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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' REPLY BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS** Hearing Date: October 4, 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	

CASES

STATUTES

OTHER AUTHORITIES

Under the guise of providing housing under SB35, Vallco Property Owner LLC ("Vallco"), an affiliate of Mr. Peter Pau dba "Sand Hill Property Company,"[1] seeks to build a massive office and luxury condominium project. According to Vallco's data, out of a total enclosed building area of 10,294,000 SF,[2] barely a fifth, 2,238,738 SF, constitutes actual residential space. FAP ¶¶ 52 - 54. AR1401.

Ignoring the strictly "ministerial" approval process provided by SB35, Vallco seeks to mix-and-match discretionary and non-discretionary approval elements, and to subordinate SB35 to the vagaries of local ordinances rather than uniform, statewide standards. For instance, Vallco insists that 3,384,000 SF of office parking and amenity space be *ignored* in computing the residential/non-residential ratio, citing a definition in a City ordinance enacted for another purpose that excludes from the local definition of "floor area" non-residential parking facilities "*accessory to a permitted conditional use*."[3]

Similarly, Vallco insists that City staff were right to, and indeed required to, make other discretionary findings, e.g. accepting building roofs as "parkland."

Vallco's project would also violate state law by building over roadway easements not vacated by the City, and elsewhere trespassing beyond the terms of an air rights easement granted by the City.

Now that the City has properly decided not to defend approvals rushed through with insufficient guidance by former City staff, the Court should order the City to deny the improperly issued Project approvals.

I. INTERVENING EVENTS

1. Late Disclosure of Documents Omitted from "Administrative Record" Set.

On June 19, 2019, Petitioners belatedly obtained a set of electronic application records from the City in response to public record requests. Review of these records showed that a "comprehensive"

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[1] PR4600. (Fictitious Business Name Statement).

[2] AR1400 (high resolution copy at PR4602), "Development Summary" and "Areas Excluded from Floor Area Calculation" (not including open spaces). Sum of residential, retail and office "gross space" and underground parking/amenity structures.
4,700,000 SF + 400,000 SF + 1,810,000 SF + 1,478,000 SF + 1,906,000 SF = 10,294,000 SF.

[3] Emphasis added. CMC 19.08.030. PR0598.

final project submittal by Vallco dated September 19, 2018[4] was not included as such in the "Administrative Record" compiled and certified as complete by the City pursuant to the Court's order.[5] Steves Declaration, ¶¶ 18 - 26. Although lower-resolution versions of many of the omitted documents subsequently became part of the "approval set" stamped by the City, some other documents from both that submittal and earlier submittals including the March 27, 2018 application were omitted entirely. The *fact* that there had been an entire new submittal on September 19, 2018 embodying substantial design changes was obscured, to Petitioners' detriment.

Documents omitted from the AR record entirely include a title report submitted on September 19, 2018 with clickable hyperlinks to underlying title records and easement records, for a total of 2,332 pages. PR2000 - PR4331. Steves Declaration, ¶¶ 27 - 32.

The omission of title records from the AR set provided by the City has resulted in considerable iniquity in the briefing process. It is extremely difficult, laborious and expensive[6] to locate and obtain a *complete* set of records from the Santa Clara Recorder's office for a site with the complexity and history of the Vallco Site. This in turn made it impractical to pursue various lines of enquiry that implicate issues of title, boundaries, easements and similar issues. All the while, a title report with a full set of more than 2,200 pages of recorded documents, neatly compiled and indexed by a professional title company, had been available to Vallco and the City. Steves Declaration ¶¶ 22 - 26, 32.

The City has since[7] filed a supplement to the Administrative Record including the September 19, 2018 cover letter as a stand-in for the full set of documents submitted by Vallco at different times, together with an agreed statement indicating that omitted documents may be used by the parties.[8]

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[4] In fact, an analysis of metadata indicates that many of the documents were not created until September 21, 2018, the day of the City's project approvals.

[5] The City and Vallco were still cooperating under a joint defense agreement. PR4614 (termination of JDA, January 17, 2018).

[6] Petitioners paid $15.00 for a certified copy of a single page.

[7] Filed on August 2, 2019.

[8] Petitioners would like to thank the current City Attorney, Heather M. Minner, for initiating and driving these arrangements.

2. Enactment of AB101

Assembly Bill 101 (AB101) was enacted on July 31, 2018 as an appropriations bill, and published in August 1, 2019. Stats. 2019, Ch. 159. Over 32 sections, AB101 makes changes to a number of statutory schemes related to high-density housing, and makes budget allocations therefor, as outlined in the preamble to AB101.

AB101 amends SB35 in two principal ways. First, it now allows additional square footage and concessions under the Density Bonus Law to be considered for purposes of SB35 eligibility. Second, whereas the statute in force in 2018 provided that hazardous waste sites listed pursuant to § 65962.5, or designated pursuant to Health and Safety Code § 25356, are ineligible unless "cleared for residential use or residential mixed uses" by the Department of Toxic Substances Control, the amended statute henceforth authorizes two other agencies to clear listed sites for SB35 purposes, viz., the State Department of Public Health and the State Water Resources Control Board.

Nothing in the statutory wording indicates that any part of the enactment is to apply retroactively to the present action filed in 2018. (See discussion, *infra*.) In the event that AB101 were found to apply to the present action, Petitioners will have been substantially prejudiced in the briefing process by having significant aspects of its case undermined by an enactment passed at the eleventh hour as a result of Vallco's lobbying efforts.[9]

In the interest of fairness, Petitioners respectfully request the Court's understanding for including certain additional matters in the present brief.

II. PRELIMINARY ISSUES

1. Statute in Force at Time of Challenged Acts and/or Filing Must be Applied. Retrospective Application of Later Statute is Improper.

Vallco cites a statutory provision - § 65913.4(c)(2) - that was not in force in 2018 when the events herein occurred, and this action was filed. Opposition Brief (OB) 53:20. The new subsection was added to SB35 by Stats. 2018, Ch. 840, Sec. 2, (SB 765) effective January 1, 2019[10] and touches on the interaction between the "ministerial" approval process under SB35 and the separate but related

[9] Vallco's supplemental brief (p. 5) declares categorically that "[t]he amendments to SB 35 take the hazardous waste site and Density Bonus issues out of the case."

[10] Similarly, but less consequentially, Vallco cites to § 65913.4(j), an apparent error for § 65913.4(i)

process for local review of subdivision maps. Similarly, Vallco cites § 65913.4(l) which also is a later amendment to SB35. OB 27.

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."[11] *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207.

Nothing in the language of Ch. 840 indicates that the amendments were intended to apply retroactively. Retroactive application of statutes raises thorny procedural and Due Process complications. Even if read to apply to the present action, the cited provision does not purport to supersede or abrogate procedures to review and approve tentative maps under statewide and local law, but merely synchronizes the timing of SB35 and subdivision map review.

2. AB101 does NOT Purport to Take Effect Retroactively.

Nothing in the statutory language of AB101 (Stats. 2019, Ch. 159) indicates a legislative intention that the statute apply retrospectively to the present lawsuit filed in 2018 in respect of events in that calendar year. Bare references to "clean-up" in *legislative committee reports* fall far short of overcoming the heavy presumption against retroactive effect. Even "the most reliable documents of legislative history ... may not have the force of law." *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal. App. 4th 786, 795. In the recent case cited by Vallco, the Senate Judiciary Committee had carefully outlined its understanding of "existing law" before specifically declaring that the purpose of the enactment there was to "*clarify* that people seeking to enforce their civil rights in good faith ... should not be deterred by [concern over attorney fee awards.]"[12] *Scott v. City of San Diego* (2019), Cal_ Court of Appeal, 4th Appellate Dist., 1st Div.

Nor can AB101 be considered a "clarification" of existing law. There is no ambiguity in the original SB35 wording at issue here that could be "clarified" by the Legislature. Further, interpretation of statutes is the province of the courts. "A legislative declaration of an existing statute's meaning is but a factor for a court to consider and 'is neither binding nor conclusive in construing the statute.' [Citation.]" *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473.

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[11] Internal quotation and citation omitted.

[12] Emphasis and ellipsis in original.

Neither of the two changes that AB101 effects to SB35 are compatible with the statutory language in force in 2018.[13] DTSC is the sole agency entrusted with "clearing" of listed hazmat sites for residential use. Similarly, the existing Density Bonus Law operated independently of SB35, and SB35 projects must satisfy the two-thirds residential square footage requirement *before* invoking additional "bonus" square footage and concessions under the statewide Density Bonus Law and its local equivalents. § 65915.

Conversely, these express statutory changes confirm Petitioners' view of SB35 in 2018: (1) square footage ratios must be ascertained *before* any density bonus or concession is considered; and (2) DTSC was the only agency with authority to clear a listed or designated hazmat site.

3. AB101 does NOT Moot Mandamus Petition.

Vallco's supplementary brief asserts in effect that the mandamus petition is mooted by the intervening statutory change. This misreads the law. It has long been established that in mandamus, "[t]he petitioner's right and the respondent's duty are measured as of the time the proceeding is filed. [Citation]." *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 732.

The action sought by Petitioners is *revocation* of the City's improper approvals issued in 2018. No intervening change in the law renders *revocation* of the earlier approvals unlawful in 2019. This contrasts with the position in *Torres* where the *execution* of a waste hauling contract had become unlawful under a new initiative. *Torres v City of Montebello* (2015) 234 Cal. App. 4th 382, 403.

4. HCD Guidelines Expressly Confirm Petitioners' Interpretations: (1) Two-Thirds Square Footage Ratio Must be Met BEFORE Density Bonus is Invoked; and (2) Department of Toxic Substances Control was Sole Agency Charged with Clearing Sites for Residential Use in 2018.

As authorized under SB35, the Department of Housing and Community Development (HCD) has issued Guidelines reflecting its view of the SB35 statute ("Guidelines").[14] PR5771. § 65913.4(i). While not bound by agency views, courts give considerable weight to an agency's interpretation of a statute "where the interpretation concerns technical and complex matters within the scope of the agency's expertise." *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62

[13] Stats. 2017, Ch. 366, Sec. 5.

[14] Vallco's opposition mentions the HCD guidelines but does not seek judicial notice of them. OB 9 FN2, OB 31.

Cal.4th 204, 236.[15]

On the issue of clearing hazardous sites for residential use, HCD's guidelines state unambiguously that a site listed or designated as a hazardous waste site is *not* eligible for SB35 approval. PR5771. As a narrow exception, "[t]his restriction does not apply to sites the *Department of Toxic Substances Control* has cleared for residential use or residential mixed uses." (Emphasis added.) HCD Guidelines (November 29, 2018), Section 401(b)(5)(A). PR5789.

With reference to the interaction between SB35 and the Density Bonus Law, the Guidelines are equally unambiguous: "Additional density, floor area, or units granted pursuant to Density Bonus Law are excluded from [the SB35 ratio] calculation." HCD Guidelines (November 29, 2018), Section 400(b)(1). PR5787.

Legislative intent having been unambiguously clarified through the statute's own mechanism, there is no leeway now to treat the incompatible 2019 enactment as merely clarifying the original statutory intent. Even assuming, *arguendo*, that AB101 could be read as indicating the meaning of the *original* SB35 statute in force in 2018, "a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. [Citation]" *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.

5. Case Specific Pronouncements Issued *ex parte* by HCD Staffer should be DISREGARDED.

Vallco seeks to adduce several pronouncements purportedly issued by a staffer of the Department of Housing and Community Development. Exhibits F, G, H, I to Real Party in Interest Vallco Property Owner LLC's Motion to Augment the Record and Request for Judicial Notice.

As argued in detail in Petitioners' accompanying opposition to that motion, these documents should be excluded from consideration by the Court. The purported rulings (referred to as "technical assistance") are NOT authorized by statute (SB35 only authorizes HCD to issue *guidelines*), were issued

[15] Section 101(b) of the Guidelines purports to provide that "[n]othing in these Guidelines may be used to invalidate or require a modification to a development approved through the Streamlined Ministerial Approval Process prior to the effective date." PR5775. However, a correct interpretation of SB35 itself is not preempted because it is also reflected in the Guidelines.

ex parte without notice to or an opportunity by Petitioners to be heard, are based on undisclosed communications, and amount to blatant usurpation of the judicial power by an administrative agency.

6. Petitioners have Standing to Seek Mandamus.

Vallco asserts - somewhat contradictorily - that a private party without a direct legal interest may not seek traditional mandamus. OB 53 FN 48. This point was already preemptively addressed in the opening brief. POB 9:6 - 10. "[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced ..."[16] *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439. See also *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165 and cases cited therein.

III. ARGUMENT

A. SB35 STATUTORY FRAMEWORK.

1. SB35 Statute Does Not Generally Preempt Other Statutory Schemes Affecting Land Use.

As noted, SB35 permits a project to proceed notwithstanding the absence of suitable residential *zoning* provided that the site has a residential or mixed use *designation* under the General Plan, but does not generally displace "objective" zoning standards. § 65913.4(a)(2)(C).

SB35 does not oust the application of other long-established statutory schemes in the land use area. For example, projects subject to the Subdivision Map Act (§ 66410) are generally *ineligible* under SB35 altogether unless the project is eligible for low-income housing tax credit or commits to "prevailing wage" terms. This is inconsistent with the implied claim that SB35 preempts subdivision map approval. Traditional property rights are also unaffected by SB35. Simply put, SB35 does not authorize Jack to build his project on Jill's land without her consent. Here, Vallco claims the right to build a *residential* feature - the "Bridge" - where the easement granted by the city confines uses to retail. Vallco obliquely acknowledged the issue. AR1020 FN2. An applicant is responsible for verifying any easements failing which a project approval may be revoked. AR0911.

[16] Internal quotation marks omitted.

SB35 does not authorize city staff to vacate existing road easements. The vacation of road easements must follow Streets and Highways Code § 8230 *et seq.* In addition, the grant or vacation by a city of property rights subject to a General Plan is subject to prior review and decision by the city council. § 65402(a). The record shows no vacation procedures.

2. SB35 Statute does Not Place City Inaction Beyond Judicial Review.

Vallco asserts that failure by a city to provide written documentation of *ineligibility* of a project within 90 days results in the project being "deemed" to comply with "objective planning standards" such that *a city* cannot reverse the deemed compliance "determination." OB 12 - 13. Vallco then claims that "deemed" compliance is conclusive *as against Petitioners*. OB 19:25 - 22:12

First, Vallco errs in referring to a "determination." The statute requires a city to issue substantiated written notification of items of *non*-compliance. *Failure* to issue such notices may result in deemed compliance. § 65913.4(b)(2). "Deemed" compliance by default does not constitute a "determination" or other action by City staff.

Second, while a *city* would may be bound by the position it takes at the 90-day deadline in *failing* to challenge grounds of non-compliance under SB35, a city's actions or inaction are not thereby placed beyond judicial challenge *at the instance of a citizen or other interested party*. A city's actions or inactions may be found to have been mistaken as to facts or the law, to have been *ultra vires* beyond the authority of the decision-maker or otherwise be vitiated by departures from proper governance standards, and may even have been procured by fraud or bribery. Nothing in SB35 evinces an intention to put *any* city action beyond review by the Court.

Third, while a statute may provide that a certain state of facts shall be "deemed" to exist, e.g. in default of a timely action by an agency, this does not mean that the triggering agency action or inaction is beyond the scope of judicial review and remedy. Indeed, judicial review of administrative action usually involves court orders to undo or correct administrative action or inaction undone with retroactive effect. Once the administrative action has been corrected, the predicate for the "deeming" provision is no longer in existence as a matter of law. *O'Dell, infra*, is illustrative. A city had failed to act timely to extend a police recruit's probationary period before it ended, thus effectively activating civil service status. The court held that while the city *should* have notified the recruit of the proposed

extension before the end of the original probationary period, the city would be given a belated opportunity to notify the recruit retroactively that his probation was being extended (thus deferring full employee status). *O'Dell v. City of San Diego* (1989) 207 Cal. App. 3d 882, 885 - 887. See also *Moore v. Superior Court of California* (1912) 20 Cal. App. 299 [trial court instructed to hear election contest case notwithstanding expiration of statutory period to hold hearing].

Lastly, if a city's failure to act were proven to have been procured e.g. through misrepresentation, fraud or bribery, equity would not permit a technical limitations defense to stand in the way of substantive justice. *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192.

3. SB35 Creates Two-Phase Approval Process. City Treated June 22, 2018 "Streamlining" as Provisional Eligibility Determination Subject to Later Verification.

As the Court noted in its Order Denying Motion for Judgment on the Pleadings,[17] SB35 "allows review to be completed in two stages and does not provide that a city may render only one decision to approve or deny a project application." The City's "streamlining" letter dated June 22, 2018 expressly required the applicant to provide information during the 90 - 180 day review phase to "provide additional information to assure compliance with "applicable objective development [*sic*] standards and their implementation." AR0894.

B. CITY'S NON-OPPOSITION NEGATES PRESUMPTION OF REGULARITY OF MINISTERIAL DECISIONS.

By filing a notice of non-opposition, the City has expressed its position that it does NOT defend the correctness of the City staff's decisions relating to Vallco's application challenged herein.

Petitioners accept that at the time of the City's statement, more than 180 days had elapsed from the effective application date however calculated. Under SB35, the City's actions and approvals are now beyond *the City's* power to revoke or revise. The City's action in opting not to oppose the petition is thus the *only* practicable option for the City to express its disapproval of misguided actions by former staff.

The City having spoken through its elected representatives,[18] no presumption in favor of the

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[17] P. 11:22.

[18] The former City Council took no action to review or approve the SB35 application.

regularity of the city's actions can apply. If anything, the Court should give due consideration to the City Council's own critical view of actions by staff acting under great pressure and dealing with a new and untested statewide statute.

Vallco cites *Anderson* for its assertion that the actions by City staff in relation to the SB35 application are entitled to deference. *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192 - 1193. The claim goes amiss in fact and in law. In *Anderson* (*id.* 1173) a *city council* found a project consistent with the city's own general plan. In such situations, courts "accord great deference to the authoring agency's determination [] for consistency with its *own* general plan." *Id.*, 1192. By contrast, ministerial actions by city staff are subject to non-deferential review. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 64 [Deferential review of ministerial actions is not appropriate.]

C. PROJECT FALLS FAR SHORT OF MEETING TWO-THIRDS RESIDENTIAL SQUARE FOOTAGE RATIO.

(References: POB 12 - 23. FAP ¶ 48 - 52. FAP ¶ 54. OB 23:14 *et seq.* AR4602.)

The Vallco Project effectively seeks to leverage an *inapplicable* provision within the Cupertino Municipal Code (CMC) to camouflage a massive office and luxury condo project as affordable housing.

1. SB35 Statutory Scheme Requires that Consistent, Statewide Standards be Applied to Calculate Floor Ratio.

To function as a statewide regime to foster housing development, SB35's two-thirds threshold for residential square footage must be ascertained by reference to uniform, statewide standards. The obvious and indeed only practicable statewide reference standard is the California Building Code, specifically, the definitions of "Floor Area, Gross" and "Floor Area, Net." PR5036. Whichever approach is properly applied, Vallco's project falls far short of meeting the statutory two-thirds ratio. Cupertino has adopted the CBC for certain purposes. CMC 16.02.040.

Petitioners have noted that to allow each city to write and apply its own definition of "square footage" for calculating residential and non-residential floor area under SB35 is an open invitation to local game-playing and defeats the basic rationale of statewide regulation. POB 14:21 - 15:1. Conversely, mixing historical local rules adopted by a local legislature to assess floor area for disparate use types and situations would typically result in meaningless "ratios" that compare lychees to longans.

2. Residential Square Footage Fell Short of Two-Thirds Ratio on June 19, 2018.

Vallco's amendments on June 19, 2018 (just before the June "streamlining") claim an SF ratio of 66.8%. AR0934. To reach that figure, Vallco "double-counted" 64,804 SF[19] of residential parking space on Level 7, Block 3, a critical value to reach the two-thirds residential threshold on the basis that the level was over 15' in height. AR0938, AR0934 (totals). However, in Vallco's actual design, the *higher* portion of the level in question[20] was less than 14'2" in height at the time. AR1448 (Section 4, Block 3 and Section 3, Block 3), AR1449 (Section 1, Block 3), PR4932, PR4934 (excerpts). In effect, Vallco's letter was merely a *promise* to amend its non-compliant design in future.

3. Vallco Improperly Omits 3,384,000 SF of Underground Office Parking from Ratio Calculation.

SB35 aims principally to facilitate the provision of "housing." See, e.g. § 65913.4(a)(4)(A) and (B) . SB35 de-emphasizes the provision of parking space by providing that parking standards may NOT be imposed, e.g. if a project is located within half a mile of public transit. § 65913.4(d)(1)(A).

Counting acres of parking as "residential" space for purposes of the ratio would make a mockery of the SB35 scheme. "[T]he court may consider the impact of an interpretation on public policy, for '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.' [Citation]" *Mejia v. Reed* (2003) 31 Cal.4th 657, 663.

Vallco's application relies on an *inapplicable* exception in Cupertino's pre-existing CMC rules to make **3,384,000 SF of underground parking** for office and retail use disappear from the ratio calculation, while insisting that *residential* parking be counted, citing a definition in Cupertino Municipal Code CMC 19.08.030 enacted long before SB35. PR0598. AR1400 (initial "data sheet," blurred), PR4602 (better copy secured by Petitioners). AR0891 - AR0892 (excerpt from CMC in "streamlining" letter), AR0025 ("Development Summary" and "Areas Excluded from Floor Area Calculation").

The cited provision is inapplicable to the Project, being a specific *exception* to the regular rule requiring underground parking to be counted. Nothing entitles Vallco to claim this exception. CMC

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[19] The double-counted total was slightly adjusted later, to 65,411 SF. AR0649 (August 6, 2018), AR0030 (September 15, 2018).

[20] It appears that the reference to Level 7 is a simple mistake for Level 8. Floor height throughout Level 7 is less than 9'10". AR1448, AR1449, PR4932, PR4932, PR4936.

19.08.030 (PR0958) defines the term "floor area" as follows:

> "Floor area" shall not include the following: ...
> 4. Parking facilities, other than residential garages, **accessory to a permitted conditional use** and located on the same site. (Emphasis added)

A "conditional use" is "allowable solely on a discretionary and conditional basis, subject to issuance of a conditional use permit, and [subject] to all other regulations in [Title 19 - Zoning]." CMC 19.08.30. PR0610.

A CUP application for a large project would need to be heard by the Planning Commission and approved by the City Council. CMC 19.12.030. There is no indication in the record that any such permit was sought or considered. Indeed, to qualify for SB35 approval, projects must NOT be "subject to a conditional use permit." § 65913.4(a).

4. Threshold Decision to Apply CMC Definition rather than California Building Code is *Discretionary* and beyond the Scope of "Ministerial" Decision Permitted under SB35.

The *threshold* decision of (purportedly) following the CMC definition of "floor area" rather than the California Building Code definition of "Floor Area, Gross" results in a dramatically different outcome: 3,384,000 SF disappear from the non-residential total, and the project becomes (barely) compliant. The record does not indicate that City staff sought guidance as to which set of definitions should be used to assess the residential floor area *ratio* under SB35.

Vallco seeks to adduce an opinion by an HCD staffer stating that a city *may* apply its own local rules. HCD has no experience with the application of *local* definitions of "floor area" for residential and non-residential uses in different scenarios, and will hardly be able to assess whether these are compatible with the principles and policies of SB35. Further, if a city has the option to apply its local definition or statewide standards, the choice of *which* to apply is necessarily *discretionary* and not guided by readily ascertainable, objective standards. Such a decision would be inconsistent with SB35 requirement of non-discretionary, "ministerial" decision-making by reference to readily ascertainable rules.

5. Vallco Failed to "Double-Count" 1,198,904 SF of Office Space.

In the final building sections, Vallco failed to double-count office floors as required under CMC rules where the floor height exceeds 15' by reference to the building shell. This affects the 2nd, 3rd ,

and 4th floors each of Block 6 (AR0156, section 1, 2, and 3), Block 7 (AR0157, section 1, 2, and 3) and Block 8 (AR0158, section 1, 2, and 3), shown as level 03,05, and 07 on AR 0031/AR0032. In Block 11, the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th floors were not double-counted, also shown as levels 03, 05, 07, 09, 011, 012, and 014 on AR 0032. The correct office square footage amounts to 3,180,351 SF whereas Vallco's approved plan set declared only 1,981,447 SF. The underdeclared office total is 1,198,904 SF, resulting in a residential ratio of 65.9%.

6. SB35 Ratio Calculation Requires Consistency - Gross/Gross or Net/Net.

To make sense of SB35's mandate that two-thirds of a project's square footage must be dedicated to residential use, the square footage values for residential and non-residential uses must be computed consistently, either comparing *gross/gross* values including respective parking and amenity areas, or *net/net* excluding those areas.

Gross calculations are set out at POB 21:11 - POB 23:10. Even if a reduced retail area of 400,000 SF rather than 600,000 SF is assumed, the gross-gross ratio comes out as 45.66%. POB 23:1-9 (substituting 5,594,000 SF for the non-residential total, and 10,294,000 for the total area yields ratio of 45.66%). This is consistent with Section 400(b), of the HCD Guidelines which expressly refers to the "proportion of gross square footage of residential space and related facilities as defined ... to gross development building square footage for an unrelated use such as commercial." *Id*. PR5787.

7. Net/Net Square Footage Ratio Still Falls Short at 59.63% even if Vallco's "Post-Bonus" Retail Area of 400,000 SF is Substituted.

Petitioners have shown that when the square footage ratio is calculated on a *net-net* basis (i.e. *excluding* parking), the resultant ratio comes to only 57.53% based on Vallco's own June 1, 2018 square footage figures which do not reflect "double-counting" of floor space above 15' in height. AR1024. POB 20:11 - 20.

Again, Vallco complains (OB 35:1 - 3) that this calculation is improper because Petitioners employed the "pre-bonus" figure of 600,000 SF for retail space whereas Vallco was entitled to a bonus concession reducing retail space to 400,000 SF.

While the HCD Guidelines[21] direct that square footage ratios be assessed *before* applying any bonus concessions, even inserting the *post-bonus* figure of 400,000 SF results in a ratio of 59.63%, still far short of the two-thirds ratio required by SB35. In fact, that precise calculation is set out in the FAP, p. 11, ¶¶ 49 - 51.

8. Gross/Gross Calculation Yields Square Footage Ratio of 45.66% even if Vallco's "Post-Bonus" Retail Area of 400,000 SF is Substituted.

Petitioners' calculation of the *gross/gross* square footage ratio (including parking area associated with residential and non-residential use) is set out at POB 21:11 - 23:10. Vallco expressly confirms that Petitioners used the correct figures for non-residential parking space. OB 35:4 - 5.

Substituting the reduced retail area value of 400,000 SF instead of the "pre-bonus" value of 600,000 SF, and assuming a residential total of 4,700,000 SF including amenities and parking (AR1024) yields the following:

Description	Area (in SF)	Remarks
Residential Total (including amenities and parking	4,700,000 SF	AR1024
Non-Residential Total (including parking)	5,594,000 SF	1,810,000 SF (non-res.) + 400,000 SF = 2,210,000 SF + 3,384,000 SF (non-res parking etc.)
Total Use Area (residential and non-residential)	**10,294,000 SF**	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	**45.66%**	4,700,000 SF/10,294,000 SF = 45.66%

Again, this is precisely the calculation set out in the FAP. FAP p. 15, ¶ 59.

9. Square footage ratio must be satisfied BEFORE density bonus is invoked.

As Petitioners have consistently argued, and HCD's Guidelines agree, the square footage ratio requirement under SB35 must be satisfied *before* any density bonus etc. is invoked. POB 14:11 - 20, HCD Guidelines Section 400(b) PR5787. This interpretation is eminently sensible in light of the policy objective of SB35 to aid the creation of housing, including affordable housing, and of statewide and local density bonus legislation to grant *further* density bonuses to developers that provide affordable housing.

[21] Guidelines, Section 400(b)(1). PR5787.

Vallco claimed a density bonus of 623 units. AR1401 ("Density Bonus Summary"). At a minimum unit size of 388 SF, the total bonus comes to 241,724 SF. Without the density bonus, the Project falls far below the two-thirds minimum.

10. Vallco's Square Footage Ratio Falls Short Unless the Bridge Area is Counted as "Residential."

Vallco's final calculation of square footage that became part of the City's purported approval is set out in AR0025 and AR0030 - AR0032 and includes "double-counting."

Residential	4,961,904	66.8%
Retail/Entertainment	485,912	6.5%
Office	1,981,447	26.7%
TOTAL	7,429,263	

The calculation includes the "Bridge" area, a two-story elevated walkway over N Wolfe Road. Vallco's use of this space is subject to an easement that by its express terms confines Vallco to *retail uses*. PR4484 - PR4485. The land itself, not being in an area with a residential or mixed GP designation, is not subject to the SB35 statute and thus not subject to the statute's override of non-residential zoning.

The Bridge accounts for a total of 78,326 SF (with double-counting, AR0942) , all of which Vallco allocates to the "residential" portion. AR0934, AR0942. AR0025 ("Development Summary"), AR0031 (SF per block and use type), PR4620. Correcting the figure for residential square footage by subtracting 78,326 for the Bridge area, and adding the same amount to Retail (the *only* permitted use for the Bridge space), results in a residential ratio of only 65.7%:

Residential	4,883,578	65.7%	Cf. AR0025, AR0030 - AR0032. 78,326 SF *deducted* (Bridge SF)
Retail/Entertainment	564,238	7.6%	Cf. AR0025, AR0030 - AR0032 78,326 SF *added* (Bridge SF)
Office	1,981,447	26.7%	(unchanged)
TOTAL	7,429,263	100.0%	

The shortfall of about 1.0% amounts to 74,293 SF, equivalent to 191 studio apartment of 388 SF.

AR0174.

However, claiming the Bridge space as "residential" square footage is improper, for several reasons.

11. "Bridge" Walkway Area over N Wolfe Road is on Land NOT Owned by Vallco. Easement Granted by City is Specifically Restricted to Retail Uses. Vallco's Proposed Uses Cannot be Counted toward Residential Square Footage.

Vallco's ratio calculation depends on inclusion of the square footage of the "Bridge" over N Wolfe Road. OB31. However, Vallco does not own the land over which the new Bridge[22] is to be built and cannot assert any development rights under SB35. Vallco's rights flow solely from an *easement* granted by the City to Vallco's predecessor permitting building above the public road owned by the City of Cupertino. AR0709, AR0830, AR1483 [showing "Existing Offsite Rights." "Bridge" over N Wolfe Rd. appears shaded yellow at center of drawing with call-out showing construction details.] PR4480 (air rights easement). Vallco's use of the bridge structure is limited to "Retail Uses" enumerated in the easement grant. PR4484. PR4494 (associated third amendment to development agreement).

The enumeration of specific "Retail Uses" and the general context of the development agreement evinces a mutual intention to restrict the area to traditional commercial uses likely to produce substantial tax revenues for the City. The residual types of retail uses defined in items 11 ("Other uses which, in the opinion of the City's Planning Commission, are consistent with the character of a General Commercial (CG) Zone ...") and 12 ("Any retail or commercial uses which are located ... in regional shopping centers, *the operation of which generates sales tax revenue or similar or equivalent type revenue*"[23]) evince the City's intention, accepted by Vallco's predecessors, that use must be for tax-generating *retail* purposes.

A yoga or Pilates studio with access restricted to high-end residential tenants (AR1019) would most almost certainly be a loss leader in business terms. Neither the business model (likely subsidized by Vallco or a POA), nor the exclusion of the general public from the premises, were within the contemplation of the parties to the recorded development agreement (as amended) that *circumscribes*

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[22] The currently existing structure already includes a bridge/walkway over N Wolfe Road.
[23] Emphasis added.

the scope of the N Wolfe Road air easement. Item 3 of the list (PR4484 - PR4485) specifically *restricts* establishments open only to members rather than the general public:

> 3. Lodges and restricted membership clubs *as subordinate uses in buildings intended primarily for uses specified on this Exhibit E*. (Emphasis added)

The City's intention was clearly to confine membership-type clubs to "subordinate" uses in *buildings generally dedicated to retail*. This rules out the institution of yoga studios etc. accessible only to well-heeled residential tenants.

Under the development agreement itself, uses other than listed "Retail Uses" *but within the* "Vested Elements" are "subject to a separate use permit application." PR4446. "Vested Elements" are based on the General Plan and zoning in force at the time of the Development Agreement, August 15, 1991 neither of which included residential or mixed use. PR4421. There is no record of Vallco filing any "separate use permit application" with the City.

The grant or alteration of easements over or in favor of City land is a discretionary decision and as such is *ultra vires* of City staff, and alteration appears in the record. SB35 itself does not purport to preempt a city's right to control its own land, including through easements created over or in favor of city land.

Further, Vallco is not entitled to implement *any* residential uses above N Wolfe Road. While the General Plan amendment in 2015 sets forth a vaguely worded mixed use designation for the "Vallco Shopping District" segments West and East of Wolfe, the road itself - a public road owned by the City - was NOT designated for mixed use when the General Plan was amended in 2015. PR0704. Lacking such a General Plan *designation*, N Wolfe Road is not subject SB35's provision permitting residential or mixed use projects to proceed based on a mere General Plan *designation* for residential or mixed use even if the designation has not been implemented by *zoning*. § 65913.4(a)(2)(C) . Even if such a mixed use designation had been in place, the benefit would accrue to the City as fee owner. Vallco's interest in the land remains circumscribed by the terms of the recorded easement.

The General Plan amendments adopted by the City Council by resolution on October 20, 2015 included a substantially revised "LU-1" diagram as a one-stop indication of area attributes. PR0637. The "Vallco Shopping District" is shown in the diagram as bisected by N Wolfe Road. Consonant

with this, the color-coded attribute box in the bottom left corner comprises separate columns setting forth "Maximum Residential Density" and "Maximum Height" parameters for the portions "West of Wolfe Road" and "East of Wolfe Road," respectively. The more detailed schematic diagram of the Vallco Shopping District equally shows the area as consisting of separate West and East segments bisected by N Wolfe Road. PR0657 (diagram of Vallco Shopping District). PR0704 (superseded 2014 version of diagram).

D. PROJECT EXCEEDS ZONED HEIGHT.

(References: POB 23 - 28. OB 43 - 46, FAP ¶¶ 83 - 87. AR0828.)

The City Manager's June 22, 2018 streamlining letter flatly acknowledges that the Project reaches building heights of 249'7" and acknowledges the existence of an unidentified "zoning designation" but claims without elaboration that the zoning designation for the project site is "inconsistent with the General Plan land use designation." AR0893 - AR0894. This claim is incorrect in substance, and is beyond the scope of ministerial decision-making authorized under SB35.

As Petitioners have noted (OB 25), parts of the site are zoned P(CG) and subject to a 30 feet building height limit under CMC 19.60.060. PR0632. The remainder of the site is zoned P(Regional Shopping). The Draft Environmental Impact Report circulated by the City in May 2018 and adopted by the City Council on September 19, 2018 notes that part of the site is zoned P(CG), with the remainder zoned P(Regional Shopping) with a maximum building height of 85 feet. PR0026. PR6528, PR6530.

1. Objective General Plan Standards are not Inconsistent with Objective Zoning Standards.

The purported finding of "inconsistency" misinterprets SB35.

As noted, SB35 does not generally supersede zoning law. § 65913.4(a)(5). *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, 622 FN3 [City is required to comply with zoning requirements for SB35 projects].

Vallco does not address Petitioners' point (OB 26 - 28) that there is no *necessary* inconsistency between the General Plan without building height restrictions and a zoning ordinance that limits *building height*. SB35 by its terms pre-empts zoning only to the extent that express *zoning* for

residential use is not required provided the project site has been *designated* for residential or mixed-residential use under the General Plan. § 65913.4(a)(2)(C). Apart from this highly specific override of local zoning regulation, SB35 expressly provides for review for consistency with "objective zoning standards." § 65913.4(a)(5).

Section 65913.4(a)(5)(B) speaks to situations where *objective* zoning standards and *objective* general plan standards are mutually inconsistent. Policies and "visions" in a General Plan or zoning ordinance cannot form the basis of a ministerial finding of inconsistency.

A General Plan generally sets a framework within which detailed zoning regulations and Specific Plans may be enacted to implement GP policies. Operating at a higher level of abstraction, General Plan provisions will rarely be identical with local zoning. Exceptionally, a numerical discrepancy susceptible to ministerial determination could arise, e.g. where a new General Plan sets maximum building height at 45 feet while an older zoning ordinance still permits 60 feet. There is no necessary contradiction between a General Plan without specific height limitations, and a zoning ordinance that does set height limitations.

The City adopted its current General Plan on December 4, 2014, and certain amendments thereto on October 20, 2015. PR0681 - PR1211, PR0638 - PR0680. The General Plan "envisions" the Vallco Shopping District as "a new mixed-use 'town center" and gateway for Cupertino." PR0704. Such visions are by their nature highly subjective and do not constitute "objective" general plan standards susceptible of ministerial ascertainment. Height limitations are left to a future Specific Plan. POB 24, PR0637 [Maximum height "Per Specific Plan."]

Nothing in the General Plan purports to set aside existing zoning. Indeed, in connection with the adoption of the 2014 General Plan, the City council requested that staff review existing zoning ordinances and propose amendments for consistency with the General Plan. As a result of this review, a package of zoning amendments was adopted in reliance on the same CEQA process, but existing height limits were left in place. Ordinance 14-2125 PR6390.

The General Plan itself *acknowledges* that height limitations would continue to apply by deferring to a future Specific Plan on this issue. PR0637. In fact, on September 19, 2018, two days before the project approvals herein, the City Council did adopt a Specific Plan for the Vallco area with

height restrictions of between 45' to a maximum of 150', thus confirming that those height limits are consistent with the General Plan. PR6665.[24] PR6528 (reciting adoption of SP). As Vallco concedes, the interpretation *by a city council* of its own General Plan was held entitled to "great deference." *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305.

2. Transition to P(CG) Zoning did not Effect Substantive Change. CG Height Standard of 30 Feet was Unaffected by Transition to P(CG) Zoning.

The P(CG) classification was enacted through Ordinance No. 11-2085 as part of a general clean-up of zoning regulations mainly to "improve[] readability and consistency with other City ordinances." PR6002. The P(__) classifications were later amended as part of a bundle of amendments in conjunction with the adoption of the new General Plan in 2014. Ordinance No. 14-2125. PR6390. Chapter 19.80 was added to the CMC to provide for the establishment of "Planned Development (P) Zones" to facilitate "planned coordination ... and greater flexibility" of land uses." CMC 19.80.010 A. PR5955.

In substance, the new P( ) classifications follow the permitted and conditional uses of the original classification, thus P(CG) uses are the same as the traditional CG uses. CMC 19.80.030B - D PR5956.

Nothing in CMC Chapter 19.80 indicates that existing building heights are superseded. In fact, an application for a P zoning district requires as a prerequisite a finding that the accompanying conceptual development plan "is consistent with ... any underlying zoning designation which regulates the site." CMC 19.80.040C1. PR5957.

3. P(CG) and P(Regional Shopping) Zoning Classifications are Subject to Discretionary Approvals.

The P(__) zoning scheme specifically requires a zoning application and the adoption of a responsive zoning ordinance. Neither are permissible within the scope of the SB35 ministerial approval procedure. Thus, the pre-existing "objective" standards including the 30-feet building height restriction under the former CG zoning apply. CMC 19.80.050. PR5957.

[24] The Specific Plan was later reversed by referendum.

Procedures for changing zoning regulations are set forth in CMC 19.152.030 and require consideration by the City Council and the Planning Commission leading to the adoption of a zoning ordinance.

E. PROJECT FAILS TO DEDICATE PARKLAND OR PAY FEE.

Vallco pursued its project on the basis that the project roof space would be accepted as "parkland," and specifically referenced the General Plan as requiring the project to provide 12.96 acres of "park space." AR1098. AR1141.

Vallco claims that the City has in fact accepted Vallco's roof space as parkland but cites no reference in the record to that effect. OB 48:1, OB 49:11. In fact, the City seemed to keep open the possibility that fees would be charged in lieu. AR0925. For its part, Vallco has consistently taken the position that its roof space qualifies as "parkland." Vallco's post-approval fee protest letter expresses confidence that "the Project will be determined to contain sufficient (if not an excess of) dedicated parkland that no fee will be required." PR4611.

A decision to accept roof space as parkland under the General Plan *policies* would be inherently discretionary (OB 48:4 - 11) and would be beyond the scope of ministerial decision-making. As noted *supra*, ministerial decisions do not represent the policy view of the City council and thus are *not* entitled to special deference as would be a decision by a city council pertaining to its General Plan.

As Vallco notes, parkland dedication is also required both under GP policies and under more detailed CMC 13.08.050 and CMC 13.08.060. PR0514 - PR0515. If a City determines that park facilities are required on-site, "land sufficient in topography and size" must be dedicated by the applicant. Otherwise, in-lieu fees are to be levied. The decision *whether or not to require* on-site facilities is discretionary. SB35's insistence on "objective" planning standards is satisfied by requiring in lieu fees for all SB35 projects using the CMC formulas.

F. PROJECT IS LOCATED ON INELIGIBLE HAZMAT SITE.

The Vallco site was at all relevant times listed as a hazmat site pursuant to § 65962.5. PR0004. This was the finding of the DEIR circulated by the City in May 2018 and adopted by the City Council on September 19, 2018.

It is undisputed that the Site was the subject of multiple entries on the "Geotracker" system.

AR1590 - AR1594. SB35's rule for such sites is simple: a listed or designated site is ineligible for streamlining "unless the Department of Toxic Substances Control has *cleared the site for residential use or residential mixed uses*." § 65913.4(6)(E). (Emphasis added.) A city staffer reviewing the application ministerially must check two items: (1) Are there are any database entries for the site? (2) If yes, has DTSC "cleared" the site *for residential use*? This is the sole pathway to eligibility under SB35. Various systems for listing environmental hazard sites have been in operation for many decades reflecting the fact that toxic substances remain in the soil and do not simply vanish.

Vallco's argument confuses agency decisions to discontinue further *investigations* and mitigation measures of hazmat locations with agency action that would expressly and positively *clear* an affected site for residential use under SB35. § 65913.4(a)(6)(E). As a further alternative, Vallco presents a site investigation report commissioned by itself that purports to show that listed environmental hazards no longer exist. This is not pertinent. City staff acting in a ministerial capacity may not go behind an existing site listing maintained by statewide agencies. The only path out of hazmat limbo is through DTSC. Equally, a subsequent change of CalEPA's listing policy, apparently at the instance of Vallco, to delete certain listings does not alter the fact that the site was listed in 2018. The Legislature is deemed to have been familiar with administrative practices at the time of a new enactment.

G. PROJECT IS INCONSISTENT WITH EXISTING ROADWAY EASEMENTS.

(References: FAP ¶ 77 and OP Exhibit 5, pp. 30 - 32, 44, 47; FAP ¶ 78 and OP Exhibit 6, p. 18; FAP ¶ 79 and OP Exhibit 7, p. 87 - 94. AR0831, AR0830, AR1401, AR1422.)

Vallco's application admits (AR1401)[25] in small print that the Project is incompatible with existing road easements and other easements, and that to effect the "vacation, relocation and re-dedication" of roadway easements, the City would need to determine that to do so would be "in the public interest," i.e. that it requires *discretionary* decision-making by the City Council outside SB35. AR1401 (General Notes, 7), AR0196. Vallco actually submitted two alternative plans with different building configurations, but did not pursue these alternatives. AR1407, AR1486.

Nothing in SB35 purports to preempt the dedication or vacation of road or public service

[25] Petitioners note that later versions of the P-0102 overview document omit these general notes. AR0774, AR0648, AR0401, AR0026.

easements. Such preemption would raise complicated issues in the area of property rights and public taking.

The Vallco site is subject to two road easements at the Northern end, West and East of N Wolfe Road, respectively 42' and 55' in width. AR0831. These road easements were originally created through dedication and acceptance in 1975. PR3879 - PR3888.

The record does not indicate any vacation or adjustment of these roadway easements, yet Vallco's street level building plan has buildings covering the location of the road easements. AR1422.

The Public Streets, Highways, and Service Easements Vacation Law (Streets and Highways Code § 8300 *et seq*.,) prescribes specific procedures to vacate street/highway easements and other "public service easements" as defined therein. SHC §§ 8306, 8308, Streets and Highways Code § 8309 (definitions). The general vacation procedure requires public notice and a proceeding before the city council. Streets and Highways Code, §§ 8320 - 8325. The alternative summary procedures under §§ 8330 - 8336 available in certain circumstances requires a resolution by the city council or action by an expressly delegated officer. No such vacation or relocation appears in the record.

H. PETITION IS NOT BARRED BY STATUTE OF LIMITATIONS UNDER § 65009(C)(1).

Petitioners respectfully submit the following arguments to supplement their earlier argument in opposition to Vallco's motion for judgment on the pleadings (MJOP) and to create a record.

Vallco claims that the petition is barred by the statute of limitations under Gov. Code § 65009. Vallco lacks standing to assert this affirmative defense on behalf of the City which has elected not to pursue it. The claim is also mistaken on the law and on the facts, for several reasons.

As an initial point, the language of § 65009 and decisions interpreting the statute show that the statute was conceived and repeatedly amended to govern discretionary, express decisions by local governments, principally a "legislative body's decision." The statute was extended to certain *enumerated* types of decisions ("matters") by inferior tribunals *specifically authorized by local ordinance* to act in those "matters." Ministerial decision-making is outside the contemplation of § 65009 which was enacted long before SB35.[26] In time, the Legislature may enact a statute of

[26] Section 65009 in the version in force in June 2018 had most recently been amended by Stats. 2013 Ch 767 § 2 (AB 325).

limitations geared to SB35, but no such statute exists at present.

A party asserting the statute of limitations as a defense has the burden of proving every element of the statute. *People ex. rel. Brown* (2007) 149 Cal.App.4th 422, 432. Here, Vallco's brief fails to state and prove full particulars of this asserted defense.

1. Vallco Lacks Standing to Assert Statute of Limitations on Behalf of City.

In California, a statute of limitations is an affirmative defense that must be raised by the defendant. *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191. The City has opted NOT to pursue a challenge on this basis, and Vallco lacks standing to do so.

Vallco as "real party in interest" herein has a right to notice and to be heard. *Sonoma County Nuclear Free Zone '86 v Superior Court* (1987) 189 Cal.App.3d 167, 173.

Vallco cites no authority for the proposition that it is authorized to assert an affirmative defense on behalf of the City that the City has chosen not to pursue. In one decision discussing § 65009(c)(1)(E), the court specifically recited that "[t]he City joined in PG&E's demurrer." *Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 154.

The stated purpose of § 65009 is to "provide certainty for property owners *and local governments* regarding decisions made pursuant to this division."[27] § 65009(a)(3). The statute recognizes that local governments have interests in certainty that are distinct from those of property owners. Here, as noted *infra*, the City had a reasonable interest in continuing its review of the application without having to deal with a judicial challenge.

2. SB35 Deadlines were Waived when Vallco Amended and Re-Submitted Project. City Continued Review of "Objective Planning Standard" Compliance after July 31, 2018.

SB35 provides for 90-day and 180-day deadlines from the date of complete submission for a city to respond. As courts have recognized, such deadlines can pose a dilemma for an applicant whose project application is found to contain "substantial but curable defects." An applicant's own interests may be best served by waiving the strict statutory deadline rather than risk early denial of the application. *Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1052.

[27] Emphasis added.

Vallco's March 27, 2018 application was devoid of any verifiable material on the issue of the square footage ratios, such as square footage values broken down by block, by floor and by use category and related diagrams. Such data was not provided until June 1, 2018 and corrected on June 19, 2018. AR1019 - AR1036. AR0934. Full-size drawings were not submitted until August 17, 2018. AR0618, AR0646 - AR0651. Without verifiable/falsifiable substantiation of this crucial aspect, the original submittal of documents (ostensibly on March 27, 2018) simply cannot be treated as a complete "application for a development" under § 65913.4(a) such as to trigger the statutory deadlines.

On June 19, 2018, Vallco had apparently only just discovered - likely from Petitioners' submissions to the City[28] - that it had failed to consider the need to "double-count" floor areas above 15 feet in height under the CMC definition of "floor height."[29] AR0928, AR0934 (second table). At that point, rather than stand on the finality of its March 27, 2018 submittal, Vallco submitted an amended project application dated June 19, 2018 with additional documentation inconsistent from the March 27, 2018 application, thus waiving the statutory deadlines. *Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal. App. 4th 195, 206- 207 [statutory deadlines may be waived by developer]. *Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1052. [Developer benefits from waiving statutory deadline.]

The City itself requested additional information in its June 22, 2018 letter which Vallco supplied in later submittals on or after July 31, 2018. AR0864. Only thereafter was the City able "to determine that the proposed project, *as it relates to objective planning standards*, could be properly implemented." AR0006 (emphasis added). In other words, the City, with Vallco's concurrence, continued its review of compliance with objective planning standards after July 31, 2018. Similarly, the City's June 22, 2018 letter announced that it would thereafter "review the project for compliance with Municipal Code Chapter 13.08, Parkland Dedication." AR0910. Further, the City's September 21, 2018 approval letter defines all submittals up to and including September 15, 2019 (actually submitted under cover letter dated September 19, 2018) as the "Project Application."

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[28] Original petition, Exhibit 5, p. 7 (analysis delivered to City by Petitioners on June 19, 2018 including references to CMC definition of "floor area.")

[29] CMC 19.08.030 defines "floor area" such that floors above 15' in height (20' for "first floor") to be double-counted. PR0598.

AR0003.

3. Action did not Accrue at 90-Day Stage.

The unnumbered portion of § 65009(c)(1) sets forth the basic statutory scheme: enumerated challenges must be brought "*within 90 days after the legislative body's decision*."[30] *Travis v. County of Santa Cruz* (2004) 33 Cal. 4th 757, 762 [Action timely brought under § 65009(c)(1)(E) within 90 days of *final decision imposing conditions*.] "The 90-day time limit begins to run from the date the substantive 'decision' is made."[31] This comports with common sense since preliminary steps are often less well documented and will often not be published when made.

Section 65009(c)(1)(E) "applies to actions seeking review of permit conditions." *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1325. "The limitations period for challenging the application of a land use regulation to a specific piece of property runs from date of the final adjudicatory administrative decision." *Id.* citing *Hensler v. City of Glendale* (1994) 8 Cal.4th 1. 22.

The second limb of § 65009(c)(1)(E) pertains to any action "to determine the reasonableness, legality or validity of any condition attached to a variance, conditional use or any other permit." Here, it is undisputed that no substantive "variance, conditional use or other permit" was issued in June 2018. The City's June 22, 2018 letter purports to be a determination "of whether the Project Application is eligible for streamlined, ministerial review process pursuant to SB 35." AR0888. The substantive project permits/approvals were not granted until September 21, 2018 following a further revised project submittal.[32] AR0003.

4. City's June Actions were not "Matters Listed in Sections 65901 and 65903"

The first limb of subdivision (E) applies to any action "[t]o attack, review, set aside, void or annul any decision on the matters listed in Sections 65901 and 65903," carving out a narrow exception (not applicable here) from the general statutory scheme directed at decisions by the "local legislature."

"Matters listed" are, respectively, decisions by a board of zoning adjustment or zoning administrator on applications "for conditional uses or other permits," "for variance from the terms of the

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[30] Emphasis added.

[31] *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal. App. 4th 1561, 1571.

[32] The City's approval letter refers to a "plan set dated September 15, 2018" (AR0003), but the submittal cover letter since disclosed to Applicants is dated September 19, 2018.

zoning ordinance," and decisions by a "board of appeals ... from the decisions of the board of zoning adjustment or zoning administrator." §§ 65901(a), 65901(b), and 65903, respectively. None of these describe the June actions. Further, each of these permutations applies only where the legislature specifically delegates decision-making through a *local ordinance*. *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1487, 1492 - 1492. [Decision maker authorized to by ordinance to act as zoning director.]

Simply put, "Government Code sections 65901 and 65903 provide for hearing and decision on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits. [Citation]" *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 527. See also *Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 155 ["§§ 65901 and 65903 provide for hearing and decision on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits." citing *Travis, supra*, 766 FN2.] None of the "matters" in the referenced sections reads on the City's June actions.

Lastly, even for a challenge brought pursuant to subparagraph (F) "[c]oncerning any of the proceedings, acts or determinations taken, done or made *prior to any of the decisions in subparagraphs (A), (B), (C), (D), and (E),*"[33] the challenge period is still "within 90 days after the legislative body's decision," i.e. *not* from the date of the *preliminary* step or steps (which may often not be formally documented or publicly noticed). § 65009(c)(1) (unnumbered body section).

Section 65009(c) was described as applying to "challenges to a broad range of local zoning and planning decisions" in *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 526 (citing language from *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 782-783, 786 (construing former § 65009(c)). This does not mean that the statute applies regardless of its technical language. Each decision discussing § 65009(c)(1) carefully enunciates the particular statutory language and its application to the facts.

5. City and Vallco Waived Service of Petition by Substantively Participating in Action.

Vallco's claim that the original petition herein did not stop the statute of limitations rests on the

[33] Emphasis added.

premise that the original petition was timely filed but was not *formally* served on the City. However, like the city respondent in *Kriebel* (*infra*), the City waived any objections based on service of process by undertaking acts that taken together constitute unambiguous acceptance of the jurisdiction of the Court for purposes of the statute of limitations. *Kriebel v. City Council of San Diego* (1980) 112 Cal.App.3d 693, 699.

It is undisputed that the original petition herein was filed effective June 25, 2018, and that the petition with attachments was transmitted to and accepted by counsel for the City and Vallco. Both the City and Vallco filed papers and appeared to oppose Petitioners *ex parte* application for an alternative writ of mandate. Thereafter, like the parties in *Kriebel* the City, Vallco and Petitioners *reached a procedural agreement* whereby Petitioners would file an amended petition without hindrance by Respondents and Real party. Petitioners undertook thereafter to proceed by way of noticed motion for a peremptory writ of mandamus, rather than *ex parte*. This agreement was confirmed in writing. Steves Declaration ¶¶ 7 - 14. Exhibit 4.

As in *Kriebel*, the fact that the City's appearance itself was at an *ex parte* hearing is an irrelevant distinction in the broader context, including the procedural agreement with petitioners confirmed in writing long before the statute of limitations had expired.[34] *Id.*, 700.

6. City Affirmatively Waived Statute by Representing that City would Not Assert Finality of June 22 Decisions. City would be Estopped from Belatedly Asserting Statute of Limitations Based on June Position Now, and Vallco is Estopped from Asserting Otherwise.

The City affirmatively represented to Petitioners - with Vallco's knowledge - that the City would not insist that its actions through June 25, 2018 would be asserted against Petitioners as constituting *final* decisions on the SB35 application and that Petitioners could without detriment to Petitioners challenge the final decision (to be rendered in September) instead.

> Finally, I would again encourage you to consider not amending but dismissing the petition without prejudice since the City is still in the midst of processing the project application, **has not taken final action on the project and has until late September to take such action.** [Emphasis added]
>
> Steves Declaration ¶ 13, Exhibit 4.

[34] Consistent with the parties' understanding, Petitioners' statements for the September 28, 2018 case management conference indicate that no answers to the original petition were due.

The City's statement amounts to a clear representation by the City - with Vallco's tacit approval - that it would not raise its earlier June actions as an affirmative defense in later stages of the action, and a prospective waiver of any such affirmative defense. The City's actions in the context of the June 25, 2018 filing and *ex parte* application and surrounding communications between the parties clearly amounted to a knowing waiver of the City's right to assert the finality of the City's actions and inactions through June 25, 2018. A "waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation]" *Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1053.

The City's stance was eminently reasonable from the City's and Vallco's point of view at the time in that neither would want to have to deal with a renewed challenge while the SB35 approval process was continuing. Indeed, Petitioners relied on the representation and did not renew the challenge until after the City's project approvals had been finalized in late September. "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. [Citation.] To create an equitable estoppel, 'it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' " *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153.[35]

Having affirmatively represented that it would not raise the finality of its June actions as an affirmative defense, the City would now be equitably estopped from asserting otherwise now. Evidence Code § 623.

Vallco, to the extent that it even has standing to assert the affirmative defense at all, cannot assert a defense that was prospectively waived by the City. Vallco itself was a party to the communication in question and tacitly accepted it. Further, Vallco adopted City's position when it entered into a joint defense agreement[36] and acted and appeared jointly in this action until the joint defense agreement was terminated on January 17, 2019. PR4614.

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[35] Internal citations omitted.

[36] The City has refused to disclose the terms of the joint defense agreement itself. However, the Court will note that Vallco and the City made joint submissions and appeared jointly at the case management conferences herein.

I. PURPORTED APPROVALS BY INTERIM CITY MANAGER WERE ULTRA VIRES AND IMPROPER. PUBLIC REVIEW WAS REQUIRED TO BE CARRIED OUT BY PLANNING COMMISSION AND/OR CITY COUNCIL.

The purported approvals by the Interim City Manager were *ultra vires* and improper. Public oversight review was required to be carried out by the Planning Commission and/or City Council. OB 30:20 - OB 31:18.

SB35 provides for several alternatives for the conduct of review of "*public oversight*." Review and public oversight "may be conducted by the ... planning commission or any equivalent board or commission responsible for review and approval of development projects, or by the city council ..." § 65913.4(c). Vallco seeks to add a further item to the statutory alternatives, namely further review by staff only. OB52:14 - 21. However, the term "public oversight" combined with the enumeration of *non-staff* review bodies negates that reading.

The claim that "[t]he City elected to have its staff review and analyze the objective planning standards as applied to this Project"[37] is misleading. OB 52: 20 - 21. The AR shows no trace of "the City" making any such "election" through its proper decision-making bodies, the City Council and the Planning Commission remitting the matter to staff. To the extent that SB35 permits alternative modes of review, it was *for the City Council or Planning Commission* to make the threshold decision, in a formal public meeting, of *how* to conduct the review and public oversight hearings.

Vallco appears to claim that the word "may" in the statutory language should be read more broadly, to include the possibility that a city may opt not to hold review and public oversight hearings at all. In the context of subdivision (c), the term "may" is more naturally read as being confined to the choice of reviewing body for this phase of the review process, not the question of whether or not such review should be conducted at all.

Even assuming that the statutory language permits the option of omitting review and public oversight, the statutory language and long-established principles of local governance require that the *threshold decision whether or not* to conduct review and public oversight hearings needed to be made by the City Council or the Planning Commission. For staff to simply withhold the matter from

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[37] Petitioners note that Vallco is referring to review of "objective planning standards" during the *second* review stage after the 90-day period.

consideration by either body amounts to usurpation of those bodies' authority. This is so, *even and particularly*, in cases where members of either body may privately prefer *not* to be seen taking a public stance in favor of an unpopular project. Steves Declaration, ¶¶ 15 - 17.

J. PURPORTED APPROVAL OF TENTATIVE SUBDIVISION MAP IS INVALID

(References: POB 7, 32 - 35, 28 - 30 [Failure to dedicate park land]. FAP ¶¶ 92 - 93 and Prayer - Second Cause of Action, #2. FAP ¶ 77 and OP[38] Exhibit 5, p. 37. Original Petition ¶¶ 24 - 26; OB 53 - 54.)

Petitioners challenge the City's purported approval of a Tentative Subdivision Map both in substance and on procedural grounds. In substance, the purported approval of a tentative subdivision map is improper because the development fails to dedicate parkland as required under the General Plan and is otherwise inconsistent with the General Plan. AR0003, FAP p. 21 ¶¶ 92 - 93 and Prayer - Second Cause of Action, #2. Further, the Planning Commission was *required* ("shall") to deny approval of the subdivision map due to inevitable interference with public roadway easements as noted *supra*. CMC 18.16.060B 7. PR0573. Procedurally, the purported approval was also improper because review of subdivision maps is the responsibility of the Planning Commission, but City staff withheld the matter from the Planning Commission and City Council. OB 33. Final approval is a matter for the City Council. CMC 18.08.030 (PR6736), CMC 18.16.010 - CMC 18.16.070 (PR0570 - PR0573).

Government Code § 66473.5 requires that a local legislature only approve a tentative subdivision map after finding it consistent with the General Plan which includes a requirement for parkland dedication or payments in lieu. Instead, a staff member purported to approve the tentative subdivision map. AR0196 - AR0268. The application specifically cites §§ 66426 and 66427(a) as well as applicable General Plan provisions. AR0196.

1. SB35 does NOT Pre-empt Subdivision Map Approval Process.

Vallco incorrectly cites § 65913.4(c)(2) for the proposition that "SB 35 preempts all local map approval processes, and replaces them with SB 35's streamlined process." OB 53:6 - 7, 53:16-20.

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[38] The First Amended Petition (FAP) incorporates by reference Exhibits 5, 6 and 7 to the original petition (OP).

This claim goes amiss for several reasons.

First, the cited provision was not part of the statute in 2018. The original version of SB35 was enacted by Stats. 2017, Ch. 366, § 3. This is the version that was in force at the time of filing of this action (June 25, 2018). The provision cited by Vallco was only added by Stats. 2018, Ch. 840, Sec. 2. (SB 765) , effective January 1, 2019.[39] "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."[40] *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207.

Indeed, even the 2019 version of SB35 expressly preserves the *separate* procedures under the Subdivision Map Act and related local subdivision ordinance procedures, but imposes a time limit on those *parallel* review procedures:

> "If the development ... is *consistent with all objective subdivision standards in the local subdivision ordinance*, an *application for a subdivision pursuant to the Subdivision Map Act* ... shall be exempted [from CEQA] *and shall be subject to the public oversight timelines set forth in paragraph* [(c)](1)]." (Emphasis added.)

§ 65913.4(c)(2) (2019 Version) .

The Legislative Counsel's Digest[41] for Stats. 2018, Ch. 840 expressly notes that a change was intended, but that the Subdivision Map Act remains operative with respect to such developments:

> (4) This bill would provide that if the development is subject to the Subdivision Map Act but [is eligible under SB35 under the "prevailing wage" and other financial standards], the application for the subdivision pursuant to the Subdivision Map Act is exempt from the California Environmental Quality Act and **would require the application for the subdivision to be considered within the specified time periods**. [Emphasis added.]

The *original* version of SB35 in force in 2018 does NOT purport to preempt the Subdivision Map Act procedures, but on the contrary provides that a development project subject to the Subdivision Map Act is *ineligible* for "streamlined, ministerial" approval *unless* the project also meets additional "low-income housing tax credit," "prevailing wage" and/or "skilled and trained workforce" requirements. § 65913.4(a)(9). The statute *expressly* recognizes that the Subdivision Map Act is *not* preempted by SB35. Even if SB35 were read to affect subdivision map procedures, it specifically

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[39] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB765

[40] Internal quotation and citation omitted.

[41] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB765

permits "public oversight." § 65913.4(c).

2. Subdivision Map Act Approval is Not Necessarily Subjective or Lengthy.

Vallco also argues that the City's map approval process is preempted by SB35 because it is "lengthy and laden with subjectivity." OB 54. However, as noted, SB35 does not purport to oust the Subdivision Map Act, but expressly recognizes that it does apply. Standards considered for purposes of subdivision map approvals are not *necessarily* subjective. Indeed, many standards considered for purposes of subdivision map approvals would overlap with "objective planning standards," "objective zoning standards" and "objective design review standards" under SB35.

Nor can SB35 be read as ousting the involvement of the Planning Commission or City Council on the grounds that such procedures are necessarily too lengthy. SB35 itself provides for "design review" and "public oversight" under SB35 to be conducted *by the Planning Commission or City Council*.

3. Purported Subdivision Map Approval was Improper even if only "Objective" Criteria are Considered. Project Improperly Includes Ground Floor Residential Use and Omits Required Ground Floor Retail.

The General Plan requires retail and active uses on the ground floor. Residential use is allowable only "on upper floors with retail and active uses on the ground floor." Policy LU-19.1.4, PR783. Here, Block 9 and Block 10 have no ground floor retail at all. AR0945, AR0946, AR1422 [building plan, street level]. FAP ¶ 77, p. 16 - 17, Exhibit 5 to original petition; FAP ¶ 78, p. 20, Exhibit 6 to original petition; FAP ¶ 79, p. 23 - 24, Exhibit 7 to original petition.

No "subjective" judgment is called for to find that two major blocks lack any retail areas according to Vallco's application. In any event, in considering an application for tentative map approval under the Subdivision Map Act and local ordinances, the Planning Commission would not have been confined to "objective" standards under SB35.

More broadly, the Planning Commission could have found the entire project non-compliant with the General Plan mandate which "envisions this area as a new mixed-use 'town center' and gateway for Cupertino." The area was to feature "publicly-accessible parks and plazas that support the pedestrian-oriented feel of the revitalized area." PR0704. Walking past the ground floor level of twenty-two story residential buildings is not most people's idea of a "pedestrian-oriented feel."

4. City Properly Adopted Subdivision Map Legislation as Authorized by Subdivision Map Act.

The Subdivision Map Act authorizes cities to adopt legislation requiring the dedication of land, or payments in lieu, as a condition of approval of a subdivision map. § 66477. Cupertino adopted such legislation. CMC 18.04.030 (PR5899), CMC 18.16.050A (PR0572), GP provisions cited and quoted in POB 28 - 30.

5. Challenge to Subdivision Map Approval was Timely Raised and is Not Barred by Statute of Limitations.

Surprisingly, Vallco represents to the Court that "Petitioners have asserted no such claim [challenging the subdivision map approval]" and that "the 90-day limit to challenge the map approval - December 20, 2018 - has passed. (§ 66499.37)."[42]

Petitioners squarely raised their challenge to the Tentative Map approval in the First Amended Petition, including a reference to Cupertino Municipal Code 18.24.030 (PR0584). FAP p. 21 ¶¶ 92 - 93 and Prayer - Second Cause of Action, #2.[43] The statewide Subdivision Map Act (§ 66410 *et seq*.) expressly directs local jurisdictions to implement subdivision map ordinances to implement subdivision map policies. § 66411.

Even if the claim had not been fully elaborated in the FAP, Petitioners would be able to seek amendment of their claim "referring back" to the date of the FAP (October 16, 2018). Under California law, a statute of limitations only requires that a defendant be given timely notice of the "general set of facts" constituting the claim such as to "to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits." *Citizens' Association for Sensible Development v. County of Inyo* (1995) 172 Cal. App. 3d 151, 160. *Garrison v. Board of Directors*

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[42] Vallco attempts to obfuscate the matter by prefacing its misleading claim with the assertion that "Petitioners' opening brief is the first occasion on which they have raised the claim that the City failed to follow local map-approval *procedures*." OB 53, (emphasis added). This overlooks FAP ¶ 93 which notes that the City administration improperly engaged in discretionary decision-making by purporting to treat roof areas as "parkland." Vallco's footnote 49 claims in circular fashion that Petitioners' challenge to the tentative map approvals could be no such thing "because the amended petition focuses solely on SB 35's objective planning standards." (Emphasis added). Vallco also overlooks Petitioners' separate challenges under Cupertino's Density Bonus Ordinance. FAP ¶¶ 98 - 112.

[43] Petitioners had already raised detailed objections to various aspects of the tentative map approval process in the original petition herein. Original Petition ¶¶ 24 - 26, Exh. 7, p. 68 - 70; Exh. 5, p. 37 - 43; Exh 7, pp. 94, 104 - 119. Exh. 6, p. 20. Those exhibits are also incorporated by reference in the FAP. FAP ¶¶ 77 - 78.

(1995) 36 Cal. App. 4th 1670, 1677 ("California courts have shown a liberal attitude toward allowing amendment of pleadings to avoid the harsh results imposed by statutes of limitations. [Citation]") *Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal. 2d 596, 601. [Amendment disallowed only where "a wholly different legal liability or obligation" would result.]

CONCLUSION

The Project was never eligible for the privileged "streamlined, ministerial approval process" provided by SB35, and former City staff erred in fact and in law in approving the Project. The Project also fails to meet mandatory requirements under the City's Density Bonus Ordinance and infringes on unvacated roadway easements.

The purported tentative subdivision map approval is independently improper and invalid.

This Court should issue a writ of mandate ordering the City to revoke its finding of eligibility, project approvals and all other approvals and permits issued pursuant thereto, *nunc pro tunc*.

DATED: August 23, 2019

Respectfully submitted.

[Signature]

Bern Steves
Attorney for Petitioners
Friends of Better Cupertino
Kitty Moore, Ignatius Ding and
Peggy Griffin

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:

(1) PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS

(2) DECLARATION OF BERN STEVES IN SUPPORT OF MANDAMUS PETITION (REPLY)

(3) PETITIONERS' MOTION TO AUGMENT THE RECORD, REQUEST FOR JUDICIAL NOTICE AND/OR FOR ADMISSION OF EVIDENCE BY DECLARATION IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS

(4) PETITIONERS' OPPOSITION TO REAL PARTY IN INTEREST VALLCO PROPERTY OWNER LLC'S MOTION TO AUGMENT THE RECORD AND REQUEST FOR JUDICIAL NOTICE

(5) PETITIONERS' REPLY TO REAL PARTY IN INTEREST VALLCO PROPERTY OWNER LLC'S OPPOSITION TO PETITIONERS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF

(6) PETITIONERS' RECORD SET 2

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

__x__ Placing a USB stick containing the above-referenced "PETITIONERS' RECORD SET 2" only in a sealed envelope, and placing said envelope in a Federal Express dropbox in Santa Clara County, California, addressed as follows.

__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 (not including the PETITIONERS' RECORD SET 2) to be sent by transmitting an electronic version through Bender's Legal Service to the eService Recipients or persons listed below.

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

Executed on August 23, 2019 in California.

[Signature]

Bern Steves