 65755(a)(1). In addition, a court may mandate the approval of applications for residential units under specified circumstances (Gov. Code, § 65755(a)(4)), or otherwise enjoin the County for failure to comply with the above-

G. Will The Initiative, If Adopted, Violate The Terms Of The *DeHaro* Settlement Agreement?

On June 21, 2004, the County entered into a settlement agreement with the plaintiffs in *Jorge DeHaro v. County of Napa*, Napa County Sup. Court Case No. 26-22255, in connection with a lawsuit that alleged the County failed to comply with various state and federal affordable housing and discrimination laws. (*DeHaro* Stipulation and Order, June 21, 2004, p. 1 (*DeHaro* Settlement Agreement).

As set forth in detail in the *DeHaro* Settlement Agreement, the County is obligated, among other things, to adopt a housing element for the 2001-2007 compliance period (and concomitant re-zoning actions) that substantially complies with requirements of the applicable law. (*See, e.g.*, *DeHaro* Settlement Agreement, pp. 2, 3, 9).

The Initiative does not violate the terms of the *DeHaro* Settlement Agreement since, as explained more fully above, it would not likely be construed as: (1) significantly impairing the County's ability to comply with state and federal affordable housing laws (in the event and to the extent the Settlement Agreement imposes obligations on the County beyond those addressed in the 2001-2007 Housing Element cycle); (2) precluding development of the sites in the Angwin area identified for affordable housing in the County's current Housing Element; or (3) otherwise preventing the County from satisfying its obligations thereunder.

H. Does The Initiative Trigger Violations Of The Religious Land Use and Institutionalized Persons Act?

The proposed Initiative, in addition to making text amendments to General Plan land use designations that apply to parcels throughout the County, also would make changes to land use maps. The map amendments exclusively would concern three parcels that are all owned by Pacific Union College or its affiliates. Specifically, the Initiative would redesignate all three parcels, which total approximately 50 acres, from an Urban Residential designation to either AWOS or PI. Because lands designated AWOS do not permit urban uses, and because lands designated PI would disallow, under the proposed Initiative, the further subdivision of land, Pacific Union College arguably would face substantial restrictions in development of the properties for uses that support the college.

Given these restrictions, Pacific Union College possibly could, depending on what facts it can establish regarding its religious purposes and disparate impacts resulting from adoption of the Initiative, make a viable claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA**";** 42 USC, §§ 2000cc *et seq*).

There are two bases for claims that can be brought under RLUIPA. Under one framework, a governmental entity violates the law where it "substantially burdens" a party's "religious exercise."[12] It is difficult at this time to determine whether Pacific Union College could show that any land use changes effected by the Angwin Initiative would substantially burden its development plans, and whether these changes would interfere with religious exercise or merely affect secular enterprises. This uncertainty exists

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referenced statutes (Gov. Code, § 65757.) Given the Proponents' expressed position, however, these risks are considered remote. (*See* Appendix A.)

[12] An overview and legal analysis of RLUIPA's key features is attached to this memorandum as Appendix C.

because it does not appear Pacific Union College has any pending development applications before the County that would allow for a more refined evaluation. At the same time, the absence of a development application would create a legal obstacle for Pacific Union College; specifically, an as-applied RLUIPA claim under the "substantial burden" test would not appear to be ripe until such time as the college has submitted a definite proposal. Nevertheless, there remains some risk that, if enacted, the Initiative could give rise to such federal claims in the future, with the attendant expense to County of defending the same.

RLUIPA also includes a "nondiscrimination" provision that renders a city strictly liable for implementing a land use regulation that discriminates against religious uses regardless of the justifications offered by the public agency. (*Midrash Sephardi, Inc. v. Town of Surfside* (11th Cir. 2004) 366 F.3d 1214, 1229, 1231 [RLUIPA violated where town imposed zoning restrictions on synagogues and churches but not on similar nonreligious assemblies or institutions like private clubs and lodges].) This provision operates independently of the "substantial burden" provision of RLUIPA, and a claim under this prong of the federal act would not suffer from issues related to ripeness. On its face, however, the proposed Initiative does not discriminate against Pacific Union College or any other religious institution. This fact does not preclude a party from attempting to show that the Initiative disproportionately impacts its properties but, at this time, we are aware of no facts that would establish such a claim. We understand that Pacific Union College is not the only private party affected by many of the terms of the Initiative; thus, the Initiative arguably applies equally to all landowners.[13]

Regardless of the substantive theory at issue, a claimant under RLUIPA must establish standing. To this end, it is unknown at this time whether any claimant, such as Pacific Union College, could establish the requisite facts to confer standing under RLUIPA, which requires that a claimant either receive federal monies, have a nexus with interstate commerce, or undergo an adjudicatory, individualized land use approval process. However, the attached authorities would appear to indicate that, generally, it is fairly easy to establish standing. (Appendix C.)

Depending on what facts Pacific Union College can ultimately establish, there remains some risk, albeit one we deem small, of future claims that the Initiative violates RLUIPA. Though the risk of a successful suit may be diminutive at this time, the costs of defending such a lawsuit in federal court, though difficult to estimate, could reach $500,000 – $750,000, or more, through the appellate level.

[13] At the same time, the Initiative does seek to eliminate, in PI designations, an exception to the minimum parcel size restriction that currently allows "further parcelization … to support the college's educational mission …." Further, the Initiative would eliminate planned development zoning in favor of AWOS and Public-Institutional designations. The General Plan provides that "[t]he college's Planned Development zoning was created in order for the college to provide necessary services to its students and ensure that the college would be able to grow should the student body increase in size" (AG/LU-32.) Thus, Pacific Union College could potentially argue the Initiative targets only, or primarily, the college by revising policies specifically designed to facilitate the institution's interests. The college still would have to prove the Initiative's changes to land use plans addressing education also interfere with religious exercise, however, to make any RLUIPA claim, and there is no evidence supporting such a claim at this point.

I. To What Extent May A Portion Of The Initiative Survive If Other Portions Are Not Valid?

The potential defects in the proposed Initiative would not seem to affect the entirety of its scope, and Section 6 of the Initiative contains a severability clause which states in relevant part: "If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, part, or portion of this initiative is held to be invalid or unconstitutional by a final judgment of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this initiative." The question is whether portions of the Initiative may survive in the event other sections are held invalid, despite this severability clause.

A provision in, or a part of, a legislative act may be unconstitutional or invalid without invalidating the entire act." (13 Cal. Jur. 3d. Const. Law, § 76; *Verner, Hilby & Dunn v. Monte Sereno* (1966) 245 Cal.App.2d 29, 33.) Thus, "[a]n ordinance may contain provisions which are invalid, either because of a conflict with state law or for any other reason, and other provisions which appear to be valid, and in such case the question arises whether the good may be separated from the bad and allowed to stand. Sometimes the legislative body declares its intent, by a severability clause, that each part of its enactment stands or fall on its own merits, regardless of the others, and considerable weight is given to such a clause." (*People v. Commons* (1944) 64 Cal.App.2d Supp 925, 932-933; *see Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 227, 237-238.) However, even if broadly drawn, a severability clause does not deprive the judiciary of its normal power and duty to construe the statute and determine whether the invalid part so materially affects the balance as to render the entire enactment void. "In other words, the presence of a severability clause does not change the rule that an unconstitutional [or invalid] enactment will be upheld in part only if it can be said that that part is complete in itself and would have been adopted even if the legislative body had foreseen the partial invalidation of the statute." (*Verner, supra,* 245 Cal.App.2d 29, 35.) That is, "where the invalid portions of the statute are so connected with the rest of the statute as to be inseparable, it is clear the act must fall." (*Commons, supra,* 65 Cal.App.2d Supp. at 933.)

Here, those portions of the Initiative which may be subject to Map Act and Planning and Zoning Law preemption and violations concern the Initiative's amendment of the General Plan's PI designation to totally and permanently prohibit any subdivision whatsoever in PI-designated lands. There exist other sections of the Initiative that would modify the County's AWOS designation, and extend it to additional lands, and these would appear to be unaffected by invalidation of the subdivision bar. Given the Proponents' asserted intent to clarify the Land Use Map issue, the risk of invalidation of the Initiative on that ground appears small. Therefore, it is likely the severability clause would effectively operate to limit the extent of invalidation of the terms of the Initiative if a reviewing court did determine certain portions only were preempted and invalid.

III. CONCLUSION.

Overall, there is significant risk that, if enacted, the proposed Initiative, or portions of it, would be vulnerable to being legally challenged and invalidated. The Initiative's most significant potential legal defects include:

- The Initiative's provisions effecting a permanent prohibition of subdivisions in PI-designated lands are likely preempted, in whole or in significant part, by the

Subdivision Map Act, and also likely violate the State Planning and Zoning Law's interim urgency ordinance and uniformity requirements.

- The Initiative may constitute illegal spot zoning and violate equal protection rights guaranteed to local property owners.

- The Initiative may be misleading, or worse, illegal, by virtue of its re-adoption of the County's entire Land Use Map, which could be construed to severely and permanently restrict the County's future exercise of its police power authority to amend the Land Use Map for any reason without a further vote of the people. However, this risk would be ameliorated to the extent the Proponents clarify this issue in the ballot materials before the vote occurs, as stated in a letter by their legal counsel.

Less potent grounds for potential legal challenges to the Initiative include:

- Certain provisions of the Initiative facially violate California Initiative Law's prohibition of "indirect" legislation and the use of precedence clauses. Whether a fatal legal defect would be held to exist on this basis, however, depends on whether the Initiative creates internal inconsistencies in the County's General Plan, which, in turn, depends on how the County Board of Supervisors exercises its power to interpret the General Plan. While there arguably may be some inconsistencies, based on the available evidence, we see no clear General Plan inconsistencies which we believe would support invalidating any part of the Initiative, and this conclusion is supported by the County's own planning analysis.

- The Initiative, insofar as it restricts Pacific Union College's use of its land, may give rise to future claims and lawsuits based on assertions that it violates the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Based on (a) the ministerial nature of the County's role under the Elections Code; (b) existing law that strongly disfavors pre-election review of Initiative measures, and (c) the facts that the Initiative contains a severance clause and that some of its provisions (e.g., the ban on subdivision in PI lands) are likely to be held severable in the event they are enacted and then invalidated, it is highly unlikely that pre-election review of the Initiative would be granted by a court. Therefore, it is not recommended that pre-election review be sought, even if County's Board believes the Initiative is legally defective.

APPENDIX B: Consistency Analysis of Proposed Initiative and County General Plan

ISSUE: Does The Initiative Potentially Result In An Internally Inconsistent General Plan And, If So, Can The Initiative Withstand A Challenge On That Basis?

Any initiative amendment to a general plan "must conform to all the formal requirements imposed on general plan amendments enacted by the legislative body. The amendment itself may not be internally inconsistent, or cause the general plan as a whole to become internally inconsistent (Gov. Code, § 65300.5), or to become insufficiently comprehensive (Gov. Code, § 65300), or to lack any of the statutory specifications for the mandatory elements of the general plan set forth in Government Code section 65302. (*DeVita*, *supra,* 9 Cal. 4th at 796, n.12.) As set forth in Section III.A.2, of the Memorandum, an inconsistency also would make the Initiative vulnerable to a claim that the Initiative violates the prohibition against "indirect" legislation.

Authorities Defining Consistency.

"An action, program or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." (Governor's Office of Planning and Research, *General Plan Guidelines* (2003), p. 164; *see Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 13 Cal.App.4th 1577; *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879.) To be consistent, an action, program, or project must be "in agreement or harmony" with the general plan. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817.) In evaluating the scope or meaning of any given policy in a General Plan, the legislative body that adopted the document is entitled to significant deference in its interpretation. (*See, e.g., Save Our Peninsula Comm. v. County of Monterey* (2001) 87 Cal.App.4th 99, 142 [city's interpretation owed "great deference … because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity"].)

The proposed Initiative arguably may create rules that are inconsistent with some policies and actions in the General Plan, although there is no clear evidence of any internal inconsistency. The determination ultimately would depend on the manner in which the County Board of Supervisors interpreted existing provisions in the General Plan.

The Proposed Initiative Arguably May Conflict With The General Plan By Discouraging The Location Of Urbanized Uses In The Angwin Area.

The terms of the proposed Initiative, insofar as it bans subdivisions and redesignates certain parcels from Urban Residential to AWOS, potentially could be deemed to be in disharmony with certain policies in the General Plan that could be interpreted to promote the location of urban uses in the Angwin area.

One general class of policies in the General Plan that arguably might conflict with provisions of the proposed Initiative are those that seek to locate urban uses, such as multi-family housing and commercial uses, in "urbanized areas." For instance, the General Plan includes the following policies:

- **Policy AG/LU-22**: Urban uses shall be concentrated in the incorporated cities and town and designated urbanized areas of the unincorporated County in order to preserve agriculture and open space, encourage transit-oriented development, conserve energy, and provide for healthy, "walkable" communities. (AG/LU-17.)
- **Policy AG/LU-23:** Consistent with longstanding practice and "smart growth" principles, the County will enact and enforce regulations that will encourage the concentration of residential growth within the County's existing cities and town and urbanized areas designated on the Land Use Map. (AG/LU-17, -18.)
- **Policy AG/LU-28:** Consistent with the County's longstanding commitment to urban-centered growth, new multi-family housing and other urban uses shall be directed to the incorporated cities and town and urbanized areas of Napa County. (AG/LU-18.)
- **Policy AG/LU-34:** The following standards shall apply to lands designated as Urban Residential on the Land Use Map of this General Plan.
  Intent: Provide, in identified urban areas, for development of a full range of urban housing opportunities, such as detached or attached single-family dwellings, multiple dwellings, townhouses, row houses, condominiums, live/work lofts, and cluster housing, in a desirable relationship to planned common use space, limited commercial, institutional, educational, child care, cultural, recreational, and other uses, while at the same time preserving the quality of urban areas. (AG/LU-20.)
- **Policy H-2b**: The County shall encourage the construction of new affordable housing units within designated urban areas at densities that are commensurate with the availability of public or private water and sewer systems. These units shall be capable of purchase or rental by persons of extremely low-, very low-, low- and/or moderate-income as determined by applicable Federal guidelines. (H-13.)
- **Policy H-4a:** Multifamily housing will be constructed within designated urban areas of the County where public services are adequate or can be made available. This excludes individual single-family residences, legal accessory dwellings on commercially-zoned parcels, farm labor dwellings, and second units, which can be located outside of designated urban areas. (H-14.)

In delineating "urban" or "urbanized" areas, the General Plan could be interpreted to include the Angwin area in this class. The following policies are relevant to this potential interpretation:

- **Policy AG/LU-58:** The "urbanized" area of Angwin shown on the County's land use map and zoned Planned Development shall contain institutional uses (i.e., the college), residential uses, and limited neighborhood-serving non-residential uses. (Also see Policy AG/LU-53.)
- **Policy AG/LU-63:** The County recognizes the historical significance of Pacific Union College in the Angwin community and will continue to support this time-honored institution and employer in its educational mission. (AG/LU-33.)
- **Policy AG/LU-65:** The Angwin area should retain a variety of housing types to support residents, students, and employees of Pacific Union College and St. Helena Hospital. (AG/LU-33.)

Arguably, the Angwin area is consistently described and envisioned as an area intended to accommodate urban uses that are supportive of Pacific Union College and the St. Helena Hospital; one policy says that the Angwin Area that "shall" contain specified urban uses, including residential uses (*see* Policy AG/LU-53). While this policy specifically

references parcels in the area that are ”zoned Planned Development,” it is unclear whether the General Plan contemplates urban uses for those parcels insofar as they continue to be zoned as stated, or whether the identified parcels (i.e., those parcels that *currently* bear a Planned Development zoning designation) should continue to accommodate urban uses.

The terms and intent of the proposed Initiative could, depending on the interpretation of the County Board of Supervisors, be deemed to contradict or frustrate these policies. For instance, the proposed Initiative would redesignate two parcels owned by Pacific Union College from Urban Residential to AWOS, which generally permits only agricultural uses. Insofar as parcels currently are designated or would be redesignated PI, the Initiative would preclude any subdivision of such parcels. The practical effect of these terms would be to discourage urban uses in an area that the General Plan contemplates for the expansion of urban uses; hence, conflict might arguably surface.

The Proposed Initiative Arguably May Conflict With General Plan Policies Requiring A Stable And Consistent Regulatory Environment.

As further explained in Sections B and C, of the Memorandum, the Initiative, insofar as it precludes subdivisions in parcels designated Public Institutional, would appear to freeze existing land use regulations that apply to such parcels, with the effect that each parcel in a given zone is subject to different requirements, e.g., a different minimum parcel size. Such a framework could be in disharmony with the following General Plan policies:

- **Goal AG/LU-6:** Create *a stable and predictable regulatory environment* that encourages investment by the private sector and balances the rights of individuals with those of the community and the needs of the environment. (AG/LU-12, emph. added)
- **Policy AG/LU-107:** The County shall provide *a clear, consistent, timely, and predictable review process* for all proposed projects, ensuring that all applicants are treated fairly, that staff’s analysis is objective, and that decision-makers and interested members of the public receive information and notice as required by law.
- **Action Item AG/LU-107.1:** Undertake revisions to the zoning ordinance (County Code Title 18), *simplifying and reorganizing to the extent feasible so that members of the public, applicants, planners, and decision-makers can more easily access information and understand code requirements*. (AG/LU-62 , emph. added.)

Insofar as the Initiative has the potential to create a system of regulation that is not uniformly applicable, it would appear to create an inconsistent, unpredictable, and obscure review process for any proposed project on affected parcels, and potentially result in unfair treatment to current owners of parcels who may see neighbors disparately burdened or benefited based on the existing configuration of land. Such a framework could be deemed unstable and not conducive to investment.

The Initiative further fails to create new zoning code requirements that address the disparate lot sizes and particular issues that may arise from these differences. Accordingly, the County Board of Supervisors could interpret these policies to conflict with the proposed Initiative insofar as it creates, practically, a widespread system of spot zoning.

The Proposed Initiative Arguably May Conflict With General Plan Policies Requiring Equitable Treatment of Property Owners.

As discussed above, the Initiative has the potential to create a regulatory land use framework that treats property owners who ostensibly are subject to the same zoning designations in a disparate manner. The Initiative therefore could be interpreted to frustrate a policy in the General Plan mandating equal treatment of persons:

- **Policy AG/LU-106:** The County shall seek to ensure that equal treatment is provided to all persons, communities, and groups within the county in its planning and decision-making processes, regardless of race, age, religion, color, national origin, ancestry, physical or mental disability, medical condition, marital status, gender, self-identified gender or sexual orientation, or economic status.

Thus, to the extent the proposed Initiative may engender a viable claim of violation of equal protection rights, it also may, depending on the proclivity of the County's Board, be deemed to create an inconsistency with the aforementioned policy in the General Plan.

The Proposed Initiative Arguably May Conflict With General Plan Policies That Require The County To Maintain Flexibility In Its Planning.

The proposed Initiative would amend the Napa County Land Use Map "as set forth in Exhibit D," which is a map from the General Plan that includes all of Napa County. Meanwhile, Section 8 of the proposed Initiative, without qualification, provides that "this initiative may be amended or repealed only by the voters of the County of Napa." A potential implication is that the Initiative may propose to re-adopt the Land Use Map in whole, such that any future amendments to the map would require approval of the electorate. (*See* Memorandum at Section III.D.2.) However, the Initiative's Proponents have submitted a letter (Appendix A to the Memorandum) disavowing any such intent and asserting they will so clarify in the ballot materials.

If, contrary to the Proponents' post-submittal letter, the matter were not clarified in the ballot materials, and the Initiative were construed to adopt such a restrictive mechanism for amendment, such a mechanism would appear to conflict with the following General Plan policies that reserve to the County flexibility in its land use planning:

- **General Agricultural Preservation and Land Use Policy:** Preserving the economic viability of agriculture by helping to position Napa County to compete globally and by accepting the industry's *need to adapt and change* is a goal that is inherent in the policies presented in this Element. (AG/LU-9, emph. added.)
- **Policy AG/LU-33:** *The County will promote development concepts that create flexibility, economy, and variety in housing* without resulting in significant environmental impacts and without allowing residences to become timeshares, resorts, hotels, or similar tourist-type accommodations. (AG/LU-19, emph. added)
- **Policy AG/LU-109:** The County recognizes the principle of sustainability by seeking to address community needs *without compromising the ability of future generations to meet their own needs*. (AG/LU-62, emph. added)

The County Board of Supervisors would be within its discretion to determine that the flexibility provided for in this policy could be compromised by the Initiative to the extent it actually requires a vote of the electorate for *any* amendment to the Land Use Map.

The Proposed Initiative Arguably May Conflict With General Plan Policies That Limit Uses In AWOS Zones To Agricultural Uses.

The proposed Initiative would amend the AWOS designation to allow for the "modernization and expansion of the existing sewage treatment facility located on the West side of Howell Mountain Road." This term might conceivably be interpreted to contradict the following General Plan policy:

- **Policy AG/LU-12:** No new non-agricultural use or development of a parcel located in an agricultural area shall be permitted unless it is needed for the agricultural use of the parcel, except as provided in Policies AG/LU-2, AG/LU-5, AG/LU-26, AG/LU-44, AG/LU-45, and ROS-1. (AG/LU-14.)

If "development" were interpreted to encompass an intensification of existing development, the Initiative could be viewed as in conflict with this policy. However, given the County's past interpretation and application of its AG/LU policies to allow intensification of existing development within AWOS lands in some instances, it is unlikely any inconsistency would be found.

Appendix C

Under RLUIPA, A Law May Not Substantially Burden Religious Exercise Unless The Law Is Narrowly Tailored To Further A Compelling State Interest.

Under RLUIPA, a government may not substantially burden the religious exercise of persons or entities through land use regulation, or otherwise discriminate against religious entities through land use enactments. Under the substantial burden test, a government may not "impose or implement a land use regulation in a manner that imposes a *substantial burden*" on religious exercise unless the government demonstrates that the imposition of the burden is "in furtherance of a *compelling governmental interest*" and is the "*least restrictive means* of furthering" that interest. (42 USC, § 2000cc.)

a. *Definition Of "Substantial Burden."*

RLUIPA does not itself define "substantial burden," but case law does provide guidance.

The Ninth Circuit has held that "for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." (*San Jose Christian College v. City of Morgan Hill* (2004) 360 F.3d 1024, 1034-35.) Accordingly, a land use regulation that lessens to a significantly great extent the possibility that a group could construct a religious building would constitute a substantial burden. (*Guru Nanak Sikh Society of Yuba City v. County of Sutter* (9th Cir. 2006) 456 F.3d 978, 992 [county violated RLUIPA where it twice denied use permit application, the first time based on concerns that infill location would cause traffic and noise issues, the second time due to concerns that relocated site on a large, agriculturally-zoned site would encourage leapfrog development; county had not asserted any compelling interest].) The burden is on the plaintiff to establish a substantial burden.

b. *Definition Of "Religious Exercise."*

Another key component of a claim under RLUIPA is establishing that a religious exercise is at issue. "Religious exercise" is defined broadly to include the "use, building, or conversion of real property for the *purpose* of religious exercise." (42 USC, § 2000cc-5(7)(B) [emph. added].) Under RLUIPA, the exercise of religion does not have to be "compelled by, or central to, a system of religious belief." (42 USC, § 2000cc-5(7)(A).) RLUIPA goes on to state that the Act's aim of protecting religious exercise is to be construed broadly and "to the maximum extent permitted by the terms of this chapter and the Constitution." (42 USC, § 2000cc-3(g); *see Westchester Day School v. Village of Mamaroneck* (2d Cir. 2007) 504 F.3d 338, 347.) Thus, facilities like religious schools, religious education offices, and those that serve as meeting places for religious councils and other gatherings clearly fall within the scope of RLUIPA. (*See, e.g., Mintz v. Roman Catholic Bishop of Springfield* (D.Mass 2006) 424 F.Supp.2d 309.) However, there are important limitations on the scope of RLUIPA.

First, mere ownership of a property by a religious entity does not convert its use into a religious one. (*Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.* (N.D.Ga.,2012) 2012 WL 500263, *20.) Second, where a religious institution engages in secular activities that do not relate to religious exercise, the protections of RLUIPA do not apply. (*Grace United Methodist Church v. City of Cheyenne* (10th Cir.2006) 451 F.3d

643, 654; *Calvary Christian Center v. City of Fredericksburg* (E.D.Va.,2011) 800 F.Supp.2d 760, 773; *Westchester Day School v. Village of Mamaroneck* (2d Cir. 2007) 504 F.3d 338, 347-48; *Westchester Day Sch. v. Village of Mamaroneck, supra,* 417 F.Supp.2d at 543-544; *Guru Nanak, supra,* 326 F.Supp.2d at 1151.) As the Second Circuit noted, RLUIPA requires an examination into 'whether the facilities to be constructed [are] to be devoted to a religious purpose.'" (*Westchester Day Sch., supra,* 417 F.Supp.2d at 544*, citing Westchester Day Sch. v. Village of Mamaroneck* (2d Cir. 2004) 386 F.3d 183, 189, emph. added.)

c. *Definition Of "Compelling Interest."*

If a party establishes that a legislative act "substantially burdens" a "religious exercise," the government only may justify the law by demonstrating that the imposition of the burden is "in furtherance of a *compelling governmental interest*" and is the "*least restrictive means* of furthering" that interest. (42 USC, § 2000cc.) Case law provides guidance on what qualifies as a "compelling interest."

Compelling governmental interests are those that protect public health, safety or welfare. (*See Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ["[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."]; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), *quoting Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 888, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).)

The preservation of land uses, including agricultural and industrial uses, likely does not qualify as a compelling interest, however. In the district court opinion preceding Ninth Circuit's decision in *Guru Nanak, supra,* the district court stated, "defendants [did] not attempt to argue that ... concerns about consistency with agricultural use constitute a compelling interest," noting that the defendants' "reluctance to raise such arguments is understandable, for the strict scrutiny standard imposed by RLUIPA is a difficult one to meet." (*Guru Nanak Sikh Society of Yuba City v. County of Sutter* (E.D.Cal.2003) 326 F.Supp.2d 1140, 1154.) When the Ninth Circuit affirmed the district court's grant of summary judgment, the Ninth Circuit noted that "[t]he County effectively concede[d] that it has no compelling interest." (*Guru Nanak,* 456 F.3d at 992.)

On the basis of the *Guru Nanak* decisions, another district court in California held that the preservation of industrial land was not a compelling interest, especially where a city permitted other, non-industrial uses in the vicinity. (*Grace Church of North County v. City of San Diego* (S.D.Cal. 2008) 555 F.Supp.2d 1126, 1140.)

d. *Standing Requirement.*

A claimant under RLUIPA must establish standing however, it is not difficult, as a practical matter, to satisfy this jurisdictional requirement. RLUIPA only applies in one of three circumstances:

- <u>If the state "program or activity receives Federal financial assistance."</u> (42 USC, § 2000cc(2)(A).) This requirement implicates congressional authority pursuant to the Spending Clause. (*Guru Nanak, supra,* 456 F.3d at 986.)

- If the substantial burden imposed by local law "affects … [or] would affect, commerce with foreign nations, among the several States, or with Indian tribes." (42 USC, § 2000cc(2)(B).) This requirement implicates congressional power pursuant to the Commerce Clause. (*Guru Nanak, supra,* 456 F.3d at 986.) From a practical standpoint, it does not appear particularly difficult to meet this criterion by establishing a nexus with interstate commerce. (*See, e.g., Westchester Day School v. Village of Mamaroneck* (S.D.N.Y. 2006) 417 F.Supp.2d 477; *See Camps Newfound/Owatonna v. Town of Harrison* (1997) 520 U.S. 564, 573; *Reich v. Mashantucket Sand & Gravel* (2d. Cir. 1996) 95 F.3d 174, 181; *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*(C.D.Cal.2002) 218 F.Supp.2d 1203, 1221-22.)

- If "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulation, under which a government makes, or has in place formal or informal procedures of practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved." (42 USC, § 2000cc(2)(C), emph. added.) This provision means that RLUIPA applies "when the government may take into account the particular details of the applicant's proposed use of land when deciding to permit or deny that use." (*Guru Nanak, supra,* 456 F.3d at 986.) Unless the other two criteria are met, RLUIPA does not apply to land use regulations that typically are written in general and neutral terms. However, where a general regulation is applied to grant or deny a certain use to a particular parcel of land, that application is an "implementation under" under 42 USC, § 2000cc(2)(C). (*Guru Nanak, supra,* 456 F.3d at 987.)