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September 14, 2021

VIA ELECTRONIC MAIL

Chris Jensen
City Attorney
City of Cupertino
10300 Torre Avenue
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Re: Vallco Town Center: Permit Expiration

Dear Mr. Jensen:

The purpose of this letter is to respond to Mr. Larson's letter dated August 30, 2021 indicating that the Vallco Town Center SB 35 project approvals (the "Project Approvals") will expire on September 21, 2021, unless an extension is first granted, and asking that we submit an extension request by September 14.

The City misreads the law. The Project Approvals are not set to expire this month, as we explained in our letter dated May 26, 2021, which is attached here. As we explained, the Project Approvals remain valid until May 22, 2023. This date is not subject to serious dispute. The Department of Housing and Community Development ("HCD")—the agency charged with interpreting SB 35—told you as much in their technical assistance letter dated September 1, 2021. HCD's technical assistance came as no surprise, as its position is consistent with the SB 35 Guidelines,[1] which have the force of law. The City's continued willful misinterpretation of SB 35 is inhibiting the project, and must stop.

There are matters between a city and a developer that may be subject to reasonable disagreement. This is not one of them. When HCD informs you of the meaning of SB 35, it would be wise to listen.

Because the Project Approvals do not expire until May 2023, Vallco does not need to request a one-year extension. If the City revokes the Project Approvals next week, Vallco will prevail in

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[1] HCD provided two public comment periods for the current Guidelines, releasing drafts for public comment on April 16, 2020 and July 17, 2020, and adopted the Guidelines on March 30, 2021. Even though the City had the largest SB 35 project in the state, and one subject to litigation, it chose not to participate, unlike the many other jurisdictions that provided comments. We did not learn of the City's interpretation until April 2021, one year after HCD published the first draft and only months before the alleged expiration.

the ensuing litigation, and the City will face substantial liability. Nevertheless, we continue to believe it is in both the City's and our interest to ensure this project moves forward and is not mired in unnecessary litigation. For that reason, and as first explained in our May 26, 2021 letter, we would prefer that the City provide a one-year extension rather than wrongly revoke the Project Approvals.

To be sure, that May 26, 2021 letter already set forth our request for an extension, and the City never responded. Instead, at the September 7 City Council meeting, the presentation from the City Manager wrongly stated that Vallco has "never" requested an extension. Our request did not disappear because the City ignored it.

In light of our request, it is plain that we have satisfied the statutory criteria that require the City to provide a one-year extension; the enclosed materials provide more than enough documentation for the City to grant an extension. Therefore, to avoid litigation on this issue, we reiterate our request for an extension. Indeed, if the City does not agree that the May 2023 date is accurate, the City would abuse its discretion if it failed to grant an extension and instead were to revoke the Project Approvals.

I. The Evidence Supports Granting the Project an Extension

A. Significant Progress Has Been Made Preparing the Project for Construction

Assuming one is required, the statute provides guidance on the standards for granting an extension. The City must interpret and implement SB 35 "in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." GC § 65913.4(n). This language creates a strong presumption in favor of an extension, which would prevent the City from losing 2,402 units of housing.

As confirmed in the recent City Manager report, the City's discretion regarding an extension "shall be limited to considerations and processes set forth" under the statute. Gov't Code§ 65913.4(f)(3). The statute specifies that the key consideration is whether "there has been significant progress toward getting the development construction ready, such as filing a building permit application." Gov't Code § 65913.4(f)(2).

The following activities demonstrate that the "significant progress" threshold has long been met; this list is not exhaustive but rather an overview of key areas of progress, which go far beyond the statutory "filing of a building permit application." Also, as described below, a number of key agreements necessary for future progress on the Project have been submitted to the City and are awaiting the City's response.

- *All Permit Applications Have Been Filed and Diligently Pursued.* SB 35 provides that "significant progress" occurs when a building permit application has been filed. We

satisfied this threshold when we filed applications for not just one but all permits in December 2018, less than three months after the initial approval, and have been diligently pursuing them ever since. These include applications for demolition, shoring and excavation, site utilities, foundations, the podium and the superstructure. This early and prompt submittal for all permits demonstrates a commitment to the Project and that we have made significant progress. Since then, we have responded to numerous rounds of comments from the City, including new comments raised for the first time during later rounds. We have also paid over $2.5 million in plan check and other fees to the City since the Project was approved, and approximately $1 million in fees to other agencies, such as CalWater, Cupertino Sanitary (CuSD) and PG&E.

- *City Has Issued Multiple Permits and Significant Construction Activity Has Been Undertaken*. The Project has undertaken significant construction activities. The City issued the Demolition permit for the area west of Wolfe Road in August 2019 and we have since removed approximately 800,000 square feet of structures. Further, the City also issued the Make-Ready Utility permit in June 2020 and we have been undertaking related work. This work not only entails significant construction activity to remove and relocate various utilities (sewer, water and storm drain lines, PG&E equipment, etc.), including on-site construction of an approximately 300 foot retaining wall, but it also requires extensive coordination with utility providers (e.g., CalWater, PG&E, CuSD) to ensure proper design for the relocated utilities and to avoid service disruptions. In support of this construction work, we have put up bonds in excess of $4.2 million. This construction activity is currently ongoing and has already lasted at least 16 months. Removing all structures and relocating utilities are the key steps toward making the site "construction ready," a process that is nearly complete.

- *Extensive Investigation Into and Progress on Environmental Contamination*. In contrast to false allegations the City recently made to the media and others that we have delayed investigating the site for years, we conducted the initial borings immediately after Project approval in October 2018 and then prepared a robust Site Characterization Report and Environmental Site Management Plan, which we worked with the City to finalize in summer 2019. Based on the procedures agreed to in the Environmental Site Management Plan, we have continued the investigations through 2020 and into 2021 and in the process have prepared additional reports and work plans, including a PCB Work Plan, a draft Excavation Management Plan and other investigative reports. These reports were being peer reviewed by the City's consultant and most went through several rounds of review. We are currently working with the Santa Clara County Department of Environmental Health ("DEH") to finalize these documents and the work plan. Any narrative that the City is drawing that we have delayed environmental work is revisionist history.

- *<u>We Elected to Participate in the DEH Voluntary Clean Up Program</u>*. Condition of Approval #15 requires that we "obtain all necessary clearances" from applicable regulatory agencies, which under a plain reading means that if an approval is required from an agency, we must obtain it, but in the absence of such a requirement, we can move forward in compliance with all applicable laws. To date, neither we nor the City have identified any regulatory requirement to obtain approval from any oversight agency. Further, when the Fire Department's August 2020 closure letter for the Sears Automotive Center directed us to DEH, we immediately went to them but were told that they would not provide direct oversight, though they would review a closure report to verify the removal and disposal of contaminants was properly carried out. DEH relayed this directly to the City staff, including City Manager Deborah Feng, in a phone call on November 2, 2020. After this call the City then said that oversight from the U.S. EPA was required, but soon after U.S. EPA confirmed in writing that its oversight is not required either. Given this clear and consistent direction from the regulators that "clearance" is not required, the issue should have been closed. Yet instead of issuing the Shoring and Excavation permit so we could begin the removal process, the City shifted its position on January 28, 2021 and suggested that we could proceed if DEH confirmed again (this time in writing rather than by telephone) that it would not provide direct oversight.

  And it did not take long for the City's position to change again. After the City brought in new outside legal counsel, the City issued a letter dated April 13, 2021 asserting that if DEH determines that removal can proceed without its oversight (which they already had), then we must "provide a regulatory agency that will assume this function to the City for concurrence." That is, more than two years into the permitting process, we were informed of the new and inhibiting position that the obligation to obtain any and "all necessary clearances" actually means "clearance is necessary," and that we must find oversight from some agency, regardless of whether it is required. At the time, the City suggested that we try a new agency—the Office of Environmental Health Hazard Assessment—that had never been mentioned before. Rather than engage in further debate and delay, we immediately applied for DEH oversight under the Voluntary Clean-up Program. Fortunately, DEH accepted oversight and we are now actively engaged in, and will follow, their process. Based on this, the City issued the Shoring and Excavation permit on June 24, allowing us to proceed on the condition that DEH confirms "it is safe and/or appropriate."

  As this shows, we have been diligently pursuing cleanup of the site. The problem has not been our considerable efforts, but rather the shifting City standards based neither in law nor in the conditions of project approval. For this reason, we take issue with the City Manager's response to the Mayor's question of whether permits to clean up the site have been withheld. The City could and should have issued the Shoring and Excavation

permit long ago; if it had followed the law and proper process and done so, the site would be cleaned up by now.

Nevertheless, through the DEH voluntary oversight process, we are now on a clear path to cleaning up the site and continuing with construction. Vallco's foremost priority has always been to ensure the health and safety of construction workers, future residents and tenants, and the broader Cupertino community, and we remain committed to that priority through a timely site clean-up process and beyond. Please keep in mind we are committed to removing all contaminants from the site immediately, an expensive approach that developers don't often freely choose on their own.

- *Substantial Progress on Final Map*. We first submitted the Final Map application in December 2018 and have gone through several rounds of reviews with the City, having recently resubmitted it on August 10. At this point, we understand that all technical issues have been resolved, but the Final Map is again (and still) undergoing legal review. The City's current outside legal counsel has had the Final Map since at least March 30, 2021, but we have yet to receive any legal comments to date.

- *Subdivision Improvement Agreement*: In connection with the Final Map, we also substantially negotiated a Subdivision Improvement Agreement with the City's prior City Attorney based on existing City forms, and had narrowed the discussion to a small number of technical issues. A proposed final version of that agreement has been with the City's new legal team since May 13, 2021, but we have not received any response or comments.

- *Below Market Rate Program Regulatory Documents*. We have had ongoing discussions with the City's Housing Division about the affordable housing component and have made significant progress on agreeing to how this important component will be managed. We also prepared a draft BMR Regulatory Agreement and a Master Affordable Housing Agreement, both based on discussions with the City's Housing Division and outside counsel, shared on December 16, 2020 and July 13, 2021, respectively. We have not received a response from the City on either document.

- *Off-Site Improvements*. The Project team has worked extensively with the Public Works Department on offsite improvements, including new roadways along Wolfe Road and new frontage improvements along the entire Project intended to expand the surrounding roadway capacity, improve public safety and enhance bike/ped mobility. While the majority of these improvements have been agreed to, we continue to work through a proposed new intersection between Vallco Parkway and the I-280 interchange that will not only enhance driver and bike/ped safety along Wolfe Road but also support the new fire station, described below. We have conducted two VISSIM analyses to study the

intersection and a further analysis is currently underway. The dialogue has been productive and we look forward to reviewing the latest modeling with the City once it is complete.

- *Fire Station*. We have long discussed with the Fire District including a fire station at Vallco that will help to meet their long-held desire for another station on the east side of Cupertino. While we have always intended to include a fire station, we marked it as "optional" in the SB 35 approval plans because discussions with the Fire District were preliminary and there was no obligation to provide it. Notably, the EIR that the City certified for the larger Specific Plan project in 2018, i.e., a larger project studied at the same time as this Project, found that the impact to emergency services to be less than significant because "the expansion or construction of additional fire protection facilities would not be required to provide adequate service and response to the project site," a conclusion based on input from the Fire District. Vallco Special Area Specific Plan, Draft EIR, at 245. While a fire station within the Project is not a requirement, we are committed to supporting the Fire District's vision and look forward to enhancing community safety beyond the Project site. We are pleased to report that we have since made significant progress in agreeing to the specifics for the fire station and are excited that this will provide yet another community benefit. According to the City, new stations of this size typically cost $9 to $10 million, but we will be providing this facility at no cost to the District.

- *Impact Fee Discussion*. We have engaged in significant negotiations and analysis with the City regarding the development impact fees owed. This discussion primarily progressed with the City's prior City Manager and City Attorney, during which we agreed in concept to many concessions to promote City policies. We have recently re-engaged with the new City staff, which has effectively started the discussion from the beginning as we are learning of different City priorities and approaches and have seen the gap between our positions only widen. While it has been frustrating to start anew, we still believe all discussions have been undertaken in good faith and we look forward to the ongoing engagement, including the City's recognition of community benefits inherent to the Project in the areas of affordable housing, open space and transportation that deliver a net positive impact. Even if work remains, the effort to date has been significant. In any event, agreement on fees is not required to issue permits because the Mitigation Fee Act includes a "pay under protest" process that ensures that disputes can be resolved on a timeline that does not hold up permit issuance.

B. The City Agrees That Significant Progress Has Been Made, and the City Attorney Has Advised to Issue an Extension

We appreciate that the City Manager report confirms that "substantial progress has been demonstrated" based on many of the above described actions, as set out in several pages of detail in the report. We also appreciate that you have advised that it would be appropriate to grant the extension based on this evidence and that if the City were to deny an extension on grounds inconsistent with the statutory direction, that the City would risk not only a court reversing that decision, but potential exposure to attorneys' fees and damages. We also note, for what it is worth in the context of a ministerially processed project, in the September 7 meeting the City Council made no effort to direct staff to withhold any extension. In fact, Cupertino's Mayor declared that the City "stands ready to move the project forward."

C. The Project Has Encountered Numerous Delays Outside the Project's Control

The Project has encountered a number of delays due to a variety of factors outside our control, which has contributed to months if not years of delay, including extraordinary turnover in City staff (particularly at the leadership level), new issues raised late in the process as new City staff and legal counsel on-board, delayed engagement of third party consultants and the City's long-running and fruitless search for a dedicated project manager.

These delays are not a surprise given the City's open hostility to the Project and SB 35 generally. This first manifested itself when the City decided not to participate in the litigation brought by Councilmember Moore and Friends of Better Cupertino. While the City purported to take a "non-opposition" stance, the court easily saw through this, calling the City's so-called "non-opposition" brief a "sandbag" effort and an "impromptu negative commentary on the Project disguised as nonopposition." *Friends of Better Cupertino vs. City of Cupertino*, Case No. 18CV330190, Order Denying Petition for Writ of Mandate, at fn. 10. Despite a decisive order from the court and recent admonishment from HCD that the City has a legal obligation to process permits without delay, the City Manager report continues to take issue with SB 35 as a statute at a policy level and with the Project's use of the statute thereof. Unfortunately, this attitude toward the law has tainted the City's permit processing. The City must respect state law and carry out its duties accordingly, which include processing permits without delay and in a way that does not "inhibit, chill, or preclude" the Project.

1. <u>Staff Turnover Has Led to Processing Delays</u>

The changing City staff, particularly at the leadership level, is well known. We are now working with the fifth City Manager (or interim City Manager), the fourth City Attorney (or interim City Attorney) and the third outside law firm since we submitted the SB 35 application, not to mention new leadership within the Departments of Community Development and Public Works. Putting

aside any reasons for these changes, this is a very complex project with an involved history that takes time to come up to speed on. This number of transitions, particularly on these critical roles, inevitably has caused delays.

Not only does it take time to bring on new people, but new people have new ideas and approaches, which has resulted in shifting priorities, a phenomenon the City must make every effort to militate against in this situation. The list of topics in the Interim City Manager's Staff Report highlights this problem. For example, City Staff never once raised the fire station as an issue until new legal counsel was engaged and announced in a meeting on May 5, 2021, well over two years into the process, it needed to be dealt with immediately at the foundation permit stage instead of at the superstructure stage, as would be typical. Our desire had always been to build the fire station, so we accelerated that effort, shifted the necessary resources and have since made substantial progress with the Fire District. The City has also now suggested that fire access to the green roof needs to be resolved prior to issuing the foundation permit. We are confused by this as the Fire District has actually already approved the foundation permit plans. We also recently learned that the City now interprets a subjective General Plan policy to require that we provide a transit hub. These are just a few of the many examples in the last few months alone that demonstrate a pattern by the City of bringing a new priority to our attention due to changed personnel very late in the process that then causes us to change focus, divert resources and lose time. At this same time, several much more critical-path documents sit with the City, apparently disregarded. While new people will surely endeavor to bring new ideas or approaches, the disorganized staffing issues in Cupertino have led to delays and a disjointed and unpredictable process.

2. The City's Delay in Engaging Third Party Plan Checkers Has Slowed Permit Processing

Bringing on third party consultants and plan checkers has also been a source of considerable delay. While the City has described the Project as having "a magnitude and scale that is beyond the City's traditional in-house plan review and inspection services,"[2] the City did not send out an RFQ for such services until six months after approval in March 2019, and then proposed consultants were not brought to the City Council until February 2020 and the firms were not actually engaged until May 2020. During this approximately 18 months, our applications languished due to insufficient resources.

3. The Lack of a Project Manager Has Resulted in an Uncoordinated Process

Finally, throughout the nearly three years, there has not been a project manager on the City side. Earlier this year, the prior City Manager acknowledged this was causing delays to our Project and sought to engage someone to act in this capacity, but ultimately found the costs to

[2] City Council Staff Report, Agenda Item 6, February 4, 2020.

be too high. As described during the recent report to Council, this has resulted in a series of uncoordinated conversations. This lack of dedicated management has resulted in delays to the process. We have also been shut out of City led discussions about our Project with outside agencies such as CalWater, the Fire District, and DEH, to name a few, where City staff has convened meetings to our exclusion that have only served to confuse our coordination effort with these agencies, mismanage expectations, and potentially discourage them from advancing the Project.

Taken together, these factors have combined to create a very challenging permitting process where we are regularly responding to new issues, having to resolve technical issues with attorneys and others who lack the technical knowledge, and generally proceeding in a disjointed manner. It has also caused unreasonable delay.

4. <u>The City Regularly Attempts to Divert Us with Non-Project Matters</u>

In addition to the above Project related matters, over the course of the 3 years since the Project was approved, the City has made many efforts to draw attention and resources away from the SB 35 approved project by engaging in an array of diversionary tactics:

- Rescinded a Specific Plan that we had pursued as the community preferred alternative project and had previously approved;

- Downzoned the Project site in an effort to leave the Vallco property without entitlements in the event Friends of Better Cupertino prevailed in the SB 35 approval litigation, including stripping the site of thousands of units of housing;

- During the SB 35 litigation, taking anti-project positions requiring time, effort, and resources to rebut;

- Engaged in a purported good faith compromise project effort that consumed 6 months' time and significant monetary resources, only to have Council reject the negotiated compromise project out of hand; and

- Enacted and/or threatened to impose numerous new policies and standards on the project (dark sky ordinance, reach code compliance, various mobility policies), even though they are barred under SB 35.

* * * *

We see that the City has a few choices, each of which will lead to a longer permit term. First, it could follow the legally binding HCD Guidelines and agree that the permit expires in May 2023. Second, based on the evidence presented, the City could grant an extension. As we requested

in May, and repeat here, we would accept an extension as a means to avoiding litigation, although we would maintain our position that the permit currently does not expire until May 2023. Finally, the City could do neither and revoke the permit. Litigation would then ensue, we would prevail, the Project Approvals would be reinstated, and the City would be exposed to covering our attorneys' fees and damages, which promise to be significant. We trust that the City will take the right steps.

We look forward to working together as we move the Project forward and complete the City's and community's vision for a vibrant town center at Vallco.

Sincerely,

COBLENTZ PATCH DUFFY & BASS LLP

Katharine Van Dusen

KTV:kks
Attachment

cc: Greg Larson, Interim City Manager
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May 26, 2021

VIA E-MAIL

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Re: Vallco Town Center SB 35 Project

Dear Sunny:

I write to follow up on our May 5 discussion concerning the City's position on the expiration date for the Vallco SB 35 approval. During that discussion, you stated that you believe the approval expires in September 2021. For the reasons set forth below, that view misreads the statute, fails to account for regulatory guidelines that have the force of law, and fails to honor the statute's directive that it be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (Gov't Code § 65913.4(n).) Moreover, by imposing a standard for "vertical construction" that requires issuance of a permit that the City has so far withheld, the City has eliminated any path for Vallco to maintain its approval beyond September 2021. To promote a productive working relationship between Vallco and the City, we request that the City confirm that it will not, four months from now, treat the SB 35 approval as expired.

Prior Litigation Tolled Expiration of the Vallco SB 35 Project Approval Until May 22, 2023

For background, the SB 35 approval was the subject of writ litigation, brought by now-City-Council-member Kitty Moore, along with the organization Friends of Better Cupertino. While the City took no official position during the litigation, it nevertheless provided "impromptu negative commentary on the Project disguised as a nonopposition." (Order Denying Petition for Writ of Mandate, at fn. 10.) Judgment denying the writ and upholding the SB 35 approval was entered on May 22, 2020.

Under SB 35, this litigation tolled expiration of the project approval until May 22, 2023. (Gov't Code § 65913.4(f)(2).) The concept of litigation tolling was introduced into the statute in 2019, as part of AB 1485. The intent of AB 1485 was to ensure projects do not "time out" when developers are forced to devote time and resources to litigation and until they have certainty that their approvals are sound. But approvals of certain projects—those with public investment in affordable housing and 50 percent of the units affordable—never expire and do not need litigation tolling. (*See* Gov't Code § 65913.4(f)(1).) AB 1485 was enacted to provide that

projects that *do not* otherwise meet the aforementioned criteria for indefinite approval would expire three years "from the date of a final judgment upholding that approval[.]" (*See* AB 1485 Legislative Counsel's Digest.)

Litigation Tolling Under SB 35 Applies to the Vallco Project

There are only two categories of approval expiration deadlines under SB 35: (i) approvals that never expire, and (ii) approvals that expire three years after final approval *or* final judgment in litigation. Subdivision (f) of SB 35 (Gov't Code § 65913.4) addresses approval expiration and must be read as a whole. Subdivision (f)(1) applies to a project that contains "public investment in housing affordability, beyond tax credits, where 50 percent of the units are affordable[.]" Approvals for such projects never expire. Subdivision (f)(2) distinguishes itself from projects under subdivision (f)(1) by applying to projects that "do[] not include 50 percent of units affordable[.]" Use of this parallel language makes clear that the Legislature intended for a project to fall into *either* (f)(1) *or* (f)(2): a project either never expires, under (f)(1), or it expires three years after final approval or litigation, under (f)(2).

It appears you contend that Vallco does not fall under either (f)(1) or (f)(2). It appears instead that you believe the Vallco Project falls under (f)(3), which mentions a three-year expiration date for all approvals. Your reading apparently is that because subdivision (f)(3) does not contain any reference to the number of affordable units, it applies to *all* SB 35 projects, even those that receive indefinite approval under (f)(1) or litigation tolling under (f)(2). That reading—i.e., that subdivision (f)(3) creates an expiration date for all projects—is inconsistent with (f)(1) and (f)(2). Subdivision (f)(3) cannot be read to shorten the approval period for any project under subdivisions (f)(1) and (f)(2). Your interpretation appears to be that (f)(3) creates a new category for projects that do not otherwise meet the criteria of (f)(1) or (f)(2), i.e., a catch-all, but the statute does not say that. That is, your reading requires language that is not there. And as described below, adding that language would lead to absurd results, so cannot be correct.

The best explanation is that (f)(3) contains some redundancies with (f)(2) and must be read together with (f)(2). The legislative history supports this view. When first introduced, SB 35 was silent on permit expiration. The version introduced on March 9, 2017 was the first mention of permit expiration and it included two subparagraphs, then codified as (e)(1) and (e)(2), creating the framework for indefinite and three year permits mentioned above. At the time, (e)(1) projects required public investment and a "majority" of affordable units, and (e)(2) projects did not include "a majority" of affordable units. On May 26, 2017, the term "majority" was replaced with "50 percent," but the result was the same: projects fall into one of two categories. It appears that changing to "50 percent" was to track with other language used in the statute, not to change the effect of the provision. (The summary on this topic in the Legislative Counsel's Digest for the May 26 version did not change from the prior version, confirming that the Legislature did not intend to make a substantive change.)

Finally, the July 14, 2017 version introduced (e)(3), which is unchanged in the statute today (although now codified as (f)(3)). This new subparagraph was somewhat redundant with (e)(2), but also added new concepts of commencing "vertical construction" prior to expiration and limiting the local government's discretion to deny a one-year extension to the "considerations and process set forth" in SB 35. Subparagraph (e)(2) was silent on what action was needed to vest a three year permit and on how the local government was to analyze the issue of whether to grant an extension. If the City's view were correct that (e)(3) introduced a new category of permit expiration, that would mean that the Legislature intended that (e)(3) projects would vest upon the commencement of construction, but the vesting requirement would remain vague for (e)(2) projects. Clearly that was not the intent. The only logical reading of the purpose of (e)(3) is to read it together with (e)(2) as establishing the vertical construction requirement for all three-year permits, not as creating an entirely new category.

There is no other reasonable way to harmonize these three provisions. It would have been inconsistent with the express purpose of SB 35 to ensure the production of affordable housing for the Legislature to provide that projects with some amount of affordable housing benefit from litigation tolling, while those with *more* affordable housing do not. Yet, that would be the absurd result of the City's reading of the statute. (*Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 165 [a court will not adopt a "literal interpretation" of a statute that "would result in absurd consequences the Legislature did not intend"].) If an interpretation of a statute would lead to an absurd result that is contrary to legislative intent, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071.) A court would reject the City's interpretation.

The HCD SB 35 Guidelines Establish That Litigation Tolling Applies to the Vallco SB 35 Approval Expiration Timeline

The reading the City proposes would create three categories of expiration dates: (1) projects that never expire; (2) projects with fewer than 50% affordable units, which benefit from litigation tolling; and (3) projects with 50% affordable units, which do not receive litigation tolling. This reading is not only inconsistent with the statute as we have described; it is also inconsistent with the interpretation of Housing and Community Development (HCD), the agency that the Legislature tasked to "review, adopt, amend, and repeal guidelines to implement uniform standards or criteria that supplement or clarify the terms, references, or standards" in SB 35. (Gov't Code § 65913.4(l).)

HCD has reviewed the statute and concluded, as we have, that it only provides two expiration categories. This interpretation has been codified in HCD's Streamlined Ministerial Approval Process Guidelines (the "HCD Guidelines").[1] (HCD Guidelines, issued on March 21, 2021, at Section 301(d).) Projects that contain public investment where 50 percent of the units are

[1] Available here: https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf.

affordable do "not expire." Projects in which "at least 50 percent of the units are not affordable" remain valid "for three years from the date of the final action establishing that approval, or if litigation is filed challenging that approval, from the date of final judgment upholding that approval." *Id.*[2] The Vallco Project falls within the second category because 50 percent of its units are not affordable.

When we raised the HCD Guidelines during our May 5 meeting, you dismissed them. A court will not. The HCD Guidelines are quasi-legislative regulations that "have the dignity of statutes." (*Ramirez v. Yosemite Water Co*., 20 Cal.4th 785, 799 (1999).) Subdivision (l) of SB 35 expressly directs that HCD may adopt these Guidelines to implement uniform standards or criteria that supplement or clarify the terms, references, or standards set forth in [Section 65913.4]." HCD exercised its authority to do so in adopting the Guidelines.

The Legislature's "delegation of legislative authority" to an agency like HCD "includes the power to elaborate the meaning of key statutory terms." (*Id*. at 800.) If tasked with evaluating whether to uphold and apply HCD's interpretation, a court will only consider "whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute." (*Id.* [internal quotation marks and citations omitted].) Both criteria are satisfied here. Additionally, the HCD Guidelines have interpreted the statute to have only two expiration categories since they were adopted at the end of 2018. The Legislature has amended SB 35 three times since and has not overridden or changed this portion of the guidelines, giving HCD's interpretation its implicit endorsement. Long held and "consistently maintained" interpretations like HCD's are entitled to great deference. (*Id*. at 801.)

Even if SB 35 were ambiguous, that ambiguity must be resolved "to afford the fullest possible weight in the interest of, and the approval and provision of, increased housing supply." (Gov't Code § 65913.4(n).) Our view provides a fair and correct reading of SB 35 and the HCD

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[2] The Legislative Counsel's Digest for AB 1485, which is entitled to "great weight" (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1170), agrees that there are only two categories and all three year permits are tolled during litigation:

> *Existing law provides that approval of a development pursuant to these provisions does not expire if (A) the project includes public investment in housing affordability, beyond tax credits, and (B) 50% of the units are affordable to households making below 80% of the area median income. Existing law provides that approval of other projects pursuant to these provisions automatically expires after 3 years, except as specified.*
>
> *This bill would provide that the approval of projects that do not meet the criteria above remains valid for 3 years from the date of the final action establishing that approval, or from the date of a final judgment upholding that approval, except as specified.*

Guidelines that is also faithful to the intent of the statute. Our reading has the effect of increasing much-needed housing supply in Cupertino, because it makes it possible for us to complete the project, notwithstanding the permitting delays that have hindered development to date. Your proposed reading would make it impossible for Vallco to complete the project and would therefore eliminate 2,402 units of housing slated to be built. Given these two competing interpretations, the statute mandates the adoption of the one that will result in more housing. (*See Ruegg & Ellsworth v. City of Berkeley*, 63 Cal.App.5th 277 [rejecting an interpretation of SB 35 offered by the City of Berkeley on the ground that the “interpretation would be inconsistent with the purpose of section 65913.4 to encourage and expedite the processing of affordable housing projects” and would instead “discourage development of affordable housing”].)

<u>Vertical Construction Is In Progress</u>

A dispute between us over the correct reading or the expiration provisions might have been avoided had you not also taken your position on the meaning of “vertical construction” in those provisions. Under the statute, if vertical construction has begun—as it has here—the approval will not expire. You have informed us, however, that you believe “vertical construction” as that term is used in SB 35 will only commence when Vallco begins construction under a foundation permit that the City has delayed issuing. That narrow definition is problematic for the same reasons: it is inconsistent with the statute and does not provide the fullest possible weight to the provision of increased housing supply in Cupertino. Under your theory, a project such as Vallco that includes demolition and an underground structure, would need to undertake months of construction activities before getting to the “vertical” stage, but a simpler project without these features would “vest” almost right away. This effectively substantially shortens the permit life for more complicated projects, but there is no indication that the Legislature intended such a consequence. Your suggestion that it is limited to construction work that is physically connected to the superstructure has no basis in in the statute.

Rather, SB 35 itself explains when vertical construction is “in progress” and offers multiple alternative definitions, including if “the Development requires multiple building permits, an initial phase has been completed, and the project proponent has applied for and is diligently pursuing a building permit for a subsequent phase.” (Gov’t Code § 65913.4(f)(2)(A)(ii).) By this definition, the Vallco project is in progress: we completed a demolition phase and site preparation structural work that is part of the development; we are also diligently pursuing, among others, a shoring and excavation permit and a foundation permit. Even if the approval would otherwise expire in September 2021 if vertical construction had not begun—and as discussed above, it does not—the fact that the project is “in progress” under the statute means that the approval will not expire.

<u>The City Can Avoid Litigation By Granting a One-Year Extension as Authorized Under SB 35</u>

We could litigate these questions. I am confident Vallco would prevail because its reading is consistent with HCD's and because SB 35 demands to be interpreted in favor of providing housing. Vallco will defend its approval in court if the City forces it to do so.

But the City has within its power the ability to avoid a costly court fight. SB 35 authorizes the City to grant a one-year extension, including if the project proponent can show that it has taken a step "such as filing a building permit application." (Gov't Code § 65913.4(f)(2)(B).) As you know, we filed a building permit application in December 2018. The City's "action and discretion in determining whether to grant the . . . extension shall be limited to considerations and processes set forth" in SB 35. In the interest of avoiding a dispute, we have already asked for an extension and reiterate that request again here. The statutory criteria to grant an extension have been met. The City has no good-faith basis to deny it. While Vallco does not believe an extension is legally necessary because the project approval does not actually expire in September 2021, Vallco would accept such an extension from the City in order to avoid litigation over the question at this time.

Please inform us, by not later than June 11, 2021, whether (1) the City agrees that the approval does not expire in September 2021 but instead expires no earlier than May 2023; or, alternatively (2) the City will provide a one-year extension under SB 35.

Very truly yours,

COBLENTZ PATCH DUFFY & BASS LLP

Katharine Van Dusen

KTV:kks