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September 17, 2021

VIA ELECTRONIC MAIL

Chris Jensen
City Attorney
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202

Re: Vallco Town Center: Environmental Review Protocol

Dear Mr. Jensen:

Under its typical practices, the City of Cupertino does not get involved in the voluntary oversight process between the Santa Clara County Department of Environmental Health (“DEH”) and a property owner. Yet, despite these practices and an express statutory instruction not to “inhibit” or “chill” a project approved under SB 35, the City has apparently repeatedly requested meetings and information into DEH’s review of Vallco Property Owner LLC’s (“VPO”) approved SB 35 project site. DEH does not have the time or resources to respond to repeated requests from the City. The City’s efforts to insert itself in the voluntary oversight process must stop. DEH—as the expert agency with jurisdiction over the environmental issues at the Project site—must be allowed to carry out its work without any further interference from the City.

VPO has always prioritized the health and safety of construction workers, future residents and tenants, and the broader Cupertino community. That’s why we have and continued to diligently work to ensure that required site clean-up from prior uses is effective, timely, and in full compliance with all applicable laws. This commitment is evidenced by our rigorous testing of the Project site over several years; preparation of robust technical studies, including a Site Characterization Report and Environmental Site Management Plan prepared by well-regarded environmental consultants—consultants that the City has relied on for other major projects like Apple Park—outreach to expert agencies (like DEH and the U.S. EPA) for guidance as to appropriate disposal of any contaminated soils; good faith cooperation with the City’s requests (like Proposition 65 signage) and most recently, formal engagement with DEH through its voluntary oversight process.

As you know, the City must process permits without unreasonable delay, in a manner that does not “inhibit, chill, or preclude” the Project, and in the same manner it would a traditionally approved project. Gov. Code § 65913.4(h)(2). It also has an obligation to implement SB 35 “in a manner to afford the fullest possible weight” to the provision of increased housing. Gov. Code § 65913.4(n). In the plainest terms, the City’s obligation is to help, not inhibit, to bring the

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Project forward. The City's unilateral communications with DEH violate SB 35 by causing unnecessary delay and, most critically, divert DEH's limited resources away from oversight and towards the City's idiosyncratic and unsupported notions.

The City's normal practice (consistent with most cities) is to allow the regulatory process to unfold between the regulator and regulated without direct involvement by the local jurisdiction. When the regulatory agency completes its review, it issues information or approvals that the City can consider. Apple Park is a good example.¹ What is now Apple Park was formerly a mix of agricultural, commercial and industrial uses, which left a legacy of significant contamination (much more than is present at Vallco). Like us, Apple worked with a regulator (the Regional Water Quality Control Board), but unlike here, City Officials stayed out of the process. The City must now treat us as it treated Apple Park, and leave it to us to work through the DEH process.

The DEH process is voluntary, not mandatory, and nothing about either the conditions on site nor the conditions of approval required VPO to seek DEH's oversight.² Despite this, to end the stalemate over the City's refusal to issue a shoring and excavation permit, we entered into a Remediation Action Agreement with DEH and are currently working under their oversight to determine the most appropriate remedial action. Under the Health and Safety Code, DEH is not obligated to accept oversight, but rather it may take on oversight based on if it has "adequate staff resources and the requisite technical expertise and capabilities are available to adequately supervise the remedial action." Health & Safety Code § 101480(b). Furthermore, under the statute and the Remedial Action Agreement, DEH can withdraw from its oversight role upon determining that staff resources are insufficient. Health & Safety Code § 101480(d)(3). We understand that DEH's resources are limited, and that DEH has had concerns about being involved with a politically charged project. Despite these reservations, DEH ultimately agreed to oversight. We are deeply concerned that further meddling from the City will cause DEH to conclude that it made the wrong choice and that it should withdraw from the Remedial Action Agreement. Were that to happen, the City's actions surely would have "inhibited" the processing of the Project.

¹ Infill sites, like Apple Park and Vallco, often have soil contamination from prior uses. Sand Hill Property Company has successfully built many projects on infill sites throughout the region, including sites with residual contamination from prior uses. Within Cupertino, Sand Hill redeveloped the former Anderson Chevrolet site at 20955 Stevens Creek Blvd, now Whole Foods, which was a leaking underground fuel tank site that required DEH closure. As is typical, the City deferred to DEH and was uninvolved in the cleanup process. This has also been Sand Hill's experience in other jurisdictions.

² Before entering into the Remedial Action Agreement, DEH had previously proposed that instead of providing formal direct oversight, they would review our completion report and confirm whether further remediation should be conducted. Even though this was DEH's suggestion, not ours, the City was unsatisfied with the process proposed by the regulatory agency.

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We understand from the City Manager's report that some portion of City staff met with DEH on September 7. Even though we are the regulated entity under oversight, we do not know who attended or what was discussed. We had no notice of the meeting. You did not tell us about the meeting, even when you could have raised it during our lengthy discussion on September 3. We can only conclude that you intended to conceal the meeting from us.

We do understand that the meeting lasted about an hour, yet the only report out from the City Manager was that DEH's review of documents remains ongoing and that additional investigation may be required. Of course, this is entirely consistent with what we have recently reported to the City. DEH's resources are stretched too thin for it to provide you with information you could easily obtain from us, and your outreaches divert resources and attention away from DEH's primary oversight efforts.³ Moreover, the DEH process is inherently public.

The City's recent misleading public relations campaign is also having a chilling effect and must stop. The City Manager's extraordinary comment to the media that we have taken five years to "start addressing" the environmental condition is as galling as it is false.⁴ The truth—as the City has always known—is that this effort has been underway for years and is closer to the end than the beginning. The City's recent e-mail blasts to the community focused *solely* on environmental issues, a topic the City professes is outside of its expertise and jurisdiction. Plainly, the City's intent was not to give a balanced informational update, but rather to try to absolve itself of blame for its lengthy delays and raise hyperbolic and baseless fears among members of the public. This piece of misleading advocacy has exactly the type of "chilling" effect that the Legislature sought to prohibit and misleads the City's constituents and the public.

Our demands are simple. Treat us the same as others and allow us to work with DEH without further interference so we can meet our obligations under the Remedial Action Agreement. In fact, by avoiding further interference, the City will achieve the very goal that it purports to be interested in – ensuring public health and safety by allowing for any necessary remediation to move forward. If you have questions, ask us and where needed we can go to DEH together. In the meantime, we will keep focused on working with DEH to continue developing and implementing a plan that is safe for the future workers, residents and the broader community.

³ This same issue arose again this week when the City's environmental consultant reached out to DEH to obtain a document that we submitted, suggesting a concern that DEH's oversight is somehow geographically limited. But no such limitations are in place. As Reed Moulds wrote to Greg Larson on September 15th, oversight covers the entirety of the west side. This is not in doubt and is not an issue. Rather than cause the DEH case worker to spend time tracking down a document to investigate an incorrect inference, the City should have reached out to us, asked for the document and discussed the scope of the oversight. Any concerns could easily have been resolved by direct dialogue between the City and VPO.

⁴ See <https://www.mercurynews.com/2021/09/07/vallco-fight-cupertino-says-project-approval-about-to-expire/>, Accessed September 15, 2021.

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Sincerely,



Katharine Van Dusen

cc: Greg Larson, Interim City Manager
Reed Moulds, Vallco Property Owner, LLC
Miles Imwalle, Coblentz Patch Duffy & Bass LLP