


## MEMORANDUM

**TO:** The Honorable Mayor and Members of the Town Council

**FROM:** Joel D. Kuperberg 

**DATE:** January 12, 2006

**FILE NO.:** 024741-0001

**RE:** Analysis of the Effect of Measure N on Apple Valley Land Use Regulatory Authority

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The voters of Apple Valley passed Measure N at the November, 1999 election, and the Measure became effective on January 1, 2000. In Section 1, Measure N makes findings supportive of retaining the Town's existing rural atmosphere and equestrian lifestyle. Section 2 of Measure N adopts three separate actions with respect to the Land Use Element of the Apple Valley General Plan; apparently best known is Section 2.C, which prohibits, until January 1, 2021, any change to the 2 dwelling units per acre density limit and the 18,000 square foot minimum lot size for development within the Land Use Element's R-SF (Single Family Residential) designation without a vote of the Town's electorate.

This memorandum analyzes the specific legislative actions that were enacted by Measure N, the extent to which Measure N restricts the ability of the Town Council to adopt amendments to the Land Use Element of the Apple Valley General Plan and change allowable land uses on parcels within the Town, and the legal effect of Land Use Element amendments adopted by the Town Council since the passage of Measure N.

### A. Issues

1. Does Measure N restrict the authority of the Apple Valley Town Council to amend the Land Use Element of the General Plan, or to adopt General Plan amendments changing the allowable land use of parcels from one Land Use Element designation to another?
2. Does Measure N restrict the Town Council's authority to modify the maximum density limits and minimum lot size requirements in the Land Use Element's "Specific Plan" designation?
3. Does Measure N restrict the Town Council's authority to modify the maximum density limits in the Land Use Element's R-MF (Medium Density) land use designation?

4. What is the effect of Measure N on General Plan amendments adopted by the Town Council since November, 1999 to change the allowable uses on parcels from one land use designation to another?

### **B. Conclusions**

1. Because Section Measure N “readopted” the 1991 Land Use Element goals and policies, and the 1998 Land Use Element designations and land use map, the Town Council lacks the authority, without a vote of the electorate, either (a) to amend the 1991 Land Use Element goals or policies, or (b) to adopt a General Plan amendment changing the allowable uses of a parcel from the land use designation specified in the 1998 Land Use Element to a different land use designation.

2. Because Measure N “readopted” both the 1998 Land Use Element designations (including the Specific Plan designation), and Policy LU-3.4 of the 1991 Land Use Element, the Town Council does not have the authority, without a vote of the electorate, to apply the R-SF density and minimum lot size requirements to Specific Plan projects.

3. Because Measure N “readopted” the 1998 Land Use Element designation of R-MF with allowable densities of 2-20 dwelling units per acre, the Town Council does not have the authority, without a vote of the electorate, to revise the R-M designation to reduce the maximum density from 20 to 10 dwelling units per acre

4. Any General Plan amendments adopted by the Town Council subsequent to the passage of Measure N to change the land use designations of specific properties were invalidly adopted. However, unless lawsuits were filed challenging those invalidly adopted General Plan amendments within 90 days of the amendments’ adoption, the land use designation changes are now immune from challenge.

### **C. Analysis**

1. Because Measure N "Readopted" All of the Substantive Provisions of the Apple Valley Land Use Element, the Measure Prevents the Town Council, Without a Vote of the Electorate, from Either (a) Amending the Land Use Element, and (b) Changing the Allowable Land Use Designation of any Parcel, Until January 1, 2021.

Measure N effects three substantive changes to Apple Valley’s General Plan. The best known change is reflected in Section 2.C of the Measure, which amends the Land Use Element to preclude any change to the 2-unit per acre density limit and the 18,000 square foot minimum lot size requirement in the F-SF (Single Family Residential) land use designation until December 31, 2020, without a vote of the people. These limitations on changing the R-SF designation are consistent with, and further, the findings and purposes set forth in Sections 1.B, 1.D, and 1.E of Measure N.

While they have apparently received less attention, Sections 2.A and 2.B of Measure N also restrict Town Council authority over the Land Use Element. Section 2.A of the Initiative readopts the

goals and policies of the Land Use Element, as it existed in **1991**. Section 2.A provides in pertinent part as follows:

The Residential Lot Size initiative ***hereby reaffirms and readopts***, until December 31, 2020, goal LU-1, policy LU-1.1, LU-1.2, . . . of the Land Use Element of the Town of Apple Valley General Plan adopted on ***September 10, 1991***. (Emphasis added.)<sup>1</sup>

Similarly, Section 2.B of Measure N readopts the land use designations and land use map in the Town's Land Use Element in effect in **1998**. Section 2.B provides as follows:

In addition, the initiative ***hereby reaffirms and readopts***, until December 31, 2020, the Land Use Designation and Land Use Policy Map (figure LU-3), Equestrian Neighborhood Map of the Land Use Element of the Town of Apple Valley General Plan adopted on September 10, 1991, ***as amended through January 1, 1999***. (Emphasis added.)

The reaffirmation and readoption of the Land Use Element goals, policies, and designations are not reflected in any of the findings and purposes set forth in Section 1 of Measure N. However, Measure N's language, "reaffirms and readopts, until December 31, 2020," has the effect of enacting the 1991 Land Use Element goals and policies, and the 1998 Land Use Element designations and maps, by initiative.

Under California law, legislation enacted by initiative may only be modified or repealed by a subsequent vote of the people, unless the initiative measure expressly provides otherwise. Elections Code § 9217 provides in pertinent part as follows:

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the City. . . . No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

Elections Code § 9217 prohibits any Council-adopted change to legislation enacted by initiative, even if the initiative does not contain that express prohibition. In *DeVita v. County of Napa*, 9 Cal.4<sup>th</sup> 763 (1995), the California Supreme Court construed a similar statute applicable to counties in holding that a land use element amendment enacted by initiative may only be amended or repealed by the electorate. See also, *Mobile Park West Homeowners Assn. v. Escondido Mobile Park West*, 35 Cal.App.4<sup>th</sup> 32 (1995); 36 Ops. Ag. 236 (1980).

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<sup>1</sup> Section 2.A of Measure N "reaffirms and readopts" all of the goals and policies in the Land Use Element as it existed in 1991.

Elections Code § 9217 and the above case authorities therefore hold that, by reason of Section 2.A of Measure N, the Apple Valley Town Council may not itself amend the goals or policies of the Land Use Element adopted on September 10, 1991, until 2021. Similarly, these legal authorities hold that Section 2.B of Measure N precludes the Town Council from itself amending any of the land use designations or map in the Land Use Element in effect as of January 1, 1999, until the year 2021. Any action to amend these substantive land use portions of the Land Use Element may only be undertaken through the use of the initiative process.

2. Measure N Prevents the Town Council from Amending the Land Use Element to Modify the Density or Minimum Lot Size Requirements of the Specific Plan Land Use Designation.

The 1998 Land Use Element describes the land use designation for Specific Plan projects as permitting the following intensity:

Development densities for the entire residential and open space portions of the Specific Plan area shall not exceed two (2) dwelling units per gross acre subject to the limitations and criteria stipulated below. Therefore, small lots may be permitted where correspondingly larger amounts of open space are provided. The development density may be an average over the entire residential and open space areas, but in no case shall density transfers allow a density in excess of twenty-four (24) dwelling units per net acre for any portion of the Specific Plan (1998 Land Use Element, p. LU-7).

In addition, policy LU-3.4 of the 1991 Land Use Element provides that “open space equivalent to that provided by single-family units or 18,000 sq. ft. net lots shall be provided for in all specific plans.”

Based upon information available to us, it appears that the Town Council took action in December, 2004 to deem PUDs (which, in Apple Valley, appear to be a form of Specific Plan development) subject to the 2-unit per acre/18,000 sq. ft. minimum lot requirements for R-SF (single family residential) development under Measure N. However, by reason of Elections Code § 9217 and the case authorities cited above, Section 2.B of Measure N divested the Town Council of the authority to modify any land use designations in the 1998 Land Use Element (including the flexibility for density averaging in Specific Plan projects); and Section 2.A of Measure N precludes the Town Council itself from modifying any of the goals or policies of the 1991 Land Use Element (including Policy LU-3.4, which provides flexibility for lot sizes in Specific Plan projects). Accordingly, the Town Council may not, until January 1, 2021, modify the standards or policies governing the Specific Plan land use designation without a vote of the Apple Valley electorate.

3. Measure N Prevents the Town Council from Amending the Land Use Element to Decrease the Maximum Density in the R-M (Medium Density Residential) Land Use Designation.

In the 1991 Land Use Element, the R-M (Medium Density) land use designation permits multi-family development at a density range of 2-10 units per net acre (1991 Land Use Element, p. 8). The 1998 Land Use Element, by contrast, defines the R-M designation to allow from 2-20 dwelling units per net acre (1998 Land Use Element, page LU-5). As indicated above, Section 2.B of Measure N “readopts” the land use designations in the 1998 Land Use Element, such that Measure N effectively “locks in” a density range of 2-20 units per acre for the R-M designation unless the designation is amended by a vote of the Apple Valley electorate.

The Town’s June 27, 2000 Housing Element in some places assumes that the maximum R-M density is 20 units per acre (see Housing Element, at pp. 42, 54), but policy H-1.1 of the Housing Element (at p. 69) states that medium density development is 10 units per acre. Given that Section 2.B of Measure N precludes any action by the Town Council to modify the maximum allowable density of the R-M land use designation, the Housing Element is incorrect where it states that the R-M designation permits only 10 units per acre. Further, the Town Council may not reduce the maximum density of the R-M land use designation from 20 to 10 dwelling units per acre without a vote of the electorate.

4. While Any General Plan Amendment Adopted by the Town Council Subsequent to the Passage of Measure N that Changed the Land Use Designation of Any Parcel was Invalidly Adopted, Each Such General Plan Amendment is Now Immune from Legal Challenge if No Lawsuit was Filed within 90 Days of the Town Council’s Adoption of the Amendment.

It is our understanding that the Town Council has adopted a number of General Plan amendments in the six years following the passage of Measure N, many of which have redesignated lands within the Town from the land use designations set forth in the 1998 Land Use Element to different designations. It is also our understanding that none of these General Plan amendments have been approved by the voters. Because Section 2.B of Measure N readopted all of the land use designations, and the land use map, in the Town’s Land Use Element, these subsequent Council-adopted Land Use Element amendments were invalidly adopted under Election Code § 9217 and *Mobile Park West Homeowners Assn, supra*.

The fact that post-Measure N Land Use Element amendments were invalidly enacted by the Town Council, rather than by the Apple Valley electorate, does not address whether those Land Use Element amendments are valid and effective now. The validity of the post-Measure N Land Use Element amendments is addressed by Government Code § 65009, which creates a 90-day statute of limitations for any action to “attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan.” While the specific question of whether the statute of limitations established by Government Code § 65009 applies to actions alleging violations of Election

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Code § 9217 has not been addressed by the courts, we believe case law makes this 90-day statute of limitations applicable to the post-Measure N Land Use Element amendments.

In *Ching v. San Francisco Board of Permit Appeals*, 60 Cal.App.4<sup>th</sup> 888 (1998), the court applied Government Code § 65009 to bar a challenge to a land use decision based on a statute unrelated to land use (in that case, the conflict of interest provisions of the Political Reform Act). We believe the reasoning employed by the court in *Ching* also applies to a claim challenging a land use action as a violation of Election Code § 9217. Therefore, like the claim in *Ching*, a claim challenging a post-Measure N Land Use Element amendment as a violation of Election Code § 9217 will probably be subject to the strict 90-day statute of limitations mandated by Government Code § 65009.

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