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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, GRACE SCHMIDT, and DOES 1-20, inclusive, Respondents	Case No. 18CV330190 **PETITIONERS' RESPONSE TO BRIEFS OF AMICI CURIAE** Hearing Date: November 1, 2019 Time: 9:00 a.m. Dept.: 10 **ASSIGNED FOR ALL PURPOSES TO: HON. HELEN E. WILLIAMS, DEPT. 10**
VALLCO PROPERTY OWNER LLC Real Party in Interest	

INTRODUCTION

This case involves an important issue of first impression in the interpretation of SB 35 (Government Code § 65913.4[1]). That issue is whether there is any legal recourse for members of the public after a city's staff determines that a proposed project meets the requirements for SB 35's streamlined approval process, which, in many respects, severely limits the discretion of the city council in considering the project application. It also, and importantly, limits the right of members of the public to comment upon and ask the council to address issues with the project and its environmental and other effects on the community.

The project that is the subject of this case is a massive mixed-use project consisting of 2,402 residential units and almost 2.5 million square feet of office and commercial space[2] located on the site of the former VALLCO Fashion Mall, a 50.82 acre site in the City of Cupertino ("VALLCO property"). Two amicus briefs have been submitted to the Court opposing Petitioners' action, and supporting approval of the project.

The amicus briefs take two very different tacks in opposing Petitioners' action. The brief of amicus UA Local 393 – a union of construction workers for whom the project would represent a potential source of hundreds of union construction jobs[3], argues one narrow point – that SB 35's exclusion of sites listed on the State of California's listing of hazardous waste sites under Government Code Section 65962.5 – the so-called "Cortese List." – should not have eliminated this site from consideration under SB 35.

The second amicus brief, submitted by a number of Bay Area groups with an interest in promoting commercial and/or residential development, makes a much broader policy argument. The groups argue that the Bay Area's (and California's) shortage of affordable housing is due to one simple fact – that local jurisdictions aren't building enough housing. According to the brief, the solution is simple: "[L]ocal jurisdictions must be made to approve more housing, more quickly." (Amicus Brief of Bay Area Council et al. ("BAC Amicus Br.") at p. 3:8-9.)

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[1] Unless otherwise indicated, all statutory references herein refer to the Government Code.

[2] The project also includes 10,500 parking spaces for the included uses.

[3] SB 35 requires paying "prevailing wages" – i.e., union-scale wages – in a qualifying project's construction. (§ 65913.4(a)(8)(ii).) This "deal" cemented the construction unions' support in the Legislature.

ARGUMENT

A. THE BAY AREA COUNCIL BRIEF.

The Bay Area Council amici[4] argue that SB 35 still allows municipalities considerable discretion, and hence also allows their citizens their constitutional due process rights. (*Id.* at p. 6.) Amici insist that, " … SB 35's main impact is to require cities to shorten the period during which they evaluate a project and determine its consistency with their own established objective[5] standards." (Id. at p. 6:20-22.) They assert that it allows an adequate review period of 180 days for projects larger than 150 units. Yet that same time limit applies equally to a project of 151 units and to the far more complex Cupertino project with 2,402 residential units, plus almost 2.5 million square feet of office/commercial space (which, coincidentally, is also exempted from discretionary review under SB 35).

However, that is not what is at issue in this case. What is at issue here is whether SB 35 means what it says when it sets standards that must be met before a project qualifies for the statute's streamlined review. As Petitioners have argued, the statute, as written, set standards that the Cupertino project simply didn't meet. Consequently, the City had no discretion to let the project "slip through," and when it did, Petitioners had every right to cry foul by filing this lawsuit. (See, e.g., *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90 [writ of mandate against county under C.C.P. § 1085 was appropriate remedy when county's general plan failed to satisfy mandatory standards under state law].)

1. The Legislature crafted SB35 with stringent standards to protect the public and prevent the law's abuse.

As has long been recognized, land use has traditionally been considered a matter of local concern. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) In approving SB 35, the

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[4] The Bay Area Council is not, as it name might imply, some kind of Bay Area-wide governmental body. Rather, it is "a business association in San Francisco, founded in 1945, and dedicated to economic development in the San Francisco Bay Area. (Wikipedia - https://en.wikipedia.org/wiki/Bay_Area_Council - accessed October 2, 2019.) Many of the other groups within the amici are likewise business groups that strongly favor commercial development. They include "many of the Bay Area's largest employers." Application for leave, p. 4. The resulting housing-jobs imbalance is something they would just as soon not discuss; or have the Legislature address. The remaining groups promote housing development, both affordable and market rate and have, perhaps uncomfortably, allied themselves to pass legislation promoting housing construction.

[5] Of course, by "objective" they mean specific numerical limits, like those of a building code, which eliminate any element of discretion or judgment, thus converting local legislative bodies into little more than measuring tapes and sets of boxes to be checked off.

Legislature realized it was addressing a crisis that would require temporarily restricting that local control. That is evidence from the bill's provisions, including its applicability to charter cities and counties. However, because land use is generally a local concern, SB 35 creates an exception to that rule, and as such, is to be construed narrowly. (*Otay Land Co, LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 828.) Thus, while SB 35's provisions should be construed in favor of the construction of affordable housing, such interpretation is tempered by the need to minimize the extent to which SB 35 overrides local control of land use. Viewed thus, the limitations on projects eligible for SB 35's streamlined approval process protect local control, as well as of the environment and the health and safety of future residents of the project[6], and should be construed so that the restrictions on local land use control are no broader than needed to attain the statute's goals.

In particular, SB 35 was crafted to require that at least two-thirds of the project's square footage be residential. (§ 65913.4(a)(2)(C).) This provision is intended to prevent a developer from getting a "free ride" and escaping from local control over a large commercial development proposal by tagging onto it a "fig leaf" of residential development. This limitation should therefore be construed to insist that only square footage clearly designated for residential use be counted as such. (E.g., off-street parking, even if associated with the residential portion of the project, is not a residential use.)

2. Because Real Party in Interest's Cupertino project does not meet the stringent requirements for SB 35's streamlined approval process, its processing under SB 35 was improper, even if the housing involved might be somewhat beneficial.

The starting place for construing statutory intent is the plain language of the statute:

> To determine the intent of legislation [or voter initiatives], we first consult the words themselves, giving them their usual and ordinary meaning. … … If the . . . language is unambiguous, then its plain meaning controls. (*People v. Gollardo* (2017) 17 Cal.App.5th 547, 552.)

The plain language of SB 35 lays out the restrictions on the applicability of its streamlined approval process. Those provisions are generally clear, and where they are not, the purpose of those restrictions within the overall statute should dictate their interpretation.

[6] These restrictions are especially important because SB 35's streamlined approval process bypasses environmental review under CEQA.

As already explained, the requirement that 2/3 of the project square footage be residential was intended to prevent a developer from using the bait of affordable residential units to remove a project that was more than one-third commercial/office from a city's normal discretionary land use authority. As the City points out in its Statement of Non-Opposition, not only would a project that was more than one-third commercial/office reduce the benefit from the project's provision of affordable housing, it could actually work against the project's ability to ameliorate the affordable housing shortage in the city. A commercial/office project, particularly a large one, will require more employees than are available locally. Consequently, it will bring additional employees to the city – and those employees will end up competing with existing city residents for the housing added by the project. In doing so, it will tend to counteract and indeed undo the benefit intended to be provided by SB 35's release of new affordable housing from discretionary local control.

Of course, SB 35 could have simply limited the release from local control to just the residential component of the project. However, most projects, especially large projects, are built by commercial developers, and those developers make far more profit from commercial than residential development.[7] Thus also exempting the commercial portion of a mixed-use project from local discretionary control provides an incentive for private developers to try to take advantage of SB 35.

The Legislature balanced these factors and came up with the two-thirds/one-third ratio as the maximum amount of commercial/office development it would allow for projects to take advantage of SB 35. Developers (as here) will always want to "stretch" the limits the Legislature set. However, local citizens must be allowed to police the Legislature's desired policy balance by filing suits such as this one when a city council goes too far to accommodate a commercial developer.

II UA LOCAL 393 BRIEF.

A. SB 35, as it existed at the time of the City's action on the project, disqualified a project from the streamlined approval process if it was located on a property listed on the "Cortese List" unless the Department of Toxic Substances Control had cleared the site for residential use or residential mixed uses.

[7] Indeed, that is one of the unmentioned sources of the disparity between commercial and residential development in California.

As noted, SB 35 includes a list of property attributes, any one of which will disqualify a project from the bill's streamlined approval process. (§ 65913(a)(6)(A) through (K).) While the list includes numerous disparate attributes, a common feature of many of the attributes is that they would place future residents of the project at risk for one or another undesirable impacts. The impacts include: wildfires (D), exposure to toxic materials (E), earthquakes (F), flooding (G) and (H).[8] All of the attributes listed in this subsection have in common that they would be identified in a CEQA analysis as raising the potential for a significant impact, either on the environment or on future project residents.[9]

Because SB 35, as part of its streamlined approval process, excludes CEQA review of the project, the eleven attributes identified in this subsection would not be studied, nor would mitigations be identified for potentially significant impacts. Because the Legislature remained concerned about the potential for even residential projects to cause significant harm to the environment or to people, it placed properties with any of these attributes off-limits for the SB 35's streamlined approval process.

Several of the attributes, however, included exceptions amounting to institutionalized mitigation of a potential project risk. One of these is listing on the "Cortese List,[10]" where an exception was provided if "the Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses."

B. There was no substantial evidence before the City when it approved the VALLCO property project for processing under SB 35 that it satisfied the exception under § 65913(a)(6)(E).

It is acknowledged by all parties (and the amicus) that the VALLCO property had been placed on the Cortese List because it had contained underground storage tanks that had, over time, developed leaks and contaminated the soil, and potentially groundwater, with toxic substances.

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[8] The other categories: coastal zone (A), prime farmland (B), wetlands (C), conservation areas (I), habitat for a protected species (J), or land in a conservation easement (K).

[9] The latter category of impact was explicitly removed from CEQA's purview by California *Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369. However it clearly remains a concern of legislators.

[10] That list, named for the primary author of the bill that established it, is intended to be a comprehensive list of California properties that, for one reason or another, have been found to be contaminated with toxic materials.

It is also acknowledged by all parties that a number of agencies had taken action quite a few years earlier to investigate the contamination and had required actions by the property's then-owners to abate the contamination. At issue here is the degree of abatement, and specifically whether the California Department of Toxic Substances Control ("DTSC"), the agency generally responsible to managing toxic substances and lands contaminated by such substances, had cleared the site for residential use or residential mixes uses.

At the time the leaks of toxic material occurred, and at the time of their abatement, the VALLCO property was designated in the Cupertino General Plan, zoned, and occupied by, commercial retail uses – a large regional shopping center. For DTSC and other involved agencies to close their investigations of the contamination, they needed to conclude that the abatement of the toxic contamination was sufficient to eliminate risk to the public using the site, as well as the risk of the contamination spreading beyond the site (e.g., by groundwater contamination). Under DTSC regulations (22 CCR § 67390.2), DTSC needed to grant a variance to allow the VALLCO property site to be used. In considering whether to issue a variance, DTSC was required to consider, among other things,

> (3) factors affecting the potential for exposure of any population within 2,000 feet of the wastes such as, but not limited to, containment of the wastes, accessibility of the wastes, ground water use, wells, surface water use, *existing and potential land use*, sensitive environments, and critical habitats. [emphasis added]

As noted earlier, at the time the VALLCO property had been designated and zoned exclusively for commercial retail use. The standards for that use allowed contamination to continue to exist in soil under the site, so long as it had been sequestered sufficiently to remove any risk of the contamination spreading or of the public using the site being exposed to the toxic material. That is a very different standard from the standard required for a site to be cleared for residential use or mixed residential use. For example, residential use would allow the planting of fruit trees and other plants in the soil for human consumption. Such plants could, through their roots, access the contamination, bring it to residents, and adversely affect those residents' health.

While there is evidence in the record that the site investigation had been "closed" and the site allowed to continue in retail use, there is no evidence in the record indicating that it had been cleared for any *residential* use. AR1581 - AR1582 [Geotracker Database Profile of J.C. Penney Store], AR1586 - AR1589 [Closure letter by Santa Clara Valley Water District].

[Closure letter by Santa Clara Valley Water District - "beneficial uses" do not include residential use. AR1581, AR1588.]. AR1590 - AR1609 [Sears Automotive Center.]

When a site's general plan designation and zoning are changed, it does not automatically follow that a prior investigation that was "closed" automatically remains closed. Nor is it necessarily the case, as claimed by the amicus brief, that once an investigation is "closed," the site is fully removed from the Cortese List.

Unless DTSC is convinced that the site has been fully cleared of toxic materials for all possible land uses (including agricultural, use as endangered species habitat, and other especially sensitive uses with lower contamination thresholds), DTSC issues a variance or Land Use Covenant (22 CCR § 67391.1) that allows the land to be used for *some*, but not all possible uses.

In such cases, the investigation is closed, but the property remains on the Cortese List, and full clearance and removal from the list would require reopening the investigation and, potentially, additional actions to further reduce the residual level of toxics. Consequently, City staff acted improperly and in violation the provisions of SB 35 when, in the absence of any evidence showing that the site had been cleared for residential or residential mixed use, it accepted and processed the project application under SB 35's streamlined approval process.

C. Neither SB 765 nor AB 101 apply retroactively to "bless" the City's improper application of SB 35's streamlined approval process to the project.

The union's amicus brief points to two subsequent pieces of legislation, SB 765 and AB 101, which it claims "clarified" SB 35's provisions to retroactively legalize the City's acceptance of the project under SB 35. They have no such effect.

The union's brief claims that SB765 "clarified" the objective zoning standards and design review standards for a project's review under SB 35, but those standards are not at issue here. Instead, the issue is the project's lack of compliance with the objective standards within AB 35 that determine whether a project is eligible for the streamlined approval process (including objective zoning and design review standards) set up by SB 35.

As for AB 101, that bill, adopted in 2019 as part of the budget process, claimed to "clarify" the conditions under which a property on the Cortese List could be cleared for residential or mixed residential use. The "clarification" was to expand the list of agencies that could authorize such clearance. However, there was no ambiguity in AB 35, as enacted, as to what agency was responsible for granting a clearance. That agency was clearly and

unambiguously stated to be DTSC. Consequently, AB 101 was not a clarification, but an amendment to SB 35. As such, its retroactive application, even if intended, was limited to the extent such application would be unconstitutional.

Here, Petitioners relied upon the provisions of SB 35 in their participation in the administrative process, and in instigating litigation when the City's actions violated the provisions of SB 35 as enacted. The Legislature's action in essentially applying AB 101's amendment retroactively attempted to pull the rug out from under Petitioners' actions during and after the administrative process. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244; see also, *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1137-1138; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 479 [dissenting opinion].) Retroactive application would be equivalent to changing the rules after a game was over to reverse the outcome. Such would constitute the very essence of unfairness, and therefore violate due process.

In any case, even if AB 101 were considered to apply retroactively, there was still no evidence in the record to support City staff's determination that the VALLCO property had been cleared for residential use. The exception under § 65913(a)(6)(E) was not satisfied and the City violated its mandatory duty under AB 35 by allowing the project to be processed under its streamlined approval process.

CONCLUSION

For all the above reasons, the briefs of amici curiae do not change the situation. The City's actions in approving the project under SB 35's streamlined approval process were improper, and must be reversed.

Dated: October 4, 2019

Respectfully submitted

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By:
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