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Electronically Filed by Superior Court of CA, County of Santa Clara, on 3/18/2019 3:15 PM Reviewed By: A. Nakamoto Case #18CV330190 Envelope: 2640449

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

FRIENDS OF BETTER CUPERTINO, KITTY MOORE, IGNATIUS DING AND PEGGY GRIFFIN PETITIONERS, VS. CITY OF CUPERTINO, A GENERAL LAW CITY; GRACE SCHMIDT, IN HER OFFICIAL CAPACITY AS CUPERTINO CITY CLERK, AND DOES 1-20 INCLUSIVE, RESPONDENTS	No. 18CV330190 **PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO VALLCO PROPERTY OWNER LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS** Hearing Date: March 29, 2019 Time: 9:00 a.m. Judge: Hon. Helen E. Willams, Dept.: 10 **ASSIGNED FOR ALL PURPOSES TO: HON. HELEN E. WILLIAMS, DEPT. 10**
VALLCO PROPERTY OWNER LLC REAL PARTY IN INTEREST	

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INTRODUCTION

The belated motion by Real Party Vallco Property Owner LLC ("Real Party") - brought after Petitioners had drafted, filed and served their petition brief herein in accordance with the briefing schedule set by the Court - is not persuasive.

Without much specificity, the motion asserts that the Petition herein or parts thereof are barred by the special statute of limitations in Government Code[1] § 65009 and apparently under SB35 itself.

Section 65009 is directed at *discretionary* decisions by a "legislative body" and has been applied only in well-defined situations pertaining to the administration of *local* planning and zoning regulation. The statute has never been held to govern determinations such as the City's purported eligibility determinations. Government Code § 65009(c)(1) .

Neither the type of decision-maker (local legislature, planning commission or zoning administrator authorized by a the local legislative body), nor the subject matter of decision-making (zoning decisions, variances, etc.) aimed at by the statute is implicated by Petitioners' challenges to the June 22, 2018 determinations.

The additional determinations made by the City, expressly or by implication, in its September 21, 2018 approval letter, later corrections, and decisions made expressly or tacitly in connection with earlier communications from or to the applicant going back to July 18, 2018, inclusive (AR0001 - AR0874), are within 90 days of the date (October 16, 2018) on which the Verified First Amended Complaint was filed and served and are thus not preempted under § 65009 in any event.

FACTUAL AND STATUTORY BACKGROUND

The factual background is drawn from the Verified First Amended Petition (VFAP) herein. Petitioners' substantive case was set out in detail in the opening brief and accompanying papers filed on January 29, 2019. Chambers copies of the VFAP and of the petition brief and accompanying papers have been lodged with the Court.

[1] Unmarked references are to the Government Code.

1. The SB35 Statute.

SB35 - now codified in part as Government Code § 65913.4 - was enacted in 2017 to institute a "streamlined, ministerial approval process" for certain residential development projects that meet defined eligibility criteria. VFAP ¶¶ 13 - 21.

Qualifying projects are expressly "not subject to a conditional use permit." § 65913.4(a). It follows that none of the City's purported eligibility findings and approvals *can* pertain to any conditional use permits.

To qualify for the SB35 approval process, a project must satisfy a list of eligibility criteria ("objective planning standards"). § 65913.4(a) and (b).

In particular, a project may *not* be located on a site listed or designated as a hazardous waste by state authorities unless specifically cleared for residential use or residential mixed uses by the Department of Toxic Substances Control. § 65913.4(a)(6)(E).

Further, at least two-thirds of the square footage of the development must be designated for residential use. § 65913.4(a)(2)(C).

Save for the specific override whereby a residential *designation* under the General Plan can stand in for residential *zoning*, SB35 expressly requires that projects be consistent with existing zoning standards and other non-discretionary legal standards. VFAP ¶ 21. § 65913.4(a)(5).

2. Pertinent Chronology.

March 27, 2018	The project application is filed with City. VFAP ¶ 22. AR1056 - AR1580.
June 22, 2018	Former City Manager issues letter purporting to find Project *eligible* for "streamlined, ministerial approval" under SB35. AR0888 - AR0926.
June 25, 2018	Petitioners bring *ex parte* petition for alternative writ of mandate. Vallco and City appear at the hearing and file oppositions. VFAP ¶ 23.
September 21, 2018	Interim City Manager issues approval letter. AR0003 - AR0330.
October 16, 2018	Petitioners file and served verified first amended petition (VFAP).

3. Petitioners' Principal Challenges to City Determinations.

Petitioners challenge the City's determinations on multiple grounds, including the

following.

(i) Development located on hazardous waste site. A development project is NOT eligible for the "streamlined, ministerial approval process" provided by SB35 if the development is "located on a site that is ... [a] hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses." § 65913.4(a)(6)(E). VFAP ¶ 20.

As Petitioners have shown, the City's own reports state flatly that the Vallco project site is listed pursuant to § 65962.5. The site was never cleared by the Department of Toxic Substances Control. VFAP ¶¶ 63 - 73. Petition brief (PB) 9 - 12.

(ii) Project fails to designate two-thirds of square footage for residential use. To be eligible for streamlined, ministerial approval under SB35, at least two-thirds of the square footage of the development must be designated for residential use. § 65913.4(a)(2)(C). It should be noted that the two-thirds floor ratio is required under the state-wide SB35 itself. It is thus independent of local zoning law and not subject to local variances or permits.

The project falls short of the two-thirds residential floor ratio requirement, whether calculated net or gross. VFAP ¶¶ 46 - 62. PB 12 - 23.

Both of these eligibility criteria were also expressly challenged in the *original* verified petition filed on June 25, 2018.

(iii) Failure to conform with height limits under local zoning. SB35 provides for only a limited over-ride of local *zoning* law: a project may proceed even in the absence of residential *zoning*, provided that the project area is *designated* for residential or mixed use in the General Plan. § 65913.4(a)(2)(C). SB35 does not purport to override local zoning other than with respect to residential zoning.

The development site is zoned for a maximum building heights of 30 feet and 85 feet for

different parcels. However, as Real Party has admitted,[2] some of the proposed buildings are considerably higher. The project application should have been denied on this basis alone. VFAP ¶ 83 - 87.

(iv) Failure to dedicate parkland. Similarly, the project fails to provide for the dedication of parkland as required under mandatory General Plan policies. VFAP ¶¶ 88 - 93. Parkland dedication is also a precondition for approval of the subdivision map required for the project under Cupertino Municipal Code 18.24.030. VFAP ¶ 92.

Notwithstanding the project's failure to comply with the General Plan and generally applicable legal standards, the City purported to approve the project by issuing an approval letter on September 21, 2018 which also purported to grant related approvals/permits. VFAP ¶ 5. AR0003.[3]

4. Petition Includes Non-SB35 Issues.

Petitioners note that the VFAP and the Petition Brief challenge certain aspects of the Project outside the scope of SB35.

For example, the City's September 21, 2018 approval letter purported to approve a "Tentative Subdivision Map for Condominium Purposes." AR0003. However, the purported approval of the tentative subdivision map was improper in substance as well as procedurally. VFAP ¶¶92 - 93. PB 32 - 35.

Similarly, the Project Application fails to comply with mandatory requirements under the City's Density Bonus Ordinance and related legislation pertaining to the provision of below-market-rate and affordable housing. VFAP ¶¶98 - 113.

[2] Vallco Property Owner LLC's Verified Answer, ¶ 86.

[3] Petitioners respectfully request judicial notice of the "Administrative Record" to the extent cited herein.

ARGUMENT

A. PRELIMINARY ISSUES

1. Real Party's Arguments Lack Particularity on Key Issues - Motion Should be Denied on that Basis Alone.

Real Party's brief fails to spell out with any particularity on what basis the actual language of § 65009(c)(1)(E) and (F) would apply to bar the VFAP. The motion should be denied on this basis alone as Petitioners have not been afforded a full and fair opportunity to respond to the motion.

Moreover, the moving brief provides virtually no particulars as to *which of Petitioners' averments and causes of action* Real Party contends are precluded under each of its separate legal contentions in support of its motion for judgment on the pleadings (MJOP).

Being forced to guess at the underlying legal contentions, Petitioners are effectively put in the position of having to undertake the moving party's legal work preemptively.

2. Purported Eligibility Findings do NOT Constitute Final "Ministerial Approval."

Real Party claims that the purported *eligibility* findings at the 90-day mark themselves constitute the entire "ministerial approval." Motion Brief (MB) 10:13 - 16, 11:14. This claim misreads the statute. As Real Party notes, SB35 mandates that the ongoing review through day 180 from the application "shall not in any way ... *preclude* the ministerial approval." § 65913.4(c)(1). The verb "preclude" (as opposed to "rescind" or "negate") can only be directed at the *future* approval at the 180 day stage.

B. APPLICABLE LEGAL PRINCIPLES

1. Motion for Judgment on the Pleadings is Equivalent to Demurrer.

As Real Party notes, "[a] motion for judgment on the pleadings may be made ... on the same grounds as could be urged by a general demurrer." *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal. App. 4th 1761.

Thus, "[l]ike a demurrer, the motion is confined to the face of the pleading under attack, and **the plaintiff's allegations are accepted as true**. [Citations]." *Id.*

2. Statutes of Limitation must be Narrowly Construed.

As a general matter, statutes of limitation must be construed narrowly:

> The principle is also well established that "[s]tatutorily imposed limitations on actions are technical defenses which should be strictly construed to avoid the forfeiture of a plaintiff's rights [citation]." (*Sevilla* v. *Stearns-Roger, Inc.* (1980) 101 Cal. App.3d 608, 611.) "Such limitations are obstacles to just claims and the courts may not indulge in a strained construction to apply these statutes to the facts of a particular case [citations]." (*Ibid.*) (11) Finally, there is a "strong public policy that litigation be disposed of on the merits wherever possible." (*Hocharian* v. *Superior Court* (1981) 28 Cal.3d 714, 724.) Each of these policies supports the construction given to [CCP] section 340.5 by the trial court.

Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal.3d 46, 56

Where, as here, the Legislature has imposed a rigorous 90 day limitation period on certain actions, due process requires that the subject matter *scope* of the statute of limitation be clearly apparent on its face, rather than being applied to the facts of a particular case as a result of "strained construction" of the statutory language.

3. SB35 is Self-Contained Statutory Scheme that Includes Its Own Statutory Scheme for Accelerated Review. Policy Considerations Militate against Application of § 65009 in the Context.

SB35 itself provides two interlocking mechanisms in order to accelerate approvals for qualifying projects relative to regular project review procedures.

First, SB35 imposes strict deadlines for eligibility findings (90 days from filing) and approval (180 days). § 65913.4(b)(1)(B), § 65913.4(c)(2). Failing documented rejection at the eligibility stage, a project is deemed eligible. § 65913.4(b)(2).

Second, SB35 expressly confines a city's review to "objective" criteria without resort to "personal or subjective judgment." See, e.g., § 65913.4(a)(5).

Given that SB35 itself includes a self-contained, detailed legislative scheme to accelerate project approvals, policy reasons militate against applying § 65009 to determinations in the SB35 process.

Under Real Party's theory, any challenges to the 90-day eligibility determinations would have to be filed and served *before* the 180-day project review is complete. In most cases, *another* or amended petition would then need to be filed once the actual approval issues at the 180

day stage. Indeed, approvals are in practice subject to technical corrections past the 180 day deadline as occurred in this case. The result would in any case be an *unnecessary multiplicity of filings in respect of the same project.*

C. GOV. CODE § 65009 DOES NOT APPLY TO SB35 DETERMINATIONS.

1. Section 65009 Applies to *Discretionary* Planning and Zoning Decisions.

Real Party asserts that "[t]he Amended Petition for writ of mandamus is barred by the statute of limitations" under Gov. Code. § 65009(c)(1)(E)-(F). MB 5:2 - 4. However, that statute by its own language and structure simply does not apply to the petition herein which challenges the City's purported finding of eligibility and subsequent approval of the Vallco project in under the "streamlined, ministeral appoval process" of SB35 (Gov. Code § 65913.4).

Section 65009 governs challenges to certain local *planning and zoning decisions*, not to challenges to merely ministerial approvals. The Supreme Court has explained the scope of the statute as follows:

> [S]ection 65009 establishes a short statute of limitations, 90 days, applicable to actions challenging several types of local planning and zoning decisions: the adoption of a general or specific plan (id., subd. (c)(1)(A)); the adoption of a zoning ordinance (*id.*, subd. (c)(1)(B)); the adoption of a regulation attached to a specific plan (id., subd. (c)(1)(C)); the adoption of a development agreement (*id.*, subd. (c)(1)(D)); and the grant, denial, or imposition of conditions on a variance or permit (*id.*, subd. (c)(1)(E)).

Travis v. County of Santa Cruz (2004) 33 Cal.4th 757, 765.

Here, Petitioners challenges are *not* to any "local planning and zoning decisions." In particular, the VFAP does not challenge any "condition attached to a variance, conditional use permit, or any other permit." § 65009(c)(1)(E).

2. Section 65009 is Directed at *Discretionary* Decisions Rendered by "Legislative Body" or Delegated by Legislature, not "Ministerial" Decisions under SB35.

The decisions challenged herein are not of the nature subject to the time limitations under § 65009.

The statute is directed at *discretionary* decision making - whether legislative or adjudicative - by a "legislative body" or, in limited circumstances spelled out by the statute, in the exercise of authority delegated by the legislative body. None of those scenarios applies here.

Under the statute, the 90-day period begins to run from "the *legislative body's* decision." § 65009(c)(1) (emphasis added). In fact, neither the City Council nor the Planning Commission rendered *any* decision on the SB35 application.[4]

Petitioners' challenge is not to any *legislative* or *adjudicative* decision at all, but to purportedly ministerial decisions by the City administration by reference to "objective planning standards." § 65913.4(a).

Section 65009(c)(1) - relied on by Real Party - bars actions or proceedings "unless the action or proceeding is commenced ... within 90 days *after the legislative bodies' decision*: ..." (emphasis added). The subordinate subdivisions (A) through (F) thus refer strictly to *discretionary* decisions made by a legislative body or in the exercise of authority expressly delegated by the legislative body.

3. Amended Petition was Filed and Served within 90 Days of Approval Letter.

It is undisputed that the first amended petition was filed and served on October 16, 2018, well within 90 days of the September 21, 2018 letter purporting to *approve* the Vallco project. The moving brief claims that Petitioners challenge to the *approval* is not separate from its challenge to the *eligibility* findings in the June 22, 2018 letter and claim to find support for that proposition in *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524. This assertion misreads *Honig*. The petition in *Honig* had expressly alleged that "the [later issued] building permit was 'based on the granting of the variance,' " but nowhere suggested "that the building permit contained a defect *unrelated to the variance*." (emphasis added) In other words, the petitioner in *Honig* did not challenge the building permit on any grounds *independent* of the prior grant of the variance. *Id.* 528.

The VFAP challenges the approval on several grounds that are independent of, and thus not subsumed within, challenges to the June 22, 2018 *eligibility* finding. VFAP p. 18 - 24. For example, Petitioners challenge failure to comply with setback requirements (VFAP ¶¶ 94 - 97)

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[4] By way of background, pro-Vallco council members were well aware that the project was unpopular and avoided voting on related matters until shortly before the 2018 election. One pro-Vallco councilor nonetheless lost her seat in the November 2018 election.

under the *final* plans submitted by the applicant, as well as failure to comply with the local density bonus ordinance and regulations (VFAP ¶¶ 98 - 113). Each of these challenges is entirely distinct from and independent of the *eligibility* challenges.

Thus, even if Real Party's challenge to the timeliness of the June 22, 2018 *eligibility* findings were upheld, nothing in *Honig* supports the contention that Petitioners *discrete* challenges to the project *approval* would be "swept up" in the timeliness objections to the preceding *eligibility* challenge.

4. June 22, 2018 Determinations are Prior Proceedings under § 65009(c)(1)(F) .

Real Party contends that for a challenge to "any of the proceedings, acts, or determinations taken, done or made prior" to the issuance of a permit, "the ninety-day period begins to run from the date of the challenged prior proceeding, act, or determination" under § 65009(c)(1)(F) . MB 12:14 - 21.

This misreads subparagraph (F) and the body of subsection (c)(1). The point of § 65009(c)(1)(F) is that challenges to preliminary actions and determinations underlying a later "decision" must also be brought within 90 days of the [later] substantive "decision." The language of subparagraph (F) speaks of challenges "[c]oncerning any of the proceedings, acts or determinations taken, done or made prior to any of the decisions listed in subparagraphs (A), (B), (C), (D) and (E)," i.e., preliminary actions *prior* to the actual "decision." The preliminary steps listed in subparagraph (F) are not themselves denominated as a "decision." Thus, the statute begins to run from the date of the "legislative body's decision" under (A) - (E), not from the date of the preliminary "proceedings, acts or determinations." § 65009(c)(1).

As SB35 provides for a two-stage approval process with partial decisions at the 90-day and 180-day stages, the preceding June 22, 2018 eligibility determinations constitute "proceedings, acts, or determinations ... made prior to any of the decisions listed in subparagraphs (A), (B), (C), (D) and (E)" of § 65009(c)(1) with the result that the 90-day challenge period only started as of the final approval on September 21, 2018. § 65009(c)(1)(F).

Real Party cites *Citizens for Beach Rights v. City of San Diego* (2017) 17 Cal.App.5th 230, 239 for the proposition that the term "decision" covers a "broad range of governmental decisions,

including factual determinations." MB 12:25 - 13:3. In fact, in *Citizens for Beach Rights*, the court held that the statute was only triggered when the city decided that a site development permit remained valid "and based on that decision, issued a building permit." *Id.*

Here, the City issued a "Development Permit - Major," an "Architectural and Site Approval - Major," a "Tentative Subdivision Map for Condominium Purposes" and a "Tree Removal Permit" on September 21, 2018. AR0003. If § 65009(c)(1) were held to apply at all, it would be triggered by the issuance of these permits and approvals.

5. Eligibility Stage Findings are NOT within Scope of § 65009(c)(1)(E).

Real Party incorrectly claims in effect that the City's eligibility findings are a "decision on the matters listed in Sections 65901 and 65903" and thus trigger the 90-day statute of limitations. § 65009(c)(1)(E). MB 13 - 14. In fact, the statute itself and the case cited, *Save Lafayette Trees v. City of Lafayette* (Cal. Ct. App., Feb. 8, 2019, No. A154168) 2019 WL 493957 negate that proposition.

As *Lafayette* notes, the "matters" listed in §§ 65901 and 65903 are all expressly keyed to zoning ordinances and do not cover unrelated decisions:

> As relevant here, section 65009, subdivision (c)(1), provides that "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] . . . [¶] (E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." The "matters listed" in sections 65901 and 65903 include "conditional uses or other permits when the zoning ordinance provides therefor" and "variances from the terms of the zoning ordinance." (§ 65901, subd. (a); see also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 766, fn. 2 [Sections 65901 and 65903 "provide for hearing and decision on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits."]; *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1119, fn. 6 [same] (*Royalty Carpet*).) Section 65009, subdivision (c)(1)(E) is to be applied broadly to all types of challenges to permits and permit conditions, as long as the challenge rests on a "decision" of a local authority relating to a permit or seeks to "determine the reasonableness, legality, or validity of any condition attached to a . . . conditional use permit, or any other permit." (*Travis, supra*, at pp. 766-768.) In short, an action challenging "any decision" by a "legislative body" regarding a variance, a conditional use permit, or other permit provided for by a local zoning ordinance must be filed and served within 90 days of the decision.

Lafayette, slip opinion[5] p. 5 (emphasis added).

In fact, the tree ordinance at issue in *Lafayette* was held to be subject to § 65009(c)(1)(E) specifically because it "is a zoning ordinance." *Lafayette*, p. 5 - 6. *Lafayette* thus confirms that only decisions made directly pursuant to a local zoning ordinance are subject to the statute.

As noted, SB35 projects are expressly "not subject to a conditional use permit." § 65913.4(a) and thus not subject to the statute of limitations for such permits.

Equally, the purported eligibility findings on June 22, 2018 were not "condition[s] attached to a variance, conditional use permit, or other permit" in the exercise of the City's zoning jurisdiction. § 65009(c)(1)(E). Indeed, no underlying variance, conditional use permit or other permit had been issued at that stage to which any conditions could attach.

Significantly, SB35 does NOT use the term "permit" to refer to the determinations to be made by a city under the SB35 scheme and is emphatic that its approval process is "ministerial" and non-discretionary.

6. Even if Gov. Code § 65009 were Held to Apply, Petitioners have Substantially Complied with its Requirements.

Even assuming *arguendo* that Gov. Code § 65009 could be held to govern challenges to ministerial decisions under SB35, Petitioners have substantially complied with the requirements by filing and serving the original petition on June 25, 2018, three days after the date of the City's eligibility letter.

Counsel for the City and for Real Party were served with the original petition on or before June 25, 2018, and both filed papers in opposition to Petitioners' *ex parte* application for an alternative writ of mandamus that day. While § 65009 has been held to require strict adherence to the service requirement to "stop the clock," given the purpose of the statute of providing finality and avoiding delay, the appearance and participation in the action by both parties is the functional equivalent to formal service on the City just as a general appearance would excuse service in a civil action. As Real Party notes (MB 12:5 - 8), the statutory purpose of the service requirement

[5] Slip opinion downloaded from official court website at https://www.courts.ca.gov/opinions/documents/A154168A.PDF

addresses the concern that a petitioner could "withhold service for months or even years would effectively suspend the effective date of local land use and development decisions and leave such matters at the mercy of the complainant." (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 526 [quoting *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 790].) This concern was more than met in that both the City and Real Party were actually put on notice actually filed papers and appeared at the *ex parte* hearing on June 25, 2018.[6]

7. Determinations Relating to Absence of Hazmat Designation and Residential Square Foot Ratio are Unrelated to Zoning.

The former City Manager's June 22, 2018 determination purported to find that the Vallco site was *not* ineligible as listed a hazardous waste site listed on the statewide "Cortese List. AR0895 - AR0896. §§ 65913.4(a)(2)(E), 65962.5, Health and Safety Code § 25356.

This determination required by a statewide statute - SB35 itself - is a particularly egregious example of determination that is wholly unrelated to any local zoning ordinance and for this reason is outside the scope of § 65009(c)(1).

Similarly, SB35's requirement that two-thirds of the square footage of a project must be dedicated to residential use is not based on any local zoning regulation. The City's purported finding of compliance is accordingly outside the scope of § 65009.

8. Eligibility Stage Determinations are NOT "Matters Listed in Sections 65901 and 65903" under § 65009(c)(1)(E).

While § 65009(c)(1)(E) incorporates by reference "matters listed in sections 65901 and Government Code § 65903," none of the matters listed in these two provisions embraces the averments and causes of action in the VFAP. These exceptions *confirm* the general principle that § 65009 pertains to decisions by a legislative body or under its authority.

Section 65901(a) provides for the hearing and adjudication of "applications for conditional uses or other permits <u>when the zoning ordinance provides therefor and establishes criteria for</u>

[6] The purpose of the statute being to avoid delays in municipal decision-making, it is irrelevant that an *ex parte* appearance would not constitute a "general appearance" in a regular civil action. Section 65009 is concerned with giving legal certainty to cities and applicants by apprising them of, and affording a chance to confront, challenges early as the City and Vallco actually did in this case.

determining those matters, and applications for variances from the terms of the zoning ordinance."

Here, SB35 projects are expressly "not subject to a conditional use permit." § 65913.4(a). Moreover, the City's purported determinations were not, and do not purport to have been, made pursuant to a "zoning ordinance provid[ing] therefor." Further, none of the June 22, 2018 determinations is denominated as being or relating to a "permit."

In *Lafayette*, the court noted that § 65009(c)(1) "is to be applied broadly to all types of challenges to permits and permit conditions, as long as the challenge rests on a 'decision' of a local authority relating to a permit." Slip Opinion, p. 5.

The other section incorporated by reference in § 65009(c)(1)(E), § 65903, provides that "[a] board of appeals ... shall hear appeals from the decisions of the board of zoning adjustment or the zoning administrator ..." The June 22, 2018 do not purport to determine any appeal.

9. "Deemed" Eligibility Findings are Not Binding on Petitioners.

Real Party claims that the City's failure to issue a reasoned denial at the eligibility stage deadline (June 25, 2018) finding the Project *ineligible* for SB35's "streamlined, ministerial approval process" means that the Project was "*deemed*, as a matter of law, to comply with all the substantive requirements of the statute ..." MB 10:18 - 11:4 (Underlining added, italics in original).

Real Party further claims that the City's June Determination is final, and that "[i]t is not vulnerable to Petitioners' allegations that it was erroneous, or that the City *should* have found inconsistencies with respect to any objective planning standards." MB 11:14 - 20. Similarly, Real Party's claim that "there is no opportunity [after the deadline] for the city to reverse that determination, or for a project opponent to seek a reversal of that determination." MB 11:19 - 20 (Emphasis added).

No authority is cited for the remarkable proposition that a city's purported findings of eligibility - however inapt, unfounded, or even corrupt - are beyond judicial challenge by project opponents. In the absence of argument and citation to authority, the point should be treated as forfeited. *Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal. App. 4th 379, 388 FN2.

In substance, the contention violates basic principles of the rule of law, specifically the principal of separation of powers by effectively putting decisions by City administrator's beyond the reach of judicial review.

While Petitioners accept that *the City* could not revoke or change its findings after the 90-day deadline, it does not follow that *Petitioners* as members of the affected public can validly be deprived of the opportunity to challenge the City's determinations within a reasonable time. To bar challenges *immediately* upon the expiration of the 90-day period would effectively put such determinations by City staff beyond *any* judicial review. Such *de facto* immunity from judicial oversight would inevitably invite malfeasance as staff would feel safe in the knowledge that decisions are effectively immune from judicial review.

The language of SB35 does not require the contention that a city's administrative decisions escapes judicial review in a matter of view, nor would the separation of powers doctrine under the U.S. Constitution and California law permit the legislature to place a broad class of administrative acts *entirely* beyond the scope of judicial review irrespective of the merits. Should, e.g., a decision found to have been secured through outright bribery be allowed to stand because the bribery was only discovered on day 93? California Constitution art. III section 3. *Marbury v. Madison* (1803) 5 U.S. 137 [judiciary interprets scope of constitutional powers of other branches of government].

10. Purported *Eligibility* Finding is NOT Conclusive and does NOT Preclude Substantive Design Review.

Real Party contends that the City's failure to issue a denial letter by the eligibility stage deadline (June 25, 2018) finding the Project *ineligible* for SB35's "streamlined, ministerial approval process," means that the Project was "*deemed*, as a matter of law, to comply with all the substantive requirements of the statute ..." MB 10:18 - 11:4 (underlining added, italics in original).

This overstates the legal effect of a city's default under SB35. Section 65913.4(b)(2) provides that in the event of failure by the local government to provide the required documentation (of non-compliance with statutory criteria), "the development shall be deemed to

satisfy the objective planning standards specified in subdivision (a)."[7] It is not the case that failure to document non-compliance results in deemed compliance with "all" the substantive requirements of SB35.

CONCLUSION

As shown above, § 65009 does not bar any of the claims herein, and the motion should be denied.

In the event that the Court should grant the motion, Petitioners respectfully request a reasonable opportunity to amend their petition and petition brief.

Irrespective of the Court's decision, Petitioners respectfully request the Court's leave to review and as appropriate to update and amend the petition brief and to make minor amendments to the petition within two weeks of the Court's decision. Petitioners should in fairness be given an opportunity to amend the petition brief and petition given that Real Party's *ex parte* application immediately following the filing of the present motion resulted in an extension of Real Party's and the City's time to respond by more than two months, from March 5, 2019 to May 24, 2019, relative to the previous briefing schedule.

Respectfully submitted,

DATED: March 18, 2019

Bern Steves
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[7] Emphasis added.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service I was over 18 years of age and not a party to this action. My business address is California Business Law Office, 19925 Stevens Creek Boulevard, #100, Cupertino, CA 95014.

On the date written last below, I served true copies of the following document(s) described as:

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO VALLCO PROPERTY OWNER LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

on the interested party/parties in the case of Friends of Better Cupertino, *et al.* v. City of Cupertino, *et al.*, 18CV330190 by:

__x__ electronic transmission: Based on the Court's requirement that documents must be filed and served electronically in this action, or an agreement of the parties to accept service by electronic transmission, I caused the document(s) above to be sent by transmitting an electronic version through Bender's Legal Service to the eService Recipients or persons listed in the Service List below. The document(s) were transmitted before close of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 18, 2019 in California.

Bern Steves

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