

*City of Albany*



**ELECTION CODE 9212 REPORT**  
**ON THE**  
**ALBANY WATERFRONT SPECIFIC PLAN**  
**INITIATIVE**

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## **EXECUTIVE SUMMARY**

On April 3, 2006, the Albany City Council authorized staff to prepare an objective informational report on the Albany Waterfront Specific Plan Initiative as authorized by Election Code §9212. The intent of this report is to provide voters an impartial analysis of the policy issues that the initiative raises, and provide information regarding the implementation of the initiative.

In summary, the proposed initiative has four main parts:

- It sets forth two purposes: (1) to protect the entire Albany Waterfront, including the privately owned property located there, as an open-space resource for the public, allowing development to sufficient to replace revenues that the City, Library and School District currently receive from the property; and (2) to inform present and future owners of the private property that the community's vision for the property is primarily open space and that no significant increases in intensity of the site's present uses are acceptable.
- It adds goals to the Land Use Element of the City's General Plan of protecting open space and Bay access at the Waterfront, as well as several policies to advance that goal, including requirements (1) of a 600 foot setback from the Waterfront shoreline, (2) that any zoning or Specific Plan for the area maximize open space and public access, (3) that development of private property in the area be minimized, (4) that development replace current revenues generated by the current private uses of the property, and (5) prohibiting most gambling not associated with horse racing.
- It establishes a newly created Task Force to undertake a Specific Plan ("Shoreline Protection Planning") process for the Waterfront area. The Task Force would include members appointed by the City Council and by specified environmental organizations. Any plan approved by the Task Force would be required to adhere not only to the policies of the initiative, but also to additional principles such as protection and restoration of wildlife habitat, reopening of creeks, restoration of wetlands, expansion of beaches and dunes, location of interpretive and recreational facilities, creation of a Bay Trail and provision of public art. The City's Planning Commission and City Council would be able to amend the plan only with 4/5ths vote. Ultimate approval would be required to be approved by the City's voters.
- It imposes a moratorium on any approvals for the development of privately owned property at the Waterfront for the earlier of either two years or the completion and voter-approval of the Specific Plan for the area.

The key issues and concerns raised by the initiative are the following:

- The initiative provides amendments to waterfront land use policies, but does not necessarily provide the mechanism to fully implement the policies. The Specific Plan process called for could provide framework to require some portion of the privately

owned properties to be dedicated for public open space, access, or use, but there are legal limitations on what local regulations can impose. The initiative makes no provision for the balance of funds necessary to acquire the privately owned property and thereby achieve its goals. A rough order of magnitude estimate of the costs associated with acquiring these interests could exceed \$50 million.

- The initiative makes no provision to fund the necessary planning process required by the initiative. A rough order of magnitude estimate is that the planning costs could exceed \$1 million.
- The initiative envisions that revenues from future development would replace revenues from the current racetrack uses at the site. Given the limited development the initiative would allow at the site, and other fiscal considerations not addressed in the initiative, it is not clear that fiscal neutrality would be assured.
- Several provisions of the initiative raise substantial concerns about their legal validity.

## **INTRODUCTION**

The purpose of this analysis is to provide the City Council and members of the public an examination of the planning framework that would be created by the proposed initiative if it were to be adopted. Election Code §9212 provides wide latitude for determining what is included in any such report. This analysis is not intended to prejudice or predict the outcome of the planning process. Rather, it is a summary of the key considerations for decision-makers before the start of the process. Key excerpts from the initiative are highlighted, and the entire text of the initiative is included in the appendix.

## **CONSIDERATIONS REGARDING IMPLEMENTATION OF THE INITIATIVE**

The initiative sets forth two purposes. The first is to protect the entire Albany Waterfront, including the privately owned property located there, as ultimately an open-space resource for all to enjoy, with development to replace revenues that the City, Library, and School District currently receive from the property. Second, to inform present and future owners of the private property that the community's vision for the property is primarily open space and that no significant increases in intensity of the site's present uses are acceptable.

While the initiative articulates the goal of acquiring or using the privately owned properties at the Waterfront for public open space, it should be understood that the goal itself is not legally sufficient basis for imposition of a condition of approval on future development. In the event of future development of the property, the City has regulatory tools to impose conditions on development, including provision of open space. Court cases have held, however, that the City may not, by initiative or otherwise, constitutionally require the property owner to dedicate or allow its private property to be used by the public unless the City can demonstrate a nexus between the owner's proposed development of the property and the need for the public dedication. No such showing justifying the public's use of the privately owned property is made by the initiative. Even if the initiative becomes law, the property owner will retain the right to wholly exclude the public from its private property except to the extent that the City could justify dedication of land as a condition of approval of a future development of the property.

There are three traditional ways to realize the initiative's goal of retaining some part of the privately owned land as public open space: (1) purchase of the property at fair market value by the City or another public agency with appropriate jurisdiction over the property; (2) establishment of a nexus between the impacts of waterfront development and the dedication of open space, and applying the nexus as a condition of approval of the development of some other part(s) of the property, (simply wanting the open space will not satisfy the constitutional standard); or (3) negotiation of a development agreement between the City and the property developer in conjunction with City approval of a development project.

While the initiative does not set forth the expectation of immediate public open space acquisition, it is important to note that based on recent transactions, the City estimates the open space land envisioned would exceed \$50 million. The initiative makes no provision for funds for such acquisition. As to the second and third options, the substantive limitations on development

of the site would make it unlikely the City could legally justify imposing the kinds of dedication requirements and other conditions that would be needed to realize the initiative's goals on the modest development the initiative authorizes. For the same reason, it would be unlikely the City could negotiate such amenities in a development agreement.

## PROPOSED GENERAL PLAN AMENDMENTS

The City of Albany's General Plan serves as the comprehensive policy document for land use decisions in the City. The current General Plan was adopted in December 1992, and contains a series of "elements" that cover specific subject areas. Key to planning the waterfront is the Land Use element and the Conservation, Recreation, and Open Space element.

Current General Plan policies for the Golden Gate Fields property are detailed in the Appendix. In summary, the property is designated Commercial/Recreation, with a requirement for a 100 foot setback and provisions for the continuation of the Bay Trail.

Again, the stated purpose of the initiative is to create public open space along the waterfront. Thus, the core of the proposed initiative is the introduction of five new Land Use element policies and one new Conservation, Recreation, and Open Space element policy.

- **Creation of a 500 foot Setback from the Shoreline**

The proposed initiative would add the following policy to the General Plan:

*GENERAL PLAN LAND USE POLICY 10.1 To protect the shoreline and its resource value and to provide, to the maximum extent possible, full and open access to the shoreline, and to preserve the existing open-space character of the shoreline, all approved commercial development on the privately held property at the Albany Waterfront shall be set back from the water's edge. This setback shall be a minimum of 500 feet from the San Francisco Bay Conservation and Development Commission ("BCDC") 100-foot shoreline jurisdictional limit. This setback shall run along the entire west shoreline northward from the Berkeley border to Buchanan Street or to the area in the Eastshore State Park commonly known as the Plateau, whichever is farthest north. This 500-foot setback shall govern all the privately held property at the Albany Waterfront but shall not apply to the northern or eastern border of the privately held property on the Albany Waterfront. A small nature interpretive center that may include a café or restaurant, and recreational facilities for kayaking and other small watercraft (consistent with BCDC policies), shall be allowed to be located within the 500-foot setback.*

The policy would prevent commercial development from occurring within the 600-foot setback area. Figure 1 is an aerial photograph of the property, indicating the approximate location of the 600-foot setback. The total land area within this setback is approximately

43 acres, representing 40% of the of the total land area. Within the 600-foot setback is a large portion of the existing grandstand and surface parking area and a small portion of the existing track and infield.

- **Potential Areas of Development Resulting from the Proposed Setback**

Figure 1 is an aerial photograph of the property, indicating the portion of the property outside the 600 foot setback and potentially available for future development. The total land area outside this setback is approximately 65 acres. Of the potential development area, 58 acres are currently used for track operations or located in a FEMA flood plain, and approximately 7 acres are currently used as surface parking.

In the near term, while the track is in operation, the 7-acre portion of the northern parking lot shown in Figure 2 would conceivably be available for development. This could also be considered as the area for the first phase of future development if the initiative were to be approved.

In the event of termination of the use of the racetrack, an additional 50 acres would be available for development, as shown in Figure 3.

The remaining 8 acres outside the 600-foot setback are within the FEMA flood zone, as shown in Figure 4, and thus is restricted in terms of potential development.

**Table 1**  
**Total Land Area**

Total land area	108 acres
Land area within 600' setback	43 acres
Land area outside 600' setback	65 acres

**Table 2**  
**Land Area Outside 600-foot Setback**

Land area outside 600' setback	65 acres
Currently used for parking	7 acres
Currently designated in FEMA Flood Zone	8 acres
Currently used for track operations	50 acres

**Figure 1**  
**600-Foot Setback Area**

*(Note regarding graphic: Ladbroke Land Holdings is a subsidiary of Magna Entertainment. The acreage figures listed on the graphic itself are electronically embedded in the graphic for analysis in a different context, and not related to land area calculations included in this analysis.)*





**Figure 2**  
**7-Acre Parking Lot Area Available for Development**  
**Assuming Track Continues Present Operation**

*(Note regarding graphic: Ladbroke Land Holdings is a subsidiary of Magna Entertainment. The acreage figures listed on the graphic itself are electronically embedded in the graphic for analysis in a different context, and not related to land area calculations included in this analysis.)*



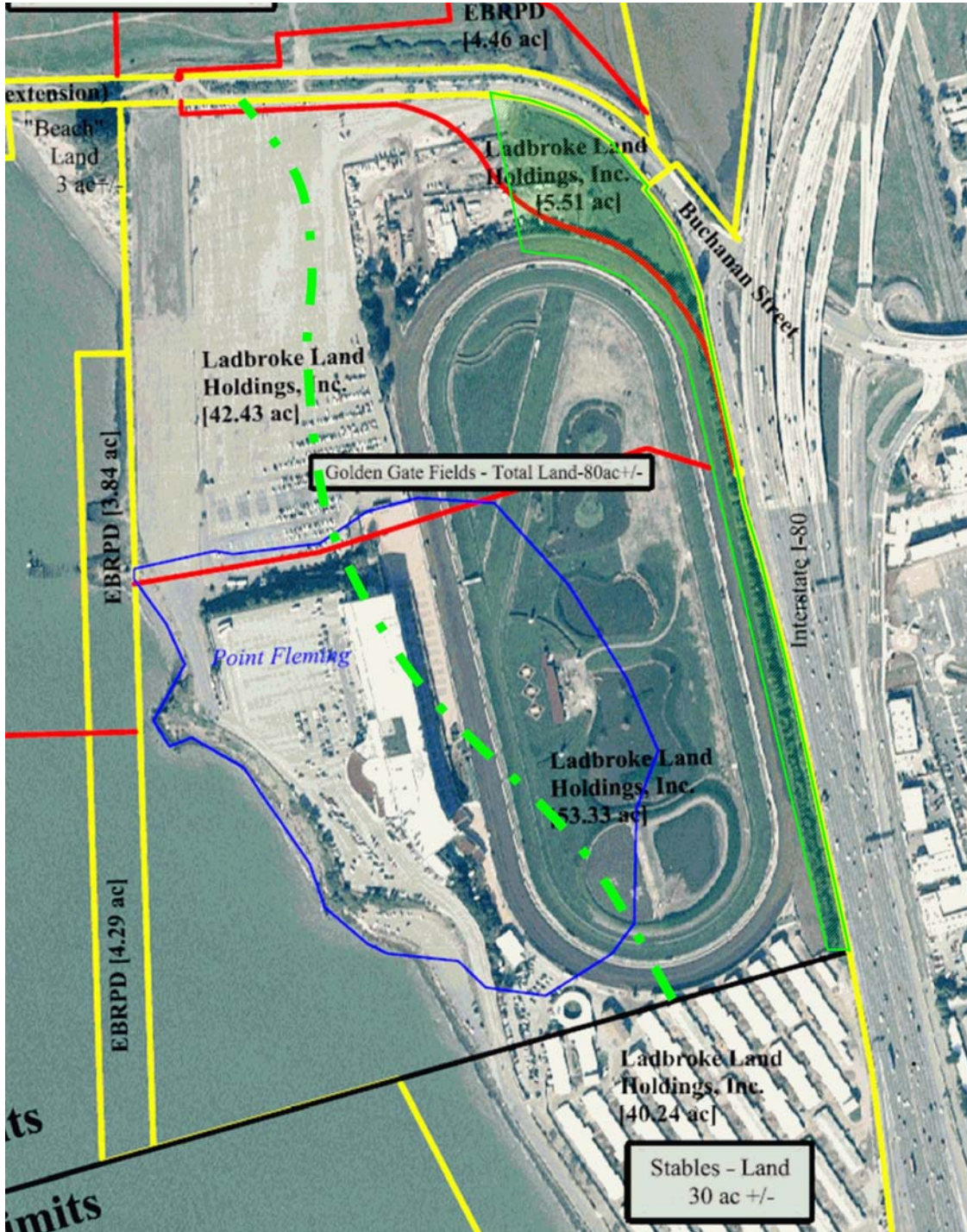
**Figure 3**  
**50-Acre Track Area Available for Development**  
**Assuming Track Use is Terminated**

*(Note regarding graphic: Ladbroke Land Holdings is a subsidiary of Magna Entertainment. The acreage figures listed on the graphic itself are electronically embedded in the graphic for analysis in a different context, and not related to land area calculations included in this analysis.)*



**Figure 4**  
**8-Acre Codornices Creek/FEMA Flood Zone Area**

*(Note regarding graphic: Ladbroke Land Holdings is a subsidiary of Magna Entertainment. The acreage figures listed on the graphic itself are electronically embedded in the graphic for analysis in a different context, and not related to land area calculations included in this analysis.)*



- **Securing Public Access on Private Property and Potential for Exactions and Dedications of Land for Public Improvements**

The proposed initiative would add the following policy to the General Plan:

*GENERAL PLAN LAND USE POLICY 10.2 -- Any zoning or Specific Plan for the privately held property at the Albany Waterfront shall make provisions for maximizing the Waterfront as an open-space resource and maximizing public access to the extent feasible. Any such zoning or Specific Plan shall designate a large portion of the privately held property at the Albany Waterfront as open space, to preserve as much as possible the existing open space of the Race Track and the privately held property at the Albany Waterfront. Furthermore, any zoning or Specific Plan should also minimize visual impacts of any commercial development.*

As explained above, the enactment of the initiative will not, of itself, automatically fulfill this objective or authorize the public's use of the private property as public open space. Thus, the initial step toward this goal would be to seek mechanisms for funding acquisition of land for public use and funding for construction of public improvements.

The fair market value of the 600-foot setback area has not been appraised. As a point of reference, it should be noted that a 16 acres of Golden Gate Fields property was sold in 2002 to the East Bay Regional Park District for the Gilman Sports Fields project south of Gilman Street. The purchase price was \$8.5 million, which translates to \$531,000 per acre. Applying the same price to the entire 43-acre parcel translates to a land value of \$22.8 million (on the Magna financial statements, the EBRPD property was valued at \$14.3 million, which translates to a setback land value of \$38.4 million).

The value of the improvements currently on the 43 acres would depend on an assessment of the buildings and assumptions about the long-term economic viability of horse racing. As a point of reference, County property tax assessment values the improvements within Albany at \$27.6 million. As a further point of reference, according to Magna Entertainment financial filings, the entire property, including Berkeley parcels, was acquired in 1999 for \$83.4 million.

Applying this information, a rough order of magnitude estimate of the combined cost of land and improvements within the 600-foot setback area is at least \$50 million. The scale of this potential expense can be illustrated by comparison to the City's current 5-year capital improvement budget, which totals \$30.4 million.

Absent outside sources of funds, or City tax measures, or an agreement with the land owner, the remaining tool available to the City to gain public access to property of this scale would be fees and dedications of land from future private development on Golden Gate Fields. In order to collect fees and require dedications from future development, the City is required to establish the relationship between the impact of a project and the

amount of fee or dedication required from the proposed project. The smaller the project, the less dedications are received. If the scale of the project is such that not all of the remaining undeveloped land is dedicated to a public agency or otherwise set aside for public access, then the remaining private property may not necessarily be improved as open space or accessible to the public.

If as a condition of approval, private property is dedicated to a public agency for open space, that agency will be responsible for improvements and long-term maintenance. If the ownership and management of the open space remains the responsibility of the property owner, the dedicated open space may be restricted as private open space.

In addition to the cost of property acquisition, a plan for improvements associated with the public open space should be prepared. The process for preparing the plan would identify programmatic objectives, identify responsible government agencies, and detail potential funding sources both for construction of improvements and long term maintenance of improvements. At this stage in the process, it is not practical to predict the programmatic objectives or the project costs. It is likely that any public improvements beyond the most rudimentary will be substantial and could be in the millions of dollars for the cost of acquisition of the land.

- **Averting a Taking of Property without Just Compensation**

As noted above, the initiative seeks a 600-foot setback in which public open space and access are envisioned, and nominal development is allowed. Accordingly, the setback provisions raise concerns that constitutional guarantees against the “taking” of property without payment of just compensation may be violated. To address this issue, the initiative, if approved, would add to the General Plan the following policy with respect to development of the privately owned land generally:

*GENERAL PLAN LAND USE POLICY 10.3 The total amount of square footage and nature of uses for commercial development within the privately held property at the Albany Waterfront shall be minimized, consistent with allowing the property owner to obtain a return on its investment that meets statutory and constitutional mandates on the protection of private property rights, but at the same time consistent with the purpose and intent of the Albany Shoreline Protection Initiative.*

The proposed General Plan policy 10.3 articulates the desire to allow a minimum amount of development of the privately owned property. In so doing, it also acknowledges that there are limitations on the ability of the City to restrict land use on privately held property on the waterfront and that the City cannot impose land use regulations that are so unduly restrictive that they eliminates all economically beneficial use of the property.

The law is settled that the City may not simply pass a law, by initiative or otherwise, that requires a private property owner to dedicate any land for public access, open space or

use, without paying the owner fair market value. To acquire such public open space, the City would either have to pay the property owner, or require the property developer as a condition of a proposal to develop some other part of the private property, and then only upon a showing of a nexus, namely, that the impacts of a proposed development create the need for the open space.

Although the law is clear that the City would be required to allow some level of development of the privately owned land in order to require public access and use of the private property, there is no set formula for determining the scale of development required to avoid a taking. Thus, legally the most prudent approach would be to provide the property owner an opportunity during the specific plan process to submit documentation that any limitations on development and public access required by the initiative would work a taking of the private property.

- **Implications for Requirement of Fiscal Revenue Neutrality**

The initiative if approved would add the following policy to the General Plan:

*GENERAL PLAN LAND USE POLICY 10.4 The purpose of any approved commercial development within the privately held property at the Albany Waterfront is to provide sufficient revenues to at least replace the annual revenues that the City, School District, and Library are receiving as of November 7, 2006 from the uses of the privately held property at the Albany Waterfront.*

Implementation of this policy would require that existing revenues be documented and creation of a financial model that calculates the revenues generated by the range of potential land uses. In a detailed report to the City Council in October 2005, a summary of City revenues was presented.<sup>1</sup> As shown in Table 3, in the past three fiscal years, total revenues to the City ranged from \$898,000 to \$974,000.

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<sup>1</sup> Note: Sales tax information is confidential information that may be released only with the permission of the business; Golden Gate Fields gave its permission for the information to be released.

**Table 3**  
**City of Albany Revenues Generated from Golden Gate Fields**

<b>SOURCES</b>	<b>FY02/03</b>	<b>FY03/04</b>	<b>FY04/05</b>
Property Taxes Fees & assessments	\$240,043	\$263,192	\$264,059
Property Taxes (Special purpose)	\$40,907	\$57,775	\$57,569
Property Taxes, County (General Fund)	\$80,000	\$81,600	\$83,124
Sales Tax (General Fund)	\$72,462	\$91,558	\$61,664
Racetrack Wagering Revenue (General Fund)	\$488,115	\$479,597	\$431,437
<b>TOTAL REVENUES, Special Funds &amp; General Fund</b>	<b>\$921,527</b>	<b>\$973,722</b>	<b>\$897,853</b>

Albany Unified School District revenues from the property include assessments based on parcel square footage and ad valorem tax based on assessed valuation. In the event portions of the waterfront are converted to public use, the assessments from those parcels would decline. With respect to ad valorem taxes, the higher the assessed value of the waterfront parcel, the lower the debt service tax levy for other taxpayers. Table 4 highlights revenues to AUSD from Golden Gate Fields.

**Table 4**  
**Albany Unified School District Revenues Generated from Golden Gate Fields**

<b>SOURCES</b>	<b>FY02/03</b>	<b>FY03/04</b>	<b>FY04/05</b>
Property taxes, assessments	\$ 271,751	\$ 278,693	\$ 280,396
Property taxes, ad valorem	\$ 61,009	\$ 55,129	\$ 68,956
<b>TOTAL</b>	<b>\$ 332,760</b>	<b>\$ 333,822</b>	<b>\$ 349,352</b>

The policy appears to assume that the track ceases operation. Consequently, it does not provide clear direction in the event development occurs while the track is in operation. Furthermore, the policy narrows the spectrum of potential land uses to those that produce relatively high revenues. In general, in recognition of the proposed initiative's goal of minimizing development of the property, this policy could best be achieved through retail and hotel development. These uses are recognized to generate the greatest net fiscal benefit to municipalities.

It also should be noted that the proposed general plan policy addresses revenues only. Thus, even if revenues to the City, school district, and library remain constant, the net fiscal impact, after expenditures are taken into account, could be positive or negative, depending on the nature of the future land use.

Furthermore, the policy is date specific, locking in an explicit dollar value. Over time, inflation will erode the real value of the November 2006 revenues. Similarly, with inflation, a project that might not generate sufficient revenues at one point in time, could comply a few years later.

As part of the implementation of the initiative, a fiscal consultant will need to be retained to document revenues as of November 7, 2006 and to prepare a financial model that accurately predicts revenues generated. The Task Force process may wish to explore modifications to this policy requirement to address both revenue and expenditure considerations, adjust for inflation, and changes in funding mechanisms.

- **Prohibition on Gambling**

The initiative if approved would add the following policy to the General Plan:

*GENERAL PLAN LAND USE POLICY 10.5-- All forms of gambling shall be prohibited at the Albany Waterfront with the exception of pari-mutuel betting on horse races and the operation of related satellite wagering facilities for pari-mutuel betting on horse races. This prohibition includes, but is not limited to, the following specific types of games: slot machines, poker (all forms), blackjack, video poker, Pai Gow (poker and tiles), other forms of sports betting, baccarat, craps, roulette, keno, pachinko, and any kind of bingo.*

This provision may be preempted by federal law relating to Indian Gaming, and courts have ruled in similar cases that such a policy would be unenforceable to the extent the site otherwise would be available for such use under federal law. <sup>2</sup>

## **PLANNING PROCESS IMPOSED BY THE INITIATIVE**

The initiative if approved would provide the following mandate to the City:

*SECTION 6. PLANNING PROCESS -- Effective upon passage of this initiative, the City shall immediately initiate a Shoreline Protection Planning Process, as defined below, for the purpose of creating a Specific Plan and, if necessary, corresponding General Plan amendment(s) and Zoning Ordinance amendment(s) for the privately held property at the Albany Waterfront. Upon completion of the Shoreline Protection Planning Process and adoption, Subject to Measure C, of*

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<sup>2</sup> See, e.g., *Citizens to Enforce CEQA v. City of Rohnert Park*, 131 Cal. App. 4th 1594, 1597 (2005), citing the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq.



*the resulting Specific Plan and, if necessary, General Plan Amendment(s), the zoning for the privately held property at the Albany Waterfront shall be amended to be consistent with the Specific Plan and General Plan amendment(s).*

A specific plan is intended to link the policies of the general plan to development proposals in a defined area. A specific plan can establish broad policy concepts, as well as detail the location, intensity, and design of future development. It also addresses infrastructure requirements and finance of public improvements.

The initiative introduces guiding principles that to the *maximum extent feasible*, the Task Force should create a Specific Plan that provides for the following:

- Reopening and restoration of creeks,
- Restoration of wetlands and other habitats,
- Natural expansion of existing beach and dunes,
- Location of a small nature interpretive center that may include a restaurant or café within the 500-foot setback,
- Location of recreational facilities for kayaks and other small watercraft (consistent with BCDC policies) at the water's edge,
- Public art,
- Public restroom facilities, and
- Completion of the San Francisco Bay Trail.
- Ballfields,
- Hiking and bicycling opportunities,
- Off-leash dog areas, and
- Play areas.

The primary implication of the guiding principles is to expand the scope for the specific plan and corresponding environmental review. The greater the level of detail associated with meeting these principles, the longer the planning process will take and the greater the cost. For example, in terms of CEQA review, potential environmental factors requiring technical study for significant impacts and corresponding mitigations could include:

- |                               |                            |
|-------------------------------|----------------------------|
| • Aesthetics                  | • Land Use                 |
| • Air Quality                 | • Population/Housing       |
| • Biological Resources        | • Public Services          |
| • Cultural Resources          | • Recreation               |
| • Geology/Soils               | • Transportation/Traffic   |
| • Hazards/Hazardous Materials | • Utilities/Service System |
| • Hydrology/Water Quality     |                            |

The initiative also specifies that future development on Golden Gate Fields adhere to ecologically sensitive, sustainable principles in building, landscaping, and transportation,

including use of renewable energy and employment of recycling, reuse, and conservation practices. Section 8 d. specifies that at a minimum, future development qualify for Silver Leadership in Energy and Environmental Design (LEED) certification and, whenever feasible, Platinum LEED certification. The City is in the process of addressing environmental sustainability in the near future as part of regular advancement of City planning and building policies. Given that certification methodologies are rapidly evolving, the specific checklist and certification level established in the initiative may be outdated by the time future development actually occurs.

- **Moratorium on Development**

Section 9 of the proposed initiative would impose a two-year moratorium on any approvals for any development of the privately held property. The Government Code establishes limits on the circumstances under which communities may impose development moratoria. The restrictions are applicable to local initiative measures.<sup>3</sup>

The issue in this particular situation is that although the measure contains a finding that the Magna Entertainment Corporation has proposed a development that would “pose immediate threats to the public health, safety and welfare,” in fact, technically, Magna has not submitted any development application to the City. Moreover, Magna acknowledges that its anticipated application would require substantial environmental review, followed by a vote of the City’s electorate under Measure C. At least one court has held that a moratorium only may be imposed where “actual approval of an entitlement for use is imminent.”<sup>4</sup> Whether a court would conclude actual approval of any entitlement for the development of the site is “imminent,” as is required for a moratorium is an area of concern.

## MANAGEMENT OF THE PLANNING PROCESS

- **Task Force Composition and Decision-making Process**

The initiative if approved would provide the following mandate to the City:

*b. Composition of Citizens’ Task Force to Guide the Shoreline Protection Planning Process -- Upon passage of this initiative, the City’s Planning Agency shall immediately begin a planning process for the privately held property at the Albany Waterfront. The planning process shall be facilitated by a Citizens’ Task Force under the auspices of the City’s Planning Agency. The roles of the Task Force are: 1) to manage the process of retaining a consultant with experience in sustainable development, community outreach, and open space planning who will facilitate a community planning process for the privately held property at the*

<sup>3</sup> 216 Sutter Bay Associates v. County of Sutter, 58 Cal. App. 4th 860, 869 n. 1 (1997); Bank of the Orient v. Town of Tiburon, 220 Cal. App. 3d 992 (1990).

<sup>4</sup> Building Industry Legal Defense Foundation v. Superior Court, 72 Cal. App. 4th 1410, 1418 (1999).

*Albany Waterfront; and 2) to preside over the preparation of the Specific Plan. The Task Force's duties include: preparing the written solicitation (Request for Proposals) for the consultant, selecting the consultant, and overseeing the preparation of the Specific Plan. The Task Force has final approval of the language of the Specific Plan that is to be delivered to the City for placement on the ballot under Measure C. The Task Force shall serve as the Lead Agency under the California Environmental Quality Act (CEQA). Pursuant to CEQA, an Environmental Impact Report shall be prepared for the Specific Plan and any associated General Plan or Zoning Ordinance amendment(s). The consultant's duties are: to facilitate the public process for the Task Force and to prepare the Specific Plan and its associated environmental review documents, all of which are subject to final approval by the Task Force. The consultant will also carry out or arrange to have carried out a competent economic feasibility study or studies to determine: 1) the minimum amount of development on the privately held property at the Albany Waterfront that is necessary to avoid a taking of the property owner's constitutional rights, and 2) the amount and most appropriate type of development to replace the revenues that the City, Library, and School District receive from the property as of the effective date of this initiative. The Citizens' Task Force shall be made up of nine (9) Albany voters: one appointed by each member of the City Council, and one appointed by each of the following environmental groups: Citizens for the Albany Shoreline, Sustainable Albany, Citizens for East Shore Parks, and the Sierra Club. It is not necessary that the representative appointed by each organization be a member of that organization.*

Section 8c. provides that in addition to the five members to be appointed by the Albany City Council, the remaining four members are to be appointed by four environmental groups, including Citizens for the Albany Shoreline, Sustainable Albany, Citizens for East Shore Parks, and the Sierra Club. Granting such authority to these private groups may violate Article II, section 12 of the California Constitution. Under that section, an initiative that names an individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, does not have any effect and may not be submitted to the voters.<sup>5</sup>

Similarly, other legal precedent suggests that it may be impermissible to delegate a city's land use authority to private individuals or groups because the power may be arbitrarily used and because of possible conflicting interests.<sup>6</sup> Stated another way, statutes that give one person power over the property of another risk being declared arbitrary and a denial of due process.<sup>7</sup> Section 8's granting of authority to the specific named environmental groups may conflict with these principles as well.

<sup>5</sup> Cal. Const. art. II, § 12; *Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal. App. 4th 565, 579-580.

<sup>6</sup> *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137; see generally J. Longtin, *California Land Use*, section 1.61[2], pp. 113-114 (2d ed. 1987).

<sup>7</sup> *Paley v. Bank of America Nat'l Trust & Sav. Assn.*, 159 Cal. App. 2d 500, 511 (1958).

This constitutional provision suggests real legal hurdles will impede assembling a Task Force and proceeding with the implementation of the initiative's specific plan process.

- **California Environmental Quality Act (CEQA) Considerations**

The initiative if approved would provide the following mandate to the City:

*The Task Force shall serve as the Lead Agency under the California Environmental Quality Act (CEQA). Pursuant to CEQA, an Environmental Impact Report shall be prepared for the Specific Plan and any associated General Plan or Zoning Ordinance amendment(s).*

State law, as expressed in CEQA Guidelines published by the State Resources Agency, establish specific criteria for identifying lead agency (CEQA Guidelines Section 15051). Considerations favor the agency carrying out the project, or with the greatest responsibility for supervising or approving the project as a whole. The criteria also favor agencies with general governmental powers, rather than agencies with a single or limited purpose. Thus, although the initiative requires that the City Council make the final decision whether to place the Specific Plan on the ballot, it mandates delegation of the lead agency role to the task force. Given that normally, the City Council would be the decision-making body that would certify the CEQA analysis, if the initiative is approved, the municipal code should be evaluated and amended consistent with state guidelines to clarify roles of the Task Force in managing the preparation of the CEQA documentation.

As a practical matter, preparation of a detailed CEQA evaluation requires the day-to-day management attention of professional staff. Currently, a CEQA analysis of the type anticipated by the initiative would be managed by the City's Community Development Department, reporting to the City Administrator, with policy direction and ultimate decision-making from the Planning and Zoning Commission and City Council as appropriate. Consultations with other City commissions and committees would be a normal part of the process. Compliance with City administrative procedures also is a standard part of the process.

Exceptions to the normal policy and administrative structure would need to be organized to ensure timely and cost effective preparation of a CEQA analysis. The key consideration is defining the point of interface between the Task Force managed CEQA process, the regular City managed CEQA process, and the administrative structure of City government.

- **Validity of Delegation of Land Use Planning Authority to the Task Force**

Sections 6 and 8 of the proposed initiative requires the City to initiate a "Shoreline Protection Planning Process" for creating a Specific Plan for the privately held property

at the Albany Waterfront, as well as attendant General Plan and Zoning Ordinance revisions. For several reasons, concern exists as to the legal validity of this provision.

- Courts have held that because the purpose of an initiative measure is to propose actual legislation, measures are invalid where they instead merely direct a city to adopt legislation.<sup>8</sup> Furthermore, if, as is possible, this defect would be deemed to affect the entire measure, the initiative's severance clause (Section 10) would not be effective to save any remaining part of the measure.<sup>9</sup>
- Section 8 of the measure requires that the Specific Plan and attendant General Plan and Zoning Ordinance revisions be prepared and approved by a Citizens' Task Force. The Albany City Charter, by contrast, makes the City Council the City's legislative body; requires the Council to approve ordinances and resolutions; and authorizes ordinances to be adopted either by the Council or by initiative. Similarly, the Charter requires the City's Planning and Zoning Commission to recommend to the Council the adoption, amendment or repeal of any master plan, or any part thereof, for the physical development of the City and to exercise such functions with respect to land subdivision, planning and zoning as may be presented by ordinance or resolution. Because the measure, which proposes an ordinance and not a Charter amendment, vests the authority for the preparation and approval of the Specific Plan in the Citizens' Task Force rather than the Planning Commission and City Council, it may be susceptible to challenge as inconsistent with the City Charter.<sup>10 11</sup> This principal applies to an initiative ordinance whose provisions would divest a City Council of powers reserved to the Council under a City Charter, or otherwise direct a Council to act in a specified manner.<sup>12</sup> Here again, if these provisions are in fact invalid, the severability provision of the measure likely would not save its remaining provisions, which then would be rendered invalid as well.<sup>13</sup>

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<sup>8</sup> See *Marblehead v. City of San Clemente*, 226 Cal. App. 3d 1504, 1509-1510 (1991).

<sup>9</sup> (See *Marblehead v. City of San Clemente*, 226 Cal. App. 3d 1504, 1510; *Calfarms Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821 (1989). While subsequent cases have distinguished the *Marblehead* line of cases, see e.g. *Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal. App. 4th 565 (1997), the measure's legal validity remains in substantial doubt under *Marblehead*.)

<sup>10</sup> While the measure requires the Council to review any Specific Plan and attendant General Plan and Zoning Ordinance revisions proposed by the Task Force, that review is only for the limited purpose of determining compliance with State planning law and for the ministerial task of placing the Task Force's work product on the ballot.

<sup>11</sup> *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 ("An ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution."); *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 230-233 (1976); *Currier v. Roseville*, 4 Cal. App. 3d 997, 1001 (1970) ("The proposition is self-evident that an ordinance must conform to, be subordinate to, not conflict with, and not exceed the city's charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.")

<sup>12</sup> *Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1034 (1991); *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102.

<sup>13</sup> *City & County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 105.

- Section 8b. also purports to require the City to supply appropriate staff and legal counsel to the Citizens' Task Force. Because the powers of initiative apply only to acts which are legislative in character, and not to executive or administrative acts, and decisions about staffing a city board are likely to be deemed executive or administrative rather than legislative, this provision may be invalid as well.<sup>14</sup> These legal issues will likely have to be resolved before proceeding with the specific plan process.
- **Cost of Planning Process**

To date, the waterfront planning process has been fluid, and thus it is difficult to anticipate with precision the costs associated with implementing the requirements. Furthermore, the cost will depend in part on the scope and nature of the plan that evolves out of the process. Nonetheless, based on consultation with consultants familiar with land use and waterfront planning in the East Bay, the cost of the process could be in excess of \$1 million. A rough order of magnitude estimate of various elements of the process is outlined in Table 5. As a point of reference, the City's current fiscal year Planning and Building Division budget for professional services is \$125,000. The initiative does not address the source of funds for implementation.

**Table 5**  
**Estimated Cost of Specific Plan Implementation**

Task	Cost Estimate
Technical Studies	\$100,000 - \$200,000
Financing Plan	\$50,000 - \$100,000
CEQA Consultant	\$550,000 - \$650,000
Project Management	\$150,000
Legal (Analysis and Document Review)	\$100,000 - \$200,000
Legal (Litigation)	\$100,000 - \$200,000
City Staff	Not included
<b>Total</b>	<b>\$1,150,000 to \$1,500,000</b>

Any type of planning process that is expected to lead to viable and legally compliant land use plan needs to be supported by technical studies prepared by qualified professionals. In the case of the waterfront, the range of technical studies would include economic studies to understand market conditions and traffic studies to understand transportation

<sup>14</sup> see *Simpson v. Hite*, 36 Cal. 2d 125, 129 (1950); *Housing Authority v. Superior Court*, 35 Cal.2d 550, 557 (1950); *Essick v. City of Los Angeles*, 34 Cal.2d 614, 624, 625 (1950) and *Citizens for Jobs & the Econ. v. County of Orange*, 94 Cal. App. 4th 1311, 1331 (2002),

constraints. Other potential technical studies include hydrological analysis, geotechnical studies, etc. In some cases, these studies will be preliminary in nature, to be further supplemented during the CEQA process.

In terms of financing studies, it is expected that at a minimum, a nexus study would need to be prepared at establish the nexus for dedication of land associated with future development at the waterfront. Similarly, a fiscal study will be required to determine the baseline for compliance with proposed General Plan policy 10.4. Additional studies may be required to determine the feasibility of alternative funding mechanisms.

The consultant cost of preparing an environmental impact report is speculative, and will depend on the scope and nature of the ultimate plan. As discussed in prior sections, implementation of the guiding principles is expected to trigger substantial environmental review.

Cost for legal services includes both outside counsel for analysis of the legal issues that are expected to arise during the planning process, such as determination of the constitutionally minimum acceptable level of development. It also is prudent practice to have experienced land use attorneys review CEQA and public financing documents to ensure compliance with legal requirements. Finally, given the preparing during the planning process as well as the cost of potential litigation.

Finally, it should be noted that cost of an outside project manager is included. The task of the project manager is to coordinate the various elements of the planning process on a day-to-day basis. The cost estimate, however, does not include the cost of City staff involvement.

- **Recovery of Costs Associated with the Specific Plan**

State law allows the City Council to recover the cost of preparing a specific plan from applicants seeking approvals for projects within a specific plan study area. For situations where a specific plan is prepared in advance of an application for development, the City would absorb the cost of the process and then recoup the cost from projects within the specific plan area at a later date through various fees.

This approach to fee recovery is typically utilized in situations where a specific plan is prepared in cooperation with property owners, and development commences shortly after completion of the plan. A fee structure would have to be established that would be based on scale of development. The timing and amount of recovery is linked to future development, and thus cannot be guaranteed.

Like other City fees, the ability to recover costs is related to the relevance of the specific plan to the applicant's proposal. If the applicant benefits from the specific plan, then there is a basis for the City imposing a fee to recover costs. In the event a future project application requires a revision to the initial specific plan or CEQA analysis, then it may

be difficult to recover costs. Furthermore, if the property owner does not pursue a development application in the near term, the environmental documentation can become out of date, and thus of less relevance to the City or to the applicant at a later date.

Assuming the property owner continues the racetrack operation for at least several years, or assuming the property owner has no interest in proceeding to develop in accordance with a specific plan developed by the Task Force, it is unlikely that the City will recover a significant amount of the costs.

## OTHER LAND USE ISSUES

- **Implications of Portions of the Racetrack Becoming a Legal Non-Conforming Use**

Currently, Golden Gate Fields conforms to City General Plan and Zoning Ordinance requirements. If approved, the 600-foot setback would make the racetrack a legal non-conforming use. The City's zoning ordinance allows any lawfully established use of land and/or structure to be continued even if the use does not comply with subsequent changes to City requirements. Any nonconforming use or structure may be maintained as necessary to keep the structure in sound condition, but generally cannot be expanded or modified. It is not clear how the initiative's specific plan or the City would address issues of normal replacement and modernization. As a practical matter, non-conforming use provisions in the zoning ordinance may need to be reviewed and updated in order to establish City requirements.

In addition, a nonconforming use shall not be reestablished if it has been discontinued for a continuous period of ninety days or if it is destroyed by more than fifty percent of its replacement value by fire, wind, flood, earthquake, or other calamity. A legal issue would be created if all or part of the racetrack and its appurtenant structures were destroyed by earthquake or fire, and the City determined not to allow their reconstruction while at the same time prohibiting substantial other development at the site. Thus, the City would need to evaluate whether modifications to its non-conforming code provisions would be sensible if the initiative passed.

- **Coordination of Land Use Policies and Regulations**

The initiative clearly states that its goal is to maximize open space and public access to the waterfront, and introduces new policies to support this goal. The initiative, however, does not modify any existing policies that are currently in the General Plan nor does it modify the Land Use Plan Map or the Conservation/Open Space Plan Map. Consequently, an important part of the process would be to update and coordinate the new goals and policies, with the existing goals and policies, narrative and diagrams.



The initiative itself also does not mandate any changes to the zoning ordinance. The function of the zoning ordinance is to implement the policies of the general plan. Thus, to ensure consistency between the general plan and the zoning ordinance, as part of the Task Force process, the zoning map and zoning map should be amended to match policy requirements of the initiative. Subject to the requirements of Measure C, future changes would be subject to a vote of the electorate.

- **Impact On Ability To Meet Regional Housing Needs**

When the initiative discusses future private development on the property, it references “commercial” development, which is typically defined as property used for retail, wholesale, office, hotel, or service uses. Of particular note, strict adherence to commercial uses would mean that residential uses would not be allowed. A comprehensive planning process, however, should recognize the importance of other elements of the general plan. For example, state law mandates that the City maintain a housing element that identifies sites for future housing development. Balancing various conflicting goals is an inherent part of the general plan process, and imposing use restrictions and fiscal criteria on one particular geographic location of the city may skew the development of a comprehensive plan for the City as a whole.

## APPENDIX

### • **Summary of Existing General Plan**

The City's current General Plan is discussed in two of the Plan's five elements. In the land use element, the Land Use Plan Map (Figure 5) includes a Park and Recreation designation along the shoreline and Commercial Recreation designation for the remainder of the Golden Gate Fields property. The Land Use Plan Map also indicates a Creek Conservation Zone for Codornices Creek running north-south next to the freeway. The land use element contains the following statements that related to the Commercial Recreation designation:

*"The Golden Gate Fields Racetrack is under a lease agreement with Catellus [the owner of the property at that time] through at least December 31, 2001. This commercial recreation use is consistent with the current Waterfront zoning. A 0.5 FAR standard has been assigned to this area.*

*"The Plan also anticipates development of public parks and public access at the Waterfront. These opportunities are further described in the Conservation, Recreation, and Open Space Element."*

Currently, there are no specific waterfront-related goal or policy statements contained in the land use element. The land use element, however, describes the status of ownership at the time of preparation of the General Plan and contains the following statement that relate specifically to development of the racetrack property.

*"The Waterfront land will continue to be operated as a racetrack at least until 2002. If the owners of the land wish to develop their property in uses other than those allowed by the Waterfront Commercial Recreation use, a series of general plan amendments must be submitted, considered, and approved by the City and the Albany voters prior to final adoption."*

The Conservation, Recreation and Open Space (CROS) element briefly describes the natural environment of the waterfront. It also describes the community amenities and public facilities. The element includes the following policies that relate directly to the Golden Gate Fields property:

*CROS 5.1 – Consider the scenic and visual importance of the waterfront area in any future private and public development.*

*CROS 5.2 – Further preserve the scenic value of the Albany shoreline by prohibiting construction of any building or structure within a 100-foot minimum of the shoreline.*

*CROS 7.1 – Implement the Bay Trail Plan along the Albany shoreline. Work with the landowner, the track operator, appropriate citizen and environmental groups,*

*the State Department of Parks and Recreation, Caltrans, the East Bay Regional Park District, the Coastal Conservancy and ABAG to achieve this goal.*

*CROS 7.2 – Consider the important, surrounding wildlife and vegetation resources that must be adequately protected when developing the alignment of the Bay Trail.*

*CROS 7.3 – Require that public access to the shoreline and to Albany Point be a part of any future waterfront development plans, and that future automobile, pedestrian and bicycle access be consistent with and coordinated with future State and regional park and open space plans at the Waterfront.*

The Conservation, Recreation and Open Space element also contains a Conservation/Open Space Plan Map (Figure 6). For the Golden Gate Fields property, there is “Proposed Parks and Open Space” designation along the shoreline and a Creek Conservation Zone for Codornices Creek running north-south next to the freeway. The remainder of the Golden Gate Fields property is not designated in the Conservation/Open Space Plan Map.

- **Summary of Existing Zoning**

In contrast to the General Plan, the Zoning ordinance presents specific requirements on individual parcels. The Golden Gate Fields property is zoned Waterfront District (Figure 7), which permits the following uses, subject to a conditional use permit. The definitions of the uses are taken verbatim from the text of the City zoning ordinance.

Park and Recreation Facilities - Noncommercial parks, playgrounds, recreation facilities, and open spaces. This classification includes community centers, boat launching ramps and marinas.

Utilities, Major - Generating plants, electrical substations, electrical transmission lines, switching buildings, refuse collection and transfer stations, processing, recycling or disposal facilities, major flood control or drainage facilities, water or wastewater treatment plants, or transportation, and all similar facilities.

Utilities, Minor - New utility facilities that are necessary to support established uses and involve only minor structures such as electrical distribution lines and aboveground cabinets.

Utilities, Underground - Public or regulated underground utility that provides water, sewage collection, electricity, natural gas, telephone, cable television or other public service or goods to the public.

Bars - An establishment the primary function of which is to prepare and serve alcoholic beverages for onsite consumption. Such establishment is distinguished from an “eating place” for purposes of licensing by the California Department of

Alcoholic Beverage Control. Such establishment may or may not provide live entertainment.

Commercial Recreation/Entertainment in the Waterfront District. Includes live horse racing which exceeds one hundred twenty (120) days in any calendar year (irrespective of whether conducted by one or more operators at the facility), golf, tennis, swimming and other commercial or spectator or participatory activities and uses which, in the opinion of the Planning and Zoning Commission, are of a similar nature.

Marinas and boat launching ramps - A facility for storing, servicing, fueling, berthing, and securing and launching of private pleasure craft that may include the sale of fuel and incidental supplies for the boat owners, crews and guests.

Parking facility, nonresidential - Any area or structure, other than within a public street, which is used for the parking of two (2) or more vehicles, but not including the storage of vehicles for sale or repair.

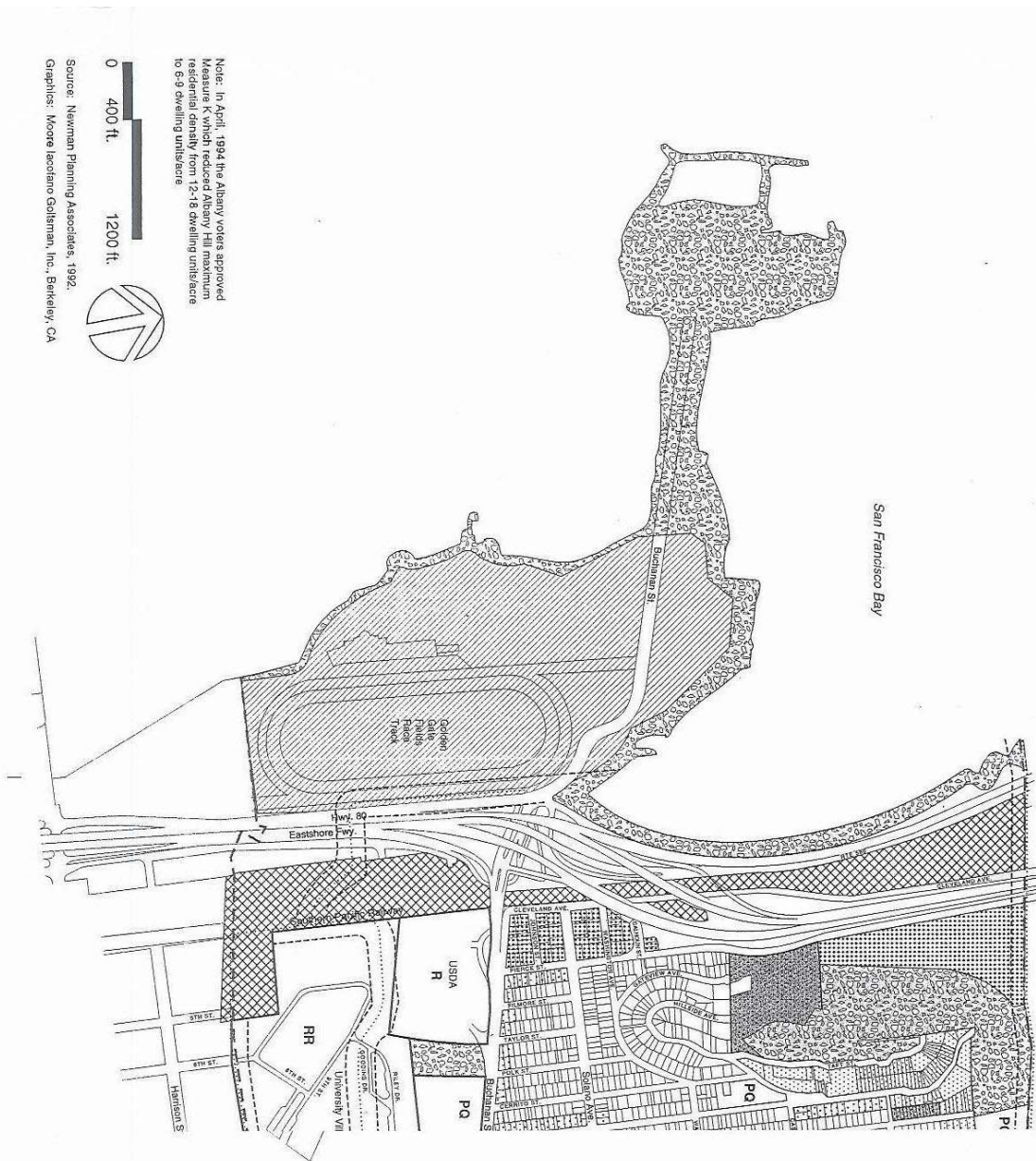
Restaurant - Businesses serving prepared food or beverages for consumption on or off the premises.

#### Waterfront and Waterfront-Sports-related Commercial Sales and Service

In addition to the Waterfront District requirements, the portion of the property adjacent to Codornices Creek is subject to the requirements of the Watercourse Overlay District. This overlay district is intended to promote the preservation and restoration of Albany's creekside areas and protect property from damage due to floodwaters.

In addition to overlay district requirements, the areas adjacent to Codornices Creek are located into the FEMA flood zone, and thus are subject to the City's Flood Damage Prevention section of the zoning ordinance.

**Figure 5  
General Plan Land Use Map**



Note: In April, 1994 the Albany voters approved Measure K which reduced Albany Hill maximum residential density from 75-10 dwelling units/acre to 9-9 dwelling units/acre.

Source: Newman Planning Associates, 1992.  
Graphics: Moore Jacobino Golzman, Inc., Berkeley, CA



LAND USE DESIGNATIONS	
	RESIDENTIAL Low Density (1-17, Av. 12 du/acre)
	Medium Density (18-34, Av. 27 du/acre)
	High Density (35-63, Av. 39 du/acre)
	Planned Development (6 du/acre)
	Planned Development (9 du/acre)
COMMERCIAL	
	General (FAR: 0.95)
	Community (FAR: 1.25)
	Planned Residential/Commercial (63 dwelling units/acre, FAR: 1.5)
	Commercial Recreation (FAR: 0.5)
INDUSTRIAL	
	Commercial/Service/Light Industrial (FAR: 0.5)
OPEN SPACE	
	Park and Recreation
	Creek Conservation Zone
INSTITUTIONAL	
	Public/Quasi Public
	Research
	Residential/Recreational/Commercial (18-34, Av. 27 du/acre, FAR: 0.95)
	Residential/Recreational
	City Property
	Churches
	Gateway

CITY OF ALBANY  
**Land Use  
Plan Map**  
1990 - 2010

**Figure 6**  
**General Plan Open Space Map**

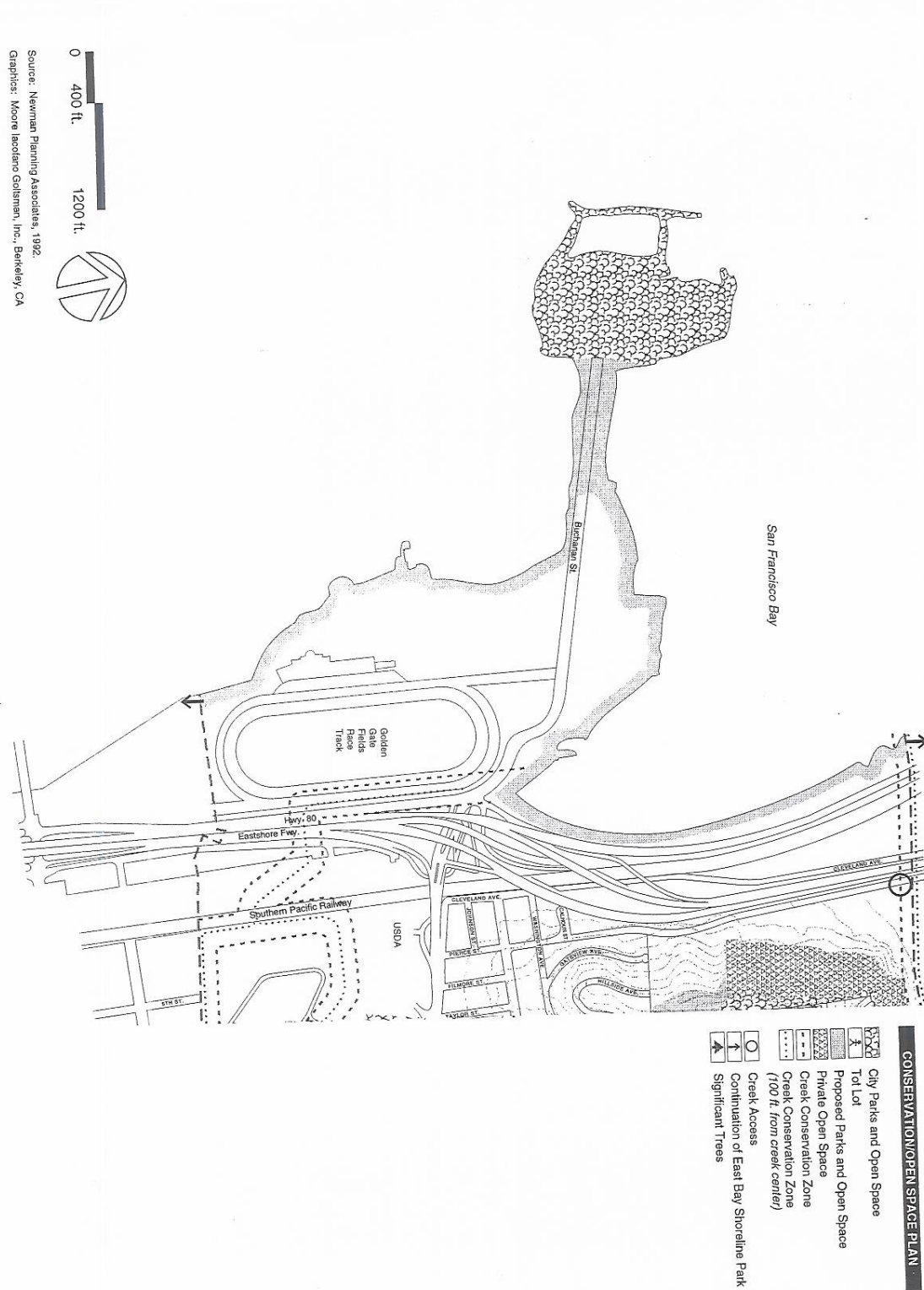
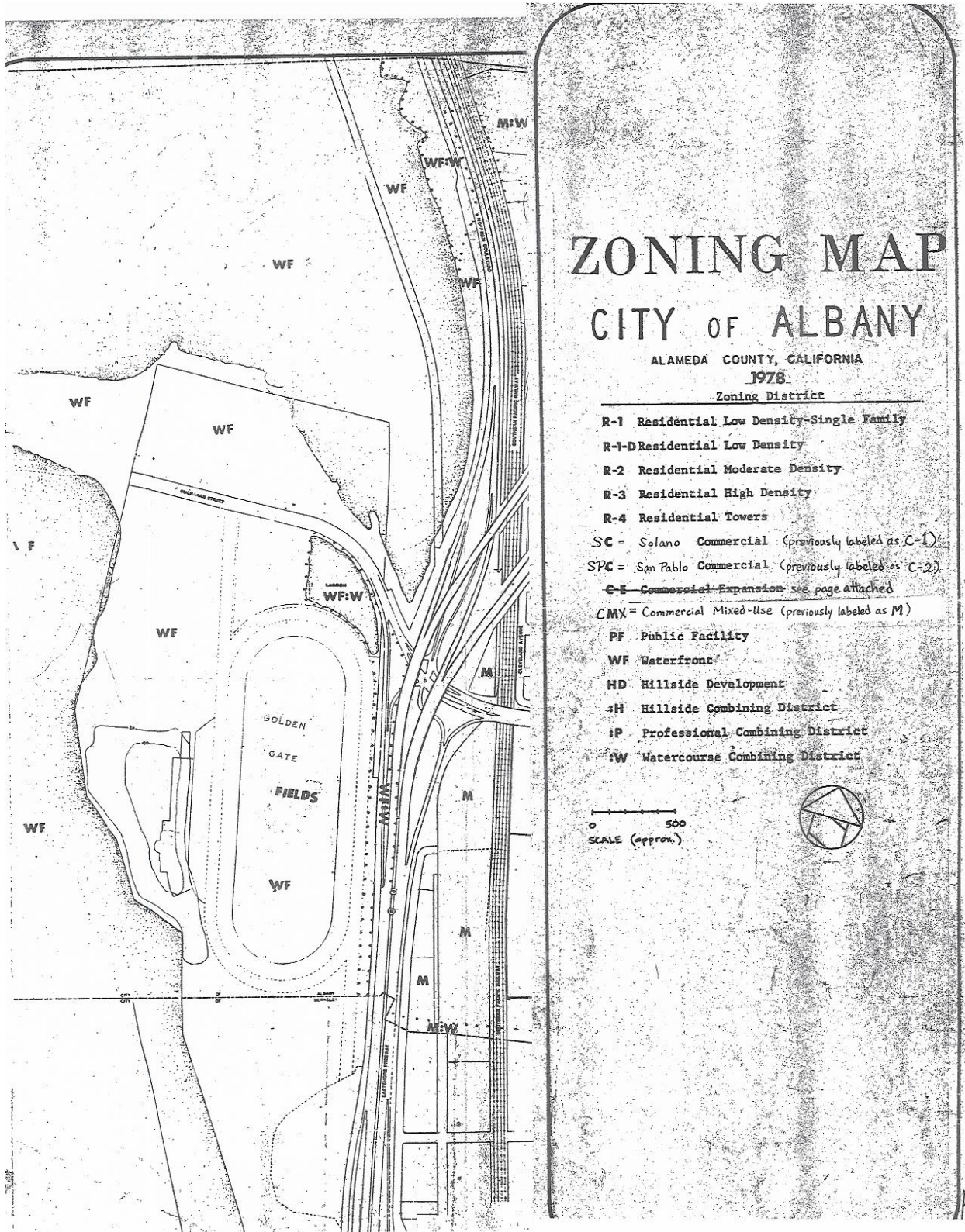


Figure 7  
Zoning Map



**Albany Shoreline Protection Initiative**  
INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY  
TO THE VOTERS OF THE CITY OF ALBANY

The City Attorney has prepared the following title and summary of the chief purpose and points of the proposed measure:

**TITLE:** ALBANY WATERFRONT SPECIFIC PLAN INITIATIVE

**SUMMARY:** This initiative would require Albany to create a specific plan for privately owned lands west of I-80, commonly known as Golden Gate Fields. The initiative would add Policy 7.7 to the General Plan Conservation, Recreation, and Open Space Element, requiring any development in the area to conform to the specific plan adopted. The initiative would also establish a process, procedure, goals, and policies for the specific plan, and add five related policies to the General Plan Land Use Element (“LU”):

- LU 10.1, setting a minimum development setback of 500 feet from the western shoreline beyond the existing 100 foot BCDC setback;
- LU 10.2, requiring waterfront area commercial development to maximize open space and public access; visual impacts should be minimized;
- LU 10.3, requiring development to be minimized while allowing the property owner a return that meets legal requirements;
- LU 10.4, stating that approved commercial development shall be sufficient to generate annual City, School District and Library revenue equivalent to the revenue as of November 7, 2006; and
- LU 10.5, prohibiting gambling except for allowable betting on horse races.

The initiative would create a 9-member committee of Albany voters to supervise preparation of a specific plan and accompanying Environmental Impact Report. Five members would be appointed to this special committee by the City Council and one each selected by the following four groups: Citizens for the Albany Shoreline, Citizens for East Shore Parks, Sustainable Albany, and the Sierra Club.

The committee would decide the language of a specific plan to be submitted to voters at the next regular election, consistent with the voter approval requirement of existing initiative Measure C. On 4/5 votes by both bodies, the Planning and Zoning Commission and the City Council could amend the plan before submission to the electorate.

The initiative directs that the committee should, to the maximum extent possible, include or address needs in the specific plan of or for the following:

- reopening and restoration of creeks, restoration of wetlands and other habitats, natural expansion of beach and dunes, a small interpretive center with restaurant, recreational facilities for small watercraft, public art, restrooms and completion of the Bay Trail; the interpretive center and the small watercraft facilities are permitted to be located within the 500 foot setback;
- ball fields, hiking, bicycling, off-leash dogs and play areas;
- ecologically sensitive waterfront development; sustainable building principles, including use of renewable energy; employment of recycling, reuse and conservation practices; and a requirement of Leadership in Energy and Environmental Design certification.

Pending the preparation of a specific plan and its presentation for final approval by the Albany voters under Measure C, the initiative would impose a moratorium lasting up to two years on any development approvals or any zoning changes for the affected waterfront area.



**Albany Shoreline Protection Initiative**  
**To volunteer for the Shoreline Protection Campaign**  
**Call 510-461-4665 or 510-525-6740**

## **Notice of Intent to Circulate Petition**

Notice is hereby given by the persons whose names appear hereon of their intention to circulate the petition within the City of Albany for the purpose of protecting Albany's Shoreline as an open space resource through the creation of an Albany Waterfront Specific Plan. A statement of the reasons for the proposed action as contemplated in the petition is as follows:

The Albany Shoreline Protection Initiative is to protect and plan for preserving the entire Albany Waterfront to the maximum extent possible as an open space resource for all to enjoy, with development to replace the revenues that the city, library, and school district now receive from this property. The initiative is intended to ensure that the community's desires for open space and Bay access at the Waterfront are incorporated in any plan for the future of the entire property, including the Race Track site.

The initiative is designed to inform present and future owners of the private property in the Waterfront District that the community's vision for the waterfront property is primarily open space and that no increases in intensity of present commercial uses of those lands are acceptable and that no gambling beyond what is currently permitted by law will be allowed. The initiative provides for the creation of an Albany Waterfront Specific Plan which will define what Albany residents want at the shoreline and will save Albany taxpayers from having to spend scarce city resources to consider repeated proposals for large-scale development on land that the citizens wish to retain as open space.

The people of Albany have repeatedly expressed their desire that the Albany waterfront be protected and planned as a whole and that the majority of the land be preserved as open space, with development designed to ensure that the revenues the city, school, and library district currently receive are protected, but this desire to so protect the waterfront has not been adequately addressed so far. This initiative ensures that the desires of the voters of Albany to protect the waterfront will be carried out.

In addition, the citizens of Albany have expressed their opposition to large-scale commercial development at the Albany Waterfront. Such development would create serious traffic impacts on I-80 and city streets, would threaten the economic vitality of Albany's existing commercial main streets (Solano and San Pablo Avenues) and would detract from the small town ambiance and character of Albany. The undersigned urge Albany voters to pass this initiative so we can have comprehensive planning for the waterfront with a plan that meets Albany's revenue and open space needs.

Signed by:

Robert Cheasty, 1604 Solano Avenue Albany, CA 94707  
President, Citizens for East Shore parks

William B. Dann, 1056 Stannage Avenue, Albany, CA 94706  
Co-Chair, Citizens for the Albany Shoreline

Marge Atkinson, 1045 Key Route, Albany, CA 94706  
Co-Chair, Citizens for the Albany Shoreline

**Albany Shoreline Protection Initiative**  
**To volunteer for the Shoreline Protection Campaign**  
**Call 510-461-4665 or 510-525-6740**

## **Albany Shoreline Protection Initiative**

The people of the City of Albany, California do ordain as follows:

### SECTION 1. TITLE

This initiative shall be known as and may be cited as the "Albany Shoreline Protection Initiative."

### SECTION 2. PURPOSE

The first purpose of this initiative is to protect and plan for preserving the entire Albany Waterfront to the maximum extent possible as an open-space resource for all to enjoy, with development to replace the revenues that the City of Albany (hereinafter referred to as the "City"), the Albany Library (hereinafter referred to as the "Library"), and the Albany Unified School District (hereinafter referred to as the "School District") now receive from this property. This initiative specifies guiding policies, processes, and procedures for future Waterfront planning to ensure that the community's desires for open space and Bay access at the Waterfront are incorporated in any plan for the future of the privately held property at the Albany Waterfront.

For purposes of this initiative, the "Albany Waterfront" is defined as all lands within the territorial boundaries of the City of Albany, California that lie west of the I80/580 Freeway. The mandates and restrictions of this initiative apply to those lands on the Albany Waterfront other than those owned by the City of Albany as of the date this initiative is submitted to the City, and other than those owned by the State of California or the East Bay Regional Park District. For purposes of this initiative, all lands on the Albany Waterfront that are not owned by the City of Albany as of February 27, 2006, and all lands on the Albany Waterfront that are not owned by the State of California or the East Bay Regional Park District are defined as and are referred to as "the privately held property at the Albany Waterfront."

The second purpose of this initiative is to inform present and future owners of the privately held property at the Albany Waterfront that the community's vision for this property is primarily open space and that no significant increases in intensity of present commercial, industrial, institutional, or residential (hereinafter collectively referred to as "commercial development") uses of those lands are acceptable.

### SECTION 3. FINDINGS

The people of the City of Albany do deliberately find and declare the following:

- a. The privately held property at the Albany Waterfront comprises the largest and most significant remaining tract of land in the City suitable for development or as open space. The shoreline itself and associated open space are important resources both for the public as a whole and as amenities that would increase the value of any private development of the privately held property at the Albany Waterfront. Commercial development in close proximity to the shoreline can adversely affect the shoreline's value. Because of the large size, unique setting, and environmental significance of the Albany Waterfront, any change in its use may irreversibly alter the character and composition of the City.
- b. Because the Albany Waterfront is such a precious resource to the community and given that 1) the Albany community has, in previous public planning forums and processes, expressed the desire to protect the Albany shoreline as open space; and 2) this desire has not been adequately incorporated into the Albany General Plan, this initiative is necessary to ensure that the shoreline is protected in accord with the will of the citizens.
- c. There are 102 acres of privately held property at the Albany Waterfront. A map of this area is attached hereto as Exhibit A and incorporated herein by this reference. These 102 acres include the Golden Gate Fields Race Track (hereinafter referred to as the "Race Track"). According to the best information available, Magna Entertainment Corp. ("Magna") currently owns, controls, or operates those 102 acres, including the Race Track. This initiative applies to those 102 acres of property.
- d. Magna, with a Southern California developer, Caruso Affiliated, has proposed its own development on a portion of the privately held property at the Albany Waterfront.
- e. At racetrack sites that Magna owns in the state of California, Magna has proposed large-scale commercial developments. The scale of these developments is out of character with the City of Albany.

**Albany Shoreline Protection Initiative**  
**To volunteer for the Shoreline Protection Campaign**  
**Call 510-461-4665 or 510-525-6740**

- f. Magna has also sought to establish casino gambling at its racetrack sites in the state of California. Magna was the sponsor of and largest campaign contributor to the 2004 statewide ballot measure known as Proposition 68, which would have legalized Las Vegas-style Casino gambling and authorized the placement of up to 3,000 slot machines at the privately held property at the Albany Waterfront. Proposition 68 would have barred the City of Albany from prohibiting or regulating the placement of those slot machines at the site. The voters of Albany resoundingly rejected Proposition 68. These facts suggest that Magna intends to propose development for the privately held property at the Albany Waterfront that would be contrary to the expressed interests and desires of the people of Albany and contrary to Albany's General Plan and zoning laws.
- g. Magna has a documented history of selling off racing facilities at the other tracks it has owned. This raises questions about whether Magna intends to continue to operate racing at the Race Track.
- h. Any potential change in the use of the privately held property at the Albany Waterfront, particularly the closure of the Race Track, could affect the City's revenue and ability to meet its financial obligations. Planning for future uses on the privately held property at the Albany Waterfront must therefore take into account the potential fiscal impacts of any change in use. Planning for future uses now will ensure that the City will be prepared with updated planning policies for the area that would reduce the impact of revenue losses that would accompany a future closure of the Race Track.
- i. The citizens of Albany wish to plan the future development of the privately held property at the Albany Waterfront in order to protect Albany citizens' use and enjoyment of that property. Albany citizens also wish to make sure that, should the Race Track close, there is a comprehensive plan in place for ecologically sensitive development of all of the privately held property at the Albany Waterfront. This plan should protect the shoreline and the privately held property at the Albany Waterfront as an open-space resource for the enjoyment of all, as well as protecting the City's revenues and ability to meet its fiscal obligations.
- j. The establishment of additional forms of gambling beyond those already in operation on the privately held property at the Albany Waterfront as of February 27, 2006, including but not limited to gambling activities that would be associated with a Casino, would be incompatible with the ecologically sensitive future planned development of the privately held property at the Albany Waterfront under this initiative.
- k. Unless carefully planned, large-scale commercial development of the privately held property at the Albany Waterfront would create serious and irremediable traffic impacts; would threaten the economic vitality of Albany's existing commercial main streets (Solano and San Pablo Avenues); and would pose immediate threats to public health, safety, and welfare. The traffic associated with the proposed development would have a significant impact on local and regional air quality and congestion on freeways and City streets, and would significantly increase the danger to pedestrians, including children walking to and from school, and bicyclists in the community. For these reasons, a moratorium on both development approvals and rezoning is necessary while the people of Albany plan, as specified in this initiative, for the future development of the privately held property at the Albany Waterfront.

**SECTION 4. PROTECTION OF LEGAL RIGHTS**

Notwithstanding their literal terms, the provisions of this initiative do not apply to the extent that the courts determine that if they were to be applied they would deprive any person of constitutional or statutory rights or privileges, or otherwise would be contrary to the United States or State of California Constitutions or laws. The purpose of this limitation is to make certain that this initiative does not infringe on any person's constitutional or legal rights or violate the law in any way, or subject the City of Albany to any legal liability.

**SECTION 5. ADDITIONS TO THE GENERAL PLAN**

The following Policy CROS 7.7 is hereby added to the Conservation, Recreation, & Open Space Element of the Albany General Plan:

CROS 7.7. Any future development or redevelopment of the privately held property at the Albany Waterfront shall only occur pursuant to a Specific Plan adopted in accordance with the process, procedures, goals, and policies enacted by the Albany Shoreline Protection Initiative.

*ALBANY WATERFRONT PLANNING GOAL AND POLICIES*

**Albany Shoreline Protection Initiative**  
**To volunteer for the Shoreline Protection Campaign**  
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The following Goal and Policies are hereby incorporated into the Land Use Element of the Albany General Plan:

Goal LU 10: Ensure that the community's desires to protect open space and Bay access at the Waterfront are incorporated in any plan for the future of the privately held property at the Albany Waterfront.

Policies:

LU 10.1 To protect the shoreline and its resource value and to provide, to the maximum extent possible, full and open access to the shoreline, and to preserve the existing open-space character of the shoreline, all approved commercial development on the privately held property at the Albany Waterfront shall be set back from the water's edge. This setback shall be a minimum of 500 feet from the San Francisco Bay Conservation and Development Commission ("BCDC") 100-foot shoreline jurisdictional limit. This setback shall run along the entire west shoreline northward from the Berkeley border to Buchanan Street or to the area in the Eastshore State Park commonly known as the Plateau, whichever is farthest north. This 500-foot setback shall govern all the privately held property at the Albany Waterfront but shall not apply to the northern or eastern border of the privately held property on the Albany Waterfront. A small nature interpretive center that may include a café or restaurant, and recreational facilities for kayaking and other small watercraft (consistent with BCDC policies), shall be allowed to be located within the 500-foot setback.

LU 10.2 Any zoning or Specific Plan for the privately held property at the Albany Waterfront shall make provisions for maximizing the Waterfront as an open-space resource and maximizing public access to the extent feasible. Any such zoning or Specific Plan shall designate a large portion of the privately held property at the Albany Waterfront as open space, to preserve as much as possible the existing open space of the Race Track and the privately held property at the Albany Waterfront. Furthermore, any zoning or Specific Plan should also minimize visual impacts of any commercial development.

LU 10.3 The total amount of square footage and nature of uses for commercial development within the privately held property at the Albany Waterfront shall be minimized, consistent with allowing the property owner to obtain a return on its investment that meets statutory and constitutional mandates on the protection of private property rights, but at the same time consistent with the purpose and intent of the Albany Shoreline Protection Initiative.

LU 10.4 The purpose of any approved commercial development within the privately held property at the Albany Waterfront is to provide sufficient revenues to at least replace the annual revenues that the City, School District, and Library are receiving as of November 7, 2006 from the uses of the privately held property at the Albany Waterfront.

LU 10.5 All forms of gambling shall be prohibited at the Albany Waterfront with the exception of pari-mutuel betting on horse races and the operation of related satellite wagering facilities for pari-mutuel betting on horse races. This prohibition includes, but is not limited to, the following specific types of games: slot machines, poker (all forms), blackjack, video poker, Pai Gow (poker and tiles), other forms of sports betting, baccarat, craps, roulette, keno, pachinko, and any kind of bingo.

#### SECTION 6. PLANNING PROCESS

Effective upon passage of this initiative, the City shall immediately initiate a Shoreline Protection Planning Process, as defined below, for the purpose of creating a Specific Plan and, if necessary, corresponding General Plan amendment(s) and Zoning Ordinance amendment(s) for the privately held property at the Albany Waterfront. Upon completion of the Shoreline Protection Planning Process and adoption, Subject to Measure C, of the resulting Specific Plan and, if necessary, General Plan Amendment(s), the zoning for the privately held property at the Albany Waterfront shall be amended to be consistent with the Specific Plan and General Plan amendment(s).

#### SECTION 7. GUARANTEED VOTE OF THE PEOPLE ON THE RESULTS OF THE SHORELINE PROTECTION PLANNING PROCESS AS REQUIRED UNDER MEASURE C

Nothing in this initiative abrogates Measure C, the Citizens Waterfront Approval Initiative. The Specific Plan and any necessary amendment(s) to the General Plan and City's Zoning Ordinance shall be placed on the ballot as a single measure and put to a vote of the people as required by Measure C. This vote shall take place at the next regularly scheduled City municipal election following the completion of the Shoreline Protection Planning Process and the

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approval by the Albany City Council for placement on the ballot of the Specific Plan and any necessary amendment(s) to the General Plan and City's Zoning Ordinance. Measure C shall apply to any adopted Specific Plan in order to ensure that the voters retain the right to vote on any future changes to the Specific Plan for the privately held property at the Albany Waterfront.

SECTION 8. SHORELINE PROTECTION PLANNING PROCESS

a. Purpose

The purpose of the Shoreline Protection Planning Process is to prepare a Specific Plan for the privately held property at the Albany Waterfront. This advance planning for the property's future development is intended to allow sufficient time for a comprehensive planning process that maximizes public participation and balances the community's desire for sustainable development and preservation of publicly accessible open space with the desire to ensure the protection of the City's revenues and ability to meet its fiscal obligations.

b. Composition of Citizens' Task Force to Guide the Shoreline Protection Planning Process

Upon passage of this initiative, the City's Planning Agency shall immediately begin a planning process for the privately held property at the Albany Waterfront. The planning process shall be facilitated by a Citizens' Task Force under the auspices of the City's Planning Agency. The roles of the Task Force are: 1) to manage the process of retaining a consultant with experience in sustainable development, community outreach, and open-space planning who will facilitate a community planning process for the privately held property at the Albany Waterfront; and 2) to preside over the preparation of the Specific Plan.

The Task Force's duties include: preparing the written solicitation (Request for Proposals) for the consultant, selecting the consultant, and overseeing the preparation of the Specific Plan. The Task Force has final approval of the language of the Specific Plan that is to be delivered to the City for placement on the ballot under Measure C. The Task Force shall serve as the Lead Agency under the California Environmental Quality Act (CEQA). Pursuant to CEQA, an Environmental Impact Report shall be prepared for the Specific Plan and any associated General Plan or Zoning Ordinance amendment(s).

The consultant's duties are: to facilitate the public process for the Task Force and to prepare the Specific Plan and its associated environmental review documents, all of which are subject to final approval by the Task Force. The consultant will also carry out or arrange to have carried out a competent economic feasibility study or studies to determine: 1) the minimum amount of development on the privately held property at the Albany Waterfront that is necessary to avoid a taking of the property owner's constitutional rights, and 2) the amount and most appropriate type of development to replace the revenues that the City, Library, and School District receive from the property as of the effective date of this initiative.

The Citizens' Task Force shall be made up of nine (9) Albany voters: one appointed by each member of the City Council, and one appointed by each of the following environmental groups: Citizens for the Albany Shoreline, Sustainable Albany, Citizens for East Shore Parks, and the Sierra Club. It is not necessary that the representative appointed by each organization be a member of that organization.

The City shall supply appropriate staff and legal counsel to the Citizens' Task Force.

c. Appointment of Task Force Members

All members of the Task Force shall be appointed within 30 days of the effective date of this initiative. The Task Force shall begin its work upon appointment of a sufficient number of members to constitute a quorum as defined below.

Except for the City Council, which shall appoint its members pursuant to its rules, each of the other organizations shall appoint a person as its representative on the Citizens' Task Force. The Planning Agency must accept the person that each respective organization appoints unless that person is not a registered voter in the City of Albany. Each person so appointed shall serve through the life of the Citizens' Task Force and so long as he or she remains a registered Albany voter or until he or she resigns or is incapacitated and can no longer function on the Task Force. An organization may elect not to appoint anyone or may be unable to appoint a person who qualifies as a Task Force member, in which case that position shall remain vacant until such time as that organization appoints a qualified person. Vacancies during the term of the Task Force shall be filled through the same process and criteria as set forth above. Upon voter approval of the Specific Plan and any accompanying General Plan amendment(s) and amendment(s) to the City Zoning Ordinance(s) governing

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future development of the privately held property at the Albany Waterfront in accordance with the provisions of this initiative, the Task Force shall be dissolved.

d. Guiding Principles for Specific Plan

In addition to the public comment presented at the open hearings held as part of the planning process, the following principles shall guide the Task Force in preparing the Specific Plan so that the Plan protects and restores wildlife habitat and provides for recreational enjoyment of the waterfront. To the maximum extent feasible, the Plan should provide for the following: reopening and restoration of creeks, restoration of wetlands and other habitats, natural expansion of existing beach and dunes, location of a small nature interpretive center that may include a restaurant or café within the 500-foot setback, location of recreational facilities for kayaks and other small watercraft (consistent with BCDC policies) at the water's edge, public art, public restroom facilities, and completion of the San Francisco Bay Trail. The Task Force should also address needs for ballfields, hiking and bicycling opportunities, off-leash dog areas, and play areas within the privately held property at the Albany Waterfront.

All development approved on the privately held property at the Albany Waterfront should adhere to ecologically sensitive, sustainable principles in building, landscaping, and transportation, including use of renewable energy and employment of recycling, reuse, and conservation practices, and should, at a minimum, qualify for Silver Leadership in Energy and Environmental Design (LEED) certification and, whenever feasible, Platinum LEED certification. Simple buildings, such as restrooms, that are not typically assessed for LEED certification, do not have to meet the LEED requirement but should be designed consistent with LEED principles to the degree feasible.

e. Meetings

The Citizens' Task Force shall determine the number and nature of all meetings, but it shall be required to have a minimum of five open community meetings to collect public comment for use in preparing the Specific Plan and two public hearings on the draft Specific Plan prior to the Task Force's approval of the Specific Plan. The Task Force shall also accept public comment in writing. The Citizens' Task Force shall comply with California's Open Meeting Law known as the Brown Act. Five members will constitute a quorum of the Task Force.

f. Approval Process

After the completion of the Shoreline Protection Planning Process and approval by a majority vote of the Citizens' Task Force, the Specific Plan, any accompanying General Plan Amendment(s) and amendment(s) to the City Zoning Ordinance(s), and their environmental review documentation, shall be forwarded to the City Council for consideration following the appropriate City and State procedures for such plans. The Albany City Council shall hold at least one public hearing on the Specific Plan and any accompanying General Plan amendment(s) and amendment(s) to the City Zoning Ordinance(s) and shall review the Specific Plan and any accompanying General Plan amendment(s) and amendment(s) to the City Zoning Ordinance(s) for compliance with the requirements of State planning law and this initiative. Upon determining that the Specific Plan and any accompanying General Plan amendment(s) and amendment(s) to the City Zoning Ordinance(s) meet legal requirements, the Albany City Council shall order the Specific Plan and any accompanying General Plan and Zoning Ordinance amendment(s) placed on the ballot for consideration by the voters of Albany at the next regularly scheduled City municipal election following the submission of the Specific Plan to the Albany City Council.

Neither the Albany Planning and Zoning Commission nor Albany City Council may approve any amendments or changes to the proposed Specific Plan or any associated amendment(s) to the General Plan or the City's Zoning Ordinance before placing them on the ballot, except upon a four-fifths vote by each body.

**SECTION 9. MORATORIUM ON APPROVALS AND REZONING DURING PLANNING PROCESS**

In order to give the Citizens' Task Force the time and opportunity to develop the plan for the future of the privately held property at the Albany Waterfront, immediately upon passage of this initiative, there shall be a moratorium on any approvals for any development of the privately held property at the Albany Waterfront, including any that are then pending. In addition, immediately upon passage of this initiative, there shall be a moratorium on consideration of any rezoning of the privately held property at the Albany Waterfront. These moratoria on development approvals and rezoning for the privately held property at the Albany Waterfront shall be effective for a period of two years or until the Specific Plan for the privately held property at the Albany Waterfront is approved by the people of Albany pursuant to Measure C, whichever occurs first.

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SECTION 10. SEVERABILITY

If any section, subsection, part, subpart, paragraph, subparagraph, clause, or phrase of this ordinance or any revision of this ordinance is for any reason held to be invalid, it is the intent of the People of Albany that the remaining portions shall not be affected, but remain in full force and effect.

SECTION 11. EFFECTIVE DATE

If adopted, this ordinance shall become effective on the earliest possible date mandated by State law.