

MEMORANDUM

TO: The Napa County Board of Supervisors

FROM: Sean Marciniak

CC: Minh Tran, Napa County Executive Officer;
Silva Darbinian, Deputy County Counsel

DATE: February 20, 2018

RE: Legal Analysis of Napa County Watershed and Oak Woodland Protection Initiative of 2018

At the request of the Napa County Board of Supervisors, we have prepared the following legal analysis of the Napa County Watershed and Oak Woodland Protection Initiative of 2018, 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 2017, certain citizens of Napa County ("Proponents") proposed the Napa County Watershed and Oak Woodland Protection Initiative of 2018 ("Initiative"). This Initiative proposes to amend the County of the Napa County General Plan and the County's Code of Ordinances ("County Code," or "NCC") to curtail future development along certain streams and wetlands, and within certain oak woodlands. Specifically, the Initiative states that it would:

- Limit the removal of trees, including both oak and non-oak species, within certain distances of streams and wetlands, where the size of this buffer would vary based on the type and quality of the waterbody at issue. This limitation would only apply to parcels that are both (1) greater than one acre in area, and (2) located within an Agricultural Watershed ("AW") zoning district. Ten exceptions would exist, including exceptions for the removal of dead, dying, or diseased trees and for the removal of trees located on public land. The complete list is identified below in Section II of this Memorandum.
- Mandate that, in the issuance of any discretionary approval, the County require that parties proposing to remove oak trees or oak woodlands replace these resources, or permanently preserve comparable habitat, at a 3:1 ratio. This

requirement would only apply to the removal of trees on parcels that are (1) greater than one acre in area, and (2) located within an AW zoning district. The ten exceptions referenced above would apply to this requirement as well.

- Limit the removal of oak trees after 795 acres of oak woodland habitat disappear, as measured from September 1, 2017 (the “Oak Removal Limit”). More specifically, the Initiative provides that:
 - Once 795 acres of oak woodlands are removed, whether by approval of the County or without authorization, the further removal of oak trees from private land within AW districts (without any qualification as to size) shall be subject to an oak removal permit or a use permit, depending on the number of trees proposed for removal.
 - After the 795-acre limit is reached, the County only may issue oak removal permits if: (1) the tree removal will take place on properties that are a minimum of 160 acres; (2) the tree removal is necessary to ensure that agricultural use of the parcel will be economically viable; and (3) if certain other findings can be made, as detailed in Section II of this Memorandum. The ten exceptions referenced above would apply to this permitting requirement as well.

The proposed Initiative would amend both the County’s General Plan and the Napa County Zoning Code to effect these changes, and provides that these legislative amendments can be further amended or repealed only by the voters of Napa County.

The Initiative has some potential legal flaws that might engender litigation challenges if it were enacted. These potential legal defects are summarized as follows:

- The Initiative is arguably unlawfully vague or misleading with respect to: (1) various standards it imposes that are based on considerations of “necessity;” (2) what type of losses to oak woodland habitat will “count” toward the Oak Removal Limit and would trigger a violation of the water quality buffer zone restrictions, particularly with respect to trees lost to wildfire; (3) what otherwise constitutes a “removal” of trees; (4) how the term “wetland” is defined, and how it interrelates to other portions of the proposed legislation; (5) how the Initiative relates to and/or amends Measure J, a previous initiative adopted by the County’s voters in 1990 that sought to preserve agricultural land uses in the County’s agricultural districts; (6) the Initiative’s effect on the General Plan Land Use Map; (7) the degree to which internal contradictions in the Initiative’s text might render it impossible for a property owner to obtain a use permit for the removal of oak trees after the Oak Removal Limit is reached; and (8) the degree to which the replanting of vineyards is exempt from the Initiative’s water quality buffer zone restrictions. (See Sections III.A and III.B of this Memorandum.)
- Certain terms of the Initiative may be preempted by the Oak Woodland Protection Act and recent housing legislation designed to streamline the approval of accessory dwelling units. (See Sections III.C.2.a and III.C.2.c.ii of this Memorandum.)

- The Initiative might be deemed to violate the citizenry's equal protection rights insofar as it exempts from its regulations the replanting of certain vineyards, telecommunication towers, cellular towers, and other defined private uses, whereas other agricultural uses and private activities are subject to the Initiative's restrictions. (See Section III.D.3 of this Memorandum.)
- The Initiative does not clearly provide persons accused of violating it the right to a hearing, potentially in tension with constitutional due process rights and protections. It also could, on its face, subject property owners to enforcement actions and criminal penalties who, through no fault of their own, lose trees due to wildfire. (See Sections III.B.3, III.D.4, and III.D.5 of this Memorandum.)
- Certain parts of the Initiative, on their face, could 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, would depend on whether the Initiative were deemed to create internal inconsistencies in the County's General Plan. To that end, the Initiative's provisions might conflict with more than a dozen goals, policies, and other provisions of the General Plan. (See Section III.F and Appendix A of this Memorandum.)

There is a significant likelihood the Initiative could be challenged on some or all of the foregoing bases.

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 that are difficult to predict. The Initiative could subject the County to lawsuits, and could be partially invalidated, based on the aforementioned bases.

As a general matter, the 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 "as is" or place a qualifying initiative on the ballot is considered ministerial. Thus, even though the Board might conclude that all or a portion of the Initiative would likely or potentially be invalid as a matter of substantive law, 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 any legal challenge.

II. **BACKGROUND AND OVERVIEW OF NAPA COUNTY WATERSHED AND OAK WOODLAND PROTECTION INITIATIVE OF 2018**

The Proponents of the Initiative, Napa County residents Mike Hackett and Jim Wilson, have authored an initiative that, if enacted, would accomplish the following:

- **Tree Protection Water Quality Buffer Zones.** The Initiative would establish buffer zones along streams and wetlands on parcels greater than one acre within AW zones, and restrict tree removal within these zones (both oak and non-oak species), though the removal of ferns, greenery, shrubs, poison oak, and other incidental vegetation would be permitted. The aforesaid buffer zones would

extend between 25 to 125 feet from the top-of-bank of any Class I, II or III stream, as defined, and within 150 feet of any wetland.

- **Oak Woodland Mitigation Requirements.** The Initiative would establish mandatory mitigations where the County renders a discretionary approval that involves the removal of oak trees or oak woodlands on AW zoned lands greater than one acre, requiring on-site replacement of lost oaks trees or oak woodlands, or permanent preservation of comparable habitat, at a minimum 3:1 ratio. Where on-site remediation is infeasible, the Initiative would require purchase of a conservation easement or payment of in-lieu fees sufficient to provide permanent preservation of comparable oaks at a 3:1 ratio on developable land within Napa County.
- **Oak Removal Limit and Permitting.** The Initiative would establish an “Oak Removal Limit,” such that when a cumulative total acreage of 795 acres of oak woodlands are removed or approved for future removal in AW zones, the further removal of oak trees or oak woodlands would be subject to a special permitting process. Specifically:
 - After the Oak Removal Limit is reached, the County would only issue these permits if one of the enumerated, ten exceptions apply or if all of the following conditions apply:
 - The tree removal will take place on properties that consist of at least 160 acres;
 - The tree removal is necessary to ensure that agricultural use of the parcel will be economically viable;
 - The removal is consistent with the policies and standards of the County’s General Plan and any applicable specific plan;
 - The permit allows removal of no more than five oak trees during any ten-year period;
 - The oak mitigation framework, as discussed above, is followed;
 - Oak tree removal is allowed only to the minimum extent necessary to ensure the economic viability of a property or address one of the listed exceptions; and
 - At least 90 percent of the oak canopy cover on a parcel is retained unless it is infeasible to require as much.
 - A proposal to remove ten or fewer oaks within a twelve-month period requires an oak removal permit. A proposal to remove more than ten oaks on a parcel within twelve months requires the approval of a use permit.
 - The County must track and report the acreage of oak woodlands removed pursuant to a specified framework.
- **Exceptions.** Ten exceptions¹ to the foregoing tree removal rules would include:
 - Removing downed and dead trees;
 - Adhering to requirements for firebreaks;
 - Averting an imminent threat to health and safety;
 - When required for the development or maintenance of access roads, septic or wastewater systems, water wells, water resources and storage facilities,

¹ Again, these exceptions apply to each of the three main regulatory frameworks the Initiative proposes for AW zones, including the proposed rules governing tree removals in water quality buffer zones, oak tree/woodland removals that are subject to remediation, and oak tree/woodland removals requiring a permit after the Oak Removal Limit is reached

- public works facilities, solar energy systems, electric vehicle charging stations, telecommunications or cellular towers, trails, flood control projects, or stream crossings;
 - Within a recorded utility right-of-way;
 - On land owned by a public agency;
 - Where undertaken by or at the direction of a government agency as part of a project to preserve, restore, or improve habitat, alleviate a hazardous condition, or abate a public nuisance;
 - When undertaken or authorized by a federal or state agency;
 - Within eleven feet of the centerline of driveways serving legally existing or proposed structures; and
 - Within 150 feet of a lawful residence or other structure.
- **Additional Exception to Water Quality Buffer Zone Regulations.** An additional exception applies with respect to the water quality buffer zone regulations. Tree removal associated with replanting grape vines, when done within the footprint of vineyards approved prior to the effective date of the Initiative, is not an activity that is subject to these rules.
- **Limitations of Initiative.** The Initiative would establish that none of the foregoing tree removal restrictions apply:
 - To the extent they are inconsistent with state or federal law;
 - To property within an Affordable Housing Combination District (“AHCD”) or other combination or overlay district where (1) the primary purpose of the district is to provide affordable housing or residential housing projects; or (2) the approval of the foregoing housing development is necessary to comply with state law;
 - To the extent they effect an unconstitutional taking of property;
 - To the extent they disturb a vested right or interfere with the implementation of project where the applicant has obtained all discretionary permits legally required prior to the effective date of the Initiative.
- **Penalties for Violation of Initiative.** The Initiative would establish penalties for violations of the foregoing rules, including that violations may be prosecuted as a misdemeanor and are subject to the maximum administrative penalties set forth in the County’s.

To accomplish the foregoing, the Initiative proposes direct modifications to a series of provisions in the Napa County General Plan and Code of Ordinances. (Initiative, §§ 3, 4, 5.) The Initiative also appears to indirectly contemplate changes to the General Plan and Code of Ordinances in two ways. First, the Initiative includes a precedence clause, requiring that any County Code provisions that are inconsistent with the Initiative’s proposed amendments shall not be enforced. (Initiative, § 7(A).) Second, the Initiative provides that the County is authorized to change the County’s General Plan and Code “as soon as possible as necessary to ensure consistency between the provisions adopted in this Initiative and other sections of the General Plan ... [and] County Code” (Initiative, § 7(C).)

To the extent the Initiative’s proposed legislation potentially violates or is preempted by state law, it contains savings clauses, whereby its proposed legislative amendments shall not apply where they are inconsistent with state law. (See, e.g., Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2)], § 8].) Section 8 of the Initiative also 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.”

III. LEGAL ANALYSIS

A. An Initiative cannot be misleading.

Courts have found an initiative or referendum petition invalid where it contains a materially misleading or inadequate short title or fails 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.)

Here, the Initiative might be considered misleading insofar as it fails to identify itself as a modification of Measure J, which the voters of Napa County enacted in 1990 to preserve agricultural land. To accomplish this, the Measure J modified the County’s General Plan to provide that the redesignation of existing agricultural land required voter approval, with certain exceptions, until the year 2021. (See General Plan Agricultural Preservation and Land Use Element [“GP-AP/LUE”] Policies -20, -21, -110, and -111.) Measure P, enacted in 2008, extended this sunset date until 2058.

The Initiative does not directly amend Measure J’s provisions, nor does it mention Measure J. At the same time, the Initiative proposes policies that, in prioritizing the protection of riparian and woodland habitat, would arguably create practical conflicts with the voters’ previous direction to maximize and preserve the County’s agricultural production. (See Appendix A, Item 9, of this Memorandum.) While unclear, one potential interpretation of the Initiative is that it would, indirectly,² contemplate a nullification or amendment to Measure J. (See Initiative, § 7(A)(C)&(E).) If this result is intended, the Initiative fails to notify voters in any clear manner of this intent and consequence, and is to that extent misleading. Given that County voters previously decided that Measure J cannot be changed without a vote of the people, this lack of clarity is a material issue.

Assuming the Proponents’ intent is that the Initiative does not contemplate changes to Measure J, it appears that conflicts existing between the land use policies proposed by the Initiative and those adopted by Measure J may nonetheless potentially create a horizontal inconsistency within the General Plan. The legal requirement of horizontal consistency, and the potential conflicts between the Initiative and Measure J, are discussed further in Appendix A of this Memorandum. (See Appendix A, Introductory Paragraphs, Item 9; see also Gov. Code, § 65300.5.)

B. An Initiative cannot be vague.

The United States Supreme Court’s classic statement of the vagueness doctrine is that “a statute which either forbids or requires the doing of an act in terms so vague that men of

² Indirect legislation is, separately and independently, a violation of the law. This issue is discussed in detail in Section III.F of this Memorandum.

common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1200.)

California courts have further stated that “[s]o long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct - like the initiative measure at issue here - a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that ‘the law is impermissibly vague in all of its applications.’” (*Evangelatos, supra*, 44 Cal.3d at 1201; see also *Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1333-1335.)

In articulating rules of construction with respect to initiative measures, courts have held the following:

- Courts interpret voter initiatives using the same principles that govern construction of legislative enactments:
 - Courts begin with the text as the first and best indicator of intent.
 - If there is no ambiguity, the plain meaning of the language ordinarily will govern.
 - If the text is ambiguous and supports multiple interpretations, courts may then turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent.
 - Legislative antecedents not directly before voters are not relevant to the inquiry.
 - The report of a legislative analyst may be used to clarify ambiguities in a given legislative proposal.
 - Ballot materials, including voter information pamphlets and arguments in favor of or opposed to a legislative proposal, may be used to clarify ambiguities therein.
 - A court cannot presume that the electorate as a whole is aware of statements made in an article published in magazine articles, legal periodicals, etc.
 - The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and a court cannot say with assurance that the voters were aware of the drafters' intent. However, if there is reason to believe voters were aware of the drafters' intention and believed the language of the proposal would accomplish it, a drafter's intent may be relevant to the construction of a proposed law..
 - In interpreting a voter initiative, courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote; a court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.
 - A court must enforce the plain meaning of an initiative's text even when its consequences were not apparent from the ballot materials.
 - A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions.

(*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321; *People v. Mentch* (2008) 45 Cal.4th 274, 282; *Ross v. RagingWire Telecom., Inc.* (2008) 42 Cal.4th 920, 930; *People v. Valencia* (2017) 3 Cal.5th 347, 388, 397; *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805; *Robert v. Sup. Ct.* (2003) 30 Cal.4th 894, 904; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904, as modified (Aug. 20, 2003).)

- There is an assumption that voters who approve an initiative are presumed to “have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered...” (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 243-244, quoting *Wright v. Jordan* (1923) 192 Cal. 704, 713.)
- There is a presumption that the voters, in adopting an initiative, did so being “aware of existing laws at the time the initiative was enacted.” (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048; see also *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)
- Court cannot infer voter intent where there is nothing to enlighten it in the first instance. (*Valencia, supra*, 3 Cal.5th at 375.)

The Proponents of the Initiative, through their counsel, have provided materials explaining their intended construction of the Initiative’s proposed legal amendments. The substance of this correspondence, which the County received by email dated February 9, 2017, is included in the analyses below. Based on the foregoing legal authorities, this information is relevant to ascertaining the meaning of the Initiative, but it is not determinative unless it can be shown this information is placed directly before the County’s voters, and that voters believed the language of the Initiative would accomplish the Proponents’ intentions. It is difficult at this time to analyze whether the Proponents’ materials satisfy these criteria, as the inquiry would require knowing the occurrence and impacts of future events (e.g., to what extent the Proponents’ constructions, as expressed in their correspondence and in this Memorandum, are placed directly before County voters).

To some extent, the existing County Code provisions will also carry interpretative weight. Where an ambiguity surfaces in an ordinance, the County Code requires the County to interpret provisions so as “to avoid unconstitutionality wherever possible” (NCC, § 1.04.110), and that no provision of the code “shall be construed as being broad enough to permit any direct or indirect taking of private property for public use” (NCC, § 1.04.130). Similarly, the County Code provides that it “is not the intent of the board of supervisors, in its administrative capacity, to condone or permit the violation of the constitutional rights of any person, nor to condone or permit the taking of private property for public use without payment of just compensation in violation of either the United States or California Constitutions.” (NCC, § 1.04.140.)

1. *The Initiative contains a “necessity” standard that might be deemed unlawfully vague.*

In *Citizens for Jobs and the Economy v. County of Orange*, the court evaluated whether a measure was improperly vague, focusing on the italicized language in the following paragraph:

In section 4 of Measure F, the County would be allowed to expend funds ‘as necessary for the planning of any project [listed in the initiative] ... and for the submission of an approved project to the voters for ratification as required herein, but only upon a vote of the Board of Supervisors after public hearing *and only to the extent necessary* (A) to define the project; (B) to prepare an environmental impact report, [etc.] ... The Board of Supervisors may expend no other funds for any other purposes relating to any such project, until and unless the act by the County to approve the project is ratified by the voters”

(*Id.* at 1335, *emph.* in original.) The court found the italicized provisions were improperly vague. Insofar as the initiative used standards based on necessity (e.g., expending funds *as necessary for the planning of the project, and only to the extent necessary* to define the project), the court said “it is not possible to tell to what extent” the discretion of the Board was circumscribed. “Who is to decide what spending is necessary, or for what purposes that are sufficiently related to the project?” the court asked. (*Id.*, *citing Motorola Communications & Electronics, Inc. v. Department of General Services* (1997) 55 Cal.App.4th 1340, 1350.)

The Initiative contains certain provisions that rely on a “necessity” standard, including the following:

- Its terms are inapplicable to property with a combination or overlay district “whose primary purpose is to provide affordable housing or to residential housing projects whose approval is necessary to comply with state law” (Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(1), 18.20.060(G)(1)].)
- It is inapplicable insofar as it is necessary to avoid a violation of law. (Initiative, § 4 [proposed NCC, §§ 18.20.050(C)(2), 18.20.050(G)(2), 18.20.060(E)(3), 18.20.060(G)(2)].)
- After the Oak Removal Limit is reached, the County may issue a permit where it is “necessary” to “ensure the economically viable agricultural use of a parcel.” (Initiative, § 4 [proposed NCC, § 18.20.060(E)(2)].)

Some of these “necessity” standards appear to be appropriately designed, such as those providing that the Initiative does not apply insofar as this result is necessary to avoid a violation of law. It would seem reasonable to expect that the County could analyze and determine, at least in some instances, whether application of a provision of the Initiative would violate a state or federal law (as has been undertaken in this report). However, the Initiative might be deemed impermissibly vague insofar as it would require the County to determine whether issuance of an oak removal permit is “necessary” to “ensure the economically viable agricultural use of a parcel.” (Initiative, § 4 [proposed NCC, § 18.20.060(E)(2)].) For instance, does this provision require County staff to determine that enforcement of the regulation would result in an unprofitable agricultural operation, or generate a reasonable rate of return? If the latter, how would County staff calculate a reasonable rate of return? There are no criteria provided in the proposed ordinance that would guide the County in this respect, raising similar questions as those asked by the court in *Citizens for Jobs and the Economy v. County of Orange*. (See *Citizens for Jobs*, 94 Cal.App.4th 1311 at 1335.)

While various County Code provisions would obligate the County to interpret ambiguities to exclude unconstitutional results (see NCC, §§ 1.04.110, 1.04.130, 1.04.140), those provisions may not assist here. The potential interpretations of “necessity,” as discussed in the foregoing paragraph, would all effect a result that passes constitutional muster, and the rules of construction in the County Code do not require the County to observe “bare minimum” constitutional protections. These rules of construction, therefore, are not assured to resolve the identified ambiguities.

2. Evaluation of whether the Initiative contains terms that are well-defined or would result in confusion.

(a) *Evaluation of Initiative’s use of word “feasible.”*

The Initiative provides that, in establishing an oak removal mitigation framework, on-site remediation is required unless it is “infeasible,” and that any off-site mitigation must be “as close as feasible” to the parcel where trees are proposed for removal. (Initiative, § 4 [proposed NCC, § 18.20.050(A)(2)&(3); see also proposed NCC, § 18.20.070(B)].) The term “feasible” also appears in: (1) the Initiative’s Annual Report requirements, providing that this report must include maps showing the acreage of oak woodlands lost “where feasible” (Initiative, § 4 [proposed NCC, § 18.20.050(C)]); and (2) the oak removal permit criteria, where issuance requires the County to find that at least 90 percent of the oak canopy cover on the subject parcel would be preserved unless “the County makes specific findings why this would be infeasible” (Initiative, § 4 [proposed NCC, § 18.20.060(E)(4)(c)]).

It is unclear how the term “infeasible” is intended to be defined. For instance, does the concept of feasibility take into account legal, economic, and technological infeasibilities, or is feasibility in this instance more limited in scope? The Initiative does not provide any guidance. (See also discussion of ambiguities caused by Initiative’s use of term “infeasible” in Appendix A, Item 11.) Currently, County staff indicate that the majority of their feasibility determinations take account of factors typically considered in CEQA review. Under the state’s environmental framework, the term “feasible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (14 CCR, § 15364.) This fairly comprehensive approach, which contemplates an applicant’s project objectives, comes into play in implementing a number of existing County Code sections where the staff are asked to make a finding or determine a proposed action is feasible. (See, e.g., NCC §§ 18.34.050, 18.104.340, 18.119.070.) Generally, California courts hold that interpretation of the word “feasible” in a legislative plan is within the discretion of the city or county adopting the legislation. (See, e.g., *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 308.)

Ambiguities in the Initiative, if adopted, could create practical concerns. For instance, consider that the Initiative would require that oak mitigation be located on-site unless it is “infeasible” to do so. (Initiative, § 4 [proposed NCC, § 18.20.060(A)(2)].) In making feasibility assessments with respect to tree mitigation (e.g., as set forth in use permit conditions, or CEQA mitigation monitoring programs),³ the County has often found

³ It does not appear that the Initiative’s proposed terms would limit the County’s ability to impose tree mitigation requirements required by other legal frameworks, such as CEQA or the County’s erosion control plan permitting process. For instance, in the

replacement to be an infeasible option for environmental reasons. For example, there may be a lack of suitable area on-site to replace trees, and there can be adverse impacts associated with the replanting of trees. With respect to the latter point, staff have found that the planting of trees can sometimes negatively modify the overall biological function of a given natural community. The replanting of oak trees in a grassland, for instance, could serve to reduce grassland areas within the County and result in adverse impacts to the species that rely on grassland for their habitat. It is unclear whether the Initiative's terms would permit County staff to continue taking into account these environmental factors, or whether feasibility requires the planting of trees to the detriment of other environmental habitats.

Where the existing provisions of the County's General Plan and County Code call for feasibility determinations, the County has consistently interpreted "feasibility" to encompass a broad set of factors. As presently used in County legislation, the term "feasible" is not vague because the County, as the adopter of this legislation, has a unique competence to interpret it.

The Initiative's proponents have indicated that "[f]easibility and infeasibility are terms of art that public agencies, including Napa County, use routinely. For instance, existing County General Plan Policy CON-24, which the Initiative amends, uses a form of this several times. And, of course, feasibility is a central concept in CEQA." (Proponents' response to *Questions based on Preliminary Review of Initiatives*, Question 1.) It appears, then, it is the drafters' intent that the word "feasible" captures the definition historically applied by County planning staff. This stated intent, coupled with the presumption that voters, in adopting an initiative, do so being "aware of existing laws at the time the initiative [is] enacted," suggests the County's historical interpretation of the word "feasible" would govern County's staff implementation of any Initiative's terms the County's voters might adopt. (*Kempton, supra*, 40 Cal.4th at 1048).

Ultimately, while the Initiative's failure to define the term "feasible" creates some potential legal vulnerability, the drafter's intent, coupled with the presumption that voters are aware of existing laws, mitigate the legal risks involved. It seems most likely a court would determine the County would be able to interpret the term as it currently does in implementing other provisions of the County Code and General Plan.

(b) *Evaluation of Initiative's use of the term "oak woodland."*

The Initiative proposes to regulate "oak woodlands," which are defined to mean "oak stands" with "greater than ten (10) percent canopy cover," where an "oak stand consists of at least two (2) oak trees of at least (5) inches in diameter, measured at 4.5 feet above mean natural grade." (Initiative, § 4 [proposed NCC, § 18.20.060(F)(2)].) The term "oak tree," meanwhile, is defined to include "any live tree in the genus *Quercus* that is not growing on timberland." (Initiative, § 4 [proposed NCC, § 18.20.060(F)(1)].)

hypothetical situations where a given property is subject to tree mitigation requirements set forth under proposed section 18.20.060 and CEQA, it would appear that the property owner would have to mitigate impacts according to whichever requirement was stricter.

While these terms are consistent with the manner in which oak woodlands are defined in some County documents, the oak woodland maps routinely used by County staff for planning purposes are compiled using methodologies that do not consider canopy cover.

- (i) Planning documents where oak woodlands are defined consistent with the Initiative's definition of "oak woodland."

The Napa County Voluntary Oak Woodlands Management Plan (the "Plan") provides that "oak woodland communities are categorized by the dominant tree species and the degree of foliage cover, with woodland defined as having a canopy coverage of 10% or greater and trees spaced far enough apart to allow for a variety of shrubs, herbaceous plants, and grasses in the understory." (NCVOWMP, p. 14.) In defining "oak woodland," the Plan cites to section 1361 of the Fish & Game Code, which defines the term to mean "an oak stand with a greater than 10 percent canopy cover or that may have historically supported greater than 10 percent canopy cover." State law also defines the term "oak tree" to "means a native tree species in the genus *Quercus*, not designated as Group A or Group B commercial species pursuant to regulations adopted by the State Board of Forestry and Fire Protection pursuant to Section 4526, and that is 5 inches or more in diameter at breast height." (Pub. Res. Code, § 21083.4(a).)

Overall, there are minor differences between how the Initiative defines "oak woodland" and "oak tree," and how the County and state have defined them in the foregoing legislative enactments or adopted plans (e.g., Initiative's oak woodlands consist of oak stands with a canopy coverage of more than 10 percent, whereas the Plan contemplates the same canopy cover but with shrubs and other plants in the understory; the Fish & Game Code defines the term to mean existing and historic populations of oaks, whereas the Initiative appears to contemplate only existing, "live" populations).

- (ii) Certain County maps that depict oak woodlands utilize a definition that is different from the Initiative's definition of "oak woodland."

The County currently maps oak woodlands according to methodology set forth in the California Native Plant Society's Manual of California Vegetation ("MCV"). This methodology is somewhat complicated, but is not based on a 10 percent canopy threshold. More information about the County's oak woodland maps, officially known as the County's Land Cover (GIS) Layer, can be found in the Biological Resources chapter of the County's Baseline Data Report (2005). (See, e.g., Baseline Data Report, pp. 4-9, 4-15, 4-22.)

Because the County's mapping system is based on methodology that is inconsistent with the Initiative's definitions of oak woodlands, there could be practical difficulties in implementing some of its proposed provisions. For instance, proposed section 18.20.060(B) requires that, "[w]henver the County issues an approval for an activity that includes removal, replanting, or preservation of any oak woodlands, the County shall incorporate any relevant oak mapping information into a vegetation classification and mapping program maintained by the County." It might be difficult, given technological and other factors, to integrate changes in oak woodlands, as defined by the Initiative, with the County's Geographic Information System ("GIS") mapping system. Assessing environmental impacts also could entail a greater degree of work, since planners,

biologists, and/or arborists could no longer rely on County GIS maps, but would have to conduct site visits or review aerial photography whenever any development was proposed to determine if the requisite 10 percent canopy cover was present.

(iii) Conclusion.

There seems to be a low risk the Initiative's use of the term "oak woodland" would be deemed unconstitutionally vague. However, because the Initiative does not define the term as it is used in the MCV, there could be practical impediments to easily tracking the status of oak woodlands within the County.

Note that, to the extent the term "oak woodland" appears in the General Plan (see, e.g., Policy CON-24, p. CON-30), the Initiative's definition of the term in its proposed zoning code amendments would not operate to change the General Plan. (See Appendix A, Item 9 [zoning amendments cannot alter general plan terms].)

(c) *Evaluation of Initiative's use of word "canopy."*

In a few instances, the Initiative proposes rules that involve the term "canopy," without defining it. For instance, under the Initiative's proposed terms, the County would be able to issue an oak removal permit only so long as 90 percent of the oak canopy is retained, unless findings of infeasibility are made. (Initiative, § 4 [proposed NCC, § 18.20.060(E)(4)(c)].) While the term "canopy" is not defined, it has a commonly understood, and clear, meaning. This common meaning is captured in the existing County Code, which defines "vegetation canopy cover" to mean "the crown area of a stand of trees (i.e., upper-story vegetation) in a natural stand of vegetation. For the purposes of this chapter, canopy cover is the collective cover of a grouping of trees viewed from an aerial photograph of the latest edition on file with the department, where the tree stand is continuous. Single trees are not considered canopy cover." (NCC, § 18.108.030.) Another question raised by the Initiative is how, if it were to be enacted, the County would measure tree canopy to ensure compliance with the proposed ordinances. To this end, County staff indicate that calculation of tree canopies is fairly routine, and can be accomplished with site visits or review of certain aerial photography. The legal risk of a court finding that the Initiative's use of the word "canopy" is unconstitutionally vague thus appears to be very low.

(d) *Evaluation of Initiative's use of word "wetland."*

The Initiative defines the term "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." (Initiative, § 4 [proposed NCC, § 18.20.050(D)(7)].) This definition of wetland tracks the language adopted by the U.S. Army Corps of Engineers in Title 33, Code of Federal Regulations, section 328.3(c)(4),⁴ the implementation of which was stayed by a federal court in October 2015. (*In re E.P.A.*

⁴ The Proponents' counsel has confirmed that the Initiative's "definition of wetlands is taken verbatim from the U.S. Army Corps definition in 33 CFR § 328.3."

(2015) 803 F.3d 804, 805.)⁵ The uncertain legal status of the federal definition of “wetland” does not preclude the County from adopting, for purposes of creating tree removal buffers, the language set forth in section 328.3(c)(4). Note, the California State Water Resources Control Board is currently proposing a state wetland definition, but this definition is different than the Initiative’s proposal, and has not been finalized.⁶

While it may be appropriate that the Initiative’s proposed definition of “wetland” tracks a stayed federal definition, it is important to understand that this federal regulatory definition has caused a great deal of uncertainty at the regulatory level. As such, the U.S. Army Corps of Engineers developed a series of technical manuals to provide practical guidance on determining what constitutes a wetland. Congress ultimately directed that the Corps’ 1987 manual be used.

On the local level, the County Code does include ordinances that refer to the word “wetland,” though no ordinance currently defines the term. (See, e.g., NCC, §§ 16.28.060, 18.40.170, 18.66.060, 18.82.080.) County staff indicate that wetlands are mapped as part of biological reports required as part of development projects, which adhere to state and federal protocols under the Clean Water Act. While uncertain, it appears that canons of construction would favor interpreting the word “wetland” as the County traditionally has done in the past.

Notwithstanding the foregoing, the Initiative’s proposed ordinance creates confusion insofar as it appears difficult to distinguish between its definition of the term “wetland” and its definition of the term “stream.”⁷ More specifically, it could be difficult for a property owner to determine whether a given watercourse qualifies as a “wetland” or a “Class I, II, or III stream,” thereby creating confusion about what size buffer should be maintained under proposed County Code section 18.20.050. It is unclear, for instance, whether a given watercourse can qualify as both a wetland and a stream, or whether the terms are mutually exclusive. Consider that a wetland, as proposed, would exist where an area is inundated by water at a frequency to support vegetation typically found in saturated soil conditions. It is conceivable that the requisite hydrology and vegetation could also be found at a watercourse qualifying as a “Class I stream,” which is defined as a perennial

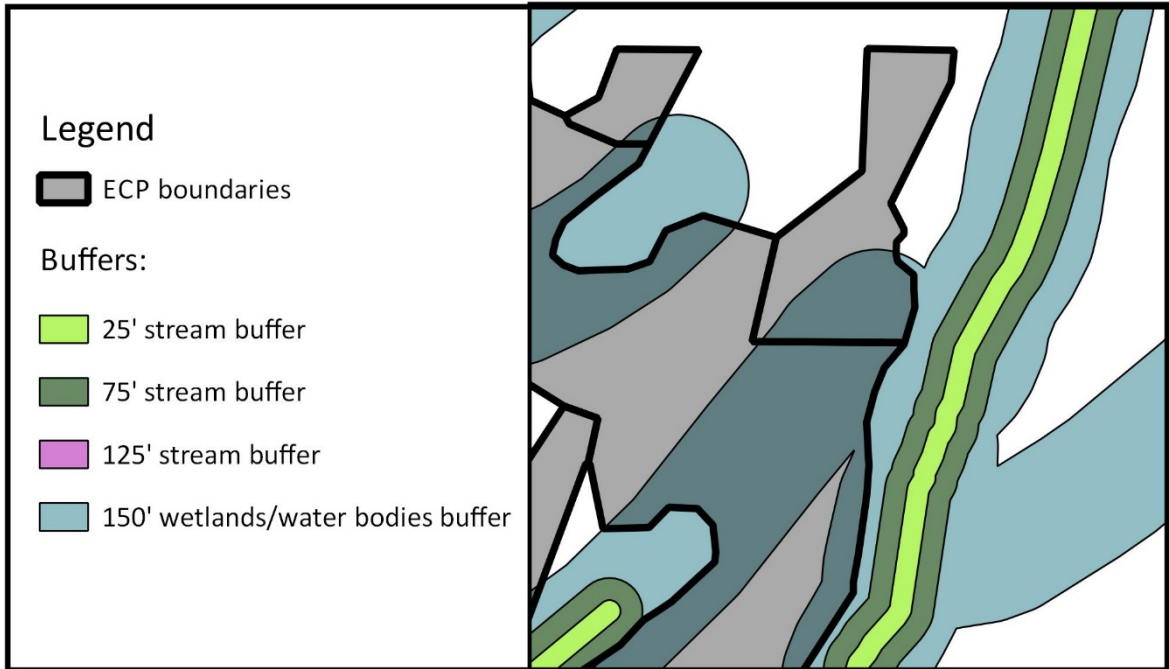
⁵ The United States Sixth Circuit Court of Appeals determined, in part, there was a substantial possibility the regulation was at odds with Supreme Court precedent, and that certain aspects of the regulation never underwent the proper rulemaking procedures.

⁶ The state is currently proposing to define a “wetland” as follows: “An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area’s vegetation is dominated by hydrophytes or the area lacks vegetation.”

⁷ The Proponents of the Initiative have prepared a chart, showing the differences between the Initiative’s definition of “stream” and those definitions adopted under other regulatory frameworks. This chart is attached to this Memorandum in Appendix B. It does not appear the proposed definition of stream in itself is ambiguous; the concerns identified below address the interplay between the Initiative’s use of the terms “stream” and “wetland.”

watercourse (i.e., present at all seasons) that provides habitat for fish. (Initiative, § 4 [proposed NCC, § 18.20.050(D)(1)(2)(3)&(7).]⁸ The practical effect could be significant.

The figure below illustrates the difference in area that comprises each of the Initiative's water quality buffer zones, with the Initiative's 25-foot and 75-foot stream buffers demarcated in yellow, green, and pink, and the Initiative's 150-foot wetland buffers delineated in light blue. Under the Initiative's proposed framework, a property owner with a Class II or Class III stream has no certainty that the smaller buffers apply and, as depicted, a determination that a stream is also a wetland could significantly affect the use of his or her property.



It appears, then, that if the Initiative's regulations were enacted, property owners might have a difficult time understanding what size water quality buffer zones apply to their properties. This ambiguity creates a potential legal vulnerability, and the legal risk is heightened given that a violator of the Initiative's terms are subject to criminal, civil, and administrative penalties (Initiative, § 4 [proposed NCC, § 18.20.070].)

(e) *Evaluation of Initiative's use of the phrase "residence or other structure."*

The Initiative provides that its provisions shall not apply within 150 feet of any "residence or other structure ... or from any point of any proposed such residence or structure" for

⁸ As explained in more detail in [Appendix A](#), Item 11, the Initiative's definitions of stream appear to track state definitions set forth in Title 14, California Code of Regulations, section 916 et seq. However, these state regulations do not appear to contemplate wetlands (i.e., use or define the term), and so there is no clear precedent as to how one might distinguish the terms "wetland" and "stream" as used in the Initiative's proposed legislation.

which building permits have issued. (Initiative, § 4 [proposed NCC, §§ 18.20.050(B), 18.20.050(C)(10), 18.20.060(A)(4), 18.20.060(E)(2)].) The Initiative does not specify, however, whether the building project must entail new construction, or whether additions also qualify for the exception. It would be reasonable for the County to interpret the proposed ordinance to grant exceptions for additions to buildings, though ultimately the scope of the exception is unclear, and the County cannot extrapolate or interlineate meaning that is not present in the text adopted by voters. To the extent the Initiative does not encompass additions, meanwhile, the Initiative might give rise to equal protection claims, brought by homeowners and proprietors of other structures wishing to renovate their buildings.

On the one hand, equal protection claims that do not involve “suspect classes” (e.g., classes based on race, national origin, religion, and alienage) are difficult to sustain, as a governmental agency need only show that a regulation is rationally related to a legitimate government interest. Here, the purpose of the Initiative is to maximize the protection of oak trees and water quality, which are legitimate governmental interests. It is not clear, however, on what basis the Proponents could distinguish between the two construction activities, and no facts have been put forth by Proponents to support this distinction. It would appear, then, that some legal risk would inhere in the Initiative’s scope of regulatory exceptions.

In summary, the scope of the Initiative’s regulatory exceptions is unclear, and resort to the plain text and extrinsic evidence does not appear to resolve the ambiguities. To the extent an equal protection issue does exist, County Code provisions obligate the County to interpret ambiguities to exclude unconstitutional results. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) As such, the associated legal risks appear to be low.

3. *It is unclear what types of losses to oak woodlands count as “removals” under the Initiative.*

- (a) *It is unclear what types of losses to oak woodlands “count” towards the Oak Removal Limit.*

The Initiative provides that the Oak Removal Limit is reached when “the cumulative total acreage of all oak woodlands removed plus all oak woodlands approved for future removal by the County within the AW district since September 1, 2017, equals 795 acres. *All oak woodlands removed within the AW district since September 1, 2017 shall be included in the cumulative total acreage, regardless of whether that removal was authorized or unauthorized.*” (Initiative, § 4 [proposed NCC, § 18.20.060(D)(1), *emph. added*]). It is unclear, however, whether wildfires and other calamities that have the potential to destroy trees and habitat would effect a “removal” of oak woodlands that count toward the Oak Removal Limit. The recent incidents in Napa and Sonoma Counties demonstrate the destructive potential of fires on open space and urban lands. As a result of the fires that occurred in Napa County in the autumn of 2017, newspapers have reported that millions of trees burned. The County estimates that the Nuns, Tubbs, and Atlas burn areas combined to affect 30,639 acres of oak woodlands,⁹ as depicted in the chart below:

⁹ This figure was compiled by overlaying a map of the burn area over the County’s GIS-mapped oak woodlands. Note that: (1) the County’s GIS map does not depict oak

Fire	acres of oak woodlands within fire perimeter	total acres of fire perimeter	% of total
ATLAS	20,747	45,225	46%
NUNS	8,336	19,974	42%
TUBBS	1,556	4,781	33%
TOTALS	30,639	69,981	44%

If 2.5 percent these oak woodlands are considered “removed” under the terms of the Initiative and “count” toward the Oak Removal Limit, the Initiative’s oak removal permitting system would, assuming it were ultimately enacted, be immediately applicable.

The Initiative’s definition of tree “removal” does include the “intentional burning” of trees, and does provide that removal must occur “as a result of human activity” (Initiative, § 4 [proposed NCC, § 18.20.060(F)(3)], but practical questions remain. For instance, in limiting its application to “intentional” burning, does the proposed legislation distinguish between fires caused by natural phenomena (e.g., lightning) and fires caused by the negligence of a human? To the extent “intentional burnings” are contemplated, would this include only the burning of trees to make way for development, or would it also contemplate the scenario where an arsonist set a fire that resulted in the destruction of oak woodlands? It also is unclear whether all fires intentionally and lawfully set by a fire official as a wildfire control method would constitute a removal of oak woodlands that count toward the Oak Removal Limit.

The Initiative’s Proponents have indicated that wildfires do not constitute the “removal” of trees, explaining that “if a tree is already dead, it doesn’t fall within the definition of “oak tree,” and that “removal is defined to mean ‘causing a tree to die or be removed as a result of *human activity* by ... *intentional* burning,’” and that wildfires are not “intentional burning.” (Responses to Questions based on Preliminary Review of Initiatives, Question 3.) Each of the Proponents’ points are recognized, but they do not rid the Initiative of uncertainty in this regard. For instance, as noted above, some wildfires are caused by intentional human activity, such as in the case of arson. Moreover, it is unclear whether the concept of intentionality covers negligent or reckless human behavior, and what happens if the cause of a fire cannot be discerned. Finally, as addressed in the next section, not all trees affected by wildfires die.

The status of backfires set by fire officials also presents some ambiguities. It is recognized that the Initiative identifies various regulatory exceptions, such as those removals which are “necessary to avert an imminent threat to public health and safety,” or “where undertaken or authorized by a federal or state agency” (Initiative, § 4 [proposed

woodlands as defined by the Initiative; and (2) this figure represents the number of acres of oak woodlands affected by the fires, and not necessarily the acreage “removed,” as defined by the Initiative. Please see the other sections of this Memorandum that discuss the ambiguities surrounding the Initiative’s use of the words “oak woodlands” and “removed.”

NCC, § 18.20.050(C)(3)&(8)),¹⁰ but these exceptions appear only to apply to the oak permit removal process that arises after the Oak Removal Limit is reached (Initiative, § 4 [proposed NCC, § 18.20.060(E)(2)]). It also is recognized, as the Proponents point out, that fires lit “by or at the direction or order of a federal or state agency” are not subject to the Initiative’s regulations. (See Initiative, § 4 [proposed NCC, § 18.20.060(G)(3)]; see Responses to *Questions based on Preliminary Review of Initiatives*, Question 3.) This exception would, in great part and as a practical matter, exempt from regulation the setting of backfires for the purposes of fighting wildfires in Napa County. However, not all wildfires are fought at the direction of a federal or state agency. The County does contract its fire services with the California Department of Forestry and Fire Protection, a state agency, but not all the incorporated cities in the County do the same — and a city (or a county, for that matter) does not appear to qualify as a “state agency.” (See, e.g., Gov. Code, §§ 11000, 11410.30(a) [“local agency” is defined as “a county, city, district, public authority, public agency, or other political subdivision or public corporation in the state *other than the state.*”].) Thus, to the extent a fire official not employed by Cal Fire directed a backfire be set that removed trees in unincorporated land, it would appear this act would not fall within the Initiative’s safe harbor under proposed section 18.20.060(G)(3). The Proponents explain that any backfires “not set by or at the direction of a federal or state agency also do not come within the definition of removal, since it is the wildfire, rather than the backfire, that ‘caused’ this removal,” and that to “the extent that there is any ambiguity on this last point, the County clearly has the discretion to interpret the initiative in this way.” (Responses to *Questions based on Preliminary Review of Initiatives*, Question 3.) In suggesting that any removal activity that occurs as a result of or in connection with a wildfire is exempt from regulation, Proponents create a complicated and potentially problematic issue of causality. This interpretation could create loopholes in the regulatory framework that property owners may be able to exploit. A more significant legal concern is that the County may not add to a statute or rewrite it to conform to an assumed intent that is not apparent in its language. It is the intent of the voters that ultimately would govern the meaning of an initiative, based on the information directly before them. Here, broadening the Initiative’s to exempt activities indirectly caused by explicitly identified, exempt activities would create concern that the County is overstepping its authority.

The Initiative’s Notice of Intention to Circulate Petition (“Notice of Intent”) indicates that the Proponents’ concern for oak trees and oak woodlands derives, at least in part, from threats stemming from “development, deforestation, fire and pathogens,” but this statement of intent is fairly general. Ultimately, there remain ambiguities as to what sort of removal activities will register for purposes of calculating the Oak Removal Limit, and neither the plain text of the proposed legislation nor extrinsic aids rid the Initiative’s text of all uncertainty in this regard.

As with the term “necessity,” the various County Code provisions that obligate the County to interpret ambiguities to exclude unconstitutional results does not appear to resolve these ambiguities. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) The potential interpretations of what constitutes a tree removal are not distinguishable from one another

¹⁰ The exception for activities “necessary to comply with written County or state recommendations or requirements for fuel or firebreaks” would not seem to apply to emergency situations. (See (Initiative, § 4 [proposed NCC, § 18.20.050(C)(2)].)

on the basis of constitutionality, and so the foregoing rules of construction do not resolve the inquiry.

- (b) *Tree “removal” with respect to water quality buffer zones also creates ambiguity, and might make property owners criminally liable where such owners lose trees through no fault of their own.*

The Initiative provides that tree removal “is allowed within water quality buffer zones” where removals are (1) “necessary to avert an imminent threat to public health and safety;” (2) “where undertaken or authorized by a federal or state agency;” and (3) “necessary to comply with written County or state recommendations or requirements for fuel or firebreaks” would not seem to apply to emergency situations.” (Initiative, § 4 [proposed NCC, § 18.20.050(C)(3)&(8)].) But whereas these provisions might allow firefighters and other personnel to fight or prevent fires, they do not address the circumstance where a property owner, through no fault of his or her own, suffers a loss of trees due to wildfire. The Initiative’s provisions addressing water quality buffer zones, in controlling the removal of trees, defines removal to include “burning.” This definition, however, does not clearly capture the intentionality of the relevant party, as was done in the proposed oak removal permitting framework, which defines tree removal to include “intentional burning.” (Initiative, § 4 [proposed NCC, § 18.20.060(F)(3)].)

Ultimately, the intent of the legislation is not clearly discernible, and could be interpreted to hold a property owner responsible for a violation of the proposed ordinance, which per the terms of the Initiative is a misdemeanor and makes one liable for maximum fines (see Initiative, § 4 [proposed NCC, § 18.20.070].) Accordingly, if enacted, the Initiative could potentially be deemed a violation of due process rights. This risk is heightened given that a violator of the Initiative’s terms are subject to criminal, civil, and administrative penalties (Initiative, § 4 [proposed NCC, § 18.20.070].) Given that various County Code provisions obligate the County to interpret ambiguities to exclude unconstitutional results, it appears the rules of construction would favor not holding a property owner liable for an action outside his or her control. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140; see also *Kempton, supra*, 40 Cal.4th at 1048 [presumption that voters know the existing laws].) Absent any other indicia of intent, then, it would appear that “burning” could include, without limitation, the intentional, reckless, and negligent burning of trees.

- (c) *It is unclear what quantum of harm or injury to a tree must occur before the activity qualifies as a “tree removal.”*

The Initiative prohibits the removal of trees in delineated water quality buffer zones, and prohibits the unpermitted removal of oak trees after the Oak Removal Limit is reached. But there remain questions as to what types of activities constitute “removals” for purposes of the legislation.

Under the proposed water quality buffer zone rules, tree removal “means causing the death or removal of any living tree of any species ... by cutting, dislodging, poisoning, burning, topping or damaging roots.” (Initiative, § 4 [proposed NCC, § 18.20.050(D)(5)].) The concept of “removal” for purposes of the Initiative’s proposed oak tree regulations is similarly delineated, with removal meaning to cause “a tree to die or be removed as a result of human activity by cutting, poisoning, intentional burning, topping or damaging of roots.” But it is unclear what constitutes a “removal,” since the Initiative uses the term

“removal” to define that very term. (Initiative, § 4 [proposed NCC, § 18.20.050(D)(5); see also proposed NCC, § 18.20.060(F)(3).) This approach makes for a circular definition, raising questions about what sort of injury or harm to a tree would constitute a removal. Would, for instance, a significant amount of tree trimming (i.e., anything short of topping) constitute “removal” of a tree, or must a tree die in order to qualify as a “removal?” Would trees that suffer damage from fire, but remain alive, be “removed” as contemplated by the Initiative?¹¹ Oak woodland habitats can enter into different stages in the course of a life cycle; for instance, after a fire, oak woodland habitat is not necessarily destroyed, but becomes a “re-emerging” habitat, as opposed to a “mature” habitat. The Initiative’s definition of “oak woodland” does not account for these scientific concepts.

These are not merely academic problems. As discussed in the preceding section, the 2017 fires affected more than 30,000 acres of oak woodlands, and questions have been raised as to whether this type of tree destruction would render a property owner liable for violation of proposed section 18.20.050. A substantial number of trees damaged by recent fires, meanwhile, have remained alive, raising questions as to how many acres of oak woodlands have been removed, and how many more can be developed before the Oak Removal Limit is reached.

- (d) *It is unclear how oak woodlands acreage would be counted towards the Oak Removal Limit.*

The Initiative indicates that the Oak Removal Limit is reached “when the cumulative total acreage of all oak woodlands removed plus all oak woodlands approved for future removal ... equals 795 acres.” (Initiative, § 4 [proposed NCC, § 18.20.050(D)(1).] The Initiative does not, however, indicate how oak woodland acreage is to be calculated. For instance, will acreage be calculated according to canopy cover, habitat parameters that are favorable to the growth of oaks, or will a cruder system be employed (e.g., if one oak tree is removed, an entire surrounding acre will be registered toward the Oak Removal Limit)?

As explained in a preceding section, in quantifying the acreage of oak woodlands for general planning purposes, the County currently uses a Geographic Information System, which calculates oak woodland area based on the 1st edition of the Manual of California Vegetation. A complication arises, however, because the Initiative’s definition of “oak woodland,” which is in part based on the degree of canopy cover, does not accord with the MCV’s methodology. If the two definitions and methodologies matched, one could presume the County’s present methodology for calculating oak woodland acreage would apply to its implementation of any new framework. (*Kempton, supra*, 40 Cal.4th at 1048.) However, because “oak woodland” is defined with reference to canopy cover and other factors, the County’s GIS/MCV approach would not be applicable.

Given the County has traditionally mapped habitat not on a parcel-by-parcel basis, but according to what land actually contains oak woodland characteristics, it is likely a court would hold that, in accounting for oak woodlands as defined under the Initiative, the County would have to account only for those acres actually supporting the canopy cover

¹¹ If removal is defined as an action causing “death or removal” of a tree, canons of construction which disfavor superfluous language would suggest something less than death constitutes a removal.

and other characteristics identified in the proposed legislation. (See *Kempton, supra*, 40 Cal.4th at 1048.)

As with the term “necessity,” the various County Code provisions that obligate the County to interpret ambiguities to exclude unconstitutional results do not resolve these ambiguities. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) The potential interpretations of what constitutes a tree removal are not distinguishable from one another on the basis of constitutionality, and so the foregoing rules of construction do not resolve the inquiry.

(e) *Evaluation of driveway width limitation.*

The Initiative would except from its proposed regulations tree removal “within eleven (11) feet of the centerline of any driveway that serves an existing or proposed structure for which all legally required permits have been issue.” (Initiative, § 4 [proposed NCC, § 18.20.050(C)(9)].) Though uncertain, it appears these dimensions were proposed to comfortably accommodate minimum 20-foot widths required of fire access roads, as set forth in the California Fire Code, which the County Code has incorporated. (CFC, § 503.2.1; NCC, § 15.32.010 [incorporating California Fire Code].)

There might be instances, however, where a wider driveway is necessary due to topography or some other legitimate planning consideration. There also may be instances where it is desirable to remove trees alongside a roadway for fire purposes. (See, e.g., NCC, § 15.32.180 [authorizing the fire code official to clear flammable vegetation and other combustible growth in areas within 10 feet on each side of a driveway].) The question is whether the Initiative would allow for these activities.

With respect to removing trees for fire protection, as discussed in previous sections, the removal of trees is not subject to the Initiative’s proposed regulations where removal is (1) “necessary to avert an imminent threat to public health and safety;” (2) “where undertaken or authorized by a federal or state agency;” (3) “where required for the development or maintenance ... of access roads; and (4) “necessary to comply with written County or state recommendations or requirements for fuel or firebreaks” would not seem to apply to emergency situations.” (Initiative, § 4 [proposed NCC, § 18.20.050(C)(2)(3)(4)&(8)].) The Proponents have confirmed this construction in correspondence to the County. (Responses to *Questions based on Preliminary Review of Initiatives*, Question 2.) It therefore would appear that fire safety measures are not subject to the Initiative’s proposed ordinance.

With respect to wider driveways, however, unless a wider driveway qualified for a stated exception to the Initiative’s regulations, it would appear the Initiative would not allow any such expansion of driveway widths. For instance, a wider driveway intended to serve a residential or agricultural use in AW zones that was not necessary to avert a threat to the public safety or intended to enhance a property’s fire safety, but was necessary only to facilitate a private land use, would be prohibited within a water quality buffer zone where it would require tree removal or, where the Oak Removal Limit was reached and oak woodlands covered a property, necessitate issuance of an oak removal permit. Notwithstanding this conclusion, if the circumstances were such that a wider driveway was necessary to ensure a property had economically viable use, and where prohibition of the driveway would qualify as an unlawful taking under the state and federal constitutions, it would appear the Initiative’s provisions would not apply. To the extent application of the proposed laws were inconsistent with state or federal law, the Initiative provides that its

terms do not apply. (See, e.g., Initiative, § 4 [NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2)]; see also Initiative, § 6(B).)

An ambiguity does surface, however, with respect to measuring which trees fall within 11 feet of the centerline of a driveway. Consistent with the discussion in Sections III.B.3.b&c, the type or quantum of injury or harm necessary to constitute a of “removal” is ambiguous. Accordingly, it is not clear when construction of a driveway will trigger the removal of a tree. For instance, must the driveway footprint encroach on the trunk of a tree? Would the substantial removal of limbs overhanging a driveway footprint qualify as a removal? The Initiative does not provide clarity, and so property owners might have to guess at whether they can or cannot remove trees within a driveway alignment. This ambiguity, in turn, creates a legal vulnerability, and the legal risk is heightened given that a violator of the Initiative’s terms are subject to criminal, civil, and administrative penalties (Initiative, § 4 [proposed NCC, § 18.20.070]).

4. The Initiative’s effect on Measure J is unclear.

As discussed in Section III.A of this Memorandum, the Initiative is also unclear with regard to its effect on Measure J. Again, Measure J was a 1990 initiative in which the County voters amended the General Plan to protect agricultural uses, and provided that further amendments to Measure J may only be approved by a vote of the people. The Initiative does not amend Measure J directly, but proposes policies that, in prioritizing the protection of riparian and woodland habitat, would create practical conflicts. (See Appendix A, Item 9, to this Memorandum.) While the Initiative would require that the County amend other portions of the General Plan and County Code of Ordinances so that they conform to the Initiative’s terms, the Initiative does not notify voters that implementing this directive would require amendments to Measure J.

Meanwhile, the various County Code provisions that obligate the County to interpret ambiguities to exclude unconstitutional results do not resolve these ambiguities. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) Conflicts with Measure J do not implicate constitutional issues, and so the foregoing rules of construction do not resolve the inquiry.

5. The Initiative does not appear to update the General Plan Land Use Map, resulting in confusion.

The General Plan provides that the Land Use Element’s standards “shall apply to the land use categories shown on the Land Use Map.” (GP-AP/LUE, Policy AG/LU-112, p. AG/LU-66.) The Initiative, meanwhile, proposes three new “Agricultural Watershed District Policies” in the General Plan that are identified with reference to Agricultural Watershed zoning. (Initiative, § 3 [proposed Goal AG/LU-8 and Policies AG/LU-0.5, AG.LU-0.6, and CON-24 (as modified)].) In other words, the Initiative links its development restrictions to categories appearing in the County Code, as opposed to land use categories established in the General Plan.

Because AW zoning is not depicted on the Land Use Map, the standards contained in the Initiative’s three new policies are, by extension, not depicted on the Land Use Map. Assuming that the Initiative only applies to the Agricultural, Watershed and Open Space (AWOS) designation, and that this approach effectively clarifies the Initiative’s scope, is incorrect because “AW-Agricultural Watershed uses and/or zoning may occur in any land use designation.” (Note to Table AG/LU-B, page AG/LU-67.) Accordingly, the Initiative

would result in a Land Use Map that does not depict where the standards of the Agricultural Preservation and Land Use Element apply, while Policy AG/LU-112 requires exactly that. This approach creates ambiguities and confusion that might render the Initiative legally vulnerable. Please also see Appendix A, Item 4, to this Memorandum.

6. *It is unclear whether the Initiative's mitigation requirements are obligatory or suggested.*

The Initiative would revise CON-24 in relevant part as follows:

Pursuant to the Napa County Watershed and Oak Woodland Protection Initiative of 2018, require a permit for any oak removal within the Agricultural Watershed zoning district after the Oak Removal Limit is reached unless specified exceptions apply. Continue to maintain and improve oak woodland habitat to provide for slope stabilization, soil protection, species diversity, and wildlife habitat through appropriate measures including one or more of the following:

- ...
- b) Comply with the Oak Woodlands Protection Act (PRC Section 21083.4) regarding oak woodland preservation to conserve the integrity and diversity of oak woodlands and retain, to the extent feasible, existing oak woodland and chaparral communities and other significant vegetation as part of residential, commercial, and industrial approvals.
 - c) Provide for replacement of lost oak woodlands or preservation of like habitat at a minimum 2:1 ratio when retention of existing vegetation is found to be infeasible. Removal of oak species limited in distribution shall be avoided to the maximum extent feasible. Within the Agricultural Watershed zoning district, require replacement of lost oak woodlands or permanent preservation of like habitat at a 3:1 ratio when retention of existing vegetation is found to be infeasible, except where the Napa County Watershed and Oak Woodland Protection Initiative of 2018 provides for an exception to this requirement.

(Initiative §3(B)(i) [Text added by the Initiative is underlined])

The ambiguity arises in the clause “appropriate measures including one or more of the following,” which suggests the County, in considering the development of oak woodlands in AW zones for residential, commercial, and industrial purposes,¹² could elect between compliance with the Oak Woodlands Protection Act identified in subsection (b), or the Initiative’s formulaic mitigation in subsection (c). Insofar as the Initiative provides that, in AW zones, the County shall “*require* replacement of lost oak woodlands or permanent preservation of like habitat,” suggesting the provision is mandatory, the structure of Policy CON-24 frames each subsection in the alternative.

¹² While AW zones are intended to encourage agricultural uses, single family homes, residential care facilities, day cares, certain wineries, kennels, and other uses are permitted by right or conditionally permitted in AW zones. (NCC, Ch. 18.20.)

If the County, in imposing conditions on certain development projects, can choose among the foregoing two mitigation frameworks, there are significant implications. For instance, the Oak Woodlands Protection Act requires only “appropriate” mitigation (Pub. Res. Code, § 21083.4(b)), whereas the Initiative prescribes fixed ratios for habitat replacement/preservation. Meanwhile, insofar as a property owner is proposing the “conversion of oak woodlands on agricultural land that includes land that is used to produce or process plant and animal products for commercial purposes,” the owner is entirely exempt from the Oak Woodlands Protection Act, and could avoid oak woodland mitigation altogether under its provisions. (See Pub. Res. Code, § 12083.4(d)(3).)

For the foregoing reasons, the effect of the regulation is ambiguous. Separately and independently, the Initiative’s proposed amendments to Policy CON-24 raise concerns about General Plan consistency and other issues, as further discussed in Sections III.C.2.a and III.F.2 of, and Appendix A, Item 9 to, this Memorandum.

Note, the various County Code provisions that obligate the County to interpret ambiguities to exclude unconstitutional results do not resolve these ambiguities. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) Whether a property owner must implement the Initiative’s mitigations or has the option to do so does not necessarily implicate constitutional issues, and so the foregoing rules of construction do not resolve the inquiry.

7. *It is unclear how the Initiative’s use permit process would operate in light of fundamental contradictions in the Initiative.*

The Initiative provides that, where a property owner proposes to remove more than ten oak trees on a given parcel within a twelve-month period, the owner must apply for a use permit. (Initiative, § 4 [proposed NCC, § 18.20.060(E)(1)].) The permit may not issue, however, unless one of the ten exceptions in proposed County Code section 18.20.050(C) apply, or the permit “allows removal of no more than five oak trees from that parcel during any ten year period.” (Initiative, § 4 [proposed NCC, § 18.20.060(E)(1), indicating additional requirements in NCC, § 18.20.060(E) shall apply to use permits; proposed NCC, § 18.20.060(E)(2)].) In other words, if one of the Initiative’s exceptions do not apply, a property owner wishing to remove more than ten oak trees in any given year can only obtain the required use permit if he or she complies with the contradictory requirement that he or she refrain from removing more than five oak trees from the property within any ten year period. It is unclear, then, whether the Initiative would effectively ban the right of a property owner to remove more than five oak trees within a ten year period, and whether a property owner could ever make use of the use permit process in the absence of a qualifying exception.

Note, the various County Code provisions that obligate the County to interpret ambiguities to exclude unconstitutional results do not resolve these ambiguities. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) The fundamental contradiction identified above does not implicate constitutional issues, and so the foregoing rules of construction do not resolve the inquiry.

8. *The scope of the vineyard exception to the Initiative’s water quality buffer zones is unclear.*

The Initiative provides that its water quality buffer zones shall not apply to “replanting within the footprint of existing vineyards or within the footprint of vineyards having

obtained all legally required discretionary permits from the County where the initial vineyard planting or final discretionary permit approval occurred prior to the effective date of the” Initiative. (Initiative, § 4 [proposed NCC, § 18.20.050(E)].) It is unclear, however, whether this exception applies to the act of replanting vineyards within the footprint of existing, permitted vineyards, or whether it applies to the replanting of any type of agricultural crop. The Proponents indicate that the exception was intended to apply only to the replanting of vineyards at the request of the Napa Valley Vintners (see Responses to *Questions based on Preliminary Review of Initiatives*, Question 13), the intent of the drafter, as explained above, is not determinative. This ambiguity creates a potential legal vulnerability, and the legal risk is heightened given that a violator of the Initiative’s terms are subject to criminal, civil, and administrative penalties (Initiative, § 4 [proposed NCC, § 18.20.070]).

Equal protection concerns also exist. Specifically, it would appear difficult to distinguish between property owners wishing to replant vineyards and property owners wishing to replant other crops.

On the one hand, and as discussed before, equal protection claims that do not involve “suspect classes” (e.g., classes based on race, national origin, religion, and alienage) are difficult to sustain, as a governmental agency need only show that a regulation is rationally related to a legitimate government interest. Here, the purpose of the Initiative is to maximize the protection of oak trees and water quality. It is not clear, however, on what basis the Proponents could distinguish between the replanting of vineyards and the replanting of other crops, and no facts have been put forth by Proponents to support this distinction. It would appear, then, that some legal risk would potentially inhere in the Initiative’s scope of regulatory exceptions.

In summary, the scope of the Initiative’s regulatory exceptions is unclear as to whether it permits the replanting of both vineyards and other agricultural crops. To the extent an equal protection problem does exist, County Code provisions obligate the County to interpret ambiguities to exclude unconstitutional results. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140; see also *Kempton, supra*, 40 Cal.4th at 1048 [presumption that voters know the existing laws].) As such, the associated legal risks appear to be low, though there remains some vulnerability.

C. An Initiative cannot enact a local law that is preempted by state law.

An initiative cannot lawfully impose a local law that is preempted by state law. Preemption occurs where a local ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. This section analyzes whether the Initiative is preempted by the Oak Woodland Protection Act (Pub. Res. Code, § 21083.4 et seq); the California Forest Practice Act and Rules; and recent legislation streamlining the construction of accessory dwelling units.

1. Relevant case law/statutes.

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 Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 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 v. County of Santa Barbara* (1994) 7 Cal.4th 725, 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.)

2. Application of preemption analysis to Initiative.

(a) Oak Woodlands Protection Act.

State law and the Initiative both contemplate mitigation for the removal of oak trees, and this overlap might potentially invalidate certain provisions of the Initiative.

The Oak Woodlands Protection Act (the “Act”), codified in Public Resources Code Section 21083.4, provides that, in determining what level of environmental review should apply to a project under the California Environmental Quality Act, a county determining that a project will have a significant impact on oak woodlands shall require one or more of the following mitigation measures: (1) conservation of oak woodlands through use of a conservation easement; (2) the planting of trees; (3) the contribution of funds to the Oak

Woodlands Conservation Fund, as established in the Fish and Game Code; or (4) implement other mitigation measures developed by the County. (Pub. Res. Code, § 21083.4(b).) With respect to the planting of trees, the Act does not fix a replacement ratio, though it does provide that planting replacement trees “shall not fulfill more than one-half of the mitigation requirement for the project;” and the requirement to maintain replaced trees terminates seven years after the trees are planted. (Pub. Res. Code, § 21083.4(b)(2)(B)&(C).)

The Act also exempts from its provisions the “[c]onversion of oak woodlands on agricultural land that includes land that is used to produce or process plant and animal products for commercial uses.” (Pub. Res. Code, § 21083.4(d)(3).)

Finally, the Act indicates that its provisions “shall not be construed as a limitation on the power of a public agency to comply with this division or any other provision of law.” (Pub. Res. Code, § 21083.4(g).)

The Initiative’s approach to oak tree removal mitigation is different. In this respect, the Initiative requires the replacement of removed oak trees at a ratio of 3:1 by permanently preserving comparable trees on-site or by replacing oak trees on-site, with a “check-up” after five years to ensure the survival rate is 80 percent or greater. (Initiative, § 4 [NCC § 18.20.060(A)(2)].) If the rate is below 80 percent, the property owner must implement additional remediation. In terms of prioritizing different mitigations, the Initiative’s proposed General Plan amendment provides that the retention of existing trees if preferable but, if that is not feasible, on-site replacement of trees shall be required. (Initiative, § 3D[proposed change to General Plan Policy CON-24, subsection (e)].) That said, if on-site remediation is infeasible, off-site mitigation in the form of a conservation easement or payment of an in-lieu fee is acceptable. (Initiative, § 4 [proposed NCC § 18.20.060(A)(2)].)

It is foreseeable that the Initiative and the Act will both apply to a number of development actions. The Initiative’s oak mitigation requirements apply whenever the County is asked to consider a discretionary approval. (Initiative, § 4 [proposed NCC § 18.20.060(A)].) A discretionary approval also triggers the application of the California Environmental Quality Act (Pub. Res. Code, § 21080(a)), meaning both sets of regulations would govern development applications that contemplate the removal of oak trees.¹³

The Act does not expressly preempt local law; in fact, the Act indicates that its provisions “shall not be construed as a limitation on the power of a public agency to comply with this division or any other provision of law.” (Pub. Res. Code, § 21083.4(g).) One could deem the Act, then, to provide for minimum requirements, whereas local jurisdictions are authorized to impose stricter requirements. At the same time, the Initiative places

¹³ For instance, whereas the Initiative provides for an inspection of mitigation trees after five years, County staff indicate that, in monitoring tree mitigation required pursuant to other regulatory frameworks (e.g., CEQA), monitoring occurs on an annual basis. However, it does not appear that the Initiative’s timing would replace, for instance, CEQA mitigations. Rather, the two would appear to coexist. Under the same principle, the County could impose a mitigation ratio greater than 3:1; the upshot would be, for instance, that insofar as a developer complies with the greater ratio requirement, he or she would also comply with the Initiative’s 3:1 obligation.

limitations on oak woodland mitigation requirements, providing that planting mitigations shall fulfill no more than half of the Act's mitigation requirements, and that the obligation to maintain replacement trees shall end seven years after planting. (Pub. Res. Code, § 21083.4(d).) It also should be noted that Section 21083.4(g) provides that the Act shall not prevent a *public agency* from complying with another provision of law, which is different from authorizing a public agency to enact a contradictory law. In other words, it is not clear that subsection (g) permits an agency to make demands of a property owner that exceed the Act's requirements, as opposed to permitting the agency itself to comply with obligations imposed by other law on the agency. No court appears to have interpreted whether the Act occupies the field of oak woodland mitigation, and so the scope of the Initiative is subject to some legal uncertainty in this regard. Moreover, the County's General Plan requires "compliance with the Oak Woodlands Preservation Act" in considering residential, commercial, and industrial approvals, thereby expressly placing the Act, at least in part, in tension with the Initiative's proposed terms regardless of whether, or to what extent, preemption applies. (General Plan, Policy CON-24(b).)

The Initiative might be construed as inconsistent with, and potentially preempted by, the Act in the following ways:

- The Act does not prioritize on-site remediation, but provides property owners with more flexibility in selecting mitigation. Meanwhile, the Initiative sets forth a hierarchy of mitigation, requiring first on-site replacement, then on-site preservation, and finally off-site options.
- The Act limits the obligations of a property owner to replace trees, determining that planting replacement trees "shall not fulfill more than one-half of the mitigation requirement for the project." (Pub. Res. Code, § 21083.4(b)(2)(C).) The Initiative does not include this limitation, but apparently would require a property owner to replace all trees at a 3:1 ratio if feasible, which would fulfill the Initiative's mitigation requirement *in its entirety*. (Initiative, § 3D[proposed change to General Plan Policy CON-24, subsection (e), § 4 [NCC § 18.20.060(A)(2)].)
- The Act provides that maintenance of replacement trees shall terminate seven years after the trees are planted. (Pub. Res. Code, § 21083.4(b)(2)(B).) The Initiative requires, without any limitation, that replanting and monitoring of replacement trees is required, and that if less than 80 percent of trees have survived in the fifth year after the replanting, additional remediation is required. (Initiative, § 4 [NCC § 18.20.060(A)(1)(b)].)
- The Act also exempts from its provisions the "[c]onversion of oak woodlands on agricultural land that includes land that is used to produce or process plant and animal products for commercial uses." (Pub. Res. Code, § 21083.5(d)(3).) The Initiative, meanwhile, does not exempt conversions of oak woodlands on any type of agricultural land, creating uncertainty about whether mitigation requirements apply in these circumstances.

To the extent the Initiative's oak woodland mitigation framework is optional, as opposed to mandatory (see Section III.B.6 of this Memorandum; see *also* Appendix A, Item 9 to this Memorandum), concerns about preemption are lessened, though the County would not be able to require the Initiative's mitigation measures to the extent they were preempted.

(b) *California Forest Practice Act and Rules.*

The California Forest Practice Act, codified at Public Resources Code section 4511 et seq, and the California Forest Practice Rules, codified at Title 14, California Code of Regulations, Chapters 4, 4.5, and 10, regulate logging on privately-owned lands in California. Courts have held that this regulatory framework exclusively governs the conduct of timber harvesting operations. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139.) Accordingly, local law may regulate the location of timber operations but not the manner in which they are carried out. (*Id.*) For instance, a County may not require a permit for timber operations on various properties. (Pub. Res. Code, § 4516.5(d); *Westhaven Community Development Council v. County of Humboldt* (1998) 61 Cal.App.4th 365.) Timber operations are defined to include the removal of trees for commercial purposes from “timberland,” and must be performed according to a timber harvesting plan meeting certain requirements. (Pub. Res. Code, §§ 4527, 4581.) “Timberland,” in turn, is defined as land “which is available for, and capable of, growing a crop of trees of a commercial species used to produce lumber and other forest products, including Christmas trees.” (Pub. Res. Code, § 4526.)

The Initiative provides that its limitations on the removal of oak trees and oak woodlands do not affect timberland, as defined in Public Resources Code section 4526. (Initiative, § 4 [proposed NCC, §§ 18.20.060(D)(5) [water quality buffer zones do not apply to removal of trees pursuant to timber operations undertaken pursuant to state timber harvesting plan], 18.20.060(F)(1)(2)&(4) [definition of oak and oak woodlands for purposes of Oak Removal Limit and oak removal permitting do not include trees growing on timberland].)

Insofar as the Initiative proposes to regulate the removal of trees within stream and wetland buffer areas, this scope “applies to all County approvals relating to any conversion of timberland pursuant to Public Resources Code 4621, including but not limited to County Erosion Control Plans, but does not otherwise apply to timber operations undertaken pursuant to state timber harvest plans. (Initiative, § 4 [proposed NCC, § 18.20.050(D)(5)].) Section 4621 addresses the conversion of timberland to “uses other than the growing of timber,” and a person contemplating such a change must apply for a timberland conversion permit from the state and meet other requirements. (Pub. Res. Code, §§ 4621.2 [required findings, including that conversion is in public interest, existence of suitable land that is not zoned for timber production], 4622 [conditions of approval].)

The Proponents of the Initiative appear to have intended to design its tree removal limitations to respect the boundaries of the state’s timberland regulations. To the extent the Initiative’s proposed legislation violates or is preempted by state law, it contains savings clauses, whereby its proposed legislative amendments shall not apply where they are inconsistent with state law. (See, e.g., Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2)], § 8.)

There accordingly appears to be little risk a court would deem the Initiative to be preempted by the California Forest Practice Act and rules.

- (c) *Recent legislation streamlining the approval of accessory dwelling units.*
 - (i) Statewide importance of low-cost housing.

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.C.1 of this Memorandum [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, reflect 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].)

To a great extent, this preemption concern does not appear applicable to the 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. Moreover, and as explained in more detail below, the Initiative expressly includes certain "affordable housing" exceptions, whereby its development restrictions and permitting processes do not apply to the extent they would violate state housing requirements. (See, e.g., Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2)], § 8.) Nonetheless, certain terms of the Initiative would appear to conflict with provisions in the Government Code that encourage and streamline the approval of accessory dwelling units.

(ii) Evaluation of potential conflicts with ADU legislation.

State law mandates that local agencies ministerially approve accessory dwelling units, or “ADUs,” that meet certain requirements. (Gov. Code, § 65852.2(a)(3),(4)&(b).) In general, a ministerial decision involves little or no personal judgment by the public official as to the wisdom or manner of carrying out the project — the public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision generally involves only the use of fixed standards or objective measurements. A discretionary approval, by contrast, does require the official to exercise subjective judgment in approving or conditionally approving a project.

With respect to ADUs, the Government Code provides that a jurisdiction must ministerially approve a unit if the following conditions are met: (1) the unit is not intended for sale separate from the primary residence and may be rented; (2) the lot is zoned for single-family or multifamily use and contains an existing, single-family dwelling; (3) the unit is either attached to an existing dwelling or located within the living area of the existing dwelling or detached and on the same lot; (4) the increased floor area of the unit does not exceed 50 percent of the existing living area, with a maximum increase in floor area of 1,200 square feet; (5) the total area of floorspace for a detached accessory dwelling unit does not exceed 1,200 square feet; (6) no passageway can be required; (7) no setback can be required from an existing garage that is converted to an ADU; (8) the unit complies with local building code requirements; and (9) approval is given by the local health officer where private sewage disposal system is being used. (Gov. Code, § 65852.2.) The County has adopted local legislation that implements the Government Code. (NCC, §§ 18.08.550, 18.104.180.) Meanwhile, the AW zoning district permits single family dwelling units, thereby permitting ADUs through a ministerial process where the foregoing Government Code requirements are met. (NCC, § 18.20.020(C).)

The Initiative’s oak removal permitting process appears to disrupt this streamlined ADU approval process. Specifically, the Initiative prescribes a discretionary permitting process for any proposed removal of oak trees or woodlands in AW districts after the Oak Removal Limit is reached, requiring the County to determine whether the proposed tree removal ensures the economically viable use of a parcel. (Initiative, § 4 [proposed NCC, § 18.20.060(D)&(E).]¹⁴ Thus, insofar as construction of an ADU would require the removal of an oak tree (after the Oak Removal Limit is reached), the terms of the Initiative and State law would be in conflict.

The Initiative does provide that where a property falls within a combination or overlay district, the primary purpose of which is to provide affordable housing or residential housing projects required by State law, the Initiative’s terms are not applicable. (See, e.g., Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(1), 18.20.060(G)(1).]) However, while owners of property within an AW zone have the option of electing and developing under

¹⁴ The oak removal remediation requirements in proposed section 18.20.060(A) of the Napa County Code only apply to development projects already requiring discretionary review. (Initiative, § 4.) The water quality buffer legislation in proposed section 18.20.050, meanwhile, does not appear to trigger any discretionary review processes. (*Id.*) Therefore, because the Government Code now requires that ADUs be ministerially approved, the foregoing two components of the Initiative would not appear to conflict with these streamlining provisions of state law.

the County's Affordable Housing Combination District, it does not appear that a property owner must do so to construct an ADU. The Initiative's "affordable housing" exception, then, does not appear to reconcile the Initiative's conflict with the Government Code's ministerial ADU approval provisions. That said, to the extent the Initiative's proposed legislation violates or is preempted by state law, it also contains savings clauses, whereby its proposed legislative amendments shall not apply where they are inconsistent with state law. (See, e.g., Initiative, § 8].)

Accordingly, it appears the oak removal permitting process cannot apply to the County's approval of ADUs, even after the Oak Removal Limit is reached. This determination does not invalidate the Initiative but, in light of the Initiative's savings clauses, suggests that the County cannot require oak removal permits in the entitlement of ADUs.

(d) *Sustainable Groundwater Management Act.*

The Sustainable Groundwater Management Act ("SGMA") established a new structure for managing California's groundwater resources at a local level by local agencies. SGMA requires the formation of locally-controlled groundwater sustainability agencies ("GSAs") in the State's high- and medium-priority groundwater basins and subbasins ("basins"). The Napa Valley Subbasin has been determined to be a medium priority basin.

A GSA is responsible for developing and implementing a groundwater sustainability plan ("GSP") to meet the sustainability goal of the basin. However, there is an alternative to a GSP, provided that the local entity can meet certain requirements. (Water Code, § 10733.6.)

On November 30, 2016, Napa County published the Final Draft of the report *Napa Valley Groundwater Sustainability, A Basin Analysis Report for the Napa Valley Subbasin* ("Basin Analysis Report"), which proposed an alternative submittal to the GSP. As part of this alternative submittal, the County delineated groundwater recharge areas that substantially affected groundwater recharge, including wetlands.

The Initiative's proposed terms do not appear to affect any of the foregoing planning efforts. While the Initiative does affect the County's streams and wetlands, and defines certain resources for purposes of water quality and oak removal regulations, these terms do not appear to affect the County's compliance with SGMA.

First, it does not appear the County's classification of streams and wetlands affects regulatory processes other than the Initiative's proposed regulation of water quality buffer zone, oak mitigation, and oak removal. The County's SGMA-related planning efforts have been undertaken in accordance with DWR regulations, including definitions adopted by DWR, and the Initiative does not purport to affect these planning efforts.¹⁵ To the extent the Initiative defines streams and wetlands (see Initiative, § 4 [proposed NCC, § 18.20.050(D)(1)(2)(3)&(7)], it is only "for purposes of [proposed] section" 18.20.050.

¹⁵ For instance, wetland delineations were prepared to DWR in accordance with the state guidance, and DWR has reviewed and proposed no modifications to the County's delineations. (See Dec. 9, 2016 DWR letter, *Proposed Modifications to the Final Draft of the Basin Analysis Report for the Napa Valley Subbasin.*)

Second, the practical effect of the Initiative, if adopted, would not appear to compromise the County's alternative plan for compliance with SGMA. The stated purpose of the Initiative is to protect water quality and tree resources. To the extent the Initiative's protects sources of groundwater recharge, such as wetlands and streams, such terms would appear to constitute an extra layer of protection to water resources, and should not disrupt any existing protection upon which the alternative plan relies. (See Initiative, § 4 [proposed NCC, §§ 18.20.050(F), 18.20.060(G)(2)].)

- (e) *Regional Water Quality Control Board General Permit for Vineyard Properties (Order No. R2-2017-0033)*

The California Regional Water Quality Control Board, San Francisco Bay Region, regulates the discharge of waste from certain vineyards by setting performance standards, schedules, and mitigation and monitoring requirements where operation of a vineyard is proposed. This regulatory framework implements, in part, the Porter-Cologne Water Quality Control Act.

It would not appear that the Initiative would interfere with or frustrate this regulatory program. The Initiative provides that nothing in its terms "shall preclude the County from requiring larger stream or wetland setbacks pursuant to any other policy or regulation," nor is it enforceable where it would be inconsistent with state or federal law. (Initiative, § 4 [proposed NCC, §§ 18.20.050(F), 18.20.060(G)(2)].)

D. 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) 126 Cal.App.3d 330, 337.)

The Initiative includes provisions that its regulations shall not apply to the extent they violate the constitution or laws of the United States or State of California. (Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2)] § 6(A).)

1. Analysis of Initiative's potential to effect an unlawful taking of property.

There Initiative appears to recognize and respect, to large degree, the private property rights protected under the state and federal constitutions. For instance, the proposed legislation, by its own terms, does "not apply to projects or activities for which the owner or applicant has obtained a vested right, pursuant to state law, or has obtained all legally required discretionary permits from the County necessary for it to proceed, prior to the effective date of the Napa County Watershed and Oak Protection Initiative of 2018." (Initiative, § 4 [proposed NCC, § 18.20.080]; see also Initiative, § 4 [proposed NCC, § 18.20.050(E), establishing certain exemptions for existing vineyards].)

The state and federal constitutions, however, protect more than vested rights but also, for instance, the economic viability of a given property. To this end, the Initiative more broadly provides that, in “the event a property owner contends that application of this Initiative effects an unconstitutional taking of property, the property owner may request, and the Board of Supervisors may grant, an exception to application of any provision of this Initiative if the Board of Supervisors finds, based on substantial evidence, that both: (1) the application of any aspect of this Initiative would constitute an unconstitutional taking of property; and (2) the exception will allow the cutting or removal of trees only to the minimum extent necessary to avoid such a taking.” (Initiative, § 6(B).)¹⁶ Note, however, that if the Initiative were enacted, the Board likely would *have to grant* an exception in order to comply with constitutional law (i.e., the Board really would not have the discretion to grant or withhold one). Note too that the express terms of the Initiative would also appear to compel the Board to grant an exception. (See Initiative, § 4 [proposed NCC, §§ 18.20.050(G)(2), 18.20.060(G)(2), providing Initiative’s regulations do not apply where they are inconsistent with state or federal law].)

Further, where an ambiguity surfaces, the County Code requires the County to interpret provisions so as “to avoid unconstitutionality wherever possible” (NCC, § 1.04.110), and provides that no provision of the code “shall be construed as being broad enough to permit any direct or indirect taking of private property for public use” (NCC, § 1.04.130). Similarly, the County Code provides that it “is not the intent of the board of supervisors, in its administrative capacity, to condone or permit the violation of the constitutional rights of any person, nor to condone or permit the taking of private property for public use without payment of just compensation in violation of either the United States or California Constitutions.” (NCC, § 1.04.140.)

2. Analysis of assumptions and statistics underlying Initiative’s Oak Removal Limit.

The Initiative’s Oak Removal Limit appears to be designed to place a “cap” on vineyard development after 2030.

More specifically, the Oak Removal Limit appears to be calculated based on estimated vineyard growth through year 2030, as outlined in the County’s General Plan. To this end, the General Plan Conservation Element projects that 10,000 acres of vineyards are likely to be established through year 2030. (GP-CE, pp. CON-19 and -20.) We understand that this projection contemplated gross vineyard acreage, and did not account for portions of

¹⁶ A taking could occur under the Initiative’s framework if, for instance, the Oak Removal Limit were reached, the only usable portion of a site less than 160 acres were covered in oak woodlands, and none of the listed exceptions under proposed section 18.20.050(C) applied. In this case, a property owner wanting to locate a use on his or her property would not be able to obtain an oak removal permit. (See Initiative, § 4 [proposed NCC, §§ 18.20.060(E)(2) [eligible sites must be 160 or more acres].) In such a situation, the inability of the property owner to obtain an oak removal permit likely would eliminate all economic value of the subject property, triggering application of the Initiative’s “failsafe” provision under section 6(B). Currently, there are roughly 663 parcels exceeding 160 acres that are located entirely within AW zones, though it is unknown how many of those parcels, if oak woodland acreage were subtracted out, would retain a farmable area of more than 160 acres.

vineyards not dedicated to the growing of grapes (e.g., areas dedicated to access roads, infrastructure, and other uses).

Meanwhile, County records show that approximately 4,321 acres of new vineyard were permitted from January 1, 2005 until May 1, 2017,¹⁷ meaning that approximately 5,679 acres of vineyards could be developed before reaching the General Plan's 10,000-acre projection.¹⁸ Based on the above information, the Oak Removal Limit seems to contemplate the 10,000-acre projection as a "cap" on vineyard development. The 795-acre Oak Removal Limit, then, reflects an assumption 14 percent of the remaining, 5,679 acres are covered in oak woodlands (i.e., $0.14 \times 5,679 = 795$ acres, the "Oak Removal Limit").

Ultimately, the Oak Removal Limit could result in a greater or lesser level of vineyard establishment, depending on the accuracy of the assumptions underlying its calculation. For instance, if more than 14 percent of AW zoned lands are covered in oak woodlands, then the full 10,000 acres contemplated in the General Plan would likely not undergo development, since the 795 acres of woodland development would be removed faster than anticipated. Meanwhile, if the coverage rate is less than 14 percent, more than 10,000 additional acres would accommodate vineyards.

Despite these uncertainties, it would appear to be difficult to successfully challenge the Initiative on the basis that the Oak Removal Limit is based on false assumptions that render the legislation arbitrary and capricious. The Initiative is not implementing any established limit on oak woodland removal set by the County, but is creating a practical "ceiling" on future development in oak woodlands based on general projections in the County's General Plan Conservation Element. How the Initiative's Proponents derived the Oak Removal Limit would only be potentially legally vulnerable if it were not based on substantial evidence. Here, the intent of the Proponents is to set a quantifiable limit on future removal of oak woodlands that is roughly in line with expected vineyard development in the future. Land use planning in any jurisdiction is often imprecise, and California courts recognize the difficulties of this process, and will defer to local governments insofar as their regulatory framework addresses a legitimate public interest, is reasonable, and has evidentiary backing. The Initiative seeks to maximize protection of natural resources while allowing a fixed amount of future development, and so the risk of a party successfully challenging the Initiative based on discrepancies between the Oak Removal Limit and the projections in the General Plan would appear to be low.

Finally, it is important to know how much of the 795-acre oak woodland "budget" has been taken by vineyard projects constructed or approved since September 1, 2017.¹⁹ Since

¹⁷ After May 1, 2017, 124.5 acres of vineyards were permitted and, currently, there are 565.9 acres pending. These acreages do not appear to be wholly accounted for by the Initiative.

¹⁸ According to the Initiative's Proponents, the Napa Valley Vintners prepared a handout entitled *The 2018 Initiative and Vineyard Development Potential*, which is attached as Appendix C, to this Memorandum. This document indicates that there are 5,679 acres of undeveloped land in AW districts that may be converted to vineyards.

¹⁹ It is not clear what would occur if these approvals were challenged in court. Based on the plain language of the Initiative, which provides that "all oak woodlands

that date, County staff indicate that 22.39 acres of vineyards were constructed and/or permitted that removed oak woodlands, leaving a balance of 727.61 acres of vineyard development before the Oak Removal Limit is reached.²⁰ Please note, there appear to be pending applications for development that would affect an additional 123.25 acres of oak woodlands. If approved, the balance of oak woodlands that could be developed before reaching the Oak Removal Limit would be 604.36 acres.

Tables showing the list of approved and pending projects, minus the project currently under judicial review, are included in Appendix E to this Memorandum. A map showing the location of this development is included as Appendix F.

3. *The Initiative might potentially violate the equal protection rights of Napa County citizens.*

The Initiative's water quality buffer zone regulations do "not apply to replanting within the footprint of existing vineyards or within the footprint of vineyards having obtained all legally required discretionary permits from the County where the initial vineyard planting or final discretionary permit approval occurred prior to the effective date of the Napa County Watershed and Oak Woodland Protection Initiative of 2018." (Initiative, § 4 [proposed NCC, § 18.20.050(E)].)²¹ Aside from vineyards, the Initiative also exempts telecommunications or cellular towers, solar energy systems, and electric vehicle charging stations from its scope. (Initiative, § 4 [proposed NCC, § 18.20.050(C)].)

The Initiative's terms appear to have been formulated, at least in part, through compromises reached by the Initiative's Proponents and the Napa Valley Vintners, a non-profit trade association that advocates for local vintners.²² While it is speculative to say

approved for removal by the County within the AW district" will register toward the Oak Removal Limit (Initiative, § 4 [proposed NCC, § 18.20.060(D)]), it appears that it is the administrative approval, and not the status of ensuing court proceedings, that "counts" toward the Oak Removal Limit. That said, insofar as a reviewing court would direct the County to rescind any approval affecting oak woodland acreage, presumably the cumulative total acreage of all oak woodlands removed since September 1, 2017 would decrease by the appropriate amount.

²⁰ There are limitations as to the accuracy of this data. First, the acreage of oak woodlands associated with approved and pending development, as cited herein, is calculated using the County's GIS mapping system, and does not accurately capture the area of "oak woodlands" as the term is defined in the Initiative. Moreover, these statistics capture only oak woodlands affected by proposed vineyards, and do not account for other uses such as residences and wineries. The foregoing "accounting" of oak woodlands, therefore, should be deemed an estimate only.

²¹ Consistent with Section III.B.8 of this Memorandum, it is unclear whether this exception applies to the replanting of grape vines or any agricultural crop. We have assumed, for purposes of this analysis, that it is only the replanting of grape vines that is exempted. Regardless of what is replanted, it is the class of current vineyard owners that arguably would be disproportionately affected/benefitted by the Initiative.

²² Proponents have provided the County with a press release purportedly distributed by the Proponents and the Napa Valley Vintners, which is attached to this Memorandum as Appendix D.

for certain whether the vineyard exemption was included in the Initiative's text to satisfy the Napa Valley Vintners,²³ its narrow scope potentially raises issues about equal protection, and questions as to why other agricultural operations and accessory uses were not similarly exempted. The AW zone — the only zoning district regulated by the Initiative — is ostensibly intended to preserve and promote all agricultural uses, and not just vineyards or properties owned by vintners. Moreover, while solar energy systems and electric vehicle charging stations may merit an exemption due to the public benefits of encouraging alternative energy, it is unclear whether there exists a legitimate rationale for exempting only telecommunications and cellular towers from the Initiative's provisions.

To survive judicial scrutiny, a regulation must be rationally related to a legitimate governmental interest. While this legal test is generally not considered difficult to satisfy, the Initiative's proponents have not articulated any rational reasons for exempting only a narrow set of agricultural and other private land uses from its scope. The Initiative would therefore appear to have some potential legal vulnerability on the ground of a violation of equal protection rights, although on balance this risk appears to be low.

4. Does the Initiative, in authorizing the assessment of civil, administrative, and mitigation penalties for violations of its terms, violate the law?

Cities and counties can impose administrative fines or penalties for the violation of an ordinance, and can adopt legislation providing for the abatement of any nuisance at the expense of the person responsible for the nuisance. (Gov. Code, §§ 38773 to 38773.5 53069.4.)

With respect to penalties, the Initiative provides that violators shall be subject to "the maximum administrative penalty that the County has established for violations of this Code," shall be potentially liable for civil penalties, and shall have to pay a sum of money equal to the cumulative value of the individual oak trees unlawfully removed or the full cost of remediating the damage. (Initiative, § 4 [proposed NCC, § 18.20.070(C)&(E).])

While they could be considered somewhat harsh, the Initiative does not appear to impose penalties that are "grossly excessive" and that transcend "the constitutional limit." (*BMW of North American, Inc. v. Gore* (1996) 517 U.S. 559, 585-586.) In many respects, the Initiative's penalty structure is fairly standard and, insofar as it requires assessment of a "maximum administrative penalty" and the financing of mitigation for a violation, these fees appear to be reasonably related to the costs of curing the violation, and not disproportionate to what the County could assess on a violator of a different ordinance.

A question does arise, however, as to how the County will calculate the value of individual oak trees that are removed. At present, the County does not have an official protocol or methodology; the most reasonable method would appear to be having a certified arborist assess the value of the trees and document his or her determinations in a report..

Notwithstanding the above, insofar as the Initiative could result in criminal, civil, and maximum administrative penalties for property owners who suffer tree loss through

²³ We understand that the Napa Valley Vintners may now be opposing the Initiative, based on recent news reports.

wildfire that occurred beyond their control, as discussed in Section III.B.3.b, the Initiative could be deemed to violate their due process rights, making the Initiative potentially vulnerable to legal challenge in that respect.

5. The failure of the Initiative to provide a citizen with a hearing to contest an alleged violation might violated the accused's rights to due process.

A minimal requirement of the due process clause of the U.S. Constitution is the right to a hearing that provides an accused party with an opportunity to present arguments in response to the proposed penalty, fine, or disturbance of a property right. (*Ohio Bell Tel. Co. v. PUC* (1937) 301 U.S. 292, 305.) While constitutional law does not require a governmental agency to establish a formal hearing, with full rights of confrontation and cross-examination, the agency must provide an opportunity to be heard. (See *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 276.)

The Initiative would provide that a violation of its terms constitutes a misdemeanor and subjects a violator to various civil and administrative penalties. (Initiative, § 4 [proposed NCC, § 18.20.070(C).] Whereas the Initiative requires the investigation and noticing of an alleged violation, it is unclear whether the Initiative provides accused parties with a hearing and other due process rights. (See Initiative, § 4 [proposed NCC, § 18.20.070(A).] The legislation merely states that violations are “subject to any and all available judicial and administrative enforcement actions, including, but not limited to, the provisions addressing civil and administrative penalties, stop orders, and public nuisance abatement procedures set forth in the County Code.” (Initiative, § 4 [proposed NCC, § 18.20.070(C).] This reference to other procedures in the County Code, while clearly contemplating the ability of the County to levy penalties (i.e., the ability to initiate “enforcement actions”), does not clearly incorporate the rights accorded to accused parties that appear in the County Code. Any failure to provide a member of the public with such rights would constitute a violation of constitutional law. To the extent the Proponents of the Initiative did intend to incorporate hearing rights set forth elsewhere in the County Code, the Initiative is, at best, vague on this point.

Separately, the Initiative would appear to potentially violate Government Code section 53069.4, which requires that “ administrative procedures set forth by ordinance adopted by the local agency ... shall provide for a reasonable period of time, as specified in the ordinance, for a person responsible for a continuing violation to correct or otherwise remedy the violation prior to the imposition of administrative fines or penalties” While the Initiative provides that a violator must correct an alleged violation by “a date specified,” the Initiative does not guide the code enforcement officer in selecting an appropriate date and, accordingly, does not guarantee an accused violator his or her rights to a reasonable cure period.

E. An Initiative provision cannot impair an essential legislative function and/or rise to the level of a constitutional amendment.

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].)

1. Evaluation of requirement that Initiative may only be amended by a vote of the people.

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 supervisory repeal of initiatives.” (*Id.* at 797.)

The initiative at issue in *DeVita* was Measure J, and it is similar to the Initiative considered here in that both constitute legislative amendments to the County’s General Plan by limiting urban development. However, Measure J is distinguishable from the instant proposal in that it contemplated an expiration date, whereas the proposed Initiative arguably could be interpreted to institute a permanent moratorium, with limited exception, on development occurring within oak woodlands after the Oak Removal Limit is reached, and near watercourses. Such a measure may qualify as a “constitutional,” as opposed to “legislative” enactment, or otherwise interfere with the agency’s police power, and thus remain outside the scope of the initiative power. (*Id.* at 798-799.) The appropriate question is whether the Initiative would inherently frustrate the fundamental objectives of the planning law. (*Id.* at 792.)

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.* at 799; *cf. Citizens for Jobs, supra*, 94 Cal.App.4th at 1327 [initiatives that broadly limit 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].) The court also held Measure J’s voter-approval clause merely formalized Elections Code section 9125, which sets no limit on the length of time an initiative can remain in force absent amendment or repeal by a vote of the electorate. (*Id.* at 798.)

It is likely a court would uphold the Initiative against claims it impaired an essential governmental function. The instant Initiative, like Measure J, makes it difficult to change aspects of the General Plan, and imposes formidable restrictions on development on properties with oak trees and oak woodlands, but the scope of this restriction is similar insofar as it amends a portion of the General Plan and, in restricting further amendments thereto, reiterates the provisions of Elections Code section 9125.

2. *Evaluation of practical effects of administering Initiative provisions, and associated fiscal impacts.*

In reviewing whether an initiative will interfere with an essential governmental function, courts are “mindful that initiative measures are not to be stricken down lightly.” (*Citizens for Jobs and the Economy, supra*, 94 Cal.App.4th at 1324.) What follows is an analysis of the administrative and fiscal burdens that adoption of the Initiative would impose on County government, and whether any such burdens amount to an impairment of an essential governmental function.

(a) *Administrative and fiscal impacts of overseeing compliance with water quality buffer zone requirements.*

The Initiative would prohibit the removal of trees in designated water quality buffer zones, and so staff time and resources expended in overseeing this regulatory framework would involve enforcement actions where a member of the public violated its terms. Typically, portions of the cost of enforcement are recovered through the assessment of criminal, civil, and administrative penalties, but in County staff’s experience these rarely result in recoveries of greater than 35 percent of actual costs.

(b) *Administrative and fiscal impacts of overseeing compliance with oak removal mitigation requirements.*

The time and materials that County staff spend in proposing and monitoring mitigation requirements are traditionally recovered from project applicants, and so the fiscal impacts of overseeing compliance with oak removal mitigation requirements are likely negligible. Most, if not all, of the County’s discretionary permits are on a time and materials basis, with costs being passed on to the applicant. While workload would no doubt increase, it would very difficult to quantify; however, to the extent additional staff proved necessary, it is anticipated that fees collected through the time and materials system would fund this support. With respect to enforcement costs in the case of a violation, please see Section III.E.2.a, above.

(c) *Administrative and fiscal impacts of tracking oak woodland removal for purposes of enforcing Oak Removal Limit.*

Per County staff, vegetation removal (including oak woodlands) are currently tracked for new vineyard projects requiring Erosion Control Plans, and so the fiscal impacts of ongoing tracking are anticipated to be minimal. Moreover, to the extent the County’s existing tracking system falls short in capturing unanticipated aspects or details of the proposed Initiative, the application process could be revised to require applicants to provide pre- and post-project oak woodland data as part of their application package or development proposal.

(d) *Administrative and fiscal impacts of overseeing oak removal/use permit for removal of oak trees after Oak Removal Limit is reached.*

Per County staff, the cost of processing permits can be highly variable, depending on the magnitude and complexity of the request. As discussed in Section III.E.2.b, it is customary that permit applicants reimburse the County for staff time and costs expended

on permit processing, and it is anticipated the County would recover costs incurred in processing oak removal permits in the same manner.

F. Does the Initiative violate California initiative law’s prohibition of “indirect” legislation or the use of precedence provisions?

The Initiative proposes a number of direct changes to the County’s General Plan and Code of Ordinances. (See Initiative, §§ 3, 4, 5). Because a general plan and zoning ordinance must be internally consistent, to the extent the Initiative’s direct changes conflict with other County regulations, the Initiative provides that any such inconsistent provisions “shall not be enforced in a manner inconsistent with this Initiative,” and that the County is further “authorized to amend the County of Napa General Plan ... the County Code, including the Zoning Code, and other ordinances, policies, and plans ... affected by this Initiative as soon as possible as necessary to ensure consistency” (Initiative, § 7(A)(C)&(E).)

These provisions raise the issue of whether the Initiative might be held 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*, 9 Cal.4th at 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 congestion 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 inconsistencies 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 which, if adopted, would have authorized the county to make conforming amendments to the county’s general plan and ordinances as proved necessary,²⁴ similar to Section 7(C) of the Initiative. As to Sections 7C and 7D of the San Diego County initiative, the Court reasoned:

²⁴ 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 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.)

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 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]; *see also Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744 [disfavoring determination that an initiative can impliedly amend a general plan].)

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 Initiative.

Those portions of the Initiative in Sections 7(A) and 7(C) 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*. (See, e.g., *id.*; *Sierra Club*, *supra*, 126 Cal.App.3d at 704, 708.) Moreover, they are likely invalid and ineffective to the extent that the evidence shows the "direct legislation" parts of the Initiative actually create any internal general plan inconsistency.

Recognizing that the 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 A to this memorandum, the proposed Initiative arguably *may* conflict with various policies in the General Plan in more than a dozen ways, depending on how the County Board of Supervisors is inclined to exercise its discretion to interpret and balance relevant provisions of the General Plan. While the law concerning indirect legislation is not settled, any provision of the Initiative deemed to clearly conflict with existing General Plan policies might be deemed invalid by a reviewing court if it were to be challenged. As discussed further in Appendix A, a majority of the Initiative's provisions have the potential to conflict to some extent with existing General Plan policies, including the Initiative's water quality buffer zone regulations, the oak tree and woodland mitigation requirements, and the establishment of the Oak Removal Limit and its associated permitting processes.

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 AW zones that are identified for affordable housing in the County's current Housing Element; or (3) otherwise preventing the County from satisfying its obligations thereunder.

H. To what extent may a portion of the Initiative survive if other portions are held invalid?

The potential defects in the proposed Initiative would not seem to affect the entirety of its scope, and Section 8 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 challenged and held invalid, pursuant to the foregoing 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 potentially be held preempted or otherwise unlawful include its stream buffer provisions, oak woodland/tree mitigation requirements, Oak Removal Limit, and oak woodland/tree removal permitting processes. However, many of these components are separate and independent (e.g., the stream buffer provisions versus the Oak Removal Limit provisions), and invalidation of one component would not necessarily mean the remaining provisions would be invalid. Therefore, it is likely the severability clause would effectively operate to limit the extent of any invalidation of the terms of the Initiative if a reviewing court were to determine certain discrete portions only were preempted and invalid.

IV. ECONOMIC AND POLICY IMPACTS OF THE INITIATIVE.

A. Estimated impact on property values and tax.

The Initiative’s proposed development restrictions, in comparison to the existing regulatory framework, would affect approximately 402,729 acres of additional land in AW zones,²⁵ including 100,756 acres of additional land subject to water quality buffer zone regulations. At the same time, existing acreage is already subject to significant environmental protection frameworks, but the County presently has not been able to calculate this acreage. Ultimately, the economic impacts of the proposed amendments are speculative. It is likely that, insofar as acreage within a given property became undevelopable, the value of that parcel would decrease which, in turn, would result in a loss of property tax revenue from the County. At this time, however, the County has not been able to quantify this effect.

B. Impact of Initiative on efforts to increase agricultural diversity within Napa County.

The Initiative would result in less development of agricultural uses within the County owing to the practical exclusion of development from water quality control buffers, the occupation of developable acreage with tree mitigation, and through the establishment of the Oak Removal Limit and the permitting process that applies thereafter. It does not appear, on its face, to discriminate between the types of agricultural activities that may be planted pursuant to its regulatory exceptions or as part of development occurring before the Oak Removal Limit is reached. The Proponents indicate that the Initiative “could help encourage diversity by providing greater protection for the County’s long-term water supply ... and by reducing the type of destructive erosion that washes away high quality soils.” (Response to *Questions based on Preliminary Review of Initiatives*, Question 14.) While the Proponents might have articulated environmental benefits of the Initiatives, the causal connection between the Initiative and an increase in agricultural diversity is unclear. It appears the Initiative’s effects on agricultural diversity ultimately are neutral.

²⁵ A map showing developed and undeveloped properties within AW zones is included in [Appendix G](#) to this Memorandum.

C. Potential to incentivize removal of oak saplings.

The Initiative prevents the removal of trees that are five inches or more diameter within the proposed water quality buffer zones (Initiative, § 4 [proposed NCC, § 18.20.050(D)(5)]) and, after the Oak Removal Limit is reached, significantly restrict a property owner's ability to remove any oak trees that are five inches in diameter (Initiative, § 4 [proposed NCC, § 18.20.060(E)(1)&(F)(2)]).) A question was raised as to whether this legislation might have the unintended effect of limiting the natural development of oak and other woodlands on properties within Napa County, as property owners might be incentivized to remove saplings before they reach the critical mass necessary to fall within the scope of the Initiative. It appears that existing provisions of the County Code would, to some extent, safeguard against the removal of oak saplings. Chapter 18.108.070 subjects "earthmoving activities," which includes "vegetation clearing," to a host of permitting processes depending on the nature of the property. (NCC, § 18.108.030.) For instance, under the County's existing conservation regulations, earthmoving is generally prohibited in stream setback areas, precluded on slopes greater than 30 percent, and subject to permitting requirements on slopes greater than five percent. (NCC, §§ 18.108.025(B), 18.108.060, 18.108.070(A)&(B).) The County thus would have the ability to control, subject to certain exceptions and exemptions, the removal of oak saplings. That said, there are limitations to the County's authority, and existing regulations would not prevent the removal of all oak saplings. Thus, to some extent, there is a possibility that the Initiative, if enacted, could incentivize property owners to remove oak trees before they triggered restrictions imposed by the Initiative's proposed ordinances. It is difficult to predict, however, how many acres of oak and other woodlands would fail to materialize if the Initiative is adopted, however.

Perhaps a greater consideration is that, since the wildfires of 2017, many owners of property damaged by the fire may be incentivized to prevent oak woodlands from re-emerging on their land. As discussed above, the Initiative defines "oak woodlands" according to a canopy cover threshold, and it is possible that certain wildfires could result in a determination that such acreage has been "removed" from the County's oak woodland inventory. In such circumstances, property owners wishing to avoid the Initiative's strictures might be incentivized to prevent oak trees from re-emerging on their land in the first place (e.g., by planting gardens or grass), whereas nature, left to its own devices, would have replaced the habitat lost.

D. Potential of Initiative to interfere with infrastructure project.

A question has been raised as to whether the Initiative would impact the funding for infrastructure, including infrastructure related to transportation, schools, parks, and open space. The Board of Supervisors has also inquired as to whether the Initiative would preclude the construction of public roads and other public safety work in the vicinity of oak woodlands after the Oak Removal Limit is reached.

The Initiative does not specifically mention infrastructure or public roads except to provide that, during an enforcement action, the County has the right to impose conditions on a violator that includes the removal of any infrastructure built in violation of law. (Initiative, § 4 [proposed NCC, § 18.20.070(B).) However, the Initiative does except from its scope actions necessary to avert an imminent threat to public health and safety; facilities necessary for the public health; the development of access roads; projects within a recorded utility right-of-way; projects on land owned by any public agency; actions

undertaken by or at the direction or order of a federal, state, or local agency as part of a project to preserve habitat, alleviate a hazardous condition, or abate public nuisance; and projects undertaken or authorized by a federal or state agency. (Initiative, § 4 [proposed NCC, §§ 18.20.050(B), 18.20.050(C), 18.20.060(A)(4), 18.20.060(E)(2).])

Given that a majority of infrastructure projects, including public roadway projects, would be undertaken by either County, a state agency, or a public utility on land owned or dedicated to these entities, it would appear that the Initiative would not unduly interfere with any planned infrastructure projects.

V. CONCLUSION.

Overall, there is some 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 may be deemed unlawfully vague or misleading with respect to: (1) various standards it imposes that are based on considerations of "necessity;" (2) what type of losses to oak woodland habitat will "count" toward the Oak Removal Limit and would trigger a violation of the water quality buffer zone restrictions, particularly with respect to trees lost to wildfire; (3) how the Initiative relates to and/or amends Measure J, a previous initiative adopted by the County's voters that sought to preserve agricultural land uses in the County's agricultural districts; (4) the Initiative's effect on the General Plan Land Use Map; (5) the degree to which internal contradictions in the Initiative's text might render it impossible for a property owner to obtain a use permit for the removal of oak trees after the Oak Removal Limit is reached; and (6) the degree to which the replanting of vineyards is exempt from the water quality buffer zone restrictions. (See Sections III.A and III.B of this Memorandum.)
- Terms of the Initiative may be preempted by the Oak Woodland Protection Act and recent housing legislation designed to streamline the approval of accessory dwelling units. (See Sections III.C.2.a and III.C.2.c.ii of this Memorandum.)
- The Initiative might arguably be deemed to violate the citizenry's equal protection rights insofar as it exempts from its regulations vineyards, telecommunication towers, and cellular towers, whereas other agricultural uses and private activities are subject to the Initiative's restrictions. (See Section III.D.3 of this Memorandum.)
- The Initiative does not clearly provide persons accused of violating it the right to a hearing, potentially in tension with constitutional protections of due process rights. It also could, on its face, subject property owners to criminal penalties who, through no fault of their own, lose trees due to wildfire to enforcement actions. (See Sections III.B.3, III.D.4, and III.D.5 of this Memorandum.)
- Certain parts of the Initiative, on their face, might 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 is deemed to create internal inconsistencies in the County's General Plan. To that end, the Initiative's provisions might conflict with

more than a dozen goals, policies, and other provisions of the General Plan. (See Section III.F and Appendix A of this Memorandum.)

Based on (a) the ministerial nature of the County's duty to enact "as is" or place duly qualified initiative measures on the ballot 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 are likely to be held severable in the event they are enacted and subsequently challenged and invalidated, it is highly unlikely that pre-election review of the Initiative would be granted by a court. Therefore, even if County's Board believes the Initiative is legally defective in whole or in part, it may not disqualify the initiative and it is not recommended that pre-election review be sought.

APPENDIX A: 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 v. County of Napa* (1995) 9 Cal.4th at 796, n.12.) As set forth in Section III.F 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 foregoing, interpretative powers apply equally to legislation adopted by a county board of supervisors and legislation adopted by initiative, such as the General Plan policies enacted through Measure J. (*San Francisco Tomorrow v. City & Cty. of San Francisco* (2014) 228 Cal.App.4th 1239; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675; *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.)

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.

Analysis Of Initiative And Its Consistency with the General Plan.

- 1) ***The Initiative appears to be consistent with the Housing Element’s identification of affordable housing sites and the Affordable Housing Combination District’s promotion of affordable housing.***

The Housing Element provides a detailed description of specific sites available for housing. (See GP-HE, Table H-F, p. H-12; Figure H-1-1, p. H-35; Table H-1-1, p. H-50.) These sites are given the Affordable Housing Combination District (AHCD) zoning designation, and some of the

sites have a base zoning of AW. (See GP-HE, Table H-F, p. H-12; pp. H-39 and H-52.) The Housing Element examines each of these sites, including a detailed review of environmental and regulatory constraints, to determine the reasonable number of housing units that can be developed in these specific areas. (*Id.*; see also See GP-HE, p. H-32 et seq.) The total “reasonable” amount of housing for these AW zoned housing sites is about 150 units. (See GP-HE, Table H-F, p. H-12.)

The Housing Element is implemented by the AHCD zoning. (Napa County Code Chapter 18.82.) This overlay zoning allows development the foregoing housing opportunity sites at specified densities without a use permit. (Napa County Code §18.82.050(c).) The Initiative substantially restricts development near water bodies and creates a new discretionary permit to remove oak woodlands on the AW zoned sites, and the imposition of these development restrictions would, on their face, frustrate the purpose of the AHCD’s removal of the use permit requirement.

However, there are two provisions in the Initiative that ameliorate this conflict: (1) the Initiative provides that it is inapplicable to property with a combination or overlay district “whose primary purpose is to provide affordable housing or to residential housing projects who approval is necessary to comply with state law” (Initiative, § 4 [proposed NCC, §§ 18,20.050(G)(1), 18.20.060(G)(1)]); and (2) the Initiative provides that it is inapplicable insofar as it is necessary to avoid a violation of law (Initiative, § 4 [proposed NCC, §§ 18,20.050(C)(2), 18,20.050(G)(2), 18.20.060(E)(3), 18.20.060(G)(2)]).

The foregoing exceptions would appear to allow for the full development of affordable housing on AHCD zoning. Napa County has a total unit capacity of 1,677 housing units, and its Regional Housing Needs Allocation (“RHNA”) obligation is 180 units, and it does not appear the Initiative would interfere with buildout of this capacity. (See GP-HE, pp. H-10 to H-13). It should be noted, too, that Measure J restricts, to a greater extent, the construction of housing projects in agricultural lands, providing that the County may re-designate an agricultural district to another type of district only upon finding that the change is necessary to comply with state law, and that there is no suitable land available in non-agricultural lands or incorporated cities within the County. (See GP-AP/LUE, Policy AG/LU-111(f), pp. AG/LU-65 to -66.)

2) *The Initiative appears to be consistent with the Housing Element policies that seek to maximize the provision of new affordable housing.*

While the Initiative does not appear to interfere with the County’s ability to satisfy RHNA obligations, the Initiative might frustrate goals in the County’s Housing Element that seek to maximize the production of affordable housing.

The construction of affordable housing is often subsidized through the construction of market-rate housing, such as through the exercise of incentives under State Density Bonus Law or through the payment of in-lieu fees. Legislative enactments that limit market-rate development, then, have the effect of discouraging the production of affordable housing.

Here, the Initiative’s development limitations do not apply to property with a combination or overlay district “whose primary purpose is to provide affordable housing or to residential housing projects who approval is necessary to comply with state law.” (Initiative, § 4 [proposed NCC, §§ 18,20.050(G)(1), 18.20.060(G)(1)].) State law generally requires a county to provide minimum amounts of affordable housing. The County’s Housing Element, by contrast, seeks to

maximize the production of affordable housing. Consider the following goal, policy, and program of the Housing Element:

- **GOAL H-5:** Maximize the provision of new affordable housing in both rental and ownership markets within unincorporated Napa County. (See GP-HE, p. H-14.)
- **Policy H-5a:** Reduce, defer, or waive planning, building, and/or development impact fees when nonprofit developers propose new affordable housing development projects. (See GP-HE, p. H-17.)
- **Program H-2b:** Continue to encourage greater provision of affordable housing units in conjunction with market rate projects by implementing the Affordable Housing Ordinance, which requires an inclusionary percentage of 17 to 20 percent in for-sale projects, allows the payment of housing impact fees in for-sale housing projects only for developments of four or fewer units, and requires new rental developments to pay a housing impact fee. (Ongoing) The County will conduct a nexus study during the Housing Element planning period to verify the residential fee amounts and inclusionary percentages. (See GP-HE, p. H-20.)

It does not appear, however, that the General Plan, when considered as a whole, requires a maximization of housing projects in agriculturally designated lands. As discussed above, Measure J significantly restricts the construction of housing projects in agricultural lands, requiring the County to find prior to approval that the proposed housing project is necessary to comply with state law, and that there is no suitable land available in non-agricultural lands or incorporated cities. (See GP-AP/LUE, Policy AG/LU-111(f), pp. AG/LU-65 to -66.)

Insofar as General Plan policies seek to maximize affordable housing, it appears these policies are limited in scope to non-agricultural lands. Accordingly, the restrictions on residential development in the Initiative would appear to be consistent with these policies, since the Initiative only concerns agriculturally zoned lands.

3) *The Initiative's limitation of oak woodlands removal might frustrate the Housing Element's objective to facilitate second unit construction.*

By restricting development in oak woodlands, the Initiative also impacts the Housing Element's objective to facilitate the development of at least twenty-five second unit dwellings during the planning period in zoning districts where second units are permitted. (GP-HE, p. H-19 [Housing Element Objective H-2b].) Second units are permissible in AW zoning.

Second units are often deemed to qualify as affordable housing, and while the Initiative provides for "affordable housing" exceptions from its development limitations, this exception only covers development pursued under an AHCD overlay and residential development necessary to satisfy state law. Because second units may be developed in the County outside of these two circumstances, application of the Initiative's development restrictions might frustrate the County in fully implementing its second unit production goals.

It appears a conflict would exist between the Housing Element and Initiative except that, as discussed in Section III.C.2.c of the Memorandum, it appears the Initiative's oak removal permitting process cannot apply to the County's approval of second units (known alternatively as ADUs), since state law provides that such units shall be approved ministerially, and would preempt any conflicting, local legislation. This preemption, then, might moot concerns over any

inconsistency between the Initiative and the General Plan's objective for the facilitation of second units.

4) *The Initiative might create inconsistency between the Agricultural Preservation and Land Use Element and the Land Use Map.*

To demonstrate Napa County's land use policy, the General Plan Land Use Map depicts where the standards in the Agricultural Preservation and Land Use Element apply to the designations shown on the map. (GP-AP/LUE, Policy AG/LU-112, p. AG/LU-66 [The standards shown or contained in the Land use Element shall apply to the land use categories shown on the Land Use Map"].) The General Plan's maps and figures must be consistent with the policies stated in the Plan. (See *Sierra Club v. Kern County Board of Supervisors* (1981) 126 Cal.App.3d 698.)

Rather than making changes to a General Plan designation shown on the Land Use Map, the Initiative provides three new "Agricultural Watershed District Policies" that apply in AW zoned areas, where such policies include the establishment of water quality buffer zones, the imposition of mandatory oak removal mitigation measures, and the imposition of a permitting process for the removal of oaks after a certain level of development has occurred. (Initiative, §§ 3, 4.) References to AW zones appear in a few of the Initiative's proposed General Plan provisions, including proposed Goal AG/LU-8 and Policies AG/LU-0.5, AG.LU-0.6, and CON-24 (as modified). (Initiative, § 3.) Because AW zoning is not depicted on the Land Use Map, the standards of these two new policies are not depicted on the Land Use Map. Underscoring this problem is that "AW-Agricultural Watershed uses and/or zoning may occur in any land use designation." (GP-AP/LUE, Note to Table AG/LU-B, p. AG/LU-67.) The Initiative results in a Land Use Map that does not depict where, on the Land Use Map, the standards of the Agricultural Preservation and Land Use Element apply, whereas Policy AG/LU-112 directly requires this type of illustration.

At worst, this failure creates an inconsistency in the General Plan; at best, the Initiative's failure to update the Land Use Map results in a lack of clarity in the applicable standards, and would likely lead to confusion. (See Section III.B.5 of the Memorandum.)

5) *The Initiative might promote non-agricultural uses on agriculturally designated lands in conflict with General Plan Policies prohibiting the same, and conflict with General Plan policies favoring the diversification of agricultural products.*

The General Plan's Agricultural Preservation and Land Use Element includes the following goals and policies:

- **Goal AG/LU-1.** Preserve existing agricultural land uses and plan for agriculture as the primary land use in Napa County. (GP-AP/LUE, p. AG/LU-12.)
- **Policy AG/LU-4.** The County will reserve agricultural lands for agricultural use, including lands used for grazing and watershed/open space, except for these lands which are shown on the Land Use Map as planned for urban development." (GP-AP/LUE, p. AG/LU-13.)
- **Policy AG/LU-9.** The County shall evaluate ... rezonings ... to determine their potential for impacts on farmlands mapped by the State Farmland Mapping and Monitoring Program ... and shall avoid converting farmland

where feasible. Where conversion of farmlands mapped by the state cannot be avoided, the County shall require long-term preservation of one acre of existing farm land of equal or higher quality for each acre of state-designated farmland that would be converted to nonagricultural uses. This protection may consist of establishment of farmland easements or other similar mechanism, and the farmland to be preserved shall be located within the County and preserved prior to the proposed conversion (GP-AP/LUE, p. AG/LU-14.)

- **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-1.²⁶ (GP-AP/LUE, p. AG/LU-14.)

The Goal and Policies quoted above strongly support preserving agriculturally designated lands, as shown on the General Plan Land Use Map, for agricultural uses. In contrast, the Initiative provides significant limitations on agricultural uses while providing exceptions to promote open space preserve, residential, and governmental uses. Each of these are distinctly non-agricultural uses, and the extent to which the Initiative would encourage such non-agricultural development is potentially significant. For instance:

Open Space Preserve Use – Insofar as the Initiative creates water quality buffer zones and limitations on the removal of oak woodlands, the Initiative converts many acres of agricultural lands into open space preserves. An open space “preserve” is land use separate and apart from an agricultural use; it is recognized and described in the General Plan as “dedicated open space areas whose primary purpose is the preservation of native plants and wildlife, significant landscape features, and natural resource.” (GP-ROSE, p. ROS-4.)

Residential and Governmental Uses – The Initiative contemplates approximately ten exceptions from its development restrictions, including where development is proposed on public land, within utility rights of way, within 150 feet of residences, and for certain affordable housing projects. (See, e.g., Initiative, § 4 [proposed NCC, § 18.20.050(C)&(G).] In doing so, the Initiative promotes non-agricultural development.

These “exceptions to the rule” do not align, for instance with the exceptions in existing Policy AG/LU-12 (i.e., non-agricultural uses are allowed where they support agricultural uses; see *a/so* footnote 4), and thus promote non-agricultural use of agricultural lands that the existing General Plan policies do not contemplate. Moreover, it is unclear how the de facto conversion of valuable farmland to open space lands would interact with Policy AG/LU-9, which requires long-

²⁶ The listed policies allow non-agricultural use where: (1) they are accessory to agricultural use (Policy AG/LU-2); (2) they consist of farm labor housing and institutional components that promote agriculture (Policy AG/LU-5); (3) they are limited to single-family residences and child care centers (Policy AG/LU-26); (4) they consist of commercial uses on parcels fronting the west side of the Napa River south of the City of Napa (Policy AG/LU-44); (5) they consist of existing commercial establishments located within a commercial zoning designation (Policy AG/LU-45); and (6) recreational open space and facilities that maintain agricultural productivity (Policy ROS-1).

term preservation of one acre of existing farm land of equal or higher quality for each acre of state-designated farmland that would be converted to nonagricultural uses. The Initiative does not address, much less provide for, the preservation of farmland for each acre affected by its water quality buffer zones and oak woodland protection measures.

The practical effect of these changes could be substantial, though quantifying impacts is difficult. Policy CON-24 currently could be interpreted to require a 2:1 oak tree replacement ratio, whereas the Initiative proposes a 3:1 ratio, and thus would require an increase in mitigation by 50 percent. Meanwhile, there are 2,336 acres of mapped farmland in the County which are currently overlaid with oak woodlands, and which would have to be preserved under Policy AG/LU-9 insofar as this acreage is located in AW zones. Accordingly, the requirements of Policy AG/LU-9 could create conflicts, and result in an inconsistency, with the Initiative's proposed rules (e.g., what if the situation arose where it became necessary to convert oak woodlands into working farmland in order to comply with Policy AG/LU-9's preservation requirements?). There would seem, here, to be a battle of preservation efforts.

Accordingly, the Initiative's protection of natural resources might create a practical obstacle to implementing the County's policies favoring increases in agricultural production.

Moreover, the Initiative might frustrate the realization of General Plan policies that favor the diversification of agricultural products. For instance, Policy AG/LU-10 provides that the "County recognizes that increasing local food production in Napa County and increasing local food purchases by County residents and institutions ... will contribute to greater food security, increase agricultural diversity, and create a reliable market for small-scale farmers." (GP-AG/LUE, pp. LU-16, -17.) By placing a limit on development through the establishment of the Oak Removal Limit (see Initiative, § 4 [proposed NCC, § 18.20.060(D)]), and by disincentivizing the production of crops besides grapes (see Sections III.D.3 and IV.C of this Memorandum), the Initiative potentially frustrates these goals.

6) *The Initiative's development restrictions might conflict with policies in the General Plan Conservation Element.*

The General Plan's Conservation Element includes the following goals and policies:

- **Policy CON-2.** The County shall identify, improve, and conserve Napa County's agricultural land through the following measures:
 - Provide a permanent means of preservation of open space land for agricultural production;
 - Require that existing significant vegetation be retained and incorporated into agricultural projects to reduce soil erosion and to retain wildlife habitat. When retention is found to be infeasible, replanting of native or non-invasive vegetation shall be required.
(GP-CE, p. CON-22.)

- **Policy CON-26.** Consistent with Napa County's Conservation Regulations, natural vegetation retention areas along perennial and intermittent streams shall vary in width with steepness of the terrain, the nature of the undercover, and type of soil. The design and management of natural vegetation areas shall consider habitat and water quality needs, including the needs of native fish and special status species and flood protection where appropriate. Site-specific setbacks shall be established in coordination with Regional Water Quality Control Boards, California Department of Fish and Game, U.S.

Fish and Wildlife Service, National Oceanic and Atmospheric Administration National Marine Fisheries Service, and other coordinating resource agencies that identify essential stream and stream reaches necessary for the health of populations of native fisheries and other sensitive aquatic organisms within the County's watersheds. Where avoidance of impacts to riparian habitat is infeasible along stream reaches, appropriate measures will be undertaken to ensure that protection, restoration, and enhancement activities will occur within these identified stream reaches that support or could support native fisheries and other sensitive aquatic organisms to ensure a no net loss of aquatic habitat functions and values within the county's watersheds. (GP-CE, p. CON-30 to -31.)

In some respects, the Initiative implements the foregoing policies. For instance, with respect to Policy CON-2, the Initiative's imposition of mandatory oak tree mitigation requirements supports Policy CON-2's requirement that property owners replant native vegetation. However, tension exists insofar as Policy CON-2 suggests that preservation of open space and vegetation on agricultural lands should be a secondary consideration to preservation/development of agricultural use on such lands. For instance, the policy requires that existing vegetation be retained and "incorporated into" agricultural projects for the purposes of reducing soil erosion and retaining wildlife habitat and not, as the Initiative proposes, that erosion control and habitat preservation take precedence over agricultural uses.

With respect to Policy CON-26, the General Plan contemplates that site-specific setbacks shall be established in coordination with Regional Water Quality Control Boards, California Department of Fish and Game, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration National Marine Fisheries Service, and other coordinating resource agencies that identify essential stream and stream reaches necessary for the health of populations of native fisheries and other sensitive aquatic organisms within the County's watersheds. It is not clear that the Initiative's formulation of water quality buffer zones, which essentially impose setbacks along certain streams and wetlands, underwent any such review by state and federal agencies, or on what basis the width of these zones was calculated.

7) *The Initiative's amendment to CON-24 might conflict with the Summary and Vision Chapter.*

The Summary and Vision Chapter currently states that the Conservation Element has been revised from past General Plans to "[m]itigate potential losses of significant biological communities and *oak woodlands countywide* by avoiding their removal or requiring their restoration/replacement, or preservation of like habitat at a 2:1 ratio within Napa County."

The Initiative amends Policy CON-24 to require a 3:1 preservation for removed oak woodlands in the AW zoning district, which conflicts with the Summary and Vision Chapter's description of preservation "countywide" at a 2:1 ratio. This discrepancy appears to create confusion rather than an integrated statement of County policy.²⁷

²⁷ It may be argued that the Summary and Vision Chapter is not material because it is not within a required element of the General Plan. There are two counter-arguments to this position. First, the Government Code requires that the entire General Plan be an integrated, internally consistent policy document, not just the General Plan's elements. Second, arguing against the need to conform the Summary and Vision chapter to the rest of the General Plan calls into question the need for any other conforming amendments in the Initiative's section 5, which includes amendment to the Implementation Element.

8) The Initiative appears to create an inconsistency within General Plan Policy CON-24 insofar as the Policy incorporates the terms of the Oak Woodlands Protection Act.

The Initiative revises CON-24 in relevant part as follows:

Pursuant to the Napa County Watershed and Oak Woodland Protection Initiative of 2018, require a permit for any oak removal within the Agricultural Watershed zoning district after the Oak Removal Limit is reached unless specified exceptions apply. Continue to maintain and improve oak woodland habitat to provide for slope stabilization, soil protection, species diversity, and wildlife habitat through appropriate measures including one or more of the following:

...

- b) Comply with the Oak Woodlands Protection Act (PRC Section 21083.4) regarding oak woodland preservation to conserve the integrity and diversity of oak woodlands and retain, to the extent feasible, existing oak woodland and chaparral communities and other significant vegetation as part of residential, commercial, and industrial approvals.

- c) Provide for replacement of lost oak woodlands or preservation of like habitat at a minimum 2:1 ratio when retention of existing vegetation is found to be infeasible. Removal of oak species limited in distribution shall be avoided to the maximum extent feasible. Within the Agricultural Watershed zoning district, require replacement of lost oak woodlands or permanent preservation of like habitat at a 3:1 ratio when retention of existing vegetation is found to be infeasible, except where the Napa County Watershed and Oak Woodland Protection Initiative of 2018 provides for an exception to this requirement

(Initiative §3(B)(i) [Text added by the Initiative is underlined].) The proposed language allows “one or more” mitigation measures, including compliance with the Oak Woodland Protection Act (Pub. Res. Code, § 21083.4 et seq), which expressly allows for mitigation through conservation easements for oak woodlands at an unspecified ratio, or payment to an in lieu fund for oak woodland conservation (Pub. Res. Code, §21083.4(b).) The Initiative, in contrast, prescribes a fixed ratio, and does not provide for the payment of in lieu fees.

As discussed in Section III.C.2.a of this Memorandum, there are potential inconsistencies between the Oak Woodlands Protection Act and the Initiative. Because a portion of the General Plan Policy CON-24 incorporates the terms of the Oak Woodlands Protection Act, any such inconsistency would also negatively affect the internal consistency of the General Plan.

9) The Initiative’s development restrictions might conflict the provisions of Measure J.

The County’s General Plan provides that it is important for the County to make decisions “without substantially decreasing the amount of land designated as Agricultural Reserve (AR) or Agriculture, Watershed and Open Space (AWOS) by the General Plan without approval of the voters pursuant to Measure J.” (GP-AP/LUE, p. AG/LU-9.)

Measure J is codified in the General Plan under Policies AG/LU-20, AG/LU-21, AG/LU-110 and AG/LU-111, which provide in relevant part:

- The minimum parcel sizes in AWOS districts is 160 acres, and in AR districts is 40 acres. (See also Policy LU-8 [minimum parcel sizes ensure that agricultural areas can be maintained as economic units].)
- The types of uses in AR districts are agriculture, the processing of agricultural products, and single-family dwellings.
- In AWOS and AR districts, the maximum building intensity is one dwelling per parcel.
- Lands designated AWOS or AR may not be re-designated with a different use until December 31, 2058
- Nothing shall be construed or applied to prevent the County from complying with its housing obligations under state law.

The Initiative might conflict with Measure J in the following ways:

- Insofar as the Initiative precludes or substantially limits tree removal within proposed water quality buffer zones and within AWOS or AR districts after the Oak Removal Limit is reached, it effectively might reduce the farmable area of parcels so that they are no longer economically viable. Measure J provides that the minimum parcel size in AWOS districts shall be 160 acres, and that the minimum parcel size in AR districts shall be 40 acres. These minimums, meanwhile, were explicitly set so as to ensure that agricultural areas could be maintained as economic units. Therefore, insofar as the Initiative would reduce, as a practical matter, the availability of developable area in AWOS and AR districts,²⁸ it could result in parcels that, effectively, are below the minimum acreage requirements and therefore not economically viable. Moreover:
 - The Initiative's oak removal permitting processes contemplate that such permits may not issue unless they are necessary to ensure the economically viable agricultural use of a parcel. (Initiative, § 4 [proposed NCC, § 18.20.060(E)(2).] However, it is unclear whether this permitting requirement contemplates the economic-based, minimum acreage requirement under Measure J. To avoid such a conflict, the Initiative would likely have to be applied in such a manner that, whenever a prohibition against the removal of oak trees or woodlands would result in farmable areas of less than 160 acres in AWOS districts and 40 acres in AR districts, economic need would per se be established. The Initiative does not identify criteria for economic viability and thus is potentially in conflict with Measure J. At best, the Initiative is improperly vague on this point.
 - The Initiative's oak removal permitting process contemplates that such permits may not issue where a parcel is less than 160 acres in area, regardless of what General Plan district the parcel is located in (because AW zones might occur in AWOS, AR, and other General Plan districts). This broad approach potentially conflicts with Measure J's establishment of a 40-acre minimum parcel size in AR districts (GP-AP/LUE, pp. AG/LU-16 to -17 [Policy AG/LU-21]) because, after the Oak Removal Limit is reached, the full number of farmable, 40- to 159-acre parcels envisioned under Measure J potentially would not be developable.
 - Measure J provides that lands designated AWOS or AR may not be re-designated with a different use until December 31, 2058, whereas the Initiative

²⁸ See statistics regarding developable land and other acreages in Item 5, *supra*.

could, in restricting the removal of oak woodlands, convert mapped farmland²⁹ in the aforesaid districts to open space preserve and other non-agricultural uses. (See Item 5, above.)

10) *The Initiative's precedence clause may be unlawful and result in both horizontal and vertical inconsistency among the General Plan and County Code.*

The Initiative's conforming amendments purport to render the Initiative consistent with the General Plan (Initiative, § 5), and that if "any provisions of the County Code or of any other County of Napa ordinance or resolution ... are inconsistent with the General Plan amendments and County Code amendments adopted by this Initiative," they "shall not be enforced in a manner inconsistent with this Initiative" (Initiative, § 7(A).)

Stated another way, the Initiative provides that inconsistencies between the Initiative and existing General Plan provisions are resolved in favor of the Initiative. The California Supreme Court has held that an agency cannot rely on a precedence clause to fulfill the statutory requirement for an internally consistent and integrated general plan. (*Sierra Club v. Kern County Board of Supervisors* (1981) 126 Cal.App.3d 698.) Specifically, in the matter of *Sierra Club v. Kern County Board of Supervisors*, Kern County's General Plan expressly provided that the land use element would control in the event of conflicts between the land use element and the open space element. The court held that the open space element could not be held legally subordinate to the land use element through the use of a precedence clause.

Furthermore, some of the potential conflict occurs between the Initiative's proposed changes to the County Code and the existing provisions of the General Plan, creating a situation where a zoning provision purports to amend conflicting sections of a general plan. For instance, the Initiative's proposed amendments to the General Plan only generally contemplate restrictions on tree removal within water quality buffer zones and on property in AW zones after the Oak Removal Limit is reached. (Initiative, § 3 [proposed new General Plan Goal AG/LU-8 and Policies AG/LU-0.5 and AG/LU-0.6.]) The specific details of these tree removal restrictions, including for instance the oak removal permitting criteria and exceptions list (see, e.g., Initiative, § 4 [proposed NCC, §§ 18.20.060(C), 18.20.060(E)]), have independent potential to conflict with provisions of the existing General Plan. It would be contrary to state law, then, to sanction a precedence clause that nullifies existing general plan provisions on the basis they conflict with details in a new zoning ordinance. The Government Code and court opinions provide that a general plan sits atop the land use planning document hierarchy, and zoning ordinances that are not consistent with a general plan are invalid at the time they are passed. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 544.) As such, the Initiative could result in amendments to the County Code that do not comport with provisions of the General Plan.

11) *The Initiative might create a vertical inconsistency by rendering portions of the Conservation Regulations inoperable.*

²⁹ This acreage figure was provided by County staff, and describes acres designated using the state's Farmland Mapping and Monitoring Program, which includes the categories of Farmland of Local Importance, Prime Farmland, Farmland of Statewide Importance, and Unique Farmland.

Napa County's Conservation regulations provide stream setback requirements as well as a mechanism for the Planning Commission to approve exceptions to those setbacks on a case-by-case basis. (NCC, §18.108.025 & 040.) This existing framework differs from the Initiative's water quality buffer zone setbacks in a number of ways, including: (1) the two watercourse setback regulations involve streams that are defined differently; (2) the setback distances are different; (3) the list of prohibited uses within the setback areas are different; and (4) the list of uses that are permitted in setback areas as exceptions/exemptions are different.

The County Code's existing setback framework applies to "streams," which are defined as:

- Watercourses designated by a solid line or dash and three dots symbol on the largest scale of the United State Geological Survey maps most recently published, or any replacement to that symbol;
- Any watercourse which has a well-defined channel with a depth greater than four feet and banks steeper than 3:1 and contains hydrophilic vegetation, riparian vegetation or woody-vegetation including tree species greater than ten feet in height; those
- Those watercourses listed in Resolution No. 94-19 and incorporated herein by reference.

(NCC, §18.108.030.) The Initiative's setbacks, meanwhile, prevent development in areas surrounding "Class I, II, or III" streams, defined as follows:

- "Class I stream" means a perennial watercourse that serves as a domestic water supply, or that provides habitat to sustain fish for all or part of the year.
- "Class II stream" means a perennial or intermittent watercourse that provides aquatic habitat for non-fish aquatic species, including invertebrates.
- "Class III stream" means an intermittent or ephemeral watercourse showing evidence of a defined bed and banks, annual scour and capacity to transport sediment to a Class I or Class II stream.

(Initiative, § 4 [proposed NCC, § 18.20.050(D)(1)-(3).]³⁰)

Accordingly, there are streams that would be subject to the Initiative, but that would not trigger application of the County's existing setback rules, such as intermittent watercourses showing evidence of a defined bed and bank, but which do not have a bed deeper than four feet and banks steeper than 3:1. Meanwhile, there are streams subject to the County's existing setback rules that would not be subject to the Initiative's provisions, such as a watercourse designated on a recent United State Geological Survey map that does not, for instance, have a defined bed or bank. Note, also, that the Initiative contemplates buffers around wetlands, whereas the County's existing framework does not.

The geometry of the Initiative's setbacks, when compared to existing setbacks, also differs. Setbacks established in the County's existing code range from 35 feet to 150 feet depending on the slope of surrounding lands, with buffers increasing as slopes increase. (NCC,

³⁰ These stream classifications, incidentally, appear to loosely match the water classifications set forth in Table I of Title 14, California Code of Regulations, section 916.5, which the State of California uses to determine watercourse and lake protection zones in regulating timber operations. However, it does not appear the Initiative incorporates these state definitions, or attempts to regulate timber operations.

§18.108.025.)³¹ The Initiative, meanwhile, prescribes setback distances depending on the type of stream or wetland involved (e.g., Class 3 streams have a setback of 25 feet, Class 1 streams have a setback of 125 feet, and wetlands have a setback of 150 feet), without regard to topography. (Initiative, § 4 [proposed NCC, § 18.20.050(A)(1)-(4).])

The categories of uses permitted in the two different setbacks are also different. With respect to the existing stream setbacks, construction of main or accessory structures, earthmoving activity, grading or removal of vegetation, or certain agricultural uses of land shall be prohibited within the stream setback areas. (NCC, §18.108.025) Please note that “earthmoving activities” are defined fairly broadly, and include “any activity that involves vegetation clearing, grading, excavation, compaction of the soil, or the creation of fills and embankments to prepare a site for the construction of roads, structures, landscaping, new planting, and other improvements. It also means excavations; fills or grading which of themselves constitute engineered works or improvements.” (NCC, §18.108.030) The types of prohibited agricultural uses include *growing and raising trees*; grazing livestock, selling agricultural products, animal husbandry, and other farming activities. (NCC § 18.08.040, *emph. added.*) The Initiative, meanwhile, prevents only the removal of trees within its proposed water quality buffer zones, and does not more broadly prohibit land uses. (Initiative, § 4 [proposed NCC, § 18.20.050(B).])

Note, the existing prohibition on growing and raising trees in a stream setback zone potentially conflicts with Initiative’s tree removal mitigation requirements, which require on-site mitigation unless it is “infeasible” to do so. (Initiative, § 4 [proposed NCC, § 18.20.050(A)(2).]) It is unclear, then, whether the existing prohibition on “growing and raising trees” in an existing setback area is a legal infeasibility that enables a property owner to mitigate tree removal at an offsite location, or if the Initiative’s prioritization of on-site mitigation nullifies the existing prohibition on planting trees in a stream setback area. This ambiguity presents a legal vulnerability.

The types of uses permitted in the two setback areas, referred to herein as “exceptions,”³² also differ. The existing stream setback regulations permit a broad variety of exceptions, as summarized in the table on the next page.

³¹ Note that the provisions of Chapter 18.108 protect natural resources in areas besides stream setbacks. For instance, earthmoving is generally prohibited in stream setback areas, precluded on slopes greater than 30 percent, and subject to permitting requirements on slopes greater than five percent. (NCC, §§ 18.108.025(B), 18.108.060, 18.108.070(A)&(B).) In some respects, then, the existing County Code protects a broader array of properties.

³² County Code Chapter 18.108 identifies both exceptions and exemptions. The former denotes activities that need not comply with stricture regulations so long as a use permit is issued, whereas exempt activities are generally entirely free of the strictures of Chapter 18.108. (*Compare* NCC, § 18.108.040 *with* NCC, §§ 18.108.050.)

Uses permitted in existing stream setbacks under Chapter 18.108 of the County Code	Uses permitted in Initiative's water quality buffer zones ⁺
⁺ exceptions are placed in rows best corresponding to exceptions in existing County Code)	
Maintenance of existing legal vineyards or other agricultural crop*	Replanting within the footprint of existing vineyards or within the footprint of vineyards having obtained all legally required discretionary permits from the County where the initial vineyard planting or final discretionary permit approval occurred prior to the effective date of the Napa County Watershed and Oak Woodland Protection Initiative of 2018*
Use and maintenance of existing tractor turnaround areas, agricultural roads, recreational roads, trails and crossings*	No analog
Activities which are consistent with agricultural practices in the area and which are intended to protect the security and safety of the surrounding area including, but not limited to, fire, flood protection and bank stabilization, weed control, trespass and nuisance protection*	No analog
Development and maintenance of those water resources, including pumps, that are necessary for agricultural and domestic purposes*	No analog
Maintenance and replacement of existing public works facilities such as pipes, cables, culverts and the like*	No analog
Maintenance of existing or restoration of previously dredged depths in existing flood-control projects and navigational channels authorized by a permit issued by the director of public works pursuant to Title 16*	Where required for the development or maintenance of flood control projects, provided that the development or maintenance occurs pursuant to all applicable laws*
Construction of nonmotorized vehicular and pedestrian trails*	No analog
Construction of new public works projects such as drainage culverts, stream crossings when such projects are specifically authorized and permitted by existing state, federal or local law*	Where undertaken or authorized by a federal or state agency*
Construction activities undertaken by or under the auspices of a federal, state or local agency to preserve or restore existing habitat areas*	Where required for the development or maintenance of public works facilities, provided that the development or maintenance occurs pursuant to all applicable laws*
Removal of vegetation as authorized by the director or designee to alleviate an existing hazardous condition*	To remove downed and dead trees or dying or diseased trees*
Other uses similar to the foregoing found by the director or designee to be consistent with the intent of this chapter*	No analog
Installation of stream crossings, recreational roads, and equestrian and nonmotorized trails in accordance with appropriate permits from other state, federal and local use permit requirements when it can be determined by the director or designee that the least environmentally damaging alternative has been selected as a part of an approved project*	Where required for the development or maintenance of pedestrian, bicycle; or equestrian trails or stream crossings, provided that the development or maintenance occurs pursuant to all applicable laws*
Additions to existing single-family residences or other structures allowed without a use permit where the proposed addition is attached and when no earthmoving or grading is required***	No analog
Maintenance of private access roads, such as	No analog

<p>resurfacing, cleaning ditches, etc.***</p>	
<p>Clearing of vegetation and/or grading in connection with:***</p> <ul style="list-style-type: none"> -the construction, remodeling or other improvements of single-family residences and/or associated accessory structures permitted before May 13, 1991; -the planting and/or maintenance of decorative landscaping and/or construction of landscape structures meeting certain standards; -for projects specifically authorized by any use permit or other administrative or discretionary permit, including small winery exemptions, issued by the county of Napa or Napa County water conservation and flood control district prior to June 11, 1991; -any septic or wastewater system, or water well; -other facilities necessary for the protection of public health; - correction of any problem involving hazardous wastes or materials, where such construction or corrective activity is required by, and completed under the supervision of the County planning department to comply with federal, state or local standards; minor trenching (so long as such work is conducted and restored outside the winter shutdown period and outside the required stream setbacks); - preliminary testing for site suitability for septic systems or water wells; -creation and/or maintenance of firebreaks required by, and completed under the direction of the California Department of Forestry and Fire Protection; -a state timber harvesting permit or other state or federal permit; -a city permit for city-owned properties; -the abatement of a public nuisance; -the clearing of temporary erosion control cover crops and/or grading activities, but only in conjunction with the planting of agricultural crops or installation of erosion control measures on land cleared of vegetation and/or graded prior to May 13, 1991; -completion of multi-year phased agricultural, 	<p>Where required for the development or maintenance of water wells, water resources and storage facilities, septic or wastewater systems or other facilities necessary for the protection of public health, provided that the development or maintenance occurs pursuant to all applicable laws*</p> <p>Where necessary to avert an imminent threat to public health and safety*</p> <p>Where undertaken by or at the direction or order of a federal, state or local agency as part of a project or program .to preserve, restore or improve habitat, or alleviate an existing hazardous condition*</p> <p>On land owned by any public agency*</p> <p>Where undertaken by or at the direction or order of a federal, state or local agency as part of a project or program .to abate a public nuisance*</p>

<p>vegetation and/or grading activities approved pursuant to certain County ordinances;</p> <p>-activities which are consistent with existing agricultural practices, including but not limited to, post hole digging, fire protection and prevention, and weed control; maintenance operations for ongoing agricultural activities, including maintenance of existing roads, existing erosion and sediment control devices, and activities involving minimal soil disturbance such as discing, spraying, fertilizer applications, shallow ripping for root stimulating, trellising, installation of irrigation, fencing, and minor trenching for repair work;</p> <p>-earthmoving activity associated with mining and mining-related activities conducted pursuant to and in compliance with an approved surface mining and reclamation permit; earthmoving activity and construction of improvements authorized by a final map or development agreement approved and recorded by the county of Napa after January 1, 1986;</p> <p>-earthmoving activity and construction of improvements authorized by use permit, site plan approval and building permit approval where provisions for erosion control were included as part of the approved permit for projects located within the industrial park or the general industrial zoning districts;</p> <p>-replanting of existing vineyards when the area to be replanted involves less than one acre, and the footprint of the replanting area does not change, and any re-contouring, grading or re-engineering is necessary to correct existing erosion or water quality problem, regardless of slope percent of the area to be replanted;</p> <p>-repair and maintenance of existing water storage facilities when no permit is required from any federal, state or local agency; and</p> <p>-construction of a water tank in connection with an existing dwelling where no construction of a roadway is necessary and the slope is fifteen percent or less.</p>	<p>See vineyard replanting exception in first row*</p>
<p>No analog</p>	<p>Within a recorded utility right-of-way</p>
<p>For structural/road development projects: roads, driveways, buildings and other man-made structures have been designed to complement the natural landform and to avoid excessive grading; and primary and accessory structures employ architectural and design elements which in total serve to reduce the amount of grading and earthmoving activity required for the project, so long as these projects meet other defined parameters**</p>	<p>Within eleven (11) feet of the centerline of any driveway that serves an existing or proposed structure for which all legally required permits have been issued*</p> <p>Where required for the development or maintenance of access roads, provided that the development or maintenance occurs pursuant to all applicable laws*</p>
<p>Agricultural projects and agricultural roads (as defined by Napa County department of public works) meeting</p>	<p>No analog</p>

defined standards**	
No analog	Within one hundred fifty (150) feet from any point of a residence or any other structure that is subject to the requirements of the California Building Code or from any point of any proposed such residence or structure for which the owner has obtained all legally required permits*
No analog	Where required for the development or maintenance of solar energy systems; electric vehicle charging stations; telecommunications or cellular towers, provided that the development or maintenance occurs pursuant to all applicable laws*

* Such exceptions are permitted by right and/or require no special permits

** Such exceptions require a use permit

*** Such activities are exempt from County Code Chapter. 18.108 whether or not they occurs within stream setback areas.

(NCC, §§ 18.108.25, 18.107.040, 18.108.050; Initiative, § 4 [proposed NCC, § 18.20.050(C)&(E).])

In general, the list of exceptions and exemptions to the development restrictions within existing stream setbacks is much more expansive than the list of exceptions to the water quality buffer zones proposed by the Initiative. That said, there are a handful of exceptions to the Initiative’s proposed water quality buffer zones that do not appear as exceptions under existing law, including exceptions for buffers around residences, solar energy systems, electric vehicle charging stations, telecommunications or cellular towers, on lands owned by all public agencies (where the existing exception merely covers city-owned properties), and within recorded utility rights-of-way.

Overall, the Initiative would enact a separate setback framework prohibiting the removal of trees in water quality buffer zones, whereas existing laws more broadly prohibit development in stream setback areas. Overlap would occur, then, insofar as existing setback regulations also prohibit the removal of trees. Where there is a conflict with respect to tree removal, the Initiative appears to contemplate that the more restrictive regime would control. For instance, the Initiative provides that nothing encoded in its terms “shall preclude the County from requiring larger stream or wetland setbacks pursuant to any other policy or regulation.” (Initiative, § 4 [proposed NCC § 18.20.050(F)].)by its own terms would control, though there is some ambiguity as to whether the more restrictive provision would control.

In general, the number of permitted activities, especially with respect to agricultural uses, would be less numerous under the Initiative’s framework, though in some respects the Initiative allows uses not contemplated by existing law. However, it would appear that the more restrictive provision ultimately would control.

Another point of conflict involves the existing prohibition on growing and raising trees in a stream setback zone. Again, the Initiative’s tree removal mitigation requirements require on-site mitigation unless it is “infeasible” to do so (Initiative, § 4 [proposed NCC, § 18.20.050(A)(2)], and so it is unclear whether the existing prohibition on “growing and raising trees” in an existing setback area is a legal infeasibility that enables a property owner to mitigate tree removal at an offsite location, or if the Initiative’s prioritization of on-site mitigation nullifies the existing prohibition on planting trees in a stream setback area. This ambiguity presents a legal vulnerability.

12) *The proposed Initiative arguably would conflict with General Plan policies requiring a stable and consistent regulatory environment.*

The following General Plan policies require a stable and consistent regulatory environment:

- **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. (GP-AP/LUE, p. 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. (GP-AP/LUE, p. AG/LU-63, *emph. added*)
- **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.* (GP-AP/LUE, p. AG/LU-63, *emph. added*)

On the one hand, the Initiative makes long-lasting changes to County's General Plan and Code of Ordinances, providing that its provisions only may be changed by a vote of the people. This fact favors stability. On the other hand, and as explained above, there are a number of conflicts between the Initiative's provisions and existing policies and regulations, creating ambiguities and uncertainties. Insofar as the Initiative has the potential to create a system of regulation that is inconsistent and unpredictable for any proposed project on affected parcels (*see, e.g.*, discussion above regarding overlapping stream setback regulations), the Initiative potentially results in unfair treatment to current owners of parcels who may see neighbors disparately burdened or benefited based on the existing configuration of their land. Such a framework could be deemed unstable and not conducive to investment.

13) *The proposed Initiative arguably would conflict with General Plan policies requiring equitable treatment of property owners.*

The General Plan mandates 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 viability of an equal protection claim is discussed in Section III.D.3 of this Memorandum. In short, the Initiative's limited exceptions for vineyards and telecommunication and cellular towers, with no corresponding exception for other agricultural and private land uses, creates a vulnerability for the Initiative.

14) The proposed Initiative arguably would conflict with General Plan policies that require the County to maintain flexibility in its planning.

Sections 3, 4, 5, 7(D) and 10 of the proposed Initiative, without qualification, provides that the language in the Initiative may only be “repealed or amended by vote of the people of the County.” This approach potentially might 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. (GP-AP/LUE, p. 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. (GP-AP/LUE, p. 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.* (GP-AP/LUE, p. 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.

At the same time, in the *DeVita v. County of Napa* (1995) 9 Cal.4th at 796, 789, the plaintiffs attacked Measure J on the theory it interfered with the flexibility of good land use planning. The court noted that, while a static general plan would be “ineffective and eventually obsolete ... it is also desirable that plans possess some degree of stability.” (*Id.*) The court ultimately determined that Measure J was lawfully adopted, noting that it had a sunset date. (*Id.* at 791.) It appears a court would similarly find that the Initiative is lawful, given that local agencies have the discretion to decide how frequently a general plan amendment can be, though the fact that the Initiative has no specific sunset date creates a small amount of vulnerability. Ultimately, so long as the County does not interpret its General Plan flexibility provisions to forbid permanent changes to agricultural promotions policies, the Initiative is likely to survive judicial attack based on flexibility concerns.

**APPENDIX B: Stream Definitions Comparison
Provided by Proponents of Initiative**

Source	Class I	Class II	Class III
Napa County Watershed and Oak Woodland Protection Initiative of 2018	a perennial watercourse that serves as a domestic water supply, or that provides habitat to sustain fish for all or part of the year. (125 ft)	a perennial or intermittent watercourse that provides habitat for non-fish aquatic species, including invertebrates. (75 ft)	an intermittent or ephemeral watercourse showing evidence of a defined bed and banks, annual scour and capacity to transport sediment to a Class I or Class II stream. (25 ft)
14 CFR 916.5 (Dept Forestry/Fire Protection)	1) Domestic supplies on site and/or within 100 feet downstream of the operations area and/or 2) Fish always or seasonally present onsite includes habitat to sustain fish	Fish always or seasonally present offsite within 1,000 feet downstream and/or 2) Aquatic habitat for non-fish aquatic species 3) Excludes Class III waters that are tributary to Class I Waters	No aquatic life present; watercourse showing evidence of being capable of sediment transport downstream to waters Class I or Class II waters under normal high water flow conditions after completion of timber operations
Policy for Maintaining Instream Flows in Northern California Coastal Streams, Effective February 4, 2014, Division of Water Rights, SWRCB, Cal EPA	Fish are always or seasonally present, either currently or historically; and habitat to sustain fish exists.	Seasonal or year-round habitat exists for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates.	An intermittent or ephemeral stream exists that has a defined channel with a defined bank (slope break) that shows evidence of periodic scour and sediment transport
Lake County, California Code of Ordinances Sec. 30-4			An intermittent or ephemeral watercourse having a defined bank and channel and a width to depth ratio of five to one (5:1) or less and shows evidence of annual scour and sediment transport
Measure P	A perennial, seasonal, or intermittent watercourse in which, in a year with average rainfall, fish are always or seasonally present onsite or habitat to sustain fish migration or spawning exists (100-150 ft standard setback)	A perennial, seasonal, or intermittent watercourse or spring in which, in a year with average rainfall, habitat for aquatic non-fish vertebrates and/or aquatic, benthic macroinvertebrates exists. (75-150 ft standard setback)	An intermittent or ephemeral watercourse having a defined channel with a defined top of bank (slope break) and a width to depth ratio of 5:1 or less showing evidence of annual scour and sediment transport (25 ft standard setback)
Measure O			same as Initiative: "Class III stream" means an intermittent or ephemeral watercourse showing evidence of a defined bed and banks, annual scour and capacity to transport sediment to a Class I or Class II stream.

APPENDIX C: Napa Valley Vintner Handout

The 2018 Initiative and Vineyard Development Potential

If the 2018 Initiative were to pass, analysis done on behalf of the Napa Valley Vintners (“NVV”) indicates that new vineyard development would continue to be allowed as follows:

- **Agricultural Watershed:** It would still allow up to approximately 5,679 acres¹ of currently undeveloped land in the AW district to be converted to vineyard pursuant to the current ECP process with the exception of requiring new setbacks and meeting the 3:1 mitigation requirements.
 - This is a 13% increase over the existing 45,000 acres² planted in Napa County.
 - Based on the County approved ECP acreage of 4,321 between 2005 and 2017 and the Draft Climate Action Plan 1,726 acres of vineyard conversion between 2005 and 2014, it is estimated that over 2,000 currently approved but undeveloped acres remain available for development. These acres would not be subject to the Oak Removal Limit.³ (See discussion of Wildfires below.)
- **Timberland in Agricultural Watershed:** The Initiative excludes “timberland” from the definition of oak woodland. The 42,431 acres of land classified as Coniferous Forest, includes 29,676 acres⁴ of land dominated by conifer tree species, such as, Douglas fir and coastal redwoods that would likely require a Timber Conversion Permit (“timberland”) and therefore, would not be subject to the Oak Removal Limit. Increased stream and wetland setbacks would apply.
- **Agricultural Preserve:** The 2018 Initiative applies only to the AW district, therefore the approximately 2,230 acres⁵ of land suitable for vineyard development in the AP district would be unaffected.
 - This is a 5% increase over the existing 45,000 acres planted in Napa County.
- **Wildfires and Oak Removal Limit:** Based on the plain language of the 2018 Initiative it is possible that the wildfires will have an impact on the calculation of the 795 Oak Removal Limit. However, the 2018 Initiative requires that the calculation of the 795-acre Oak Removal Limit be based on the total acreage of oak woodlands removed plus those approved for future removal since September 1, 2017. The Initiative defines “remove” and “removal” as “causing a tree to die or be removed as a result of human activity by [among other things]...*intentional burning*...” The recent fires were a result of numerous causal factors, such as, extremely dry conditions and high winds, we are not aware of any evidence of intentional causes at this time.
 - Questions have been raised regarding whether the Oak Removal limit has already been reached due to the initiative’s language and more recently due to the wildfires. The former concern appears to have been addressed by additional language included in the initiative clarifying that the calculation of the Oak Removal Limit only includes those oak woodlands removed or approved for removal since September 1, 2017; however, the later position is based on the fact that there is no express exception for “acts of god” or “natural disasters”. While it is correct that there is no express exception, it is important to note the definition of “remove” and “removal”, as discussed above. That said, there remain questions regarding whether any oak trees that have been physically removed by the County, other governmental agencies or contractors will be exempt based on the Initiative excluding oak removal undertaken at the direction of the state or federal government. It’s also possible that property owners have removed additional oak woodlands independent of government approval.

¹ This acreage estimate is based on a technical appendix to the County’s Draft Climate Action Plan, which indicates that from 2005-2014, approximately 253 acres of Oak woodlands were removed and approximately 1,726 acres of total vineyard were converted. (253/1726 = 14% (rounded down).) See Draft Climate Action Plan (June 2017), Appendix A, Revised Final Technical Memo #1, August 25, 2016 (“DCAP, App. A”) p. 20, Table 14. The County confirmed that between January 1, 2005 and May 1, 2017 it had approved 4,321 acres of new vineyard. This resulted in there being 5,679 acres remaining out of the General Plans projection of up to 10,000 acres of new vineyards between 2005 and 2030. The remaining acreage of 5,679 x .14 = 795.06 acres of estimated oak woodland removal. Note that some portion of the 795-acre Oak Removal Limit will not be available for vineyard development due to other uses that would also result in the removal of oak woodland.

² County of Napa

³ It should be noted that approved acres includes access roads, reservoirs, etc. and do not reflect net vineyard acres.

⁴ Napa County Baseline Data Report, Biological Resources, November 30, 2005, Table 4-3.

⁵ Tessera Sciences GIS analysis of remaining vineyard acreage in AP District prepared for NVV.

APPENDIX D: Press Release

BULLETIN

Subject: NVV and Environmental Leaders Collaborate to Protect Woodlands and Watershed

Date: September 5, 2017

NVV is collaborating with local environmental leaders in support of a ballot initiative that will protect oak woodlands and the local watershed.

The [Napa County Watershed and Oak Woodland Protection Initiative of 2018](#) establishes enhanced water quality buffer zones and oak woodland protections in the Ag Watershed, without overburdening responsible property owners.

The initiative has been filed with the County Clerk's office for the June 2018 ballot. It comes following several months of thoughtful discussions and compromise between our leadership and Mike Hackett and Jim Wilson, co-authors of last year's similar initiative effort that did not qualify for the ballot due to a legal technicality. NVV actively opposed the 2016 proposal, which lacked industry input.

What Will the Initiative Accomplish?

Together, we identified common ground to enhance environmental protections in the Ag Watershed (AW):

- **Water Quality Buffer Zones:** Compromise on buffer zones around creeks and streams in the AW was achieved by looking back at 2004's Measure P, a stream setback ordinance championed by NVV and other industry partners. The new initiative will expand the definition of watercourses subject to stream setbacks by utilizing common stream classification definitions, compared to the county's current unique definition. Class 2 streams will have a 75' setback and Class 3 streams will have a 25' setback. Presently, setbacks are 35' to 150' based on slope.
- **Oak Woodland Protection:** Compromise on oak woodland preservation includes a new mitigation ratio for removal of oaks of 3:1, rather than the existing 2:1. A qualified professional must prepare the mitigation plan and at least 80 percent of the replanted trees must survive at least five years. The initiative does not include a new permit process for

removal of oaks.

- **General Plan Projections Used to Limit Future Oak Woodland Removal:** The joint initiative proposes a limit on oak woodland acreage that can be removed within the AW. The limit is based on the amount of oak woodland removal associated with vineyard development envisioned through the lifetime of the current Napa County General Plan in 2030. With limited exceptions, further removal of oak trees above this limit would be precluded after that date, unless voters decided to increase it. Future vineyards could be developed in the same manner as now, provided this development didn't involve further removal of oak woodlands.

It's important to note that the initiative is forward-looking and will not affect vineyard replants.

Why Did We Do This?

Goal 2 of the NVV's Strategic Plan calls for us to "**Protect and enhance the Napa Valley, its wines, environment and community**" and to "Improve our environment" by "developing and advocating for strong conservation-based positions to protect and enhance natural resources." The joint initiative helps accomplish this goal and strategy.

Though the 2016 initiative, which we and other industry groups actively opposed, failed to qualify for the ballot, we never considered that a "win" for the wine industry. Rather, it inspired us to explore common ground and the chance to collaborate with the original petitioners, given they had publicly declared their intent to come back with a new ballot measure. Together, we found an approach that we believe will receive widespread support and eliminate the need for a potentially costly and divisive community campaign with an uncertain outcome.

When presented with the concept over the summer, **initial feedback from County leaders has been extremely enthusiastic.** They, too, recognize the value of industry and environmental leaders working together for common community benefit, as we have done in the past.

What's Next?

The Napa County Watershed and Oak Woodland Protection Initiative of 2018 will receive a Title and Summary from the County. This month, we'll begin a signature gathering campaign. Approximately 5,000 registered voters must sign on for the initiative to qualify for the June 2018 ballot.

Concurrently, we will be reaching out to build a broad coalition of stakeholder and community

support.

How Can You Help?

- If you are registered to vote in Napa County, be one of the 5,000 signatories to help this initiative qualify for the ballot.
- Spread the word to your friends, neighbors and colleagues on the win/win aspects of the initiative: enhanced environmental protection without undue burden on responsible property owners.

Leaders in our community have a long and successful history of collaboration and compromise for the greater good, going back to the establishment of the Ag Preserve a half century ago. There are numerous examples since. **This is the next step in that proud local tradition.**

We thank NVV Board Chair Michael Honig and NVV Community and Industry Issues Chair Russ Weis for the countless hours they have invested in this effort, as well as neighbors Mike Hackett and Jim Wilson for the spirit of collaboration demonstrated in this process.

APPENDIX E: Approved and Pending Projects Potentially Removing Oak Woodlands

TRACK I EROSION CONTROL PLANS, APPROVED SINCE 2017-09-01

Project by parcel number	ESTIMATED ACRES REMOVED BY ECP, BY VEGETATION CLASS								
	Agriculture	Coniferous forest	Developed	Grassland	Oak woodlands	Riparian woodland	Rock Outcrop	Shrubland	Total by ASMT
P15-00006 (LPC California Associates, LLC)									
018200022000		0.08			0.07				0.15
018230002000	0.33	4.43	1.72		10.90				17.39
018230004000		0.01	0.06						0.07
018230009000	0.00	0.02	0.01						0.03
Gross project acres: 18.7	0.34	4.54	1.79		10.97				17.63
P15-00399 (VANGONE VINEYARDS)									
032440005000				0.14	0.04		1.61	4.37	6.17
032440006000								0.06	0.06
Gross project acres: 6.2				0.14	0.04		1.61	4.43	6.23
P16-00230 (Steinschriber Vineyard)									
018200022000		0.74			2.29				3.03
Gross project acres: 3.1		0.74			2.29				3.03
P17-00033 (Tower Snow ECP)									
039020035000					0.03				0.03
039630006000					0.12				0.12
039640008000				0.41					0.41
039640010000				2.09	8.04				10.13
Gross project acres: 10.4				2.50	8.20				10.69
P17-00217 (Okell Holdings Track I New ECP)									
033140049000	10.55			0.09	0.57	0.03			11.23
033140052000	0.01				0.02				0.03
033340015000	0.01					0.02			0.02
Gross project acres: 11.28	10.57			0.09	0.58	0.05			11.28
P17-00249 (Hanabi 100 Acres Track I ECP)									
032530028000				2.09	0.03				2.13
Gross project acres: 2.2				2.09	0.03				2.13
P17-00280 (Falcor Track I ECP)									
043102016000				0.00					0.00
043190029000				0.26	0.00				0.26
043190030000				1.86	0.17				2.03
Gross project acres: 18.7				2.12	0.18				2.29
Grand Total	10.90	5.27	1.79	6.93	22.29	0.05	1.61	4.43	53.28

all measurements are in acres

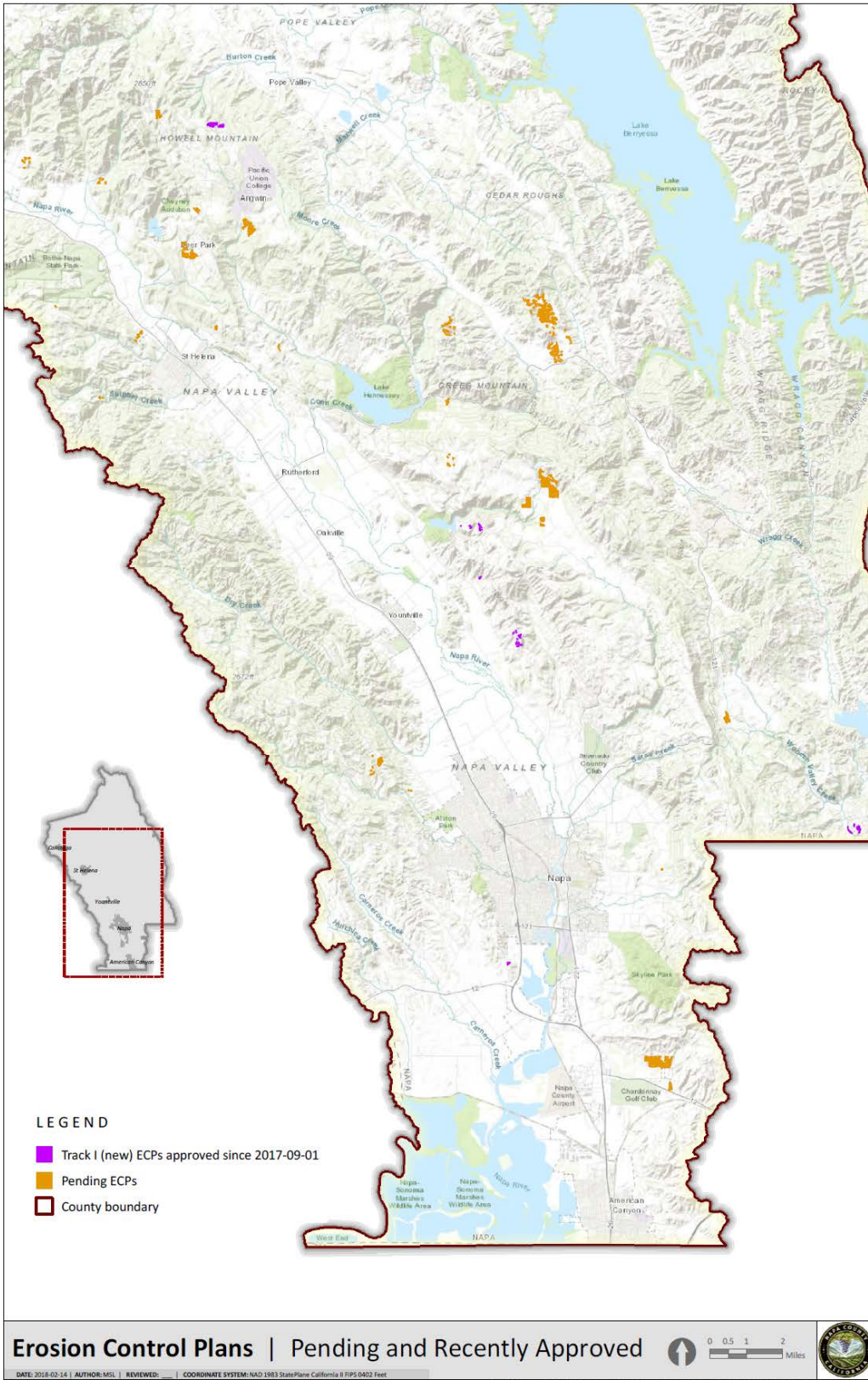
TRACK I EROSION CONTROL PLANS, PENDING AS OF 2018-02-12

ESTIMATED ACRES TO BE REMOVED BY ECP, BY VEGETATION CLASS											
Project by parcel number	Agriculture	Coniferous forest	Developed	Grassland	Oak woodlands	Other	Riparian woodland	Shrubland	Streams and reservoirs	Total by ASMT	Oak Woodland acres within stream setbacks*
P13-00373 (Davis Estates Track I ECP)											
018060011000					0.12			0.05		0.17	0.02
018060012000				0.10	1.16			4.36		5.62	0.22
018060013000					2.23			5.14		7.37	
018060076000				0.04	0.05					0.09	
Gross project acres: 15 / TOTALS:											
				0.14	3.56			9.55		13.25	0.24
P14-00043 (Frostfire Vineyards)											
021010074000		0.38	0.53		3.18		0.39			4.48	
021020007000			0.00		0.00					0.00	
Gross project acres: 4.5 / TOTALS:											
		0.38	0.53		3.18		0.39			4.48	0
P14-00322 (Anthem Winery)											
035460034000				0.00	0.01					0.01	
035460038000				0.53	0.28					0.82	
Gross project acres: 1.2 / TOTALS:											
				0.53	0.29					0.82	0
P14-00410 (Le Colline/Cold Springs, LLC)											
024300070000		1.19			2.27			4.45		7.91	
024300071000		4.30						2.53		6.83	
024300072000		6.20	0.29		3.36			3.12		12.96	
024324005000			0.00							0.00	
024332022000					0.09			0.16		0.24	
024340001000	1.00	5.01			0.79			0.21		7.01	
024340010000		0.00								0.00	
Gross project acres: 34.8 / TOTALS:											
	1.00	16.70	0.29		6.50			10.46		34.95	0
P15-00342 (Hendrickson Family Vineyards)											
032540015000								0.13		0.13	
032540016000	9.44							18.72		28.16	
Gross project acres: 28.42 / TOTALS:											
	9.44							18.85		28.29	0
P15-00389 (James B. Heiser)											
024450009000	0.12	3.53	0.06		0.11			1.38		5.20	
024450013000	0.05	0.38	0.07		0.00			0.01		0.51	
Gross project acres: 6 / TOTALS:											
	0.17	3.91	0.13		0.11			1.39		5.71	0
P16-00271 (Bremer Family Vineyard)											
021060003000			0.03		0.06					0.09	
021400002000	1.29				2.48					3.77	0.23
021400003000	0.05	0.01			0.25			0.02		0.33	
021400004000	5.48		0.01		0.05			0.05		5.58	
021400005000	2.02		0.01		1.46			2.72		6.22	
021400006000			0.00		0.16					0.16	
021420027000	0.37		0.07		2.53			1.02		3.98	
025370057000		0.98	0.29					1.89		3.16	
025370058000	0.00	0.03	3.98		0.09			4.92		9.03	
025370059000	0.02		0.07							0.09	
Gross project acres: 32.7 / TOTALS:											
	9.23	1.02	4.45		7.09			10.62		32.41	0.23
P16-00323 (Orin Swift Cellars)											
032500010000			0.00							0.00	
032500011000			1.06					11.04		12.09	
032540002000					0.98			5.82		6.80	0.4
032540003000	0.16			3.63	2.84			24.97		31.60	
032540005000								2.10		2.10	
032540007000				0.02				0.63		0.64	
032540021000								0.00		0.00	
032540043000				0.29	1.06			12.79		14.14	0.09
032540046000	0.10							35.15		35.26	
Gross project acres: 117.7 / TOTALS:											
	0.26		1.06	3.93	4.87			92.51		102.63	0.49
P16-00337 (Phelan Ranch)											
025440037000			0.26					0.23		0.23	
025440007000	5.34	0.26	0.26					12.73		18.59	
Gross project acres: 18.6 / TOTALS:											
	5.34	0.26	0.26					12.96		18.82	0

P16-00341 (North Winery LLC)										
025070043000						0.04			0.64	0.67
025110062000						3.06			0.53	3.60
Gross project acres: 4.28 / TOTALS:										
						3.10			1.17	4.27
										0
P17-00147 (Fantasca Track I)										
022250008000						1.08				1.08
Gross project acres: 1.05 / TOTALS:										
						1.08				1.08
										0
P17-00196 (Babu Vineyards)										
027010033000		0.61				1.00				1.61
027010038000						0.41				0.41
Gross project acres: 2.05 / TOTALS:										
		0.61				1.41				2.02
										0
P17-00261 (Denall Track I ECP)										
025070064000			0.09			2.64		0.04		2.77
Gross project acres: 2.7 / TOTALS:										
			0.09			2.64		0.04		2.77
										0
P17-00276 (Laird Kirkland Ranch Rd Track I ECP)										
057020081000	0.01									0.01
057140002000	1.33									1.33
057140008000				0.13						0.13
057140013000	2.13									2.13
057140014000	5.13						0.14			5.26
057140015000	0.02						0.04			0.05
057140016000	0.09			87.18		2.91	0.00			90.18
057140018000				0.01						0.01
Gross project acres: 99.2 / TOTALS:										
	8.71			87.32		2.91	0.17			99.10
										0
P17-00295 (Kenzo Wooden Vly Track I ECP)										
033040056000				1.66	0.77					2.43
033380001000	1.26			10.05	1.70					13.01
Gross project acres: 15.2 / TOTALS:										
	1.26			11.70	2.48					15.44
										0
P17-00348 (Promise Wine LLC Track I ECP)										
032520009000			3.47		0.90			0.45		4.82
Gross project acres: 4.75 / TOTALS:										
			3.47		0.90			0.45		4.82
										0
P17-00431 (Settler's Hill Track I ECP)										
022230012000					0.00					0.00
022230014000	2.21	1.26			2.40					5.88
022230015000	0.00				0.03					0.03
Gross project acres: 5.97 / TOTALS:										
	2.22	1.26			2.43					5.91
										0
P17-00432 (KJS Sorrento Track I ECP)										
025270022000	1.93			68.25	47.10		0.39	0.75		118.41
025270025000	0.17			8.40	28.57		0.09	0.18		37.41
Gross project acres: 155.8 / TOTALS:										
	2.10			76.64	75.67		0.48	0.93		155.82
										0.13
P17-00440 (Eisele Vineyard Estate)										
020340030000	0.56	0.09	0.59		5.29					6.53
Gross project acres: 6.5 / TOTALS:										
	0.56	0.09	0.59		5.29					6.53
										0
P17-00441 (3646 SMR Track I ECP)										
022150026000	0.04	0.03			0.73					0.80
Gross project acres: 1.5 / TOTALS:										
	0.04	0.03			0.73					0.80
										0
P18-00001 (Mt. Veeder Vyds Track I ECP)										
034230028000	0.05			2.27					0.01	2.33
034230029000				15.15	1.27					16.42
034270026000				0.03	0.00					0.03
034270035000				0.03						0.03
034270036000			0.03	0.20	0.00					0.23
035010001000				0.00						0.00
035010054000	0.03			0.07						0.10
Gross project acres: 19.01 / TOTALS:										
	0.08		0.03	17.75	1.28				0.01	19.14
										0
P18-00029 (Continuum Estate Track I ECP)										
032010076000								0.40		0.40
032010091000	1.05				0.04			0.85		1.94
032030043000					0.48			2.73		3.21
Gross project acres: 5.5 / TOTALS:										
	1.05				0.52			3.97		5.55
										0.02
P18-00045 (Ficeli Track I ECP)										
052220025000			1.14		0.13					1.27
Gross project acres: 1.2 / TOTALS:										
			1.14		0.13					1.27
										0
Grand Total	41.46	24.36	11.96	198.02	123.25	2.91	1.04	162.88	0.01	565.88
										1.11

all measurements are in acres
* no timberland acres were included

APPENDIX F: Map of Approved and Pending Projects



APPENDIX G: Map of Developed v. Undeveloped Lands in AW Zones

