

# 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 Initiative Amending Section 18.120.010 of the Napa County Code (1) to Disallow the Use of Personal Airports and Heliports and (2) to Limit the Circumstances Under which Helicopter Takeoffs and Landings in Support of Direct Agricultural Activities May Take Place

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At the request of the Napa County Board of Supervisors, we have prepared the following legal analysis of the Napa County Initiative Amending Section 18.120.01 of the Napa County Code (1) to Disallow the Use of Personal Airports and Helipads and (2) to Limit the Circumstances Under which Helicopter Takeoffs and Landings in Support of Direct Agricultural Activities May Take Place (“Helicopter Regulation Initiative,” or “Initiative”), with the understanding that it will be transmitted to the County’s Board of Supervisors as part of the report prepared pursuant to Elections Code § 9111.

## I. EXECUTIVE SUMMARY

In 2017, George Caloyannidis and Christine Tittel of Napa County (“Proponents”) proposed the Helicopter Regulation Initiative. This Initiative proposes to amend the Napa County Code of Ordinances (“County Code,” or “NCC”) to disallow the establishment of personal use airports and heliports, which currently are allowed upon the grant of a use permit. If enacted, the Initiative would also require that, where helicopter takeoffs and landings occur at locations other than a public airport, such flights must be “in support of direct aerial agricultural activities,” must only transport persons “essential” to that activity, and must be “unavoidable.” Currently, helicopter takeoffs and landings in support of agricultural production activities (such as aerial spraying or frost protection) have no requirement that the flights be “unavoidable” or include only “essential” personnel.

The Initiative is legally compliant in a great number of respects, but also has a number of potential legal flaws which might engender litigation challenges if it were enacted. These relevant legal determinations are summarized as follows:

- Determinations regarding scope of Initiative:
  - The Initiative would largely eliminate personal use heliports and airports, which are noncommercial facilities operated by individuals and families, and which currently are allowed by use permit in most of the County’s zoning districts.

- If the Initiative were enacted, property owners could continue to establish and operate personal use heliports and airports, but only in AV (Airport) zoning districts.
- By-right helicopter takeoffs and landings would face greater restrictions under the Initiative.
- Determinations regarding the clarity or vagueness of Initiative's terms:
  - The great majority of the Initiative's terms likely would survive an examination of whether they are constitutionally vague.
  - The Initiative's limitation of helicopter takeoffs and landings to those that are "unavoidable" and those involving only "essential" personnel, would create ambiguities that are potentially vulnerable to a constitutional vagueness challenge if one were brought.
- Determinations regarding preemption:
  - There is a risk that the Initiative, insofar as it purports to limit helicopter takeoffs and landings to those that are "unavoidable" and involve "essential" personnel, attempts to control aviation "service," an area of regulation that is preempted by federal law.
  - There is a risk that the Initiative, in placing additional restrictions on the aerial spraying of pesticides and other restricted materials, might be preempted by state law.
- Determinations regarding Initiative's effect on due process rights, vested rights, and its potential to result in unconstitutional takings:
  - The Initiative's proposed regulation of helicopter takeoffs and landings is unlikely to result in an unconstitutional taking vis-à-vis property owners who wish, in the future, to conduct avoidable helicopter flights with non-essential personnel aboard.
  - The Initiative's proposed prohibition on personal use heliports and airports is unlikely to result in an unconstitutional taking vis-à-vis property owners who have not yet established, but wish to establish, a personal use airport or heliport facility.
  - The Initiative is ambiguous as to whether it is intended to operate retrospectively so as to affect already existing and permitted operations, but if it were to be so construed it could have the following consequences:
    - With respect to the Initiative's effect on existing personal use helipads and airports, the Initiative might violate an owner's vested rights to operate such a facility, particularly insofar as it affected agricultural or utility operations; resolution of such a claim, however, likely would involve a very fact-specific inquiry and depend on other factors, such as whether the existing use might be deemed a public nuisance.
    - With respect to the Initiative's stricter regulation of helicopter takeoffs and landings, the Initiative could potentially create liability on behalf of the County, though ascertaining the existence and scope of any asserted vested rights in any particular helicopter operation would be a difficult endeavor owing to problems of proof which, in turn, would make enforcement against any particular operator difficult to sustain. That said, in order to mount a successful challenge, a claimant would likely have to allege that the Initiative effectively put the claimant out of business and, from a practical standpoint, it is unclear that increased limitations on by-right helicopter takeoffs and landings would cause the demise of a business.

- Notwithstanding the above, to the extent the Initiative is ambiguous about its effect on vested rights, existing County Code sections direct the County to adopt a construction that avoids unconstitutional applications.

There is a significant likelihood the Initiative could be challenged on the ground of vagueness, particularly with respect to its regulation of “unavoidable” helicopter takeoffs and landings involving only “essential” personnel. The Initiative also creates some potential for liability with respect to its possible effect on vested rights.

Given these potential defects, if the Initiative is enacted by the Board, or is placed on the ballot and passes, a number of consequences could ensue; the Initiative could subject the County to lawsuits, and the Initiative could be partially invalidated, based on the aforementioned bases.

As a general matter, the Board’s ability to bring a pre-election challenge to the Initiative is limited. Assuming an initiative petition substantially complies with the procedural and substantive requirements of the Elections Code for local initiatives, the Board generally may not withhold an initiative measure 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 may 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.

## II. BACKGROUND AND OVERVIEW OF HELICOPTER REGULATION INITIATIVE.

The Initiative would amend section 18.120.010 of the County Code as follows:

### 18.120.010 - Exceptions to use limitations.

- A. The following uses, in addition to those hereinbefore set forth, shall be allowed without a use permit in any zoning district:
10. ~~Helicopter takeoffs and<sup>1</sup> landings solely in support of direct agricultural production activities such as aerial spraying and frost protection at locations other than public airports, in support of direct agricultural activities but only if the takeoffs and landings comply with all of the following conditions: (a) they are solely in support of direct aerial agricultural activities and applications such as aerial spraying, aerial frost protection or aerial mapping; (b) they do not transport persons other than those essential to the conduct of such aerial activities; and (c) they are unavoidable.~~

Within forty-eight (48) hours of any takeoff or landing in support of direct agricultural activities as described herein, the helicopter operator shall submit to the director of the County's Planning, Building and Environmental Services Department a written report containing the

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<sup>1</sup> The Initiative does not, itself, identify that it proposes to add the word “takeoffs” to the County Code, but a comparison of the Initiative’s proposed legislation and existing County Code reveal that this is the case.

helicopter's registration number; date, time, duration and aerial activity of the operation; the persons engaged in the conduct of such activity; and the reason why the takeoff or landing was unavoidable.

- B. The following uses may be permitted in any zoning district (or where restricted to certain zoning districts, in accordance with such restrictions) upon the grant of a use permit in each case:
1. (Reserved);
  2. ~~Personal use airports and heliports, and e~~Emergency medical services landing sites, provided, that such use permit is not effective unless and until any required permits, licenses, or other approvals from other federal, state, and local agencies (including the airport land use commission) have been obtained;

The Initiative does not propose any modifications to the Napa County General Plan or any other legislative enactment, nor does it contain a precedence clause, providing that in the event of conflict, the Initiative's proposed zoning ordinances would prevail over existing ordinances. The Initiative also does not contain any severability clause providing that, in the event a portion of the Initiative is found to be unlawful, remaining portions of the Initiative would survive and continue to be effective.

### III. LEGAL ANALYSIS

#### A. Analysis of Initiative's regulatory reach.

One of the Initiative's significant effects, if enacted, would be the elimination of personal use airports and heliports as a permitted use upon obtaining a use permit, in any zoning district. It is important to understand, then, how these facilities are defined.

"Personal use airport and heliport" is a defined term in the County Code, and refers to "an airport or heliport limited to the noncommercial activities of an individual owner or family and occasional invited guests." (NCC, § 18.08.460.)<sup>2</sup> Consistent with the somewhat narrow manner in which "personal use airport and heliport" is defined, the Initiative would not appear to affect the entitlement or operation of the following:

- **An airport that supports a commercial use.** Again, the term "personal use airport and heliport" is limited to noncommercial activities, and would not include airports and heliports that support "commercial" activities. (See NCC, § 18.08.460.) Under the County Code, the term "commercial use" means a "use that involves the exchange of cash, goods or services, barter, forgiveness of indebtedness, or any other remuneration in exchange for goods, services, lodging, meals, entertainment in any form, or the right to occupy space over a period of time. It does not include the growing and subsequent sale of crops or livestock, the manufacturing, assembly, or processing and subsequent sale at

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<sup>2</sup> This personal use appears to be one of many flight-related uses that fall under the umbrella term "airport," which "means any area of land or water which is used, or is intended for use, for the landing and takeoff of aircraft, including helicopters and similar aircraft capable of approximately vertical ascent and descent." (NCC, § 18.08.050.)

wholesale of a product, or the operation of a telecommunication facility.” (NCC, § 18.08.170.)<sup>3</sup> “Commercial” airports, meanwhile, include “tourist and excursion transportation facilities” (NCC, § 18.08.610), which are conditionally permitted in the CL (Commercial Limited) District (NCC, § 18.28.030.I).

- **An airport operated by some entity other than an individual owner or family.** Personal use airports and heliports “are limited to the noncommercial activities of *an individual owner or family and occasional invited guests.*” (NCC, § 18.08.460 [emph. added].) The term “individual” is not defined in the County Code, but is commonly used to refer to a single human being, as distinct from a group, class, or family. We understand from conversations with staff that the County interprets the term “individual owner” to refer to a category of user that is broader than an individual person, but which includes any single ownership entity (e.g., a trust). The term “family” is a defined term in the County Code, and means “one or more persons living together under a single management conducted by one or more of the persons in the group.” (NCC, § 18.08.170.) It would appear, then, that an airport operated by a corporate entity, an association, or some other variety of organization in which constituent members do not live together would not fall within the ambit of the Initiative’s proposed prohibition of personal use heliports and airports.

Overall, the Initiative’s ban on personal use air facilities as a use allowed by use permit only would affect airports or heliports operated by individual owners or families, and which support noncommercial uses. However, because the term “individual owner” is broadly defined, this could capture a number of owners, including airports or heliports owned by a single trust, corporate entity, etc.

It is important, too, to recall that the Initiative contemplates two major zoning amendments. It also seeks to heighten restrictions on by-right helicopter takeoffs and landings, and the proposed, heightened restrictions (e.g., that such flights be unavoidable, and involve only essential personnel) would affect flights associated with any helipad or landing strip “at locations other than public airports.” (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)].) In other words, helicopter flights to and from private airports would be subject to the stricter helicopter regulations.

## **B. An initiative cannot be unduly 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 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

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<sup>3</sup> The growing and subsequent sale of crops or livestock appears to be an agricultural use, and not a commercial use. (See *id.*; see also NCC, § 18.08.040(A)-(C).) Conceivably, a personal use airport or heliport could include flight facilities that support agricultural activities. However, please see the following bullet point, which requires that personal use heliports and airports include only facilities operated by individuals or families.

challenge to a legislative measure that does not threaten constitutionally protected conduct ... 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 magazine articles, legal periodicals, etc.
  - The opinions of drafters who sponsor an initiative are not relevant since such opinions do not represent the intent of the electorate, and a court cannot say with assurance that the voters were aware of the drafters' purported 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, the drafters' 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.)

- Similarly, 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.)

Note that, 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 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. *Evaluation of whether elimination of personal use airports and heliports as use by authorized use permit creates confusion as to what is permitted and what is prohibited.***

The Initiative, if enacted, would no longer allow personal use heliports and airports by means of obtaining a use permit. (Initiative, § 2 [proposed NCC, § 18.120.010(B)(2).] This deletion from the County Code raises a number of potential questions:

- (a) How would the Initiative’s prohibition of personal use heliports and airports affect the rights (if any) of property owners to establish<sup>4</sup> personal airport uses on unincorporated County land via other permitting procedures in the County Code that the Initiative does not affect?
- (b) Would Pacific Gas & Electric, as well as other utility companies, be permitted to operate heliports and airports on their properties, or would they have to conduct such operations at public airports?

Each of these questions is discussed below.

- (a) *How would the Initiative’s prohibition of personal use heliports and airports affect the rights (if any) of property owners to establish such uses on unincorporated County land via other permitting procedures in the County Code that the Initiative does not affect?*

The question is whether, in prohibiting personal use heliports and airports as a use allowed by use permit, the Initiative’s proposed amendments to the County Code would effect a blanket prohibition of all personal use heliports and airports within any zone in unincorporated County

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<sup>4</sup> The question of whether the Initiative applies to personal use heliports and airports that already have been established is addressed in Section III.D.1.c, below.

land, regardless of whether other zoning ordinances, which remain unaffected by the Initiative, authorize their establishment.

Section 18.120.010(B), in its current form, provides that the “following uses may be permitted in any zoning district (*or where restricted to certain zoning districts, in accordance with such restrictions*) upon the grant of a use permit . . .” (Emph. added.) The Initiative would not affect this above-quoted language, but rather would strike “personal use airport and heliports” from the list of activities allowed by a use permit in all zoning districts.

At the same time, section 18.24.030(A), which the Initiative would not amend, provides that all airports, without qualification, are permitted in Airport (AV) districts upon grant of a use permit. The Initiative overlaps, then, with the AV zoning rules insofar as they both address, explicitly or implicitly, personal use airports and heliports. Because the Initiative does not contain a precedence clause, it is not entirely clear whether the Initiative intends or operates to prohibit personal use airport and heliports in AV zones, or if the rules governing AV zones effectively operate as an exception to the Initiative’s prohibition of personal use airports and heliports. The most reasonable interpretation would appear to be that the AV zoning rules do survive given that, in introducing permitted uses in section 18.120.010(B), the County Code provides that, where uses are “restricted to zoning districts,” such uses shall be “in accordance with such restrictions.” In other words, the elimination of personal use heliports and airports contemplated in section 18.120.010(B)), insofar as this provision affects all zoning districts, should be construed to respect, and not affect, the full array of airport uses that are separately and more specifically regulated in AV zones. Canons of construction dictate that 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. (*See, e.g., Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) In this manner, section 18.120.010 functions in a manner akin to a zoning overlay, and the Initiative would only affect what is authorized by the overlay.

While some ambiguity colors the Initiative in this respect, it would most likely be construed not to affect the unamended AV zoning provisions, and it therefore seems unlikely a court would find proposed section 18.120.010(B) unconstitutionally vague in this respect.

- (b) *Would Pacific Gas & Electric, as well as other utility companies, be permitted to operate heliports and airports on their properties, or would they have to conduct such operations at public airports?*

As discussed in Section III.A, the Initiative’s effect on personal use heliports and airports amends the regulation of flight facilities operated by individual owners and families and, because the term “individual owner” is broadly defined, it could affect the rights of PG&E and other utility companies to operate heliports and airports insofar as these entities are structured to own property under a single entity. Moreover, the Initiative would prohibit helicopter takeoffs and landings at all locations *other than public airports* unless these flights support *agricultural* activities and meet other, certain qualifications. (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)].) This portion of the Initiative’s proposed amendments therefore would appear to affect the operations of entities such as PG&E.

Notwithstanding the above, and consistent with the preceding section, it is unclear whether PG&E and other utility companies could override the Initiative’s helicopter regulations in AV zones by availing themselves of procedures in County Code Chapter 18.24. The purpose of the AV zone is to “[p]rovide sites in public and private ownership for the operation of airports” (NCC,



§ 18.24.010(A)), and airports, which include facilities for the takeoff and landing of helicopters (NCC, § 18.08.050), are permitted in AV zones with a use permit (NCC, § 18.24.030(A)). The question, then, is whether the Initiative's proposed regulation of the scope of permissible helicopter flights (1) conflicts with the scope of airport uses, including helicopter uses, permitted in AV zones, or (2) contemplates the airport uses allowed in AV zones, but harmoniously regulates the *intensity* of helicopter operations in such zones.

As discussed in the previous section, in considering the interplay between the Initiative's proposed ordinance changes and the County's existing AV zoning ordinance, the most reasonable interpretation would appear to be that the AV zoning rules do survive, intact and unchanged. (See NCC, § 18.120.010 [enumerated uses are "in addition to those hereinbefore set forth"].) Under this reading, then, PG&E and other utility companies would be able to conduct helicopter takeoffs and landings at non-public sites so long as they were constructed in AV zones. Personal helicopter and airport facilities newly proposed in locations other than AV zones, meanwhile, would not be permitted. With regard to existing facilities, please see Section III.D.1.c of this Memorandum, below.

While some ambiguity colors the Initiative, it would most likely be construed not to affect the unamended AV zoning provisions, and it therefore seems unlikely a court would find proposed section 18.120.010(A)(10) unconstitutionally vague in this respect.

**2. Evaluation of whether limitation on permitted helicopter takeoffs and landings in support of direct agricultural activities creates confusion as to what is permitted and what is prohibited.**

The Initiative proposes that, where by-right helicopter takeoffs and landings do occur at locations other than a public airport, such flights must be "in support of direct aerial agricultural activities," must only transport persons "essential" to that activity, and must be "unavoidable." (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).] This language raises a number of questions:

- (a) What are "direct aerial agricultural activities," and will County staff be able to identify what qualifies as such?
- (b) Is the list of direct aerial agricultural activities meant to be exhaustive or illustrative?
- (c) What type of persons are "essential" to the conduct of direct aerial agricultural activities?
- (d) When is a flight in support of direct agricultural activities "unavoidable," as required by the proposed ordinance?
- (e) What effect would the Initiative have on helicopter takeoffs and landings in support of agricultural "production" activities?

Each of these questions is discussed below.

- (a) *What are “direct aerial agricultural activities,” and will staff be able to identify what qualifies as such?*

The Initiative would prohibit helicopter takeoffs and landings at locations other than public airports unless the flights were “in support of direct agricultural activities” and are “solely in support of direct aerial agricultural activities and application such as aerial spraying, aerial frost protection, or areal mapping.” (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).] The text of the proposed ordinance appears to be somewhat redundant, insofar as its scope contemplates allowing those flights in support of “direct agricultural activities” and those flights in support of “direct aerial agricultural activities.” Presumably “direct aerial agricultural activities” is a subset of “direct agricultural activities,” though the language is ultimately unclear. The terms “support,” “direct,” and “aerial” are not expressly defined by the Initiative nor by the County’s Code.

Notwithstanding the above, it would appear it is unnecessary to include definitions of the foregoing terms in the Initiative’s proposed ordinances. Each of the foregoing terms are common words that staff have been interpreting and applying under the existing County Code (see, e.g., existing NCC, §§ 11.28.030 18.12.010(A)(10), 18.24.030(C) [use of term “aerial”]; §§ 2.80.090, 18.08.195 [use of term “direct”]; §§ 18.28.030(M), 18.40.020, 18.119.070 [use of term “support”].) The term “aerial” generally means existing, happening, or operating in the air; the term “direct” generally connotes the absence of intermediary actions or factors; and “support” generally means to enable to function or act. In implementing the existing Code, County staff indicate these terms have been noncontroversial and are ascribed their common meaning.

The term “agriculture,” meanwhile, is a defined term. Section 18.08.040 of the County Code provides that “agriculture” means the “raising of crops or livestock,” and includes growing crops, grazing animals, animal husbandry, the provision of farmworker housing, farm management activities, and certain other activities. Farm management, in turn, means the operation, maintenance, and storage of farm machinery, equipment, vehicles and supplies used exclusively for agricultural cultivation and harvesting. ( NCC, § 18.08.040(F).)

Ultimately, while somewhat imprecise, the Initiative’s requirement that helicopter takeoffs and landings support “direct aerial agricultural activities” does not employ terms that either the County or a court is likely to find are unconstitutionally vague.

- (b) *Is the list of direct aerial agricultural activities meant to be exhaustive or illustrative?*

The Initiative allows helicopter flights that support “direct aerial agricultural activities and applications such as aerial spraying, aerial frost protection, or aerial mapping.” (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).] Insofar as the Initiative lists these examples of direct aerial agricultural activities, a question arises as to whether this list is illustrative or exhaustive.

Use of the phrase “such as” is most reasonably construed as a synonym for the phrase “for example,” which is commonly understood to be a means of introducing an illustrative and not exhaustive list. Indeed, in interpreting and applying the existing requirements of County Code section 18.120.010(A)(10), which allows helicopter flights “in support of direct agricultural production activities such as aerial spraying and frost protection,” County staff have historically construed aerial spraying and frost protection as illustrative of the types of activities excepted from otherwise applicable use limitations.

(c) *What type of persons are “essential” to the conduct of direct aerial agricultural activities?*

The Initiative would prohibit helicopter takeoffs and landings at locations other than public airports unless the flights transported only those persons “essential” to the conduct of direct aerial agricultural activities.” (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).)

While the term “essential” is a common word, and would appear to mean “necessary” or “indispensable” in this context, it is nonetheless difficult to surmise what types of persons are “essential” to direct aerial agricultural activities. While certainly the pilot of any helicopter is an essential party, it is not clear, in the absence of guiding criteria, what categories of persons may be considered necessary to support the pilot, or the qualifying aerial agricultural activity. For instance, are any personnel that make a pilot’s job easier deemed to be essential (e.g., on the theory that unburdening the pilot reduces the risk of an accident), or must such personnel perform a task that is absolutely necessary for the safety of the flight, but which the pilot cannot personally undertake? Safety considerations aside, the full panoply of “direct aerial agricultural activities” would appear to include a number of highly specialized activities, such as pesticide use and surveying, and it may be difficult, and require expertise, to understand who is essential to complete a given task in a safe, effective, and/or efficient manner. In the absence of clear standards and criteria to guide them, the Initiative may effectively require that County staff and helicopter operators “guess” at who may participate in a flight so as to ensure the flight qualifies for an exception under Section 18.120.010, and thus the incorporation of the term “essential” creates some legal vulnerability. Moreover, because helicopter operators who violate the County Code are potentially subject to criminal penalties (see Section III.D.2 of this Memorandum), the consequence of a wrong decision here is potentially significant.

The question, then, is whether these ambiguities amount to a constitutional violation. On the one hand, an ordinance cannot be so vague that a person “of common intelligence must necessarily guess at its meaning and differ as to its application ...” (*Connally, supra*, 269 U.S. at 391.) On the other hand, California courts have further stated that “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.) With respect to the Initiative’s “‘essential’ personnel” requirement, there would be “easy” cases — i.e., circumstances where one clearly could comply with the proposed ordinance — such as a takeoff in which a helicopter carries only a pilot and is purposed with applying a herbicide that is absolutely necessary to save a crop. One might argue, then, that the law is not impermissibly vague in all its applications. At the same time, there exist a myriad of circumstances that are not easily classifiable, and even apparently easy cases might be subject to some uncertainty. As discussed in more detail in the next section, at least one California court has held that an ordinance incorporating a “necessity” standard can, in itself and in some circumstances, result in constitutional infirmity. (See *Citizens for Jobs, supra*, 94 Cal.App.4th at 1335.) Meanwhile, as discussed above, determining what is “necessary” is the equivalent of asking what is “essential.” Second, even if the Initiative is not constitutionally vague on its face, where a party is accused of violating the Initiative and the case is not an “easy” one, that party might be able to raise constitutional vagueness as an “as applied” defense.

While various County Code provisions would obligate the County to interpret ambiguities to avoid unconstitutional results (see NCC, §§ 1.04.110, 1.04.130, 1.04.140), those provisions would not appear to resolve the issues here; that is, the meaning of “essential” in this context is

unknown, and the County could encounter great difficulty in choosing between legal and illegal constructions.

Given the inherent difficulty in deciding who is “essential” to a qualifying helicopter flight, and the potential consequences involved, there is legal risk that the Initiative’s use of the word is unconstitutionally vague.

- (d) *When is a helicopter takeoff or landing that supports direct agricultural activities an “unavoidable” event, as required by the proposed ordinance?*

The Initiative would prohibit helicopter takeoffs and landings at locations other than public airports unless the flights supported certain agricultural uses and were “unavoidable.” (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).])

The term “unavoidable” is also a synonym of the word “necessary,” a term which at least one court has reviewed for vagueness in the context of an initiative. 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’s criterion that a helicopter flight be “unavoidable” appears to suffer from the same defect. For instance, is a helicopter flight unavoidable only where crops are at risk of dying without it? Is a flight unavoidable where it merely will save a farm owner a significant amount of work (e.g., the costs or duration of a “terrestrial” activity significantly exceed the costs or duration of an aerial activity)? Moreover, the phraseology employed by the Initiative is awkward to say the least – would not a “landing” always be “unavoidable” after a “takeoff,” or is the County expected to consider that an airborne helicopter technically could land in another governmental jurisdiction? The proposed ordinance contains no criteria that would guide the County in this respect, raising questions similar to those asked by the court in *Citizens for Jobs and the Economy v. County of Orange*. (See *Citizens for Jobs*, 94 Cal.App.4th at 1335.)

Given the difficulty a helicopter operator or County staff member would face in deciding whether a particular flight is “unavoidable,” and the potential criminal, civil, and administrative consequences involved (see Section III.D.2 of this Memorandum), there is risk that a court

would determine the Initiative's use of this term, in this context, is unconstitutionally vague. Finally, as with the term "essential," the ambiguity here is fundamental. Therefore, while various County Code provisions would obligate the County to interpret ambiguities to avoid unconstitutional results (see NCC, §§ 1.04.110, 1.04.130, 1.04.140), those provisions would not appear to resolve the issues here.

(e) *What effect would the Initiative have on helicopter takeoffs and landings in support of agricultural "production" activities?*

The Initiative, if enacted, would remove the term "direct agricultural production activity" from the existing ordinance and replace it with "direct agricultural activity." Disappearing, then, is the term "production." County staff have indicated that the term "production" is interpreted to mean the "processing of agricultural products," such as the crushing of grapes into wine or the making of jam out of strawberries. (See, e.g., NCC, §§ 18.104.200 ["Production facility" for the purpose of this section means crushing, fermenting, bottling, bulk and bottle storage, shipping, receiving, laboratory, equipment storage and maintenance facilities"], 18.104.250 [contemplating "production" capacity of small wineries].) The effect of the Initiative, then, could be to narrow the scope of permissible helicopter takeoffs and landings to those involving the growing of crops, as opposed to the processing of such crops into agricultural products such as wine. On the other hand, the Initiative's removal of the qualifier "production" could be intended to broaden the scope of helicopter takeoffs and landings that are permitted by right.

Ultimately, the effect of the Initiative in this respect is unclear, and it appears a court would have a difficult time determining the scope of permitted helicopter takeoffs and landings. The better interpretation, strictly from reading the Initiative's plain text, would appear to be that removal of a qualifier serves to remove a limitation, meaning helicopter flights in support of broader agricultural activities are permitted by right.

**3. *Evaluation of whether requirement that helicopter operators submit post-flight report is unlawfully vague.***

The Initiative requires that, within 48 hours of any takeoff or landing in support of "direct agricultural activities," the helicopter operator shall submit to the County a "written report containing the helicopter's registration number; date, time, duration and aerial activity of the operation; the persons engaged in the conduct of such activity; and the reason why the takeoff or landing was unavoidable." (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)].)

While the requirements to provide the registration number, date, time, duration, aerial activity, and involved persons all request the reporting of objective information, insofar as the Initiative would require the helicopter operator to articulate the reason the takeoff or landing was "unavoidable," the Initiative may suffer from the same vagueness problems identified in Section III.A.2.d of this Memorandum.

**4. *Evaluation of whether Initiative, in failing to disclose the full extent of its proposed zoning text changes, is unlawfully misleading.***

Courts hold that "The 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 v. Reyes* (1998) 69 Cal.App.4th 93, 99.)

Here, the Initiative fails to disclose that it seeks to impose further regulation on by-right helicopter “takeoffs and landings,” whereas the existing County Code only addresses helicopter landings. (*Compare* Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)] with existing NCC, § 18.120.010(A)(10).) In other words, whereas the existing County Code regulates helicopter landings, the Initiative neglects to indicate that it proposes to regulate helicopter “takeoffs and landings.”

This error would not appear to rise to the level of illegality. While the existing County Code’s regulation of by-right helicopter flights refers only to “landings,” it is implied that the Code applies the same regulations to helicopter takeoffs. For instance, in discussing helicopter landing sites, it is commonly understood that such sites are intended to accommodate both takeoffs and landings. To hold otherwise would be to subject helicopter takeoffs in Napa County to different rules than landings, with takeoffs potentially being banned. In this latter scenario, any helicopter that landed would never be able to take off, and it does not appear to be the case the County intended to ground all landed helicopters. From a practical perspective, then, the Initiative’s inclusion of the word “takeoffs,” while not delineated in voter materials, appears to clarify that the existing Code’s use of the term “landings” refers to both the start and end of helicopter flights, and the Proponent’s omission would not appear to substantially mislead voters.

### **C. An initiative cannot enact a local law that is preempted by federal or state law.**

An initiative cannot lawfully impose a local law that is preempted by state or federal 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 federal and state regulation of aviation.

#### **1. Relevant case law and 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 that 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:
  - 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;
  - 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
  - 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) Federal preemption analysis.

As explained below, while federal law likely does not preempt a local government’s ability to regulate the location of a heliport or airport, it might preempt the Initiative’s requirements that helicopter takeoffs and landings be “unavoidable” and involve on “essential” personnel.<sup>5</sup>

The Federal pre-emption doctrine is based on the Supremacy Clause of the United States Constitution. (U.S. Const., Art. VI, Clause 2.) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in and over the air space of the United States. (Federal Aviation Act, 49 USC §§ 1108(a) 1508(a) & 40103(b)(1) (the “Act”); *City of Burbank v. Lockheed Air Terminal Inc.* (1973) 411 U.S. 624, 626; *Abdullah v. American Airlines, Inc.* (3d Cir.1999) 181 F.3d 363, 367. The Act gives the Administrator of the Federal Aviation Administration (“FAA”), in conjunction with the Environmental Protection Agency, broad authority to regulate the use of the navigable airspace of the United States in order to ensure the safety of aircraft, the efficient utilization of such airspace and for the protection of persons and property on the ground. (*City of Burbank, supra*, 411 U.S. at 627.)

The following chart illustrates the types of local regulations that federal law does preempt, and the types of local regulations that federal law does not preempt, according to the courts:

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<sup>5</sup> Note, the extent of federal law is pervasive and preempts a municipal ordinance which attempts to govern the flight paths of aircraft using an airport which has no control tower, is not served by a certified carrier, and has no regularly scheduled flights. (*United States v. City of Blue Ash* (S.D. Ohio 1978) 487 F.Supp. 135, aff’d in *United States v. City of Blue Ash* (6th Cir. 1980) 621 F.2d 227.)

Federal law has been found to preempt local regulations that address:	Federal law has been found <u>not</u> to preempt local regulations that address:
the price of flights	the location of heliports and airports
flight routes/ air traffic patterns	pilot licensing
flight service	licensing fees
the timing of flights, including the imposition of curfew	operation of ground facilities
noise from aircraft	
use of airspace, flight levels	
aviation safety	
runway configuration	
preflight warnings	
aircraft weight	
navigation	

(49 U.S.C., § 41713(b)(1); *Gustafson v. City of Lake Angelus* (6th Cir. 1996) 76 F.3d 778, 783-784; *Hoagland v. Town of Clear Lake, Ind.* (7th Cir. 2005) 415 F.3d 693, 697; *San Diego Unified Port Dist. v. Gianturco* (9th Cir. 1981) 651 F.2d 1306, 1311-1313; *Citizens Opposing a Dangerous Environment v. County of Kern*, 228 Cal.App.4th 360, 384-385 (2014); *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 379; *Blue Sky Entertainment, Inc. v. Town of Gardiner* (U.S.D.C. NY 1989) 711 F.Supp. 678; *Tweed-New Haven Airport Authority v. Town of East Haven* (D. Conn. 2008) 582 F.Supp.2d 261, 269-272; *Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464.)

One of the seminal cases is *City of Burbank v. Lockheed Air Terminal Inc.* (1973) 411 U.S. 624, in which the U.S. Supreme Court held that the establishment of a flight curfew, intended to reduce nighttime noise from aircraft, was preempted by federal law. Various courts have interpreted this decision in various ways, leading to a split among authorities.

To some extent, California's federal and state courts appear to be more willing to determine that a local regulation is preempted than courts outside the state. In 1992, the Ninth Circuit Court of Appeals considered whether federal law preempted a city ordinance which authorized a planning commission to impose conditions on any proposed runway and taxiway configurations. (*Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles* (9th Cir. 1992) 979 F.2d 1338, 1340.) The Ninth Circuit interpreted the U.S. Supreme Court's *Burbank* opinion to provide that municipalities are preempted insofar as they impose any regulation "that directly interferes with aircraft operations." (*Id.* at 1341.) Seven years later, a California Court of Appeal affirmed that federal law preempts local controls that directly affect aircraft or flights. (*City of Burbank, supra*, 72 Cal.App.4th at 379-380; see also *Independent Living Center of Southern California, Inc. v. Shewry* (9th Cir. 2008) 543 F.3d 1050, 1055 [citing U.S. Supreme Court's *Burbank* decision and 49 U.S.C., § 1508(a) to hold that the federal government possesses "complete and exclusive national sovereignty in the airspace of the United States"].)

Courts outside of California tend to interpret the U.S. Supreme Court's decision in *Burbank* more narrowly. A line of authorities that includes *Gustafson v. City of Lake Angelus, supra*, 76



F.3d 778 and *Hoagland v. Town of Clear Lake, Ind.*(N.D. Ind. 2004) 344 F.Supp.2d 1150, 1157-1159, *affirmed by Hoagland, supra*, 415 F.3d 693, have held that the U.S. Supreme Court only determined that the field of noise regulation was preempted.

The holdings of the Ninth Circuit Court of Appeals and the California Court of Appeal would serve as legal precedent for any court reviewing the Initiative. While there may be debate on the national level as regards the scope of preemption, California Courts have been fairly consistent in their reading of law. For purposes of this Memorandum, then, it is assumed California holdings will govern any inquiry into the legality of the Initiative.

- (i) Evaluation of whether regulation of location of heliports and airports are preempted by federal law.

Judicial authorities are fairly consistent in holding that a local government may regulate the location of an airport or heliport, and that a local government's zoning powers are not preempted by federal law. (*Hoagland, supra*, 415 F.3d at 697; *Gustafson, supra*, 76 F.3d at 783-787; *Riggs v. Burson* (Tenn. 1997) 941 S.W.2d 44, 50-51; *Condor Corp. v. City of St. Paul* (8th Cir. 1990) 912 F.2d 215, 219 [city's denial of the conditional use permit was not preempted by federal law or FAA regulations of airspace]; *People v. Altman* (N.Y. Dist. Ct. 1969) 61 Misc. 2nd 4, 5 [city ordinance that prohibiting any seaplanes from taking off or landing in city water channels or waterways was not preempted; local legislation is not preempted if its conflict with federal law is so indirect and not wholly repugnant to the purpose of the Federal law so that in the end the two can be reconciled]; *Garden State Farms, Inc. v. Bay* (1978) 77 N.J. 439, 447 [ordinance prohibiting airplane and helicopter takeoffs and landings as a principle use or accessory use of any land, building or rooftop was not preempted by federal law; there was no overall nationwide uniform need for, or any statement of Congressional intent in the Act controlling, the regulation of the location of heliports]; see 14 CFR, § 157.7 [indicating that the FAA does not intend to pervasively regulate the designation of the location of private airfields].) These authorities draw distinctions between how one uses land and how one operates an aircraft, finding only the latter is preempted, and have determined that ordinances both limiting and banning airports are valid local enactments. (*Hoagland, supra*, 415 F.3d at 697.) California authorities appear to be consistent with this approach. In the California appellate court's *Burbank* opinion, the court held that "local governments retain their power to regulate land use, even with regard to safety and noise control, so long as it does not touch upon the control of aircraft or airspace, or any aspect of aviation navigation." (*Burbank, supra*, 72 Cal.App.4th at 380.)

Accordingly, it appears the Initiative's proposed prohibition of personal use heliports and airports in non-AV zones serves to regulate the location of heliports, and would not be preempted by federal law.

- (ii) Evaluation of whether regulation limiting helicopter takeoffs and landings to those in support of direct agricultural operations is preempted by federal law.

It does not appear that federal law preempts the County from restricting flights out of non-public airports only to those in support of direct aerial agricultural activities. However, this determination is somewhat uncertain.

Federal law only preempts local land use regulations that directly impact or contradict federal laws governing: efficient air space management, control of aircraft noise, aircraft safety, aircraft

navigation, actual conduct of flight operations in navigable air space, and airline price, route and service. (See Section III.C.2.a of this Memorandum.) Local land use ordinances or regulations that have only a minor and indirect impact on aviation are not pre-empted by federal law. (See *Goodspeed Airport, LLC v. East Haddam Inland Wetlands & Watercourse Commission* (2d Cir. 2011) 634 F.3d 206, 212; *Hoagland, supra.*, 415 F.3d at 697; *Skydive Oregon, Inc. v. Clackamas County* (1993) 122 O.R. App. 342, 345; *Altman, supra.*, 61 Misc. 2nd at 5.) Local land use regulations, such as provisions limiting helicopter flights to only those in direct support of agriculture operations, would not seem to be in direct conflict with the regulation of air space management, flight operations, aircraft safety, or navigation.

We have found no case that specifically evaluates the validity of a local ordinance limiting helicopter flights to only agricultural purposes. Several cases address analogous facts, although they arrive at different conclusions. The federal district court in *Faux-Burhans v. County Commissioners of Frederick County* (1987) 674 F.Supp. 1172 held that local land use restrictions that governed the number of aircraft, the type of aircraft, clear zones at the end of runways, and runway setbacks, and that *prohibited instructional flights* at a private airport, were not pre-empted by federal law. The court found that these regulations did not impact or affect actual conduct of flight operations within navigable air space (*Id.* at 1174.) In so finding, the court held that none of these activities “is federally pre-empted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace.” (*Id.*)

On the other hand, the Tenth Circuit U.S. Court of Appeal “easily” concluded that an outright ban on scheduled passenger service to a public airport related to both the “service” and “route” of aircraft, which federal law preempts. (*Arapahoe Cty. Pub. Airport Auth. v. F.A.A.* (10th Cir. 2001) 242 F.3d 1213, 1222.) The court held that, by banning scheduled passenger service, an airport authority “affirmatively curtailed an air carrier’s business decision to offer a particular service in a particular market. The ban also significantly impact[ed] the scope of services available to public citizens desiring to travel by air from the public airport.” (*Id.*)

It is not easy to resolve the holdings of the foregoing cases. Adopting the Ninth Circuit’s “direct interference” test, the proper inquiry would be whether the Initiative’s limitation of helicopter flights — i.e., to those flights in support of direct aerial agricultural activities — is a direct regulation of aircraft operations, including air service, or a zoning ordinance that indirectly affects aircraft operations. The effect of the Initiative is not an outright ban on non-agricultural flights at any specific public or private airport, but a generally applicable limitation on the location of takeoffs and landings. If the Initiative were enacted, non-agricultural helicopter flights could, for instance, continue to take place in AV and CL zones. (See NCC, §§ 18.24.030(A) [airports permitted upon issuance of a use permit], 18.08.610, 18.28.030.I [commercial helicopter flights conditionally permitted in the CL zone].) The ordinance does not directly, or perhaps even indirectly, curtail any particular air carrier’s business decision to “offer a particular service in a particular market.” (See *Arapahoe, supra.*, 242 F.3d at 1222.) Again, flights other than those in support of direct aerial agricultural activities could occur in a nearby zone within the County.

Overall, it appears that, insofar as the Initiative targets flights with a particular purpose, the gravamen of the ordinance is to control the location of certain flights, and not to control in a direct manner what happens within a given aircraft, or the service policies of its operators. On this basis, the restriction of by-right helicopter trips to only those in support of direct aerial agricultural activities would not appear to be federally preempted, though some uncertainty inheres in this determination because no court appears to have adjudicated this precise issue.

- (iii) Evaluation of whether regulation limiting helicopter takeoffs and landings to those that are “unavoidable,” and that involve only “essential” personnel, is preempted.

The Initiative’s attempt to prohibit helicopter flights that are avoidable, or involve nonessential personnel, might be preempted by federal law. As indicated above, California courts generally hold that any local regulation that directly interferes with aircraft operations is invalid. (*Burbank, supra*, 979 F.2d at 1340-1341; *City of Burbank, supra*, 72 Cal.App.4th at 379-380; see also *Independent Living, supra*, 543 F.3d at 1055.)

Given the public’s generally unfamiliarity with agricultural flights, it might be helpful to consider an analogous limitation affecting commercial air travel. To this end, regulating what agricultural flights are “unavoidable,” or necessary, would be akin to imposing a rule that only commercial passenger flights that are necessary would be allowed to proceed. Under this scenario, only flights carrying passengers that have an absolute need to travel (e.g., to receive medical care) would be permitted to takeoff or land outside of a public airport. Meanwhile, if only “essential” personnel were permitted to staff these flights, then presumably only a pilot and perhaps a skeleton crew of attendants would be required. It would seem very likely that a court would determine these rules directly interfere with the conduct of aviation operations. As discussed in Section III.B.2, it is not clear how the Initiative defines “unavoidable” and “essential,” but it would seem that any local decisions that involved sorting who could board or facilitate a flight would be legally problematic.

Even if California’s “direct interference” rule was ultimately invalidated by, say, the U.S. Supreme Court, authorities across the nation are consistent in holding that local regulations may not impinge on federal rights to control a flight’s price, route, and service. (See 49 U.S.C., § 41713(b)(1); *Gustafson, supra*, 76 F.3d at 783-784; *Hoagland, supra*, 415 F.3d at 697.) It is this latter consideration, a flight’s “service,” that bears on the validity of the Initiative.

Flight service has been broadly interpreted by courts, and includes ticketing, preflight screening, boarding procedures, provision of food and drink, seating, the conduct of pilots and crew members within the scope of normal aircraft operations, and baggage handling, in addition to the transportation itself. (See *Arapahoe Cty. Pub. Airport Auth. v. F.A.A.* (10th Cir. 2001) 242 F.3d 1213, 1222; *Butcher v. City of Houston* (S.D. Tex 1993) 813 F.Supp. 515, 517; *Peterson v. Cont'l Airlines, Inc.* (S.D.N.Y. 1997) 970 F. Supp. 246, 250.) Insofar as the Initiative’s “unavoidability” and “essential” personnel requirements regulate who might travel on a given flight, their reasons for wanting to fly, and who can staff such flights, these proposed requirements seem to affect “service,” as defined above, and might be preempted.

Please note, if enacted, various County Code provisions would obligate the County to interpret ambiguities in the Initiative to exclude unconstitutional results. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.) The difficulty, however, is that it appears that no court has reviewed, in any context, whether prohibiting “avoidable” flights or those staffed with “non-essential” personnel passes constitutional muster. Thus, attempting to reform the Initiative so that it respects the boundaries of preemption would be difficult and fraught with uncertainty.

- (iv) Evaluation of whether regulation that requires the filing of a report within 48 hours of any helicopter takeoff or landing in support of direct agricultural operations is preempted.

If enacted, the Initiative would require that, within 48 hours of any takeoff or landing from a non-public airport in support of direct agricultural activities as described therein, the helicopter operator must submit to the director of the County's Planning, Building, and Environmental Services Department a written report containing the helicopter's registration number; date, time, duration, and aerial activity of the operation; the persons engaged in the conduct of such activity; and the reason why the takeoff or landing was unavoidable. (Initiative, § 2 [18.120.010(A)(10).])

The requirement that helicopter operators submit a report detailing the specifics of their takeoffs and landings would not appear to result in any direct interference with aircraft operations, or otherwise affect the price, route, and service of any flight. Rather, this sort of administrative requirement would appear to be more akin to aviation-related licensing requirements, which are not preempted by federal law. (See *Blue Sky, supra*, 711 F.Supp. at 693.)

- (v) Note about limitations of preemption.

Even if the Initiative were determined to be preempted by federal law to some extent, this determination likely would not preclude citizens from bringing a state law nuisance claim against the proprietor or users of an airport. (See *Blue Sky, supra*, 711 F.Supp. at 691, citing *Bineman v. City of Chicago* (7th Cir. 1988) 864 F.2d 463, 70-73.) Courts draw a distinction between the regulation of aviation and a citizen's ability to obtain damages for harm caused by aviation.

- (b) *State preemption analysis.*

- (i) Legal rules regarding interrelation between state law and voter initiatives.

Courts are protective of voter initiatives. A party claiming that state law preempts a local ordinance has the burden of demonstrating that preemption, and the California Supreme Court has been particularly reluctant to infer a legislative intent to preempt a field covered by a municipal regulation when there is a significant local interest to be served that may differ from one locality to another. (*Citizens For Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 366, quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) Thus, courts will presume, "absent a clear intention of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Id.* at 371 [emph. in original], quoting *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 573-574.)

- (ii) Evaluation of whether state regulations on pesticide and agricultural chemical application by aircraft preempts the Initiative's regulation of helicopter takeoffs and landings.

As discussed above, the Initiative, if enacted, would limit helicopter takeoffs and landings to those flights that support direct aerial agricultural activities, which include "aerial spraying," and only insofar as such flights are "unavoidable" and carry only "essential" personnel. (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)].) The question is whether these limitations on the

application of pesticides or agricultural chemicals are preempted by state regulations of the same. It appears the Initiative's restrictions on aerial spraying might be preempted.

State law addresses the use of pesticides and other agricultural chemicals, as codified in Divisions 6 and 7 of the Food and Agriculture Code. Portions of this regulatory framework address poisons, restricted materials, and environmentally harmful materials, but not their delivery by aircraft. (See Food & Ag. Code, §§ 12501-12675, 12751-12944, 14001-14098, 14101-14104.) Those sections that do address the application of pesticides and chemicals by aircraft<sup>6</sup> focus on the credentials of a pilot, including pilot apprenticeship requirements, examination requirements, certification requirements, licensing, aircraft registration, financial responsibilities, insurance, and pilot discipline in the event that certain issues arise. (See Food & Ag. Code, § 11901-11940; see also 3 CCR, §§ 6542 [registration requirements], 6502 [licensing].) These statutes do not purport to regulate the frequency, intensity, necessity, or staffing of flights applying agricultural chemicals.

However, the Food and Agricultural code does contemplate that the application of certain materials is subject to the permitting authority of the county agricultural commissioner (see, e.g., Food & Ag. Code, § 14006.6), and the California Code of Regulations also contains regulations concerning the field of aerial pesticide and agricultural chemical application. Specifically, the timing, location, and mixing of chemicals is subject to state regulation. (See, e.g., 3 CCR, §§ 6462 [propanil use in certain counties cannot be used near certain agricultural operations, and application is limited to 720 acres per day; restrictions on specifications of aircraft nozzles], 6464 [phenoxy and certain other pesticides cannot be applied by aircraft outside of certain counties, and outside of certain time windows] 6544 [forbidding pilots from mixing certain pesticides]; 6691 [restriction of pesticide application near school sites].)

The California Attorney General, in considering an ordinance banning the aerial use of certain herbicides, held that state regulations preempted such an ordinance — whether enacted by a county board of supervisors or by voter initiative. (62 Ops.Cal.Atty.Gen 90 (1979).) The Attorney General indicated that “it is clear that state law prescribes in detail which ‘restricted materials’ and ‘pesticides’ may be used, by whom, and under what conditions,” and that “an ordinance banning the use of ... herbicides, by air or otherwise, would interfere with state law.” (*Id.* at 7.) “Such a ban,” the Attorney General said, “would directly interfere with the power vested in the county agricultural commissioner ... to grant permits under the criteria provided by state law” and “prohibit what the state allows.” (*Id.*) In making these determinations, the Attorney General found: (1) the local ordinance directly conflicted with state law insofar as it granted “affirmative permission” to use restricted materials in pest control and other agricultural operations; and (2) the state occupied the field of such regulation. (*Id.* at 8-12.)

Insofar as the Initiative were construed so as to ban certain aerial applications of pesticides and other restricted materials, it would appear to raise the foregoing concerns, as articulated by the Attorney General. There exists a significant risk, then, that the Initiative, insofar as it purports to ban “avoidable” helicopter flights, or helicopter flights with “non-essential” personnel, is

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<sup>6</sup> Where it is defined in the Food and Agriculture Code, “aircraft” is broadly construed to mean “every description of craft or other contrivance which is used, or capable of being used, as a means of transportation through the air from origins in other states or territories or in foreign countries.” (Food & Ag. Code, § 16002 [defining “aircraft” for purposes of Food and Agricultural Code, Division 8].)

preempted. This determination raises the question about whether the existing County Code's treatment of helicopter takeoffs and landings is preempted. It appears existing County Code sections are lawful. Section 18.120.010(A)(10), as it currently reads, provides for an unqualified exception that permits, by right, the application of pesticides and other restricted materials in support of direct agricultural activities, and thus would not appear to run afoul of the state's agricultural and food production regulations. The distinction, then, is that the existing County Code relinquishes local control to the state in this area, whereas the Initiative's proposed amendments establish local control and appear to impose restrictions on aerial chemical applications.

- (iii) Evaluation of whether State Aeronautical Act and its implementing regulations would preempt any of Initiative's proposed regulations.

The question is whether the State Aeronautics Act ("SAA") preempts the local regulation of any matters addressed by the Initiative, including the permitting of personal use heliports and airports, and restrictions on by-right helicopter takeoffs and landings. As explained below, it is unlikely that the SAA would preempt the Initiative.

The SAA, codified in the Public Utilities Code, regulates matters pertaining to aviation in California, including public and private airports and aviation safety and hazards. A major purpose of the SAA is to protect the public against noise and the adverse environmental effects of airports. (Public Utilities Code ["PUC"], § 21670(a)(2); *Bakman v. Department of Transportation* (1979) 99 Cal.App.3d 665, 677.) This legislative framework is implemented by regulations codified in Title 21, California Code of Regulations, Division 2.5. (See 21 CCR, § 3530 et seq.)

A state statutory scheme does not restrict or preempt the power of the initiative simply because it implicates matters of statewide concern. (*Citizens, supra*, 176 Cal.App.4th at 372, citing *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 537–538.) A local ordinance enters a field fully occupied by state law either when the Legislature expressly manifests its intent to occupy the entire legal area or when the Legislature impliedly fully occupies the field. (*Id.*) Based on these principles, California courts have held that the "SAA does not expressly or impliedly preempt local land use regulation," and that, "[t]o the contrary, the SAA expressly permits local regulation." (*Id.*; see also *Sunset Skyranch Pilots Association v. County of Sacramento* (2008) 164 Cal.App.4th 671, reversed on other grounds in *Sunset Skyranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902.)

Courts have noted that the SAA contains additional indications that the Legislature did not intend to interfere with the traditional municipal function of land use regulation. For instance:

- PUC, § 21005 states: "This part shall not be construed as limiting any power of the state or a political subdivision to regulate airport hazards by zoning."
- PUC, § 21676.5(b) states that after a local agency has revised its general plan or specific plan or has overruled the airport land use commission, the proposed action of the local agency shall not be subject to further airport land use commission review.
- PUC, § 21674.7(b) states that local agencies are to be guided by criteria regarding the height, use, noise, safety, and density developed by the State, but "[t]his subdivision

does not limit the authority of local agencies to overrule commission actions or recommendations....”

- PUC, § 21006 provides that no state law shall “be construed as prohibiting, restricting, or permitting the prohibition of the operation or landing in populated areas of helicopters and similar aircraft capable of approximately vertical ascent and descent, subject to such reasonable rules affecting the public safety as the department may promulgate.” This statute and authorities that interpret it suggest that local city and county zoning ordinances are not preempted by state law.<sup>7</sup>

(See *Citizens*, *supra*, 176 Cal. App. 4th at 372.)

The SAA’s regulations concerning heliports<sup>8</sup> are similarly constructed, and do not appear to preclude the local regulation of their location or operating parameters. For instance:

- To the extent that state law requires a permit for heliport or airports (see PUC, § 21661; 21 CCR, § 3530), personal use heliports and airports in unincorporated areas that comply with certain dimensions are exempt, as are temporary helicopter landing sites (when not located near schools)<sup>9</sup> and certain emergency use facilities (21 CCR, §§ 3533(b)(3),(6),(7)&(8), 3560.) Please note that “personal use” air facilities are defined precisely in the same way the County Code defines them.
- 21 CCR, § 3560 provides that, while certain design parameters of personal use airports are subject to minimum state rules, “[m]any elements in the design of Personal-Use airports are at the discretion of the owner.”

Accordingly, while helicopter flights and other airport uses are subject to state rules, the state’s framework does not occupy the field of aeronautical regulation, meaning local rules are valid to the extent they do not conflict with minimum state requirements, and some activities (e.g., personal use heliports meeting certain requirements) are entirely exempt from state permitting requirements. As such, banning the location of certain airports, restricting takeoffs and landings, or taking other measures that have the effect of restricting aviation do not appear to trigger state preemption doctrines. As one court indicated, “[m]erely because the SAA encourages the development of private flying and the general use of air transportation, does not mean the SAA mandates it.” (*Sunset Skyranch Pilots Association, supra.*, 164 Cal.App.4th at

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<sup>7</sup> The California Attorney General has concluded that PUC, § 21006 prevents Caltrans and the State California Aeronautics Commission from restricting or prohibiting the operation or landing of helicopters “as a class of aircraft” in populated areas, and such section does not extend to nor bear upon the issue of whether an area may be used for the landing and taking off of helicopters, therefore leaving “land use” decisions in the hands of cities and counties. (32 Op. Atty. Gen. 235 (1958).) Notwithstanding the above, the limitations on the reach of the SAA does not rise or fall with the meaning of PUC, § 21006; this is merely an illustrative example of the limited reach of state law.

<sup>8</sup> Under the SAA, the term “airports” includes “heliports.” (PUC, §§ 21012; 21013; 21 CCR, § 3525.)

<sup>9</sup> See Section III.C.2.b.iv for status of temporary uses under County Code and Initiative’s proposed amendments thereto.

677, 678, 691, 692 [holding also that SAA does not compel the continued operation of any previously approved airport].)

Given the California SAA's lack of any specific or definite language indicating that it pre-empts local land use regulation, the SAA's lack of any specific statute or regulation governing the location of or prohibition of aircraft or helicopter landing sites, and the case law set forth above, it does not appear the SAA preempts any portion of the Initiative's proposed regulations.

- (iv) Status of temporary helicopter landing sites under Initiative.

While not strictly a preemption issue, the question has arisen as to whether the Initiative would alter the status of temporary helicopter landing sites in unincorporated land.

The County Code does not presently address temporary helicopter landing sites. While at least one portion of the County Code adopts a permissive zoning approach, whereby uses not specifically enumerated are prohibited (see County Code 18.108.025(B)), it is not clear that this approach is the default for the entire County Code. The legislative history of past ordinances would suggest the County has adopted a permissive zoning approach, however, with respect to helicopter landing sites. The July 20, 2004 staff report that accompanied Ordinance 04-0198 provided as follows:

Subsequently, at its meeting of June 1, the Board...directed staff to [a] change the reference in the County Code from "private airports and heliports" to "personal use airports" consistent with State law; and b) clarify the definition of emergency medical services landing sites], as well as clarifying that the ordinance does not restrict helicopter landings associated with agricultural production. The Board also clarified that all other helicopter landings (including those at wineries), except as specifically allowed for in the code, are prohibited under our current code.

Regardless of how this issue is resolved, the Initiative would not alter the status of temporary helicopter landing sites except to the extent that (1) a temporary helicopter landing site also qualifies as a personal use heliport or airport; and (2) the Initiative's helicopter takeoff and landing provisions are modified, as these would affect operations at any permanent or temporary location other than at public airports. (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10)&(B)(2)].)

The state's regulation of temporary helicopter landings sites does not affect the analysis. The SAA exempts from state permitting requirements temporary helicopter landing site not located within 1,000 feet of the boundary of a public or private school maintaining kindergarten classes or any classes in grades 1 through 12. (PUC, § 21662.5; 21 CCR, § 3533(b)(6).) For purposes of the SAA, a temporary helicopter landing site is a site, other than an emergency medical service landing site at or near a medical facility, which is used for the landing and taking off of helicopters and: (1) is used or intended to be used for less than one year, except for recurrent annual events, (2) is not marked or lighted to be distinguishable as a heliport, and (3) is not used exclusively for helicopter operations. (21 CCR, § 3527(y).)

Again, the existing County Code and the Initiative can be more restrictive than the SAA and its implementing regulations, which permit, without licensing or approval, temporary helicopter landing sites. Nothing set forth in the SAA or its implementing regulations would seem to prohibit a local city or county from using its zoning powers to pass more restrictive rules or



regulations regarding the operation of helicopters than those set forth in the SAA. Both the existing County Code and the Initiative's proposed amendments thereto would not, therefore, appear to raise the prospect of state preemption.

**D. An initiative may not exceed an agency's police power nor 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.) This section evaluates whether the Helicopter Regulation Initiative has the potential to violate the constitutional rights of both property owners who do not presently operate heliports or airports, but in the future would like to, and the rights of property owners with established heliports and airports. The two classes of owners are discussed separately in Sections III.D.1.b and III.D.1.c, below.

**1. Analysis of Initiative's potential to effect an inverse condemnation of property.**

(a) *Summary of applicable law.*

The prohibition against unlawful takings of property is a protection guaranteed through the federal and California constitutions. The Fifth Amendment to the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Article I, § 19 of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

The takings clause prohibits not only the direct appropriation or occupancy of a property, but also the imposition of regulations that effectively oust an individual from a property or significantly devalue it. (See, e.g., *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 414.) The question here is whether the Initiative's intensification of helicopter takeoff and landing regulations, and its prohibition of personal use heliports and airports, would effect an unlawful, regulatory taking of property. Under applicable jurisprudence, the test for regulatory takings generally involves an evaluation of (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. (*Penn. Cent. Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) The California Supreme Court in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761 listed an additional ten factors, including consideration of a property owner's "primary expectation" and whether the regulations prevents the "best use" of land. Understandably, then, resolution of a takings claim is a difficult endeavor that is highly dependent on the facts involved.

In evaluating the size of an economic impact and whether it qualifies as an unlawful taking, courts have held that the impact must be "so onerous that its effect is tantamount to a direct appropriation or ouster" (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537), which occurs if a regulation "permanently deprives property of all value" (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 332 [clarifying, too, that it is the loss

of value and not the loss of use that is evaluated for purposes of a takings analysis].) It is difficult to predict what critical mass of diminution is necessary to effect a takings, though the Ninth Circuit has held that an 81 percent diminution is insufficient. (*MHC Fin. L.P. v. City of San Rafael* (9th Cir. 2003) 714 F.3d 1118, 1127; see also *Brace v. U.S.* (2006) 72 Fed. Cl. 337, 357 [noting Supreme Court has determined 85 to 90 percent loss of value does not necessarily effect an unlawful takings].) At the same time, case law has not generated harmonious guidance in this regard. (See, e.g., *Yancey v. U.S.* (Fed. Cir. 1990) 915 F.2d 1534, 1539 [unlawful takings where government quarantine resulted in 77 percent loss of value]; *Florida Rock Indus., Inc. v. U.S.* (1999) 45 Fed. Cl. 21, 26 [loss of 73.1 percent in value was an unlawful takings where landowner singled out to bear heavier burden than neighbors].)<sup>10</sup> The elimination of all economically beneficial use, under a separate line of decisions, more clearly effects an unlawful taking. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1027.)

With respect to investment-backed expectations, the Supreme Court has held that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.” (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 633.) With respect to the third prong of the *Penn Central* test — i.e., evaluating the character of the subject governmental action — this prong generally requires an evaluation of whether the regulatory takings can be categorized as a physical invasion of property, what the governmental purpose of the regulation is, and whether the regulation places a disproportionate burden on a small number of individuals. (*Penn Central*, *supra*, 438 U.S. at 124; *Lingle*, *supra*, 559 F.3d at 1278.)

Note that, 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 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.)

- (b) *Analysis of whether Initiative would effect an unlawful taking on property owners who might desire, in the future, to establish personal use air facilities or to conduct helicopter takeoffs and landings (i.e., prospective uses).*

The Initiative would impact the range of potential land uses a property owner might desire to establish on a vacant parcel of private property (or that he or she could establish through a redevelopment of existing uses). With regard to this category of owner, the Initiative has two effects that warrant a constitutional analysis:

- (1) It narrows the scope of permitted helicopter flights to those necessary to conduct direct aerial agricultural activities (i.e., the flights must be “unavoidable”), and that involve “essential” personnel only, whereas property owners currently can conduct unnecessary or avoidable helicopter flights in support of direct agricultural production activities, and with non-essential personnel aboard; and

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<sup>10</sup> It should be noted that the *Yancey* and *Florida Rock Indus.* decisions were issued prior to the decisions in *Lingle*, *Tahoe-Sierra Preservation Council*, *MHC Fin. L.P.*, and *Brace*, and might be decided differently today in light of that subsequent takings jurisprudence.

- (2) It prohibits, as a use allowed by use permit outside AV zones, the operation of personal use heliports and airports, i.e., facilities that support the noncommercial activities of an individual owner or family and occasional invited guests.

(Initiative, § 2 [proposed NCC, § 18.120.010]; NCC, § 18.08.460.) What follows is an analysis of these two regulatory changes.

- (i) Effect of helicopter takeoff and landing regulation.

Insofar as the Initiative narrows the scope of permitted helicopter takeoffs and landings, it is difficult to predict whether these stricter regulations would constitute an unlawful taking, mostly because it is difficult to predict its economic impact on the value of a given property. The County Code currently restricts by-right helicopter takeoffs and landings outside public airports to those conducted solely for agricultural purposes, and the Initiative does not prohibit all agriculture-related flights, but requires that they must be unavoidable and involve only essential personnel. The relevant impact, then, is the economic loss associated with not being able to engage in “avoidable” flights with “non-essential” personnel. Given the relatively high threshold that courts have established for determining whether a regulation’s economic impact constitutes a taking — i.e., there might need to be a diminution in the land’s value of at least 85 to 90 percent — it seems unlikely that the Initiative’s stricter helicopter restrictions would result in an unconstitutional taking.

- (ii) Effect of prohibition of personal use heliports and airports.

As discussed in greater detail in Section III.A of this Memorandum, the Initiative appears to only prohibit the establishment by use permit of new personal use heliports and airports in non-AV zones, though some ambiguity exists in this respect.

Consistent with the preceding analysis, courts set a fairly high bar when evaluating whether a regulation’s economic impact would effect a taking. It seems unlikely that property owners in Napa County would purchase a property for the sole or primary purpose of operating a personal use heliport or airport, but more likely that any such uses would be accessory to agricultural production, residential uses, and/or other land uses. Assuming this is the case, a court would evaluate whether the absence of a personal use heliport or airport would so significantly diminish the value of a property, farm, home, or other land use, as to render the property incapable of economically viable use.

It is possible that prohibiting the future establishment of a personal use heliport or airport would result in a sufficient diminution of value to constitute a taking. The County Code defines a personal use heliport or airport to include those facilities supporting the noncommercial activities of an individual owner or family, and the occasional invited guest. While the prohibition of a personal use heliport that, for instance, primarily served the convenience of an individual person might not register as a significant financial diminution for that person, a personal use heliport that served a single ownership entity engaged in agricultural activity or utility services might suffer a taking. Given the high threshold established by courts, the likelihood is low, but the possibility exists.

- (iii) Potential benefit of Initiative.

Since at least the 1940s, courts have held that the encroachment of planes on airspace, due to physical invasion, noise impacts, and other effects, potentially effects an unlawful taking. (See,

e.g., *U.S. v. Causby* (1946) 328 U.S. 256, 262-268; *Griggs v. Allegheny County* (1062 369 U.S. 84, 88-90.) In other words, the approval of a personal use heliport or airport could have the effect of *creating liability* on behalf of the County. Accordingly, the prohibition of such uses potentially eliminates a source of liability for the County, and could result in a fiscal benefit.

- (c) *Would the Initiative's provisions disallowing existing personal use heliports or airports, and eliminating certain by-right helicopter takeoffs and landings, violate any vested rights that property owners have acquired in such uses (i.e., can the Initiative's proposed rules lawfully apply retrospectively)?*

The Initiative raises issues concerning vested rights in two different ways: (1) depending on whether its relevant prohibition can be construed to apply retrospectively, the Initiative has the potential to affect *existing* use permits granted by the County for personal use heliports and airports; and (2) the Initiative has the potential to affect existing helicopter flight operations at both personal use and commercial non-public heliports and airports.

The law addressing vested rights has corollaries that do not apply more generally. Under California law, if a local government changes its land use regulations, a property owner can claim a vested right to build and operate a project under prior land use regulations where the owner has obtained a building permit, performed substantial work, and incurred substantial liabilities in good faith reliance upon the permit prior to the change in law. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791.) However, a vested right may be restricted or revoked if there is sufficient evidence that the use posed a menace to the public health and safety or a public nuisance. (See *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 648.)<sup>11</sup>

A slightly different line of cases governs situations where a use is permitted by right (i.e., did not require permits), but the result is similar: "Nonconforming uses may be required to be removed, but the majority of the cases seem to indicate that if this procedure is attempted the ordinance will be declared unconstitutional" where it would result in the demise of a user's business, unless the subject use is a public nuisance. (*Biscay v. City of Burlingame* (1932) 127 Cal.App. 213, 220, quoting Byrne, *The Constitutionality of a General Zoning Ordinance*, 11 *Marquette L. Rev.* 189, 214; *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 340.)

Note that, where an ambiguity surfaces, the County Code requires the County to interpret provisions so as "to avoid unconstitutionality wherever possible." (NCC, § 1.04.110; see also NCC, §§ 1.04.130, 1.04.140.)

- (i) Effect of Initiative's proposed terms on vested rights to operate existing personal use heliports and airports.

With respect to personal use heliports and airports, the Initiative's proposed prohibition of such uses by use permit in non-AV zones does not clearly indicate whether its prohibition is retroactive or prospective only in its operation. On the one hand, the Initiative's statement of Purpose indicates the proposed ordinance amendment "is intended to prohibit any *new* personal

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<sup>11</sup> The County would have to be careful in articulating the basis for any determination that a flight operation constituted a public nuisance. The regulation of certain aspects of flight operations, such as the regulation of flight noise, could raise preemption issues, as discussed in Section III.C, above.

use airports or heliports,” and that the objectionable action avoided by the proposed amendments are the “proliferation” of personal use airports or heliports. Moreover, County Code section 18.120.010(B) contemplates the “grant” of a use permit, and not its “extension.” On the other hand, the Initiative’s Notice of Intent statement indicates that it would prohibit, without any qualification, any personal use heliports and airports, “as well as prevent their proliferation.” (Initiative, § 1, pp. 1-2 [emph. added].) In other words, the Notice of Intent makes it appear as if the prohibition of *new* personal use heliports and airports (i.e., their proliferation) is in addition to some other type of prohibition, which only could be a ban on the use of existing facilities.

Given the nature of the penalties that apply to a violation of the Initiative’s regulations, which potentially include incarceration,<sup>12</sup> this ambiguity in itself might render the Initiative unlawfully vague. This determination, however, must be made in light of provisions in the County Code that direct the County to avoid unconstitutional constructions, which would, in turn, operate to limit the Initiative’s application to new uses only. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.)

If the Initiative’s Proponents were to clarify an intent that the proposed ordinances do prohibit lawfully vested rights to use existing personal use heliports or airports, it likely would run afoul of California’s doctrine of vested rights. It also likely would conflict with County ordinances that guarantee property owners certain rights to continue legal, nonconforming uses. Under local law, legal nonconformities may be continued so long as the degree of nonconformity is not increased, and the nonconformity is not abandoned. (See, e.g., NCC, §§ 18.132.010, 18.132.040).<sup>13</sup>

That said, a property owner’s vested rights are not necessarily sacrosanct under state or local law. A county agency may apply new laws to a development that has vested rights if it is necessary to protect the health, safety, morals, and general wellbeing of the public. (*Davidson, supra*, 49 Cal.App.4th at 648; see also NCC, § 18.132.040(A) [legal nonconforming use must cease if Board of Supervisors, district attorney, or any other authorized government official determines use constitutes a public nuisance as defined in Penal Code, § 370].<sup>14</sup>) The issue is whether a newly imposed regulation is sufficiently important to the public health to justify the impairment. The California courts adjudicating these issues consider the nature and extent of the impairment as compared to the nature, importance, and urgency of the interest to be served. (See *Davidson, supra*, 49 Cal.App.4th at 648; *Steward Enters., Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410.) These tend to be fact-intensive inquiries, without bright-line rules. With respect to the Initiative’s proposed regulation, the Notice of Intent does indicate that “increased

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<sup>12</sup> See Section III.D.2 of this Memorandum, below, outlining the penalties that would apply to a violation of the Initiative’s proposed ordinances.

<sup>13</sup> Because the Initiative does not contain a precedence clause, the Initiative’s failure to address and harmonize its proposed amendments to section 18.120.010 with existing protections in sections 18.132.010 and 18.132.040 create an ambiguity that, in itself, creates a legal risk.

<sup>14</sup> Penal Code section 370 provides that “anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.”

noise and danger associated with [helicopter takeoffs and landings] compromise the people's peaceful and safe enjoyment of the properties and the well-being of the abundant wildlife," which contemplates public safety and health. At the same time, the Initiative, at least on its face, does not include or cite to substantial evidence supporting this assertion. Ultimately, it is unclear how a court would rule on a challenge based on the claim that the Initiative infringes on vested rights, and resolution would likely depend on the facts surfacing through discovery and briefing in any ensuing litigation.

The retroactive effect of the Initiative's proposed ban on personal use air facilities is more than an academic exercise, as the County currently maintains four such use permits that have no term limitations, including one maintained by St. Helena Hospital for emergency medical services.<sup>15</sup>

Ultimately, it appears that, on its face, the Initiative is ambiguous as to its potential effect on vested rights, but that the existing County Code would require the County to interpret the Initiative to prohibit only future authorization by use permit of personal use air facilities in non-AV zones. If the intent of the Initiative were clarified to be that it should apply retroactively, the County could only avoid legal risk if it determined that the existing personal use air facilities to be banned are public nuisances. The Initiative contains conclusory assertions that would arguably support such a determination, though it does not contain facts to support such assertions, and resolving any dispute among property owners and the County likely would entail litigation.

- (ii) Effect on vested rights to helicopter takeoff and landing operations at any location.

In addition to prohibiting new personal use airports and heliports by use permit in non-AV zones, the Initiative also regulates helicopter takeoffs and landings wherever they might occur outside of public airports (i.e., at non-public facilities). Whereas under existing law, one could conduct, as a matter of right at such facilities, helicopter takeoffs and landings that supported direct agricultural production activities, the Initiative proposes additional criteria — e.g., that such flights are allowed to transport only essential personnel, and only when unavoidable.

The question arises, then, about what happens where a helicopter operator has been conducting takeoffs and landings that are "avoidable" and/or involve "non-essential" personnel, within the meaning of the Initiative, under the existing regulatory regime.

First, it must be determined whether the Initiative's proposed helicopter regulations purport to affect existing operations. To this end, the Initiative indicates that the proposed "Ordinance *clarifies* the limited circumstances under which helicopters may takeoff and land in the County for agricultural purposes." (Initiative, § 1 [emph. added].) By "clarifying" the law, the Initiative suggests it is not effecting a change to the law, but is, perhaps, elucidating a current ambiguity. First, this statement appears to be misleading, which in itself creates a legal risk,<sup>16</sup> because the

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<sup>15</sup> A hospital heliport or airport would appear to qualify as a personal use heliport or airport insofar as it is owned by a single entity and used for noncommercial purposes (e.g., a medical use).

<sup>16</sup> As discussed above, "The 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

Initiative quite plainly does modify existing law. Second, by purporting to clarify existing law, it appears it is the Proponents' intent that the Initiative does retroactively apply to existing permitted, agricultural-related helicopter takeoff and landing operations. Ultimately, however, the meaning of the Initiative is ambiguous and, if enacted, the County Code would direct the County to construe it so as to avoid unconstitutionality, thus potentially limiting the Initiative's application to new uses only. (See NCC, §§ 1.04.110, 1.04.130, 1.04.140.)

To the extent the Initiative's Proponents (or some other facts) clarify an intention that the Initiative affects existing non-nuisance helicopter operations, it would create a minor risk of liability for the County, though resolution of claims could be expensive and complex.

To claim vested rights, established helicopter operators essentially would have to establish that the new regulations would put them out of business. While we cannot speculate as to the business needs of every helicopter operation in the County, or businesses where agricultural-related helicopter takeoffs and landings are accessory uses, it would seem unlikely that the Initiative's proposed amendments would singlehandedly result in the demise of a business.

In the event a helicopter operated alleged as much, it could challenge the Initiative based on constitutional rules protecting private property (i.e., interference with a vested right without providing for the due process of law). One consideration is that, while the success of such a claim might not be likely, determining who has standing to file such a claim likely would entail an extensive, fact-intensive investigation about what uses were established, and for what duration they occurred. Determining what levels of activity a given helicopter operator has undertaken becomes more complex because County staff would not only have to determine whether or not an operator has a vested right, but also the scope of any such right. For instance, if a helicopter operator conducted, on average, ten "avoidable" flights per month under the existing regulatory framework and, after enactment of the Initiative, increased the frequency of such flights to twenty per month, a messy dispute could ensue that implicates significant, practical problems regarding proof. Under the foregoing scenario, the County would have to engage, for instance, in the difficult task of proving the operator's historic level of activity. Because the County does not currently track by-right helicopter operations, there would exist no independent, objective record of who is presently doing what. Moreover, because it would be the County that bears the burden of proof insofar as it pursues any code enforcement action, it is the County that would have the disadvantage in ensuring compliance with any newly enacted regulation.

Ultimately, it appears that, on its face, the Initiative is ambiguous as to its effect on vested rights, but that the existing County Code would require the County to interpret the Initiative so as to prohibit only new personal use air facilities. If the intent of the Initiative were clarified to apply retroactively, established helicopter operators potentially would accrue a right to challenge the Initiative based on claims of violation of due process and takings, but only insofar as they could prove the Initiative's amendments effectively put them out of business. Under any scenario, however, implementation and enforcement of the Initiative's regulation would entail complicated factual investigations that are likely to be difficult and expensive. Note, it does not appear any of the existing use permits for personal use heliports and/or airports have term limits; if this is not the case, we can provide further instruction on the potential effects of the Initiative on any term extensions that are sought.

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sign the initiative petition and to avoid confusion.” (*Costa, supra*, 37 Cal.4th at 1016, fn. 22, citing *Mervyn's, supra*, 69 Cal.App.4th at 99.)

**2. Does the Initiative provide for any civil, administrative, or criminal penalties where someone violates its provisions and, if so, do these penalties comply with applicable law?**

The Initiative does not provide, in its proposed ordinance amendments, for any enforcement mechanisms or penalties where a property owner or other individual violates any of the Initiative's proposed terms. The Initiative's Notice of Intent, however, provides that violations shall be punishable as misdemeanors. Moreover, there are default penalties that the County Code has established for violation of its regulations.

Any violation of an enacted ordinance qualifies as a misdemeanor under County Code section 1.20.150(B). Violations also can result in civil and administrative penalties (NCC §§ 1.20.155, 1.24.020), and the County further has the right to deem a violation to be a public nuisance, which the County can abate at the cost of the violator (NCC, § 1.20.020.) In general, 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.) Penalties also can increase depending on the duration of a violation; i.e., each new day a violation continues, the County Code provides that such non-compliance shall constitute a distinct and separately punishable offense. (NCC, § 1.20.160.)

To the extent the Initiative might be unlawfully vague, as discussed in Section III.B, assessing penalties for the violation of its regulations would be unconstitutional. The type and severity of the penalties in themselves, however, are consistent with those assessed on other types of Code violations.

**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 appropriate question is whether the Initiative would inherently frustrate the fundamental objectives of the planning law. (*Id.* at 792.)



The Supreme Court in *DeVita* concluded that the subject Napa County Initiative (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 scope of the restriction in the Initiative is similar to that in Measure J insofar as it amends a legislative framework 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 regulations for helicopter takeoffs and landings.**

The County does not track by-right helicopter flights under existing County Code section 18.120.010(A), given no permits are required for such activities. It is therefore speculative to estimate how much staff time and cost would be necessary to oversee the Initiative’s proposed regulatory framework, because the County cannot estimate the frequency with which they occur. Staff have indicated that, anecdotally, the frequency of helicopter and aircraft flights falling within the parameters of the proposed amendments is small in number, and estimate that oversight costs would be negligible. Significant costs could arise in the event it became necessary for the County to institute a code enforcement action against an alleged offender, potentially costing tens of thousands of dollars to bring an action to resolution and, in some instances, more than a hundred thousand dollars. While portions of the total cost of enforcement actions are recoverable through the assessment of criminal, civil, and administrative penalties, these recuperations rarely yield recoveries greater than 35 percent.

Ultimately, the fiscal impacts of overseeing compliance with regulations for helicopter takeoffs and landings is likely minimal, though a code enforcement action could result in significant costs for the County. It would be speculative, however, to estimate the number of enforcement actions that might ensue.

- (b) *Administrative and fiscal impacts of prohibiting personal use heliports and airports.*

It would be speculative to estimate how many unauthorized personal use heliports and airports exist or would exist in the future. To the extent a code enforcement action became necessary, the same analysis included in the preceding section would apply here.

- (c) *Administrative and fiscal impacts of reviewing and assessing helicopter takeoff and landing reports.*

There does not appear to be any means of recovering County costs associated with the review of helicopter takeoff and landing reports. However, while it is speculative to estimate how many such reports would be generated under the Initiative, staff have indicated that, anecdotally, the frequency of such takeoffs and landings is small. Therefore, it is estimated that the financial burdens of reviewing reports would be minimal.

- (d) *The purpose of the Initiative's post-flight reports is unclear, and might create an unnecessary administrative burden.*

The Initiative requires that, within 48 hours of any takeoff or landing in support of "direct agricultural activities," the helicopter operator shall submit to the County a "written report containing the helicopter's registration number; date, time, duration and aerial activity of the operation; the persons engaged in the conduct of such activity; and the reason why the takeoff or landing was unavoidable." (Initiative, § 2 [proposed NCC, § 18.120.010(A)(10).])

The purpose of the reporting requirement is unclear. The Initiative does not, for instance, direct that planning staff keep such reports for the purposes of calculating statistics, or purposes of initiating an enforcement proceeding. This failure does not create an illegality, but does require a commitment of staff time and expense with no clear objective, which arguably makes for inefficient use of public funds.

- (e) *Conclusion.*

At this time, there is no evidence that the fiscal burdens that the Initiative would impose on the County would amount to an impairment of an essential governmental function.

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

Potential defects in portions of the proposed Initiative might affect the validity of the entire proposal. The Initiative does not contain a severability clause, stating that if any portion of it is held to be invalid or unconstitutional by a court, such decision shall not affect the validity of the remaining portions of this initiative. The question is whether portions of the Initiative may survive in the event other sections are held invalid.

"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.) The inclusion of a severance clause creates a presumption in favor of severance, but resolution ultimately depends on other factors, including whether the invalid provision is grammatically, functionally, and volitionally separate. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 270–271; see *Verner, supra*, 245 Cal.App.2d 29, 35.) California courts explain that:

Grammatical separability, also known as mechanical separability, depends on whether the invalid parts can be removed as a whole without affecting the wording or coherence of what remains. Functional separability depends on whether the remainder of the statute is complete in itself. Volitional separability depends on whether the remainder would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.

(*Id.* [quotations and citations omitted].)

Local provisions in the County code also address severability, providing that “[i]f any section, sentence, clause, phrase or portion of this code is for any reason held to be invalid or unconstitutional by the decision of any court, such decision shall not affect the validity of the remaining portions of the code.” (NCC, § 1.04.150.) In support of this provision, the code provides that the “board of supervisors would have adopted this code and each section, sentence, clause or phrase and portion thereof, irrespective of the fact that any one or more sections, sentences, clauses, phrases or portions be invalid or unconstitutional.” (*Id.*) While the code provision would suggest the Initiative’s terms would be severable, the meaning of the Initiative, assuming it is placed on the ballot, would be dictated by the intent of the voters who participate in the upcoming election, and thus it is unclear that section 1.04.150 would apply to the Initiative’s terms.

With respect to the Initiative, it appears to consist of two main substantive amendments: (1) more stringent regulations on “by-right” helicopter flights from non-public facilities in support of agriculture; and (2) the prohibition on authorizing personal use heliports and airports by use permit in non-AV zones. Grammatically and functionally, these legislative changes could operate separately and independently. The same determination could be made for amendments that serve as components of the foregoing legislative proposals. For instance, the requirements that helicopter takeoffs and landings be “unavoidable,” include only “essential” personnel, and be documented in a subsequent report can all, technically, exist independently from the standpoint of grammar and function. The question of whether any of the foregoing regulations are volitionally severable is most difficult to ascertain, because the Proponents’ intent in this regard is unclear and, if the Initiative is placed on the ballot, the intent of the voters would be difficult to predict at this time (e.g., because it is unknown what materials will be placed directly before them prior to the election). As such, it is impossible to predict whether the electorate, in the event it votes on the Initiative, would intend that, in the event a portion of the Initiative were to be found invalid, the remaining part would stand, or whether the electorate would have declined to enact “the valid without the invalid.” (*Matosantos, supra*, 53 Cal.4th at 273.)

Overall, based on the limited information available, which includes the fact that components of the Initiative are grammatically and functionally separable, and that the stated intent of the

Initiative is to limit, in general, the operation of helicopters, it appears most likely a court would determine that invalidation of some portions would not affect the validity of others.

#### **IV. ECONOMIC, FISCAL, AND SAFETY IMPACTS OF THE INITIATIVE.**

##### **A. Estimated impact on property values and tax.**

With respect to property values and associated taxes, prohibiting personal use heliports and airports could reduce property values, though it warrants mention that, since 1965, only four use permits for personal use heliports and airports have been issued. As such, the economic impact is not likely to be significant, and could be offset, at least in part, by an increase in property values experienced by the small group of existing permit holders.

With respect to by-right helicopter takeoffs and landings, the increased regulation of such activities, particularly insofar as agricultural production flights would be restricted, could be significant. However, given the County does not track by-right helicopter takeoffs and landings, any attempt to quantify this economic impact would be speculative.

##### **B. Fiscal impact of overseeing and enforcing Initiative.**

As discussed in Section III.E.2, the fiscal impact of implementing the Initiative's measures are difficult to assess. To the extent the amendments would generate enforcement actions, the County Code provides for the reimbursement of County costs through penalties, though as a practical matter the County never fully recovers all costs. Meanwhile, there is at present no means to recover the costs of staff time spent reviewing post-flight reports, the submission of which the Initiative requires.

##### **C. Safety impacts of Initiative.**

The Initiative's Proponents have submitted information indicating that the rate of helicopter accidents is 7.5 per 100,000 hours of flying, whereas the airplane accident is approximately 0.175 per 100,000 hours of flying. The Proponents have also submitted a list of helicopter accidents and fatality statistics from year 2015, apparently compiled from incidents worldwide.

The relevance of this information is unclear. While helicopter and airplane flights do present the risk of injury or fatality, it is unclear whether the statistics provided are representative of flight operations in California (e.g., California may have different safety standards than would apply in Australia, Indonesia, or Fiji). Further, it is unclear whether prohibiting personal use airports would reduce the risk of accidents. Under a prohibition, flight still might occur but between public airports or personal airports located in nearby counties. Under this scenario, flight routes could be longer or shorter; if longer, incurring a greater number of flying hours, the risk of accident potentially could increase. Further, the statistics submitted do not specify whether the fatalities recorded involve pilots and passengers who might be deemed to have assumed the risks of aerial travel, third persons who did not, or a combination of the above.

The prospect of a helicopter or airplane accident is undoubtedly a terrifying and emotionally charged event. However, if the safety implications of the Initiative are to be better understood, a comprehensive study of accidents in California jurisdictions or jurisdictions that are subject to similar safety regulations should be performed by a person or firm with expertise in this area.

## V. CONCLUSION.

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

- The Initiative's provisions limiting permitted by-right helicopter takeoffs and landings at non-public airports to those that are "unavoidable" and those involving only "essential" personnel are vague and ambiguous to such an extent that they might not survive a constitutional challenge.
- Determinations regarding preemption:
  - There is a risk that the Initiative, insofar as it purports to limit helicopter takeoffs and landings to those that are "unavoidable" and involve "essential" personnel, attempts to control aviation "service," an area of regulation that is preempted by federal law.
  - There is a risk that the Initiative, in placing additional restrictions on the aerial spraying of pesticides and other restricted materials, would be preempted by state law.
- The Initiative is ambiguous as to whether, and if so to what extent, it is intended to operate retrospectively so as to affect existing operations, but:
  - If it is intended to affect existing permitted personal use helipads and airports, the Initiative might violate some owners' vested rights to operate such facilities, particularly insofar as it affected agricultural or utility operations, but resolution of such a claim likely would be fact-specific and depend on other factors, such as whether the existing use might be deemed a public nuisance.
  - With respect to the Initiative's stricter regulation of helicopter takeoffs and landings, the Initiative could create liability on the part of the County, though ascertaining the existence and scope of any vested rights in any particular helicopter operation would be a difficult endeavor owing to problems of proof which, in turn, would make enforcement against any particular operator difficult to sustain. That said, a claimant would have to allege that the Initiative effectively put the claimant out of business and, from a practical standpoint, it is unclear that increased limitations on by-right helicopter takeoffs and landings would cause the demise of a business.
  - Notwithstanding the above, to the extent the Initiative is ambiguous about its intended operation and possibly effect on vested rights, existing County Code sections direct the County to adopt a construction that avoids unconstitutional applications and interpretations.

Based on (a) the ministerial nature of the County's role under the Elections Code; (b) existing law that strongly disfavors pre-election review of Initiative measures, and (c) that, in the event the Initiative is enacted, any invalid portions of the Initiative are likely to be deemed severable (meaning the valid portions would remain operative), it is highly unlikely that pre-election review of the Initiative would be granted by a court. Therefore, it is not recommended that pre-election review be sought.