SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRIENDS OF BETTER CUPERTINO, et al., Petitioners, vs. CITY OF CUPERTINO, et al., Respondents.	Case No. 18CV330190 ORDER RE: ADMINISTRATIVE RECORD & SCOPE OF BRIEFING **ORDER ON SUBMITTED MATTER**
VALLCO PROPERTY OWNER, LLC, Real Party in Interest.	

The first amended verified petition for writ of mandate came on for hearing before the Honorable Helen E. Williams on December 19, 2019, at 9:00 a.m. in Department 10 of the court.[1] Bern Steves and Stuart M. Flashman appeared for Petitioners Friends of Better Cupertino, Kitty Moore, Ignatius Ding, and Peggy Griffin (collectively, Petitioners); Heather M. Minner of Shute, Mihaly & Weinberger LLP appeared for Respondents the City of Cupertino (the City) and Grace Schmidt, in her official capacity as Cupertino City Clerk (collectively, Respondents); Jonathan R. Bass, Katharine Van Dusen, and Miles H. Imwalle of Coblentz Patch Duffy & Bass

[1] The matter initially came on for hearing on November 1, 2019, but after the Court briefly made some initial remarks, the hearing was continued for a medical emergency.

LLP appeared for Real Party in Interest Vallco Property Owner LLC (Developer); Cole A. Benbow of Hanson Bridgett LLP appeared for amici curiae Bay Area Council, *et al.* (see list of referenced amici curiae parties with application for leave to file amicus brief) and Christopher E. Platten of Wylie, McBride, Platten & Renner appeared for amicus curiae United Association of Journeyman, Local Union 393, Plumbers, Steamfitters, and HVAC/R Service Technicians of Santa Clara and San Benito Counties (the Union) (sometimes collectively, Amici).

This Order addresses the many requests for judicial notice and for admission of extra-record evidence by the parties and Amici, along with related objections and responses, along with Developer's motion to strike portions of Petitioners' reply brief. The Court concurrently addresses the merits of the petition by separate order, and this Order re: Administrative Record & Scope of Briefing is intended to be ancillary to that one.

I. Introduction

This first amended verified petition (petition) seeks relief in traditional mandate under Code of Civil Procedure section 1085. Petitioners pray for the issuance of a writ directing Respondents to set aside the City's June 22, 2018 ministerial approval of streamlined review of Developer's application for development of the Vallco Town Center Project (the Project) under Government Code section 65913.4 (section 65913.4 or SB 35), and the City's ultimate September 21, 2018 approval of the streamlined Project. The primary grounds asserted for relief are that the Project is inconsistent with certain of the "objective planning standards" set forth in section 65913.4, subdivision (a); it is therefore ineligible for streamlined approval such that the City had a ministerial duty to deny the application by giving timely and compliant notice to Developer under section 65913.4, subdivision (b). Respondents and Developer oppose the petition, and Amici join them.

Once the pleadings were at issue, the Court by order set a briefing and hearing schedule for the parties and also granted leave by separate order for Amici to file their briefs, with an opportunity for the parties to respond. The briefing and hearing schedules were amended several times, in part because of the disputed and evolving state of the record and the related changes to the scope of briefing necessitated as a result. This is the general context for this Order defining

the scope of the record, which is a necessary and preliminary step to resolving the merits of the petition by separate order.

The parties present their disputes on the appropriate scope of what the Court will call the administrative record (or just the record) through a series of filings.[2] And they seek to augment the record through requests for judicial notice and admission of extra-record evidence. To resolve these evidentiary disputes, the Court must also address the propriety and scope of the parties' supplemental briefing and briefing presented by Amici, including by ruling on motions or requests to strike matters filed by Petitioners and Developer.

II. Summary of the Administrative Record as Offered by the City

On December 17, 2018, Respondents filed a certification of the administrative record (with accompanying index) and lodged a flash drive containing an electronic copy of the administrative record. The City's Principal Planner Piu Ghosh, who reviewed and approved the Project's building plans, helped compile the 1,616-page administrative record and attested that it was complete to the best of his knowledge. (Certification at p. 2.)

On August 2, 2019, Respondents filed a supplemental certification of the administrative record. They did so because, in the course of responding to Petitioners' June 2019 request for public records, Respondents discovered that they had inadvertently omitted correspondence Developer had sent on September 19, 2018.[3] Respondents lodged the omitted letter by attaching it to the supplemental certification. The letter is a cover letter for updated plans and supplemental reports. Although Respondents delivered the letter and enclosures to Petitioners, they did not

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[2] A true *administrative* record is typically certified and lodged in connection with an administrative mandate action proceeding under Code of Civil Procedure section 1094.5, which follows an agency's administrative hearing, findings, and final decision. Although there was no administrative hearing here, the City here certified an administrative record and for ease, the Court will refer to the record as such.

[3] Piu Ghosh states that the letter was omitted because, while the City had a practice of posting all materials related to the proposal on its website, this particular letter was not so posted. Thus, in reviewing the website to evaluate the completeness of the record, he overlooked the correspondence.

lodge with the Court (in any format) the enclosures referenced in the letter on the basis that they were both voluminous and duplicative.[4] Petitioners, Respondents, and Developer agreed that if any party wished to cite one of the enclosures, that party would provide the document to the Court as needed.

To summarize, the certified administrative record consists of the compendium of documents on a flash drive that the City lodged in December 2018, the letter filed as a supplement thereafter, and the letter's enclosures that have been produced but not separately lodged or filed with the Court.

III. Extra-Record Matters

Both Petitioners and Developer ask the Court to consider matters beyond those included in the administrative record prepared and certified by Respondents. Developer and Petitioners filed hybrid requests for judicial notice and admission of extra-record evidence.

The scope of the record in a traditional mandamus proceeding depends on the nature of the action under review. (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 576-577 (*Western States*).) Although a court may admit extra-record evidence for the purpose of reviewing ministerial decisions based on the rationale that there is ordinarily little to no administrative record to facilitate review, the general rule is that extra-record evidence is not admissible when reviewing quasi-legislative decisions. (*Ibid.*) This is because the consideration of extra-record evidence necessarily conflicts with the deference that must be afforded by the

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[4] Looking at the names and dates of the enclosures, it does appear that many are already included in the administrative record originally certified by Respondents in December 2018. This is perhaps unsurprising given that the City asked Developer to present a "clean" package of all the application documents. For example, Piu Ghosh ultimately approved the plans updated as of September 15, 2018, which plans are attached as an exhibit to the final project approval and included in the administrative record. (AR0003-0330.) Thus, the enclosures described as updated renderings and descriptions from September 15, 2018, seem to be in the record already. The other enclosures are from earlier in the approval process and also seem to be included in the administrative record, particularly as part of the supplemental correspondence sent by Developer from June through August 2018. Because Respondents did not lodge the enclosures with the Court, it is not possible to compare the face of the documents to conclusively determine that they are already included in the record. Ultimately, in light of the manner in which Petitioners have proceeded here, the Court need not address this issue further.

judicial branch when reviewing legislative exercises of discretion. (*Id.* at pp. 572-574.) Extra-record evidence may only be considered in a traditional mandamus proceeding to review a discretionary action when the proponent can demonstrate that the evidence was in existence before the entity acted and the evidence could not be presented to the entity despite reasonable diligence. (*Id.* at p. 578.) "[E]xtra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision."[5] (*Id.* at p. 579; accord *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 896 (*Porterville*); see also *San Joaquin County Local Agency Formation Com. v. Super. Ct.* (2008) 162 Cal.App.4th 159, 169.)

This standard for admissibility is largely informed by the precondition of relevance. (*Western States*, *supra*, 9 Cal.4th at p. 570.) As explained in *Western States*, "the only evidence that is relevant to the question of whether there was substantial evidence to support a quasi-legislative administrative decision … is that which was before the agency at the time it made its decision." (*Id.* at p. 573, fn. 4.) Because the arbitrary and capricious standard applicable in traditional mandamus proceedings is even more deferential than the substantial evidence standard, the precondition of relevance arguably justifies a similar standard for the admissibility of extra-record evidence in actions applying that more deferential standard. (See *Golden Drugs Co. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1469-1470; see also *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 207-208 (*Cinema West*) [proponent failed to establish propriety of extra-record evidence in action for review of a quasi-adjudicative action].)

Additionally, in *Western States*, the Court said in dicta that similar principles apply to the taking of judicial notice of facts beyond the scope of the administrative record due to the precondition of relevance. (*Western States*, *supra*, 9 Cal.4th at p. 573, fn. 4.) In other words, the limitation on the consideration of extra-record evidence applies equally to matters subject to judicial notice. (*Ibid.*)

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[5] Much of the extra-record evidence Petitioners seek to present runs afoul of this rule.

Ultimately, because a closed record is the general rule and the circumstances permitting consideration of extra-record evidence are limited, the proponent bears the burden of establishing the propriety and admissibility of the extra-record evidence. (See, e.g., *Cinema West*, *supra*, 13 Cal.App.5th at pp. 209-210.)

A. Petitioners' Requests and Submissions

Initially, Petitioners lodged two different flash drives to supplement the administrative record, one in January 2019 and another with their reply in August 2019, which drives were accompanied by combined requests for judicial notice and admission of extra-record evidence. They additionally filed a declaration of their counsel as expert opinion testimony along with their response to Developer's merits briefing sur-reply. Then, the week before the November 1st merits hearing (that was ultimately continued to December 19, 2019), Petitioners continued to file (without authorization) additional briefing concerning the record along with additional evidence and a combined request for judicial notice and admission of extra-record evidence. The Court declines to consider most of these materials for a number of reasons.

As a threshold matter, Petitioners did not present their extra-record materials, including evidence and matters subject to judicial notice, in conformity with the Court's prior order that they: "shall accompany such submittal with a motion, request for judicial notice, or other appropriate procedural vehicle to address the admissibility of *all* such documents." (Order of 01/08/2019 at p. 2:12-19, italics added.) The combined requests for judicial notice and admission of extra-record evidence presented are conclusory and do not actually address all of the documents in their respective submissions. The certifications of authenticity included therein are similarly problematic. (See Dev. Opp. at pp. 5:21-6:11 [filed 05/24/2019].)

Second, a majority of the materials Petitioners ask the Court to consider are not relevant, particularly in light of the substance of their arguments and the correlating standard of judicial review applicable in mandate. And, despite acknowledging the existence of the precedent set forth in *Western States*, Petitioners do not adequately address that precedent. Instead, they proceed as though there is no limit to the extra-record materials the Court may consider. And so,

Petitioners' requests and the contents of their accompanying submissions are troublesome for this additional reason.[6]

Finally, there is Petitioners' delay in presenting their materials and discussing their admissibility, including the substantial extra-record materials presented with their reply brief and additional materials presented long thereafter, up until the week of the initial merits hearing. Fairness and due process ordinarily preclude the presentation of evidence at such a late date that the opposing party does not have a meaningful opportunity to respond. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) And a court has inherent authority to control the proceedings before it to ensure the orderly administration of justice such that it need not entertain the filing of irrelevant or cumulative evidence. (*Id.* at pp. 289-290; see also *Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 498-500.) But because the Court here afforded Developer an opportunity to present supplemental briefing, the Court does not, as Developer urges, categorically refuse to consider all of the belatedly filed materials. That said, Petitioners' delay is emblematic of a more fundamental problem with their approach that impedes the admission of their extra-record materials, namely that they do not discuss in briefing many of the extra-record documents they seek to add to the Court's consideration of the merits. In other words, the problem is not simply that Petitioners unjustifiably[7] delayed in presenting

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[6] Petitioners' reply and accompanying declaration in support of their August 2019 request do not cure many of the defects in their original presentation. For example, with respect to the denial letter from the City of Berkeley, Petitioners state "the bare bones of a statute must in practice be fleshed out by the agencies charged with administering the statute … ." (Pet. Reply at p. 7:12-14 [filed 10/25/2019].) It is unclear how this statement establishes that the decision of an entirely separate municipality concerning an entirely separate project should be considered in interpreting the applicable statute, particularly when Petitioners do not discuss that decision. And Petitioners vaguely and unsuccessfully attempt to establish the relevancy of other documents, which they cite in passing but do not analyze in their briefing. Nor are the documents shown to be material to an issue properly considered in mandate under the appropriate standard of review. In sum, Petitioners should have addressed individual documents sooner—in their initial request—and they have not made an adequate showing for admissibility at this late date.

[7] Petitioners' vague claims of discovery abuse or delay in production by the City are makeweights that provide no legitimate excuse or justification for their course of briefing. There is no obvious logical or temporal connection between the documents they claim to have belatedly received and either the arguments they raise for the first time in their reply brief or their extra-

many of their extra-record materials, it is that materials presented after they filed their briefing necessarily are not relevant to the extent they are not the subject of legal analysis or mentioned at all in that briefing.

The Court now turns from these overarching issues to the details of Petitioners' requests.

1. January 2019 and August 2019 Requests and Submissions

Petitioners ask the Court to consider many chapters of the Cupertino Municipal Code as well as the California Building Standards Code.[8] (PR No. 1, Doc. Nos. 13-24; PR No. 2, Doc. Nos. 17-25; see generally, Cal. Code Regs., tit. 24.) A court may take judicial notice of state and municipal law. (Evid. Code, §§ 451, subd. (a), 452, subds. (a)-(b); *The Kennedy Com. v. City of Huntington Beach* (2017) 16 Cal.App.5th 841, 852 (*Kennedy*).) These codes are subject to judicial notice.

Additionally, Petitioners present the guidelines prepared by the Department of Housing and Community Development under the delegation of authority in subdivision (j) of Government Code section 65913.4 (Senate Bill or SB 35). ("Streamlined Ministerial Approval Process Guidelines," hereafter "Guidelines," PR No. 2, Doc. No. 4 <https://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf> [as of May 6, 2020].) Because these Guidelines are tantamount to statutory law (see *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*)), it is conceivable that they are subject to judicial notice under either subdivision (a) or subdivision (b) of Evidence Code section 452. That said, the Guidelines explicitly state that they "are applicable to applications submitted *on or after* January 1, 2019," (italics added) and that nothing in them "may be used to invalidate or require a modification to a development approved through the Streamlined Ministerial Approval Process prior to the

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record materials. As Developer points out, Petitioners raised a number of these points with the City directly during the review process.

[8] Developer's authenticity objection to the California Building Standards Code is not well taken. Although the statement of Petitioners' counsel that the document was downloaded from an unspecified website is inadequate, the face of the document bears indicia of authenticity and Developer does not otherwise identify any inaccuracies.

effective date." (Guidelines, § 101.) The Guidelines had yet to be promulgated when Developer submitted and the City approved the Project application here, and Petitioners arguably use them improperly to urge invalidation of a project approved through the Streamlined Ministerial Approval Process. And so, the Guidelines are inapplicable or irrelevant such that judicial notice of them is not warranted in this case.

Petitioners also ask the Court to consider the City's general plan for 2015-2040 (first enacted in 2014 and amended in 2015), the 2015 amendment to that general plan (inclusive of the enacting ordinance), and the zoning map in operation at the time of Developer's application. (PR No. 1, Doc. Nos. 6, 26-27.) These documents are subject to judicial notice under Evidence Code, section 452, subdivisions (b) and (c). (See, e.g., *City of Poway v. City of San Diego* (1991) 229 Cal.App.3d 847, 859 (*City of Poway*).) The diagram from a *draft* of the 2015 amendment is not subject to judicial notice and is otherwise unnecessary. (PR No. 1, Doc. No. 25.)

Next, Petitioners request judicial notice of a number of municipal ordinances and resolutions. (See PR No. 1, Doc. Nos. 28-29, 32; PR No. 2, Doc. Nos. 26-30, 39.) These legislative acts are, technically, subject to judicial notice. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7, fn. 2 (*Evans*), citing Evid. Code, § 452, subd. (b).) But many of them appear to be immaterial here because Petitioners neither cite nor discuss them in their briefing and they are irrelevant in light of the facts in issue under the appropriate standard of review.[9]

Ordinance No. 1850, enacted in 2000, established a redevelopment plan for the Vallco area, and so it is not as clearly irrelevant as some other ordinances included in Petitioners' request. (PR No. 2, Doc. No. 28.) Even so, Petitioners do not discuss this ordinance in any of their briefing on the merits of the petition. Ordinance No. 1850 is thus not particularly material. Ordinance Nos. 2085 and 2125 are not relevant or helpful because they are historical updates to the Cupertino Municipal Code as compared to proposed or recent enactments that have yet to be accounted for in the code. (PR No. 2, Doc. Nos. 29-30.) Ordinance No. 11-2087, inclusive of the

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[9] Some ordinances appear to be referenced in passing to show the dates of enactment for certain zoning regulations when neither the date nor the operative version of a regulation is disputed or otherwise pertinent to the issues before the Court. (See, e.g., Pet. Brief at p. 24:12.)

zoning map therein, is irrelevant because the Project is not part of the Heart of the City planning area or subject to the Heart of the City specific plan adopted by that ordinance. (PR No. 1, Doc. Nos. 28-29.) Indeed, Developer makes such an objection. (Dev. Opp. at p. 4:3-8 [filed 05/24/2019].) Similarly, Ordinance No. 18-086 is irrelevant because it adopts a specific plan for the Vallco area that was not enacted until September 2018 (after Developer submitted its application), was not applied by the City during review, and was then rescinded. (PR No. 2, Doc. No. 39.) Ordinance No. 1936[10] operates to amend the development agreement with the proprietor of the now defunct shopping mall. (PR No. 1, Doc. No. 32.) Although Petitioners rely on an earlier amendment of the agreement to make an argument about the pedestrian bridge, it is not clear how the fifth amendment in particular, enacted by Ordinance No. 1936, is material.[11] Ordinance Nos. 1375-1376 were enacted in the 1980's and concern procedures for below-market-rate housing and the creation of easements. It is not apparent that these ordinances either reflect the law in existence at the time of Developer's application or provide helpful insight into the history of any applicable portion of the Cupertino Municipal Code. (PR No. 2, Doc. Nos. 26-27.) They are, thus, not relevant.

Petitioners also ask the Court to consider a parcel map from the Santa Clara County Assessor's office and printouts from its website for five constituent parcels. (PR No. 1, Doc. Nos. 7-12.) The website printouts state on their face that they are not official records, and so they are not subject to judicial notice. (See Evid. Code, § 452, subd. (c).) The assessor's parcel map

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[10] Petitioners concede that they presented an inaccurate version of Ordinance No. 1936. (PR No. 1, Doc. No. 32; Pet. Reply at p. 3:9-11.) Developer presents an accurate version of this document. (Dev. RJN, Ex. R.)

[11] "Development agreements are creatures of legislation intended to provide developers with an assurance of their right to carry a project to completion and for which they may need to make initial commitments." (*Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1213.) "In effect, [they allow] 'a builder to acquire by contract the equivalent of a vested right at an early stage of the project.' [Citation.]" (*Ibid.*) Given the very nature of a development agreement, Petitioners' imprecise and inadequately explained reliance on agreements between the City and the previous developer is problematic and does not show why the supplemental materials are relevant.

seems to be presented solely in conjunction with those reports, and so it is not otherwise material to the disposition of the petition. Although it does appear to be an official map capable of being made the subject of judicial notice, it is not apparent what purpose would be served here by consideration of this map, particularly in light of the numerous other maps and diagrams presented to and considered by the City. The Court also observes that these materials appear to be presented in a manner inconsistent with *Western States* as a collateral source of information about the zoning of the project site. The Court does not take judicial notice of or admit these materials.

Next, Petitioners ask the Court to consider a draft environmental impact report and a final environmental impact report not adopted until September 2018, along with an accompanying consultant's report. (PR No. 1, Doc. Nos. 1-4.) Developer objects to the admission and consideration of these materials. (Dev. Opp. at pp. 3:1-4:2 [filed 05/24/2019].) There are several problems with Petitioners' request to introduce these materials. Petitioners impermissibly rely on them to contradict the evidence relied on by the City in reaching its decision and to introduce irrelevant facts about other environmental issues having no bearing on whether the criteria in section 65913.4, subdivision (a) are satisfied. While Petitioners state in passing that these reports show the City's view of the law, Petitioners do not expand on that point or rely on the documents for it. More significantly, Petitioners proceed as though the City's view of the law is immaterial under the standard of review. And so, their statement of relevance is misplaced. The City's view of the law and the materials it relied on in reaching its decision are, in actuality, set forth in the approval letter that is already before the Court. Also, Petitioners misquote a statement in the report about whether the site is on what is known as the "Cortese list," a list of potentially contaminated sites (see § 65962.5, subd. (c)(1); *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 774 (*Parker Shattuck*)). What the final report says is: "The revised project is located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5; however, the revised project would not create a significant hazard to the public or the environment as a result." (PR0004.) Petitioners truncate the latter statement. They also represent that the report states that the site has not been

cleared when the statement above contains no such affirmative representation. And, as Developer articulates, these reports were prepared for a different iteration of the proposed development that was submitted through a different process. Ultimately, the fact that the site was *historically* listed is undisputed and otherwise reflected in the official administrative record. Accordingly, it is unnecessary to resort to extrinsic evidence to ascertain this fact. For these reasons, the Court does not consider the environmental impact reports and accompanying consultant's report. (PR No. 1, Doc. Nos. 1-4.)

Petitioners ask the Court to consider a number of other miscellaneous documents that appear to be irrelevant and inadmissible. Developer objects to nearly all of these. (Dev. Opp. [filed 10/21/2019].) Petitioners submit a letter from the City of Berkeley to a developer about an entirely unrelated application for review under section 65913.4. (PR No. 2, Doc. No. 5.) Despite suggesting that this letter is an interpretative aid, Petitioners provide no analysis on the point. They generally proceed as though the City's interpretation of the law is not entitled to deference, and so it is unclear how another city's interpretation is material. Petitioners also present an official record showing that Sand Hill Property Company is a fictitious business name used by Peter Pau. (PR No. 2, Doc. No. 1.) This record is not relevant. The emails included with Petitioners' initial supplement to the record are not relevant either. (PR No. 1, Doc. Nos. 30-31.) Developer's points about the emails are valid. (Dev. Opp. at pp. 4:9-5:2 [filed 05/24/2019].) One email contains a vague supposition, without explanation, that the Project does not meet the residential-use requirement of section 65913.4. Petitioners rely on this email for the hearsay purpose of establishing that the requirement is not met. They vaguely assert that it serves a non-hearsay purpose in response to Developer's critique, but they do not rely on the document for that purpose and the fact of the effect on the listener is not in issue. Ultimately, even if admitted, the email has no evidentiary value given its contents. The other email from the Santa Clara County Department of Environmental Health to Kitty Moore lacks relevant facts and is problematic for the same reasons set forth above about the environmental impact reports. The meeting minutes from a planning commission meeting in 2005 are too temporally attenuated and are not otherwise analyzed by Petitioners to show the City's view on building heights, which is

the statement of relevance provided in the table of contents for Petitioners' second supplement to the record. (PR No. 2, Doc. No. 31.) And the notice of exemption from the California Environmental Quality Act that the City submitted to the Santa Clara County Clerk-Recorder in October 2018 has no bearing on a fact in issue in this action. (PR No. 2, Doc. Nos. 32-33.) Although briefly alluded to in Petitioners' reply in support of their petition, correspondence between the City and Developer about fees, including whether a fee should be required in lieu of dedicated parkland, are not discussed with sufficient detail to make the correspondence relevant, particularly considering the standard of review.[12] (PR No. 2, Nos. 8-9.) The last irrelevant document is the City's one-sentence letter terminating its joint-defense agreement with Developer. (PR No. 2, Doc. No. 10.) In addition to the brevity of the letter, Petitioners' vague assertion that it pertains to purported discovery abuses is insufficient to show relevance.

Finally, Petitioners ask the Court to consider a number of purportedly agreed-upon supplements to the administrative record (PR No. 2, Doc. Nos. 2-3, 6-7, 11, 34-38) and several demonstrative exhibits (PR No. 2, Doc. Nos. 12-16).

Developer does not object to Document Nos. 2-3, 6-7, and 11 from Petitioners' August-2019 submission, as these consist of documents in the originally certified administrative record as well as the supplemental record certified by the City. Given the contents of this particular subset of documents and in the absence of an objection, the Court will consider Document Nos. 2-3, 6-7, and 11 from the August 2019 submission. Similarly, the Court will consider the printout of the City's website, which the City used previously and in preparing the administrative record here to track the documents submitted by Developer. (PR No. 1, Doc. No. 5.)

As for the title report and related documents, Document Nos. 34-36, the relevance and authenticity of the documents are disputed. First, Developer disputes that it agreed to the inclusion of all of these documents. Next, the documents are not the subject of meaningful analysis by Petitioners, who reference records relied on in the title reports solely to make a prefatory point for an argument about roadway easements that is beyond the scope of their

[12] The fee letters are so brief that it is unclear what context they could possibly provide.

petition and the issues raised in their opening brief. Thus, the documents are not relevant; and, even if they were, they appear to be unnecessary or cumulative. Also, while a title report was among the enclosures to the letter the City added to the administrative record with its supplemental certification, Petitioners never aver that they are presenting the same title report that is already part of the administrative record. While Developer at first seems to concede that the title report and linked documents Petitioners downloaded and attached are already part of the record, it simultaneously disputes whether the materials are authentic. In response to Developer's objection, Petitioners direct the Court to an unspecified declaration of their own counsel, which the Court presumes to be the declaration of Mr. Steves filed on September 3, 2019. That declaration increases the confusion about these documents as it states that Document Nos. 34-36 were provided to Petitioners by the City and are versions of a document or documents that "correspond visually" to each other but with some versions lacking blue lines and other indicia of hyperlinks to documents referenced in the report. (Steves Decl., ¶¶ 28-31.) The sum total of the evidence presented by Petitioners is insufficient to establish either just what they believe these documents are, or the facts in their personal knowledge establishing that the documents are what they purport to be; it is similarly unclear which version of documents Petitioners believe the Court should review or which version they believe is accurate or operative. (See, e.g., *Valentine v. Plum Healthcare Group, LLC* (2019) 37 Cal.App.5th 1076, 1089-90; see also *People v. Zavala* (2013) 216 Cal.App.4th 242, 246, citing Evid. Code, § 1271.) As for documents linked in the title reports, Developer is correct that Petitioners do not establish an adequate foundation for consideration of any documents they obtained through "web capture," particularly in the absence of evidence showing what websites they captured the information from. The Court does not consider the title reports, including the hyperlinked documents Petitioners downloaded, as presented in their August 2019 submission.

As for Document Nos. 37-38, consisting of the development agreement the City entered into with the previous developer (inclusive of amendments) as well as a stand-alone copy of the third amendment and supplement to that agreement, there are similar problems. As for Document No. 37, Petitioners do not adequately establish a foundation for its admissibility. Petitioners'

counsel states that he got the document from someone named Randy Shingai and that he then authenticated what he received from Mr. Shingai, but he does not elaborate as to what exactly this means. As for Document No. 38, Petitioners' counsel got the document from the "Santa Clara County Recorders' [*sic*] office." (PR No. 2, Doc. No. 38.) And Developer does not object to the authenticity of Document No. 38. The Court, therefore, will consider Document No. 38 with the caveat that while material to Petitioners' argument about the pedestrian bridge, the document is not relevant, per se, in light of the facts that are actually in issue under the proper standard of review.

Turning to the demonstrative exhibits, Developer asserts that, contrary to Petitioners' representation, it did not agree to the inclusion of Document Nos. 13 and 15. Demonstrative evidence is not admissible as substantive evidence; rather, it consists of matters, such as a chart or diagram, that aid the trier of fact in understanding the substantive evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 25.) Demonstrative evidence may be considered only for the limited purpose of clarifying or explaining relevant substantive evidence and only upon a proper foundational showing. (*People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1036-1037.) The proponent must typically demonstrate relevance, some degree of resemblance and accuracy between the substantive evidence and the demonstrative evidence, and that the evidence will not confuse or mislead the trier of fact. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387-1388.) Here, as for all four demonstrative exhibits (Doc. Nos. 12-16) Petitioners do not adequately establish their foundation. In the exhibits themselves, Petitioners highlight changes in the shading and labeling of floors and state "floors merged," but it is not apparent what this means or that they are correctly interpreting the building plans. In other words, while Developer did provide updated renderings on the City's request, it is not self-evident that this amounted to a structural or legally significant change in the plans or that Petitioners correctly interpret and demonstrate those changes in the annotations they seek to present. And Petitioners' explanation in their briefing is otherwise insufficient to establish the propriety of their demonstrative exhibits. The Court will not consider the demonstrative exhibits presented in the August 2019 submission.

In sum, the Court declines to consider the majority of the materials presented by Petitioners because those materials are not relevant, particularly in light of the conclusions reached in the concurrent merits Order on the central question before the Court (whether there exists a ministerial duty on the City's part to deny a development proposal for streamlined review and approval under SB 35 based on ineligibility or conflict with the criteria listed as objective planning standards at section 65913.4, subdivision (a)(1)-(10)) and the standard of review typically applicable in mandate to decisions like that under review here. And, even assuming Petitioners had proceeded in a manner that is consistent with the nature of the relief sought and tailored to the appropriate standard of review, a majority of the materials Petitioners present remain irrelevant. This is because the materials are not the subject of meaningful legal analysis offered by Petitioners.

For all of these reasons, the Court takes judicial notice of and considers solely Document Nos. 5-6, 13-24, and 26-27 from Petitioners' January 2019 submission and Document Nos. 2-3, 6-7, 11, 17-25, and 38 from their August 2019 submission.

2. Petitioners' Expert Declaration

Developer's objection to the declaration of Stuart Flashman presented with Petitioners' response to Developer's sur-reply has merit. In addition to being untimely presented with Petitioners' final brief on the merits, the declaration is otherwise inadmissible. Stuart Flashman, one of Petitioners' counsel of record, seeks to establish himself as an expert for the purpose of opining on the legal definition in the planning context of the term "active use."[13] (Flashman Decl., ¶¶ 12-14.) "There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Thus, the legal definition of active use is not a proper subject of expert testimony. Rather, Mr. Flashman's testimony closely resembles impermissible vouching. (See generally *People v. Seumanu* (2015) 61 Cal.4th 1293, 1329-1330 [discussing

[13] The definition of active use pertains to Petitioners' argument that the Project does not comport with the general plan and, thus, does not comport with the Subdivision Map Act.

vouching through use of personal prestige, reputation, or depth of experience].) Also, the definition of an active use is not material to the issues before the Court as framed by the petition and the opening brief. And the general rule is that a lawyer must not serve as a witness and advocate in the same matter. (Rules Prof. Conduct, rule 3.7(a).)[14] As one court explained, "an 'attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate.' [Citation.]" (*Harris v. Super. Ct.* (1979) 97 Cal.App.3d 488, 493.) While Petitioners later attempted to establish an exception to this general rule based on their informed written consent, it is unnecessary to consider the sufficiency of the superficial statements and evidence presented on the subject in light of the other impediments to the admission and consideration of the declaration. The Court sustains the objection to the declaration and will not consider it.

3. Petitioners' Supplemental Request

On October 30, 2019, two days before the scheduled November 1st merits hearing, Petitioners filed yet another request for judicial notice and admission of extra-record evidence, particularly of zoning regulations from the cities of San Jose, Oakland, Santa Monica, and Redwood City. These materials are untimely and unauthorized. They are also irrelevant based on the issues properly before the Court and, notwithstanding the scope of those issues, principles of interpretation that give deference to a locality when it comes to that locality's interpretation of its own planning policies and zoning regulations. (See generally *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.) This final request is denied.

B. Developer's Request

Developer asks the Court to consider legislative history materials; administrative guidelines and opinions; and municipal acts, legislation, and laws.[15]

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[14] "Effective November 1, 2018, former rule 5-210 was replaced by rule 3.7 as part of a comprehensive revision of the State Bar Rules of Professional Conduct." (*Wu v. O'Gara Coach Co., LLC* (2019) 38 Cal.App.5th 1069, 1077, fn. 3.)

[15] As for two of these documents (Dev. RJN, Exs. Q-R), Developer's request is contingent on the resolution of Petitioners' requests as these documents are corrections and responses.

First, Developer requests judicial notice of legislative findings in Senate Bill 35, excerpts of an April 2017 report on the bill by the Senate Committee on Governance and Finance, and an excerpt of a third-reading analysis prepared for the Assembly in September 2017. (Dev. RJN, Exs. A-D [exhibits B and D appear to be excerpts from the same committee report; it is unclear why they are presented separately and out of order].) While it is well established that a court may consider legislative history materials as an interpretative aid, the means of consideration and weight ascribed to these materials varies greatly. (Compare *People v. Cruz* (1996) 13 Cal.4th 764, 773, fn. 5 (*Cruz*) with *Cummins, Inc. v. Super. Ct.* (2005) 36 Cal.4th 478, 492, fn. 11.) The legislative findings in Senate Bill 35 are part and parcel of the bill such that they are indisputably subject to judicial notice as official legislative action. (Evid. Code, §§ 451, subd. (a), 452, subds. (a)-(b).) While the California Supreme Court has relied on precedent to take judicial notice of other legislative history materials, such as committee reports and bill analyses, some dissenters have aptly observed that such materials do not clearly fall within any enumerated category of Evidence Code sections 451 and 452. (*Cruz*, *supra*, 13 Cal.4th at p. 794 (dis. opn. of Anderson, J.).) Accordingly, the excerpts of the committee report and bill analysis are not subject to judicial notice under the Evidence Code. Notwithstanding this conclusion, the Court may consider these matters, ascribing to them an appropriate weight in light of their authorship, substance, and relevance to any ambiguity necessitating resort to an interpretative aid. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 32 [providing list of materials properly constituting legislative history, including committee reports and analyses].)

Second, Developer requests judicial notice of materials prepared by state agencies, namely the California Department of Housing and Community Development (HCD) and the California Environmental Protection Agency (CalEPA). More specifically, Developer requests judicial notice of HCD staff responses to requests for technical assistance; information from CalEPA's website concerning the history, nature, and maintenance of the Cortese list; and a printout from one of the constituent databases containing Cortese list information showing there are no open cases being monitored by the State Water Resources Control Board at the Project

site. A court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).) Thus, official documents and records like these prepared by a government agency are subject to judicial notice. (See, e.g., *Field v. Bowen* (2011) 199 Cal.App.4th 346, 370, fn. 5.) Such documents may include formal opinion letters or informal correspondence expressing the position of the agency. (See *Linda Vista Village San Diego H.O.A., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 186; see also *Evans*, *supra*, 38 Cal.4th at pp. 8-9, fns. 4-5.) And a court may take judicial notice under Evidence Code section 452, subdivision (h) of reference materials posted on an agency's official website. (See, e.g., *In re Israel O.* (2015) 233 Cal.App.4th 279, 289, fn. 8.) Accordingly, the HCD correspondence and information published by CalEPA are subject to judicial notice.

Third, Developer requests judicial notice of the Cupertino Municipal Code; an excerpt of a previous general plan, Resolution No. 14-213[16]; and the amended development agreement that governed the Vallco Fashion Mall. A court may take judicial notice of a city's municipal code. (Evid. Code, § 452, subd. (b); *Kennedy*, *supra*, 16 Cal.App.5th at p. 852.) Resolutions of a municipal legislature, such as a city council, are also subject to judicial notice. (*Evans*, *supra*, 38 Cal.4th at p. 7, fn. 2, citing Evid. Code, § 452, subd. (b).) General plans, as legislative enactments, are likewise subject to judicial notice. (See, e.g., *City of Poway*, *supra*, 229 Cal.App.3d at p. 859.) The same is true of a development agreement. (*People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 870, fn. 2.) Accordingly, all of these materials are subject to judicial notice.

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[16] Developer offers Resolution 14-213 to refute Petitioners' apparent suggestion that the proposed development is subject to the Heart of the City specific plan. While Petitioners state in opposition to Developer's request that they are not making such a claim, they do suggest as much in their opening brief (Pet. Brief at p. 5:7-10), and so Developer's proffer of this document is not unwarranted. Ultimately, because the Court declines to consider Petitioners' materials pertaining to the Heart of the City planning area, it is unnecessary to consider Developer's counter offering on the subject.

Finally, Developer requests judicial notice of the fact that a complaint was made by petitioner Kitty Moore to the Santa Clara County Department of Environmental Health—Hazardous Materials Compliance Division (HMCD) alleging the continued existence or incomplete remediation of a leaking underground storage tank at the former Sears Automotive building located on the proposed construction site and that HMCD closed the complaint investigation. (Dev. RJN, Exs. L-M.) The official correspondence documenting HMCD's action is subject to judicial notice as is the fact that a complaint was made as reflected in the investigation form prepared by HMCD. (See *Evans*, *supra*, 38 Cal.4th at pp. 8-9, fns. 4-5.) These records from HMCD are thus subject to judicial notice. That said, consideration of these materials as well as the environmental report (Dev. RJN, Ex. Q) presented by Developer as extra-record evidence hinges on the Court's threshold decision about the applicable standard of judicial review and its decision to admit or exclude Petitioners' extrinsic evidence about environmental pollution. Because Petitioners' extra-record evidence will not be considered, Developer's extra-record evidence in response is likewise unnecessary and will not be considered.

Petitioners advance a number of points in opposition to Developer's request that are not persuasive.

For example, Petitioners assert that a number of documents, primarily the HCD and CalEPA documents, are from 2019 and were not in existence at the time of the City's decisions at issue. Petitioners do not otherwise provide any authority or explanation for why this is problematic. As a threshold matter, Petitioners have not limited themselves to documents considered by the City. Rather, they seek to contradict determinations made by the City through the use of extrinsic evidence. Accordingly, they aim to hold Developer to a different standard than that which they apply to themselves. In any event, while Developer appears to have printed out pages from CalEPA's website in 2019 so these materials could be presented to the Court, the administrative record reflects that the City did consider these pages of CalEPA's website in reaching its decisions that are the subject of this case. And there is no evidence that the offered pages changed in the interim. In fact, the City's description of the contents of the CalEPA

website in its approval letter matches the contents of the printouts now presented by Developer. Petitioners' points thus lack merit.

Petitioners otherwise devote a substantial portion of their opposition to critiquing the technical assistance from HCD that Developer asks the Court to consider. Petitioners seemingly mischaracterize the technical assistance as rulings or adjudications in making a number of points. This characterization is unreasonable. Also, Petitioners' points go to the weight and significance of the technical assistance and not its admissibility or qualification for judicial notice. Thus, while the Court ultimately concludes here that the technical assistance deserves little weight, there is no articulable basis for categorically excluding the information from the record.[17]

To the extent Petitioners critique other documents, they do so by asserting that the documents lack context. In other words, Petitioners appear to be arguing that the documents are misleading because they are incomplete. The excerpts presented by Developer do not appear to be misleadingly incomplete; rather, Developer offers certain documents to refute specific claims made by Petitioners. Ultimately, because Petitioners' critiques go to the weight or interpretation of the documents as compared to their admissibility or susceptibility to judicial notice, Petitioners' points do not warrant wholesale disregard of the materials. And Petitioners present other portions of the Cupertino Municipal Code to cure the gaps they complain of.

In sum, the Court may consider the documents Developer presents through the taking of judicial notice in part and otherwise through the admission of extra-record evidence. The extent to which the Court considers such materials depends, in part, on the scope of Petitioners' materials that are subject to consideration.

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[17] Petitioners' approach to critiquing the technical assistance is not particularly helpful because of the mischaracterizations, hysterical language, and reliance on principles other than those concerning deference to agency interpretations. While Developer's approach of presenting responses to leading questions posed to HCD is questionable, this approach is also transparent and easily rejected under *Yamaha* and its progeny. And so, the Court does not address at length here Petitioners' points about the weight of the technical assistance correspondence.

IV. Amici Briefing

As noted, as authorized by the Court on September 6, 2019, two amici curiae briefs have been filed in opposition to the petition by Bay Area Council (a coalition of housing-advocacy organizations) and the Union. Bay Area Council's brief is accompanied by numerous exhibits, particularly news articles. The Union's brief is accompanied by a request for judicial notice of a letter from HCD to the City that explicitly identifies this litigation and threatens to revoke compliance of its housing element in light of what HCD believes the litigation reflects. Respondents believe the amici briefs contain inaccurate and misleading statements, and so they filed a response and accompanying request for judicial notice of the housing element of the City's general plan, correspondence between the City and HCD, as well as recent meeting minutes and resolutions about the Project site. The gist of the City's response is that it *is* approving applications to develop housing. Petitioners, in addition to opposing the applications seeking leave to file the briefs, have filed a response to the briefs as well as objections thereto. In sum, while the amici briefs were permitted, there are issues with respect to the scope and weight of the briefs and supporting materials. The requests for judicial notice and objections remain outstanding.

"Amici curiae, literally 'friends of the court,' perform a valuable role for the judiciary precisely because they are nonparties who often have a different perspective from the principal litigants." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177 (*Connerly*).) Ideally, " '[a]micus curiae presentations assist the court by broadening its perspective on the issues raised by the parties.' " (*Ibid.*, quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14 (*Bily*).) In doing so, amici ordinarily must take the case as they find it and may not raise new issues that are not raised by the parties. (*California Highway Patrol v. Super. Ct.* (2006) 135 Cal.App.4th 488, 498.) Courts ordinarily will allow them to present supporting evidence and matters subject to judicial notice. (*Bily, supra*, 3 Cal.4th at p. 405, fn. 14.) "[E]xcept in cases of obvious abuse of the amicus curiae privilege," courts ordinarily will not strike supporting materials as objectionable. (*Ibid.*) Nevertheless, even when amici are allowed to present

supporting materials, a court is not bound to consider them when they are irrelevant or unreliable and may ascribe to them an appropriate weight. (*Ibid.*)

The Union's brief contains a duplicative legal argument about whether the Project is located on a hazardous waste site, going to streamlining eligibility. In addition to the fact that Developer itself advances this argument, it does not appear to have any relationship to the Union's unique perspective or expertise. Other than this legal argument, the points advanced by the Union are not helpful. It makes a pure appeal to consequences, namely that the Court should deny the petition because its members want employment at the Project site and need housing. Although the statute, by its very nature, is informed by the philosophy of consequentialism, the Union's argument is still problematic because it does not ask the Court to consider the consequences or policy outcome of a particular interpretation of the law, but rather asks the Court to rule a particular way based on the consequences standing alone. While it is not true that consequentialism as a philosophy has no place in legal reasoning (see, e.g., *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966), the Union's naked appeal approaches the boundary of permissible argument from an amicus curiae. The Union's concern about affordable housing is neither unique to its members nor a new perspective not otherwise reflected in the statute itself and its legislative history. Otherwise, the Union concludes with an unrelated assertion that if the Court grants the petition, there will be more litigation because the City will be sued by the State. This argument, like the preceding one, is a pure appeal to consequences. Moreover, this point is seemingly used as a means of making an ad hominem attack through the introduction of a threatening letter from HCD of which the Union requests judicial notice. While the letter is subject to judicial notice as an official act (Evid. Code, § 452, subd. (c)), the Court need not take judicial notice of it because it is not necessary, relevant, or helpful (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6). In sum, the Union's request for judicial notice is denied, but the Court otherwise considers its points and gives them an appropriate weight.

Bay Area Council's brief is less troublesome and more closely hews to the true nature and function of an amicus brief. The brief addresses the history and purpose of section 65913.4

in a manner that is generally relevant to the dispute and relates to the interests and expertise of the coalition of housing-advocacy organizations. But ultimately, these points are capable of ascertainment from the face of the statute and are not particularly controversial. Bay Area Council's concluding argument calls into question the legitimacy of statements made in the City's statement of non-opposition. Although perhaps insightful, the points in the City's statement of non-opposition are inapposite. In light of the arguments advanced by Bay Area Council, the Court accepts the supporting evidence it presents with the understanding that the evidence is of little significance or import in light of the points set forth above. Petitioners' objection to and request to strike the evidence and references thereto in the amicus brief is denied. The objections are too vaguely presented and based, in part, on an unsubstantiated and immaterial representation about the formatting of the amicus brief and its table of authorities. As the Court indicated in its order authorizing the brief, the materials presented by Amici will be given appropriate weight. The Court understands the function and purpose of an amicus brief and gives the materials proper weight and consideration in light thereof.

Finally, the City seeks to clear its name in response to the briefs filed by Amici. Because the Court understands that ad hominem attacks are fallacious and immaterial, the City's response and supporting documents don't add much. Its motives are of no import to the resolution of the issues of statutory interpretation and application at the heart of this proceeding. But the Court allowed a response, and so the City's response and accompanying documents will be allowed. The documents are subject to judicial notice under Evidence Code section 452, subdivision (c). Although the City's request for judicial notice is granted, the Court does not discuss these materials at length.

V. Developer's Motion to Strike

On September 30, 2019, Developer filed a sur-reply and motion to strike portions of Petitioners' reply brief on the basis that Petitioners had raised a number of new arguments for the first time in that final brief. Developer identifies no authority for its motion. There is none. Code of Civil Procedure section 435 authorizes a motion to strike a "pleading." (Code Civ. Proc., § 435, subd. (b)(1).) "The term 'pleading' means a demurrer, answer, complaint, or cross-

complaint." (Code Civ. Proc., § 435, subd. (a)(2).) A reply brief is not a pleading. There is thus no authority for striking portions of Petitioners' reply brief. Moreover, Developer's stated basis for striking portions of the reply does not clearly establish that there is a statutory ground for striking those portions under either subdivision (a) or (b) of Code of Civil Procedure section 436. Thus, Developer's motion to strike is denied.

That said, Developer is correct to call out that Petitioners pivot and raise a number of new points in their reply that do not clearly fit with their previous points or approach to challenging the City's actions. The Court admonishes Petitioners for raising these points for the first time in their reply; they could have and should have been raised sooner. (See *Tellez v. Rich Voss Trucking Inc.* (2015) 240 Cal.App.4th 1052, 1066.) Nevertheless, because Developer had an opportunity to address these points, it is not entirely unfair to consider them. Ultimately, although the Court does not strike or toss all of the belated arguments, they remain problematic and do not aid Petitioners in obtaining the extraordinary relief they seek because they are not part of a clear, legally substantiated, and analytically coherent approach to establishing Petitioners' entitlement to relief on the merits.

IT IS SO ORDERED.

Date: May 6, 2020

HON. HELEN E. WILLIAMS
Judge of the Superior Court