

1 Bern Steves (State Bar #214454)
19925 Stevens Creek Blvd. #100
2 Cupertino, CA 95014
Telephone: (408) 253 6911
3 Email: bernsteves@californiabizlaw.com

4 Attorney for Petitioners Friends of Better Cupertino,
Kitty Moore, Ignatius Ding and Peggy Griffin
5
6

7 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SANTA CLARA**

9 FRIENDS OF BETTER CUPERTINO,
10 KITTY MOORE, IGNATIUS DING and
11 PEGGY GRIFFIN

12 Petitioners,

13 vs.

14 CITY OF CUPERTINO, a General Law City;
15 GRACE SCHMIDT, in her official capacity as
16 Cupertino City Clerk, and DOES 1-20
inclusive,

17 Respondents

18 VALLCO PROPERTY OWNER LLC

19 Real Party in Interest
20
21
22
23
24
25
26
27
28

No. 18CV330190

**PETITIONERS' BRIEF IN SUPPORT OF
PETITION FOR PEREMPTORY WRIT OF
MANDAMUS**

Hearing Date: May 15, 2019

Time: 9:00 a.m.

Dept.: 10

**ASSIGNED FOR ALL PURPOSES TO:
HON. HELEN E. WILLIAMS, DEPT. 10**

TABLE OF CONTENTS

1	INTRODUCTION	1
2	STATEMENT OF CASE	1
3	A. LEGAL BACKGROUND	1
4	1. The SB35 Statute	1
5	2. SB35 Requires an “Objective,” Non-Discretionary Process to Assess Project Compliance with General Standards	2
6	3. Other Decision-Making under SB35 is also Ministerial and Non-Discretionary - Effectively “Box-Ticking” by Reference to Objective, Verifiable Criteria.....	3
7	4. SB 35 - Eligibility Phase	3
8	5. SB35 does NOT Generally Override Zoning Restrictions.	4
9	6. Current General Plan was Enacted in 2014, and Last Amended in 2015.....	4
10	7. Specific Plan Adopted in 2012 Continues in Force.....	5
11	8. Specific Plan Adopted in September 2018 is Pertinent as Indication of Pre-Existing Law and Environmental Findings for Project Site.	5
12	B. FACTUAL BACKGROUND.....	6
13	ARGUMENT.....	8
14	A. TRADITIONAL MANDATE GOVERNS REVIEW	8
15	1. Traditional Mandate Lies to Compel Performance of Ministerial Duty.	8
16	B. PROJECT IS <i>INELIGIBLE</i> FOR “STREAMLINED, MINISTERIAL APPROVAL” UNDER SB35 DUE TO HAZARDOUS WASTE SITE LISTING UNDER § 65962.5.	9
17	1. City has Admitted that Project Site is Listed as Hazardous Waste Site under § 65962.5.	9
18	2. Draft Environmental Impact Report (DEIR) Confirms Multiple Unresolved Environmental Issues.....	10
19	3. Project Site was Never Cleared for Residential Use by DTSC.	11
20	4. Project Site Remains Subject to Clean-Up and has NOT been Declared Suitable for Housing by DTSC.....	11
21	5. Clearance of Site for Residential Use by DTSC is Sole Statutory Pathway to Regaining Eligibility.....	12
22	C. PROJECT IS INELIGIBLE UNDER SB35 DUE TO FAILURE TO DESIGNATE TWO-THIRDS OF SQUARE FOOTAGE FOR RESIDENTIAL USE.	12
23	1. Floor area Ratio must be Calculated EXCLUSIVE of Density Bonus and other Concessions.	14
24	2. Floor area Ratio under SB35 must be Ascertained According to California Building Code, not Cupertino Municipal Code.	14
25	3. Vallco’s Hypothetical “Pre-Bonus” Floor Area Calculation is Unsupported, Fictitious and Methodologically Improper.	15
26	4. Corrected “Pre-Bonus” Floor Area Ratio Falls Short of Two-Thirds Minimum (66.67%).	17
27	5. Project Application Misattributes Space to Residential Use.	18
28	6. Floor area Ratio of Project Falls Short of Required Two-Thirds Value if Net Square Footage is Compared.	19

TABLE OF CONTENTS

1	7.	Residential Floor area must be Corrected Downward Based on California Building Code Definition.	20
2	8.	Gross Floor Area Ratio (Including Parking and Amenities) Falls Short of Two-Thirds Requirement.....	21
3	D.	PROJECT APPROVAL IS IMPROPER - PROJECT EXCEEDS ZONED HEIGHTS.	23
4	1.	Building Height is Limited to 30 Feet for Two Parcels at Southern End of Project Area	24
5	2.	Building Heights in P(CG) Zone Greatly Exceed Zoned Limit of 30 Feet.	25
6	3.	Building Heights in P(Regional Shopping) Zone Exceed 85 Feet Limit.	25
7	4.	Zoning is not Inconsistent with General Plan. Finding Zoning Inconsistent is not within Discretionary Decision-Making Entrusted to City Administration.	26
8	E.	PROJECT FAILS TO DEDICATE REQUIRED PARKLAND.	28
9	1.	General Plan Requires Dedication of Parkland.	28
10	2.	Roof Space does not Qualify as “Parkland.”	29
11	F.	PURPORTED APPROVALS BY INTERIM CITY MANAGER WERE <i>ULTRA VIRES</i> AND IMPROPER. REVIEW WAS REQUIRED TO BE CARRIED OUT BY PLANNING COMMISSION OR CITY COUNCIL.....	30
12	G.	BMR (BELOW MARKET RATE) UNITS ARE NOT DISPERSED, IN VIOLATION OF CUPERTINO MUNICIPAL CODE AND BMR POLICY.	31
13	H.	SUBDIVISION MAP APPROVAL IS INVALID BOTH IN SUBSTANCE AND ON PROCEDURAL GROUNDS.	32
14	1.	Approval of Tentative Subdivision Map is Responsibility of Planning Commission. City Administration’s Action was <i>ultra vires</i> and Improper. ..	33
15	2.	Approval of Tentative Subdivision Map was Improper in Substance due to Failure to Dedicate Parkland.	34
16			
17		CONCLUSION.....	35
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF CONTENTS

1	Cases	
2	<i>Alliance for a Better Downtown Millbrae v. Wade</i> (2003) 108 Cal.App.4th 123	8
3	<i>California Assn. for Health Services at Home v. State Dept. of Health Services</i> (2007)	
4	148 Cal.App.4th 696	8
5	<i>City of Morgan Hill v. Bushey</i> (2017) 12 Cal. App. 5th 34	28
6	<i>Common Cause v. Board of Supervisors</i> (1989) 49 Cal.3d 432	9
7	<i>McGill v. Regents of University of California</i> (1996) 44 Cal.App.4th 1776	8
8	<i>US Ecology, Inc. v. State of California</i> (2001) 92 Cal.App.4th 113	8
9		
10		
11	Statutes	
12	Code of Civil Procedure § 1085	8
13	Cupertino Municipal Code 2.32.070	27, 33
14	Cupertino Municipal Code 18.16 (Chapter)	33, 34
15	Cupertino Municipal Code 18.16.030B	33
16	Cupertino Municipal Code 18.16.040A	33
17	Cupertino Municipal Code 18.16.040B	33
18	Cupertino Municipal Code 18.16.040C	33
19	Cupertino Municipal Code 18.16.050A	34
20	Cupertino Municipal Code 18.16.060	34, 35
21	Cupertino Municipal Code 18.16.070	35
22	Cupertino Municipal Code 18.24.030	7, 34
23	Cupertino Municipal Code 19.56.010	32
24	Cupertino Municipal Code 19.56.050G	32
25	Government Code § 65913.4	1
26	Government Code § 65913.4(a)	2, 3, 8
27	Government Code § 65913.4(a)(2)(C)	passim
28		

TABLE OF CONTENTS

1	Government Code § 65913.4(a)(2)(C)	20
2	Government Code § 65913.4(a)(5)	passim
3	Government Code § 65913.4(a)(6)	passim
4	Government Code § 65913.4(b)(1)(B)	1, 3
5	Government Code § 65913.4(b)(2)	1, 3
6	Government Code § 65913.4(c)	2, 3, 31, 33
7	Government Code § 65915	31
8	Government Code § 65962.5	9, 10, 11
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **INTRODUCTION**

2 The city administration of the City of Cupertino (“City”) unlawfully purported first to
3 declare the development project herein (“Project”) *eligible* for the “streamlined, ministerial
4 approval process” for certain residential development projects defined under SB35 - principally
5 codified as Government Code § 65913.4¹ - even though the Project simply fails to meet two
6 independent eligibility criteria as Petitioners had clearly warned the City in detailed written
7 submissions.

8 The City administration then purported to *approve* the Project under SB35 despite
9 multiple inconsistencies with applicable statewide and local law including the General Plan,
10 zoning ordinances and other city ordinances. Each of these inconsistencies should have
11 disqualified the Project but all were ignored by the City administration under the former City
12 Manager and former Assistant City Manager.

13 This Court should order the City, *nunc pro tunc*, to vacate and reverse (i) the unlawful
14 declaration of eligibility, (ii) the unlawful project approval, and (iii) all permits and entitlements
15 issued pursuant to the approval or declaration of eligibility.

16 **STATEMENT OF CASE**

17 **A. LEGAL BACKGROUND**

18 **1. The SB35 Statute**

19 SB35 - now codified in part as Gov. Code § 65913.4 - was enacted in 2017 to institute a
20 “streamlined, ministerial approval process” for certain development projects that dedicate at least
21 two-thirds of square footage to residential use and meet other defined eligibility and approval
22 criteria. Verified First Amended Complaint (VFAP) ¶¶ 13 - 21. § 65913.4(a)(2)(C).

23 SB35 provides strict deadlines and procedures governing the review of project
24 applications. Project applications must be reviewed for *eligibility*, and reasoned denials must
25 be issued within 90 days from the date of filing. Absent reasoned and timely objections, a
26 project is deemed eligible. §§ 65913.4(b)(1)(B), 65913.4(b)(2).

27
28 ¹ Unmarked references are to the Government Code.

1 Thereafter, a wider project review by reference to “objective” zoning and other
2 “objective” “standards” must be completed within 180 days of the filing of the application.
3 §§ 65913.4(c), 65913.4(c)(2).

4 **2. SB35 Requires an “Objective,” Non-Discretionary Process to Assess Project**
5 **Compliance with General Standards**

6 Consistently with its “streamlined, ministerial approval process” by reference to
7 “objective” standards, SB35 prohibits *discretionary* decision-making by a city or city council
8 reviewing a project application. § 65913.4(c).

9 SB35 *expressly* requires that projects be consistent with existing non-discretionary
10 zoning standards² (“objective zoning standards”) and other non-discretionary legal standards
11 (“objective design review standards”³). VFAP ¶ 21. § 65913.4(a)(5).

12 In addition to mandating a “ministerial” approval process,⁴ SB35 emphasizes the
13 “objective,” non-discretionary nature of the applicable review process by defining the terms
14 “objective zoning standards” and “objective design review standards” as follows:

15 ... For purposes of this paragraph, “objective zoning standards” and
16 “objective design review standards” mean standards that involve no
17 personal or subjective judgment by a public official and are uniformly
18 verifiable by reference to an external and uniform benchmark or criterion
19 available and knowable by both the development applicant or proponent
20 and the public official prior to submittal. ...

21 § 65913.4(a)(5).

22 Simply put, SB35 envisages a *box-ticking process* whereby a project is evaluated to
23 ascertain whether or not it complies with each of a series of “objective” standards:

24 ... That design review or public oversight shall be objective and be strictly
25 focused on assessing compliance with criteria required for streamlined
26 projects, as well as any reasonable objective design standards published
27 and adopted by ordinance or resolution by a local jurisdiction before
28 submission of a development application, and shall be broadly applicable
 to development within the jurisdiction. ...

26 ² SB35 deems a project site *zoned* for residential or mixed residential use provided that the
27 General Plan *designation* provides for residential or mixed residential use.

28 ³ The term “objective design standards” is used in § 65913.4(c) and appears to be synonymous
with “objective design *review* standard.”

⁴ § 65913.4(a)

1 § 65913.4(c).

2 **3. Other Decision-Making under SB35 is also Ministerial and**
3 **Non-Discretionary - Effectively “Box-Ticking” by Reference to Objective,**
4 **Verifiable Criteria.**

5 As indicated by the express reference to a “streamlined, ministerial approval
6 process” in the first subsection, the entire decision-making process envisaged under SB35 is
7 non-discretionary and ministerial. § 65913.4(a). Indeed, the City’s eligibility letter includes a
8 listing of numerous eligibility criteria required under SB35, and indicates compliance with each
9 with a tick mark in a box. AR0889 - AR0898.

10 **4. SB 35 - Eligibility Phase**

11 To be eligible for “streamlining” under SB35, a proposed project must meet *each* of a
12 long list of independent eligibility criteria known as “objective planning standards” and set out
13 in § 65913.4(a)(1)-(10). Eligibility must be determined, and the applicant must if appropriate
14 be provided with a reasoned rejection, within 90 days of the date of submission of the project
15 application. Absent a reasoned rejection, eligibility objections are deemed waived.

16 §§ 65913.4(b)(1)(B), 65913.4(b)(2).

17 Specifically, a project “*excluding any additional density or other concessions, incentives*
18 *or waivers* granted pursuant to the Density Bonus Law in Section 65915”⁵ must be “consistent
19 with objective zoning standards and objective design review standards in effect at the time that
20 the development is submitted to the local government pursuant to [section 65913.4].” *Id.*

21 In fact, the Project fails to meet at least two of the eligibility criteria and is thus ineligible
22 for the “streamlined, ministerial approval process” under SB35 in two *independent* respects.

23 First, the Project site is listed on a statewide list of hazardous waste sites § 65962.5, and
24 the Department of Toxic Substances Control has not “cleared the site for residential use or
25 residential mixed uses.” § 65913.4(a)(6). VFAP ¶ 20.

26 Second, the Project is also ineligible because it fails to designate at least two-thirds of the
27 square footage for residential use. Even under the most favorable method of calculation, the

28 ⁵ Emphasis added.

1 actual ratio of residential to total floor area is no more than 57.53%, far short of the two-thirds
2 (66.7%) threshold as discussed *infra*. On a *gross* basis, the ratio is even lower at only 44.79%.
3 § 65913.4(a)(2)(C). VFAP ¶¶ 51 - 59.

4 **5. SB35 does NOT Generally Override Zoning Restrictions.**

5 SB35 does NOT purport to override local zoning restrictions in general.

6 SB35 spells out the precise extent to which local zoning law is preempted by permitting
7 an eligible project to be built on land that “has a *general plan designation* that allows residential
8 use or a mix of residential and nonresidential uses”⁶ even if the land has not been *zoned* for
9 residential or mixed use. § 65913.4(a)(2)(C).

10 Apart from this limited override for land *designated* for residential or mixed residential
11 use but not yet *zoned* for such use, SB35 does *not* purport to preempt, and in fact expressly
12 requires compliance with, “objective zoning standards and objective design review standards” as
13 noted above. § 65913.4(a)(5).

14 **6. Current General Plan was Enacted in 2014, and Last Amended in 2015.**

15 The current⁷ General Plan was adopted on December 4, 2014 under the name
16 “Community Vision 2015 - 2040.” PR0681 – PR1211.

17 Various amendments to the General Plan were adopted by the City Council on
18 October 20, 2015 as Resolution 15-087. PR0638 – PR0680. Importantly, the 2015
19 amendments introduced a new version of a schematic listing of planning parameters marked
20 “Figure LU-1 Community Form Diagram” (“LU-1 Diagram”) which remains current.
21 PR0637.⁸

22 No further GP amendments were adopted between October 20, 2015 and March 27, 2018
23 when the Project application (“Application”) was filed. Further, no Specific Plan pertinent to
24 the Project was adopted during this period.

25 As noted in the First Amended Petition, the City’s planning staff created and posted on

26 _____
27 ⁶ Emphasis added.

28 ⁷ Unless otherwise indicated, the state of the law as discussed herein is as of March 27, 2018,
the date the Application was purportedly filed.

⁸ This is a better electronic copy of the diagram as adopted but taken from the *draft* resolution.

1 its website a spurious document purporting to be the “GENERAL PLAN - COMMUNITY
2 VISION 2015 - 2040” (“Spurious General Plan”). The Spurious General Plan includes
3 significant changes relative to the General Plan and amendments thereto adopted by the City
4 Council. The Spurious General Plan was never adopted by the City Council and has no
5 standing as the City’s General Plan. VFAP ¶¶ 26 - 33.

6 **7. Specific Plan Adopted in 2012 Continues in Force.**

7 The City’s “Heart of the City” Specific Plan adopted was adopted by the City Council on
8 January 17, 2012. It instituted an amended zoning map for the Project site and the surrounding
9 “Heart of the City” area and defined zoning attributes. PR1213 - PR1280. PR1212 (zoning
10 maps, high resolution).

11 **8. Specific Plan Adopted in September 2018 is Pertinent as Indication of
12 Pre-Existing Law and Environmental Findings for Project Site.**

13 While the Project application was filed on March 27, 2018 and is thus governed by the
14 General Plan and zoning regulations in force at that time, Petitioners note that the City Council
15 adopted a “Vallco Town Center Specific Plan” by resolution 18-086 on September 19, 2018.⁹
16 The accompanying Draft EIR (DEIR) and Final EIR (FEIR) documentation reflects the City’s
17 view of its pre-existing law and of facts on the ground (and in the ground), such as a lengthy
18 history of industrial and agricultural pollution. PR0008 - PR0026 (Selected DEIR Documents),
19 PR0001 - PR0007 (Selected FEIR Documents).

20 Various consequential changes including changes to the City’s zoning map were adopted
21 on second reading on October 2, 2018.¹⁰ As a result of those changes, the zoning map
22 currently displayed on the City’s website does not reflect the state of the law at the time the
23 Project application was filed (March 27, 2018).

24
25 _____
26 ⁹ Action items before the council are set out on the City’s website at:
27 <https://cupertino.legistar.com/LegislationDetail.aspx?ID=3680583&GUID=FDAC8D1E-3D80-45A9-9E69-188EEED58E06>

28 ¹⁰ Staff report and draft ordinances are posted on the City’s website at:
<https://cupertino.legistar.com/LegislationDetail.aspx?ID=3687690&GUID=42268B4D-A8BA-4B30-895B-5E3C2B82259D&Options=&Search=>

1 **B. FACTUAL BACKGROUND**

2 The factual background is drawn from the Verified First Amended Petition (VFAP)
3 herein.

4 The Project application herein was filed on behalf of Vallco Property Owner LLC
5 (“Vallco” or “Applicant”), purportedly on March 27, 2018. AR1056 *et seq.*, VFAP ¶ 22.

6 In fact, as Petitioners have shown, important parts of the substantive Project application
7 documentation including Site Plans, Site Diagrams, Architectural Plans and Civil Plans were not
8 completed until March 28, 2018 and could not have been accepted by the City until
9 March 28, 2018 or for some documents March 29, 2018. The Project application was thus
10 substantially incomplete as filed on March 27, 2018 and should have been denied on that basis
11 alone. VFAP ¶¶ 36 - 39.

12 SB35 - principally codified as Gov. Code § 65913.4 - was enacted in 2017 to institute a
13 “streamlined, ministerial approval process” for certain residential development projects that meet
14 defined eligibility criteria. VFAP ¶¶ 13 - 21.

15 To be *eligible* for streamlined, ministerial approval under SB35, at least two-thirds of the
16 square footage of the development must be designated for residential use. § 65913.4(a)(2)(C).

17 The Project falls short of the two-thirds residential floor ratio requirement, whether
18 calculated net (without parking and ancillary areas) or gross. VFAP ¶¶ 46 - 62.

19 Further, a development must not be “located on a site that is ... [a] hazardous waste site
20 that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department
21 of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the
22 Department of Toxic Substances Control has cleared the site for residential use or residential
23 mixed uses.” § 65913.4(a)(6). VFAP ¶ 20. As Petitioners have shown, the City’s own reports
24 state plainly that the Vallco project site “is included on a list of hazardous materials sites
25 compiled pursuant to Government Code Section 65962.5” without having been cleared by the
26 Department of Toxic Substances Control. VFAP ¶¶ 63 - 73. PR0004

27 On June 19, 2018, several days prior to the June 25, 2018 deadline for the City’s initial
28 determination of the Project’s eligibility under SB5 as aforesaid, Petitioners submitted to the

1 City and to the City Council a letter outlining its concerns about the application’s failure to
2 comply with legal requirements under SB35 and other law. Together with the letter, Petitioners
3 submitted an “Application Compliance Topic Chart,” a “Statute Compliance Chart,” and a
4 detailed, 132 page presentation entitled “VALLCO TOWN CENTER SB 35
5 NONCOMPLIANCE ISSUES.” VFAP ¶¶ 77 - 79 and Exhibit 5 - Exhibit 7 to original verified
6 petition (incorporated by reference in VFAP).

7 Ignoring the Project’s failure to meet the two-thirds square footage requirement under
8 SB35, and the Project site being listed on multiple hazardous waste site listings without being
9 cleared for residential use by DTSC, the City issued a letter after hours on Friday, June 22, 2018
10 purporting to find the project eligible under SB35. AR0888 *et seq.*. VFAP ¶ 4. The precise
11 time sequence surrounding the filing of the original petition is set out in VFAP ¶¶ 22 - 25.

12 Petitioners filed the original petition herein on June 25, 2018.

13 The Project site is respectively zoned P(CG) with a maximum building height of 30 feet
14 (two parcels), and P(Regional Shopping) for the rest of the site. PR0493 (Fig. 3 - Project site in
15 red).

16 On the citywide zoning map in force on March 27, 2018, the Vallco site also appears in
17 red on the Eastern end of Cupertino, North of Stevens Creek Boulevard, transected by Wolfe
18 Road. PR0493.

19 As Vallco has admitted,¹¹ some of the proposed buildings are considerably higher than
20 85 feet. The Project application should have been denied on this basis alone. VFAP ¶ 83 - 87.

21 Further, the Project fails to provide for the dedication of parkland as required under
22 mandatory General Plan policies. VFAP ¶¶ 88 - 93.

23 Parkland dedication is also required as a precondition for approval of the subdivision
24 map required for the project under Cupertino Municipal Code 18.24.030. VFAP ¶ 92.

25 Notwithstanding the Project’s failure to comply with the General Plan and generally
26 applicable legal standards, the City administration purported to approve the project by issuing an
27

28 ¹¹ Vallco Property Owner LLC’s Verified Answer, ¶ 86.

1 approval letter on September 21, 2018 which also purported to grant related approvals.
2 VFAP ¶ 5, AR0003 - AR0330.

3 ARGUMENT

4 A. TRADITIONAL MANDATE GOVERNS REVIEW

5 1. Traditional Mandate Lies to Compel Performance of Ministerial Duty.

6 Traditional mandate is the proper vehicle to compel performance of a ministerial duty by
7 a public entity.

8 To warrant relief by writ of mandate, a petitioner must demonstrate that
9 the public entity had a ministerial duty to perform. (*US Ecology, Inc. v.*
10 *State of California* (2001) 92 Cal.App.4th 113, 138.) A ministerial duty
11 is one that the entity is required to perform in a prescribed manner without
12 any exercise of judgment or opinion concerning the propriety of the act.
13 (*Ibid.*)

14 *California Assn. for Health Services at Home v. State Dept. of Health Services* (2007)
15 148 Cal.App.4th 696, 707.

16 Specifically, Code of Civil Procedure § 1085 “permits challenges to ministerial acts by
17 local officials. To obtain such a writ, the petitioner must show (1) a clear, present, ministerial
18 duty on the part of the respondent and (2) a correlative clear, present, and beneficial right in the
19 petitioner to the performance of that duty. [Citation]” *Alliance for a Better Downtown*
20 *Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 128.

21 Here, the core purpose of the SB35 statute is to enact a “streamlined, **ministerial**
22 approval process.”¹² for certain development projects. § 65913.4(a).

23 Traditional mandate also lies to review an adjudicatory decision when an agency is not
24 required to hold an evidentiary hearing.

25 Ordinary mandate is used to review an adjudicatory decision when an
26 agency is not required to hold an evidentiary hearing.

27 *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785.

28 A court must ensure that an agency has adequately considered all relevant
factors, and has demonstrated a rational connection between those factors,
the choice made, and the purposes of the enabling statute. [Citation.]”

¹² Emphasis added.

1 *Id.* at p. 1786.¹³

2 Petitioners have standing to petition for mandamus because the Project - including
3 demolition and excavation on a site with a decades-long history of pollution - broadly affects the
4 health and wellbeing of all citizens of Cupertino and will invariably have a major impact on the
5 growth and composition of the City’s population, the structure of Cupertino’s downtown area,
6 availability and accessibility of parkland, traffic, and numerous other issues. “[W]here the
7 question is one of public right and the object of the mandamus is to procure the enforcement of a
8 public duty, the relator need not show that he has any legal or special interest in the result, since
9 it is sufficient that he is interested as a citizen in having the laws executed and the duty in
10 question enforced ...”¹⁴ *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.

11 **B. PROJECT IS INELIGIBLE FOR “STREAMLINED, MINISTERIAL**
12 **APPROVAL” UNDER SB35 DUE TO HAZARDOUS WASTE SITE LISTING**
13 **UNDER § 65962.5.**

14 To be eligible for “streamlined, ministerial approval” under SB35, a proposed project
15 must meet a long list of qualifying criteria known as “objective planning standards” (i.e.
16 eligibility criteria) set out in § 65913.4(a)(1) - (10).

17 Here, the Project site is listed as a “hazardous waste site” pursuant to § 65962.5 as the
18 City has admitted in its related environmental impact reports (DEIR and FEIR). The
19 Department of Toxic Substances Control has not “cleared the site for residential use or
20 residential mixed uses.” § 65913.4(a)(6). VFAP ¶ 20.

21 **1. City has Admitted that Project Site is Listed as Hazardous Waste Site under**
22 **§ 65962.5.**

23 A project is ineligible for SB35 approval if it is “located on a site that is ... [a] hazardous
24 waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the
25 Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety
26 Code, unless the Department of Toxic Substances Control has cleared the site for residential use
27 or residential mixed uses.” § 65913.4(a)(6). VFAP ¶ 20. The statewide list is commonly

28 ¹³ Internal citation omitted.

¹⁴ Internal quotation marks omitted.

1 referred to as the “Cortese List.”

2 As Petitioners have shown, the City’s own reports plainly state that the Vallco project
3 site is in fact listed pursuant to § 65962.5.

4 A Final Environmental Impact Report (FEIR) pertaining to the Project site was certified
5 by the City Council of the City of Cupertino by Resolution 18-084 on September 19, 2018 in
6 connection with the adoption of the “Vallco Area Specific Plan” pertaining to the Project site.

7 The FEIR states:

8 The revised project is located on a site which is included on a list of
9 hazardous material sites compiled pursuant to Government Code
Section 65962.5; ...

10 PR0004.

11 Both the City and Vallco admit the authenticity of the cited document and passage. City
12 Answer ¶¶ 66 - 67, Vallco Answer ¶¶ 66 - 67.

13 **2. Draft Environmental Impact Report (DEIR) Confirms Multiple Unresolved
14 Environmental Issues.**

15 Similarly, a Draft Environmental Impact Report (DEIR) dated May 2018 (after the filing
16 of the Project application) was presented to the City Council as part of the agenda packet for the
17 “Vallco Area Specific Plan.” The DEIR was incorporated by reference in the FEIR which was
18 certified by the City Council. The DEIR outline reflects the dire environmental history of the
19 Project site:

20 Several past tenants were listed on various regulatory agency databases,
21 including the California Hazardous Material Incident Report System
22 (CHMIRS) database, Emergency Response Notification System (ERNS)
database, Emissions Inventory (EMI) database, HAZNET database, and
Resource Conservation and Recovery Act (RCRA) database.

23 PR0018

24 Appendix E to the DEIR, entitled “Phase I Environmental Site Assessment” (ESA) was
25 prepared by “Cornerstone Earth Group” and is dated February 26, 2018. The ESA in turn
26 includes as internal Appendix E a report of searches of environmental databases conducted by
27 Environmental Data Resources, Inc. (EDR). The excerpted EDR report identifies *no fewer than*
28 *sixty-four (64) environmental database entries pertaining to the Project site* (denoted as TP for

1 “target property” in the report.) PR0030 - PR0033 p. 4 - 7

2 Details of site listings include multiple “Leaking Underground Storage Tanks” (LUST)
3 PR0034 - PR0039.

4 The full site report notes, e.g., prior hazardous materials use and storage associated with
5 the Sears Automotive Center and JC Penney Automotive Center formerly located on the site.

6 PR0072. For instance, the report finds remnant piping from the Sears facility:

7 Residual lubricants within the piping were observed to be dripping onto
8 the concrete floor slab and walls at several locations, mainly within the
9 basement.

10 The full report runs to 446 pages¹⁵ and details numerous other environmental issues
11 including “9.4 Underground Storage Tanks,” “9.5 Oil-Water Separators and Acid Neutralization
12 Chamber,” “9.6 Hydraulic Lifts,” “9.7 Lead-Based Paint and Termite Control Pesticides.”

12 PR0073 - PR0074.

13 **3. Project Site was Never Cleared for Residential Use by DTSC.**

14 Nothing in the AR record provided by the City indicates that the Project site was cleared
15 *by the Department of Toxic Substances Control* for “for residential use or residential mixed uses”
16 as required to regain eligibility under SB35. § 65913.4(a)(6).

17 The City’s eligibility letter implicitly admits that the Project site is listed under § 65962.5
18 by noting that it was listed for “Leaking Underground Storage Tanks” (LUST), but emphasizing
19 that the respective *case investigations* were closed. AR0896.

20 *Closure* of an individual case investigation is not sufficient to make a site eligible for
21 SB35 approval. It merely indicates that a site is not subject to *ongoing remedial efforts* (e.g. to
22 protect the ground water). Closure of an individual local investigation does not make the
23 subject site suitable “for residential use or residential mixed uses” as required by
24 § 65913.4(a)(6).

25 **4. Project Site Remains Subject to Clean-Up and has NOT been Declared
26 Suitable for Housing by DTSC.**

27 The Hazardous Materials Compliance Division of the County of Santa Clara has

28 ¹⁵ PR0042 - PR0487.

1 confirmed that the Project site is subject to clean-up and has NOT been cleared for residential
2 use.

3 With our partner, County Fire Department, we have visited the site
4 conducting a walkthrough inspection and identifying issues that need to be
5 addressed. From there, the current property management/owners and Sears
6 were asked to get back to us on the legal responsibilities of each party. We
7 are hoping to meet with he [sic] property management group to discuss
8 site clean up in the near future (trying to coordinate schedules).

9 I understand your concerns with respect to the proximity of the UST to the
10 storm drain and it appears that all parties would like to resolve this as
11 quickly as possible. Once the building and current systems have been
12 closed to our satisfaction, the decision as to if the site is suitable for
13 housing will have to be decided by either the State (Water Board or
14 DTSC) or Santa Clara's Local Oversight Program.

15 PR1282. (Emphasis added.)

16 **5. Clearance of Site for Residential Use by DTSC is Sole Statutory Pathway to**
17 **Regaining Eligibility.**

18 By providing that sites listed pursuant to Section 65962.5 or designated pursuant to
19 Section 25356 must have been cleared *by the Department of Toxic Substances Control*, SB35 by
20 its own terms excludes all listed sites that have not been expressly cleared *by the Department of*
21 *Toxic Substances Control* “for residential use or residential mixed uses.” Neither a city nor any
22 other local or state agency has authority to “clear” a listed or designated site for purposes of
23 SB35 eligibility.

24 The City and Vallco have in effect claimed that the Cortese List mechanism has become
25 outdated and no longer applies. This argument is not tenable given the timing. SB35 was
26 enacted in 2017. The Legislature must be assumed to have been familiar with administrative
27 practices followed by competent agencies for listing sites, and for clearing listings for residential
28 use as required by § 65913.4(a)(6).

29 **C. PROJECT IS INELIGIBLE UNDER SB35 DUE TO FAILURE TO DESIGNATE**
30 **TWO-THIRDS OF SQUARE FOOTAGE FOR RESIDENTIAL USE.**

31 As noted, a project must designate at least *two-thirds of the square footage* for residential
32 use to be eligible for streamlined, ministerial approval under SB35. § 65913.4(a)(2)(C).

33 The Project falls short of dedicating two-thirds (ca. 66.7%) of its floor area (“square
34

1 footage”) to residential use. As shown below, no more than 57.53% of the *net* square footage is
2 designated for residential use. VFAP ¶¶19, 48 - 62. § 65913.4(a)(2)(C). On a gross basis
3 including parking etc., the ratio is even lower at only 44.79%. VFAP 55 - 59.

4 In fact, as the Application belatedly acknowledged, SB35 requires project eligibility to be
5 assessed “**excluding** any additional density or any other concessions, incentives or waivers of
6 standards.”¹⁶ § 65913.4(a)(5). AR0930 [June 19, 2018 letter discussing notional “pre-bonus”
7 project.] Calculating the ratio based on actual floor areas shown in the plans, *exclusive* of the
8 density bonus and reduction in retail space claimed by Vallco, results in even more unfavorable
9 ratios, as shown herein.

10 As Petitioners have shown with detailed calculations, the project falls short of the
11 two-thirds residential floor ratio requirement, whether calculated net or gross.
12 VFAP ¶¶ 46 - 62. Based on the Applicant’s own floor area figures, the total ratio of residential
13 floor area to total floor area (*net* calculation, without including parking and ancillary space) falls
14 significantly short of the two-thirds (66.7%) ratio required under SB35. VFAP ¶ 51. On a
15 *gross* basis including parking and amenity space associated with the respective uses, the ratio is
16 even more unfavorable to the Applicant. VFAP ¶ 59.

17 Even using the most favorable values supported by the Project application and following
18 the Applicant’s unbalanced methodology, the Project falls short of statutory requirements by the
19 equivalent of more than 100 apartments.

20 The Project application attempts to create an appearance of compliance with SB35 by
21 *including* parking areas when calculating residential totals, but *excluding* parking areas when
22 calculating corresponding non-residential floor areas. This is fundamentally inconsistent with
23 the policy of SB35 which aims to encourage the creation of quality living space, rather than
24 parking lots and non-residential space. Further, allowing developers to count parking space
25 towards totals would perversely encourage the creation of non-living space and thus exacerbate
26 the shortage of quality housing.

27
28 ¹⁶ Emphasis added.

1 The shortfall in the floor area ratio was immediately spotted by an outside consultant
2 retained by the City who promptly alerted the City’s Planning team. By email dated
3 March 28, 2018, Geoff Bradley, a land use consultant retained by the City sent an email to the
4 City’s then Assistant City Manager, Aarti Shrivastava, with copy to Piu Ghosh, Principal
5 Planner. PR1281. The email advised in relevant part:

6 “... my read of SB35 is that mixed-use projects have to be at least
7 two-thirds residential as measured by total square footage in order to
8 qualify for the streamlined review. Vallco would seem to be well below
that based on normal unit sizes ...” (Ellipsis in original.)

9 On June 18, 2018, Petitioners submitted detailed documentation to the City that also
10 addressed the insufficient residential floor area ratio that renders the Project ineligible.
11 VFAP ¶¶ 74 - 79 and exhibits identified therein.

12 **1. Floor Area Ratio must be Calculated EXCLUSIVE of Density Bonus and
other Concessions.**

13 SB35 requires that a project, “*excluding* any additional density or other concessions,
14 incentives or waivers granted pursuant to the Density Bonus Law in Section 65915”¹⁷ must be
15 “consistent with objective zoning standards and objective design review standards in effect at the
16 time that the development is submitted to the local government pursuant to [section 65913.4].”
17 § 65913.4(a)(5).

18 Simply put, Vallco was required to satisfy the two-thirds residential/total floor area ratio
19 requirement *before* reflecting in its plans any density bonus and related concession (here, retail
20 space reduction from 600,000 SF to 400,000 SF).

21 **2. Floor Area Ratio under SB35 must be Ascertained According to California
22 Building Code, not Cupertino Municipal Code.**

23 As a statewide statute, SB35 must be interpreted by reference to uniform, statewide
24 standards applicable to construction projects including in particular the California Building
25 Code. To hold otherwise would defeat SB35’s purpose of effecting statewide regulation and
26 would encourage local game-playing through manipulation of municipal regulations by
27 development opponents or proponents in line with the ebb and flow of political influence in each

28 ¹⁷ Emphasis added.

1 city.

2 Section 201.4 of the California Building Code (CBC) provides the following definitions
3 for gross and net floor area:

4 FLOOR AREA, GROSS. The floor area within the inside perimeter of the
5 exterior walls of the building under consideration, exclusive of vent shafts
6 and courts, without deduction for corridors, stairways, ramps, closets, the
7 thickness of interior walls, columns or other features. The floor area of a
8 building, or portion thereof, not provided with surrounding exterior walls
9 shall be the usable area under the horizontal projection of the roof or floor
10 above. The gross floor area shall not include shafts with no openings or
11 interior courts.¹⁸

12 FLOOR AREA, NET. The actual occupied area not including unoccupied
13 accessory areas such as corridors, stairways, ramps, toilet rooms,
14 mechanical rooms and closets.

15 Accessed online at <https://codes.iccsafe.org/content/chapter/9991/> p. 64.

16 The exclusion of shafts and other windowless spaces leads to a lower net figure for actual
17 space for both residential and non-residential uses.

18 **3. Vallco’s Hypothetical “Pre-Bonus” Floor Area Calculation is Unsupported,
19 Fictitious and Methodologically Improper.**

20 As part of the Project application, Vallco requested and the City purported to grant,
21 concessions in connection with “the State’s and the City’s Density Bonus Law,” including the
22 following:

23 A concession to allow 400,000 square feet of retail, a reduction of 200,000
24 square feet, where 600,000 square feet is required in the General Plan
25 pursuant to Strategy LU-19.1.4.

26 AR0004.

27 Thus, the pre-bonus floor area ratios for the Project must be calculated based on the
28 pre-concession retail total of 600,000 square feet.

29 The original Project application does not show the pre-bonus floor area ratios.
30 However, a cursory paragraph in a follow-up letter dated June 19, 2018 purports to supplement
31 this information, as follows:

32 Finally, we wanted to provide additional background on the density bonus

33 _____
34 ¹⁸ Emphasis added.

1 aspect of the project. We first assumed and started with a “pre-bonus” or
 2 General Plan consistent project, and then added the 35% increase in
 3 density and made other modifications allowed by the concessions. This
 4 “pre-bonus” project included the following program: 1,810,000 square
 5 feet of office, 600,000 square feet of retail, and 1,778 residential units
 within 4,820,000 residential square feet (including amenity and garage
 space). This program is consistent with the General Plan and still
 designates at least two-thirds of the square footage for residential uses.

6 AR0930.

7 It is noteworthy that this hypothetical pre-bonus project - which is unsupported by any
 8 drawings or other data in the application - results in a residential/total floor area ratio of *exactly*
 9 two-thirds (66.66667%).

Description	Area (in SF)	Remarks
Residential Total (alleged)	4,820,000 SF	Residential total <i>including</i> parking and amenity space, claimed in June 19, 2018 correction letter. AR 0930.
Non-Residential Total	2,410,000 SF	1,810,000 SF + 600,000 SF = 2,410,000 SF <i>(NOT including</i> parking and amenity space for non-residential)
Total Use Area (residential and non-residential)	7,230,000 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	66.66667%	4,820,000 SF/7,230,000 SF = 66.66667%

21 The values and methodology underlying this alleged ratio cannot be credited, for several
 22 reasons.

23 As an initial point, a practitioner would be surprised to see that a professional developer
 24 had designed a major project without allowing for a minimum margin of error in the assessment
 25 and calculation of floor area ratios. It is difficult to resist the conclusion that the above values
 26 were created as an afterthought and provided to the City on June 19, 2018 to provide at least
 27 plausible cover for a finding that the Project meets the two-thirds requirements. The previous
 28

1 day, June 18, 2018, Petitioners had provided detailed briefing papers to the City showing that the
2 Project was ineligible for multiple reasons including failure to meet the two-thirds floor area
3 ratio required by SB35, including the two-thirds issue. Updated versions were submitted on
4 June 19, 2018. VFAP ¶¶ 75 - 79, Exhibit 3 - 7 to original petition.

5 Vallco’s method of calculation compares apples to oranges. The (alleged) residential
6 total expressly *includes* parking and amenity space associated with residential units. By
7 contrast, the alleged total for non-residential floor area does NOT include the corresponding
8 parking and amenity space for those uses. This is inconsistent with the basic concept
9 underlying the floor area ratio calculation required by SB35 which requires at a minimum
10 comparing like with like - *net* residential vs. *net* total, or *gross* residential (with parking and
11 amenities) vs. *gross* total.

12 In substance, the above hypothetical calculation is entirely unsupported by the
13 Application. No drawings or other data within the Application documents show a total of
14 “1,778 residential units within 4,820,000 residential square feet (including amenity and garage
15 space)” as claimed by the Applicant. AR0930.

16 **4. Corrected “Pre-Bonus” Floor Area Ratio Falls Short of Two-Thirds**
17 **Minimum (66.67%).**

18 The alleged total of 4,820,000 SF of residential floor area (including associated parking
19 and amenity space) claimed in the June 19, 2018 letter is contrary to substantive values given in
20 the Application.

21 The table submitted by the Applicant with the same June 19, 2019 letter to the City gives
22 the total floor area of the residential units *including amenity and parking space, after*
23 **incorporating the density bonus units**, as 4,700,000 SF. AR0934.¹⁹ It cannot be supposed
24 that the *addition* of bonus units to a (notional but undocumented) project would result in the
25 *disappearance* of 120,000 SF of floor area, reducing the pre-bonus total of 4,820,000 to a
26 post-bonus total of 4,700,000 SF *including* bonus residential units. As 4,700,000 SF is the total

27 _____
28 ¹⁹ Neither the June 19, 2018 letter nor the internal Exhibit A attached to that letter include page numbering.

figure stated in the original application and is the only figure with some support in the application drawings and other documentation, 4,700,00 must be taken as the *upper bound* of the total square footage of residential areas including associated parking and amenity areas.

Recalculating the floor area ratio based on the residential total of 4,700,000 stated in the Project application shows that the Project falls short of meeting the required two-thirds ratio even if the Applicant’s inconsistent methodology is followed:

Description	Area (in SF)	Remarks
CORRECTED Residential Total 4,700,000 SF cf. AR0934	4,700,000 SF	Residential total <i>including</i> parking and amenity space, claimed in June 19, 2018 correction letter. AR 0930. Corrected to 4,700,000 SF as explained above.
Non-Residential Total	2,410,000 SF	1,810,000 SF + 600,000 SF = 2,410,000 SF (<i>NOT including</i> parking and amenity space for non-residential)
Total Use Area (residential and non-residential)	7,110,000 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	66.10408%	4,700,000 SF/7,110,000 SF = 66.10408%

The shortfall of approximately 120,000 SF of residential space is equivalent to more than 100 apartment units that the Project should have provided but does not.

5. Project Application Misattributes Space to Residential Use.

The total amount of floor area dedicated to residential use is overstated because the Project application counts certain spaces as residential even though those spaces are necessarily subject to commercial and office use.

For example, a pedestrian bridge connects a residential block to a non-residential block and is obviously shared among both uses. AR0066, cross-section 3.

The Project application attributes the entire floor area of the bridge (41,000 SF) to residential use. AR1024. AR1031 (yellow shading indicates residential use).

1 Given the location of the bridge and its function connecting residential and
2 non-residential areas, its floor area should have been allocated in equal proportions to residential
3 and non-residential use. This allocation reduces the residential total by 20,500 SF, and
4 increases the non-residential total by the same amount, resulting in a total swing of 41,000 SF.

5 The Applicant acknowledges in a footnote (AR1020) to its explanatory letter dated
6 June 19, 2018 that the attribution of the bridge floor area has been disputed but claims that
7 (i) future residential uses (not finalized at the time) would support the residential designation and
8 (ii) the floor area dedicated to residential use would still be 67.4% (following Applicant's
9 unbalanced method of calculation, see *infra*).

10 **6. Floor area Ratio of Project Falls Short of Required Two-Thirds Value if Net
11 Square Footage is Compared.**

12 If floor area is measured in accordance with the California Building Code, and parking
13 and amenity space is either consistently *excluded*, or consistently *included* in calculating the
14 respective totals, the Project application falls significantly short of the two-thirds ratio required
15 for a project to be eligible for "streamlined, ministerial approval" under SB35.

16 NOTE: The calculations set out below are similar to those in the Verified First
17 Amended Petition, but were adjusted to reflect a total value of 600,000 SF of retail space²⁰
18 before the retail space reduction sought by the Applicant and granted in the purported approval
19 letter. AR0004, AR0930. § 65913.4(a)(5).

20 The table (AR0934) submitted with the Applicant's June 19, 2019 letter gives the
21 following figures for *net* residential floor area (i.e. not including parking and amenity areas):

Description	Area (in SF)	Remarks
Residential Units	2,714,340 SF	Actual net floor area is substantially less, cf. <i>infra</i>
Residential Amenities	550,055 SF	
TOTAL RESIDENTIAL AREA (without parking)	3,264,395 SF	(Calculated from above values)

26 The same table gives the total floor area for offices and retail space as follows:
27

28 ²⁰ Not including retail-related parking and amenity space.

Description	Area (in SF)	Remarks
Office	1,810,000 SF	
Retail	600,000 SF	AR0934 gives value of 400,000 SF reflecting density bonus concession, corrected to "pre-bonus" value.
TOTAL NON-RESIDENTIAL AREA (without parking)	2,410,000 SF	(Calculated from above values)

Based on the Applicant's own figures, the total ratio of residential floor area to total floor area comes to 57.53%, far short of the two-thirds (66.7%) required under SB35.

§ 65913.4(a)(2)(C):

Description	Area (in SF)	Remarks
Residential Total (including amenities, without parking)	3,264,395 SF	
Non-Residential Total (without parking)	2,410,000 SF	1,810,000 SF + 600,000 SF = 2,410,000 SF (<i>NOT including</i> parking and amenity space for non-residential)
Total Use Area (residential and non-residential)	5,674,395 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	57.53%	3,264,395 SF/5,674,395 SF = 57.53%

7. Residential Floor area must be Corrected Downward Based on California Building Code Definition.

In fact, the true amount of floor area attributable to actual residential units is substantially less than the total floor area figure for units (without amenity and parking spaces) of 2,714,340 SF claimed in the Application. AR0934. As the Applicant notes in footnotes to the tables for floor area by block (AR0936 - AR0947), "UNIT AREA INCLUDES UNITS, CORES, CORRIDORS AND LOBBIES." "Corridors" are expressly excluded from the definition of "Floor area, net" in the CBC. *Supra*.

1 “Cores” and “lobbies” must equally be treated as being excluded from the CBC definition
2 of net floor area.

3 The number of average sizes of each type of residential unit are set out in a table entitled
4 “Residential Program Types” that was submitted with the Project application. AR1401.
5 VFAP ¶ 53 (larger copy).

6 Multiplying the average size by the number of units for each unit category yields a net
7 floor area total of 2,238,738 SF for residential units based on the Applicant’s own average
8 figures. This net figure is 17.52% less than the alleged *net* floor area total of 2,714,340 SF
9 asserted by the Applicant for purposes of the calculation as noted above. AR0934. The
10 detailed calculation is shown in VFAP ¶ 54.

11 **8. Gross Floor Area Ratio (Including Parking and Amenities) Falls Short of**
12 **Two-Thirds Requirement.**

13 Even if - contrary to Petitioners’ view - SB35 were to be interpreted as allowing *parking*
14 *space* to be included in the calculation of residential and non-residential totals for purposes of
15 ascertaining compliance with the two-thirds residential floor ratio requirement, the Project fails
16 to meet this standard.

17 The table submitted with the Applicant’s June 19, 2019 letter to the City gives the total
18 floor area of the residential units *including amenity and parking space* as 4,700,000 SF.
19 AR0934.²¹

20 The first page of the Site Plan submitted by the Applicant includes a table of “Areas
21 Excluded from Floor Area Calculation.” AR1400.²² According to that table the following
22 areas were excluded from the floor area calculation:

Description	Area (in SF)	Remarks
-------------	--------------	---------

23
24
25 ²¹ Neither the June 19, 2018 letter nor the internal Exhibit A attached to that letter include page
26 numbering.

27 ²² The table appears on the page slightly below the map of California. AR1400 is the first page
28 of the Site Plans appears in the low-resolution rasterized form of the original PDF file submitted
to the City by the Applicant, and for this reason appears unduly blurry. Petitioners have no
direct knowledge as to why the City administration considered it appropriate to accept a
low-resolution version of this information-dense and important document.

Description	Area (in SF)	Remarks
Parking, Utilities, Infrastructure	1,478,000 SF	West Side
Parking, Utilities, Infrastructure	1,906,000 SF	East Side
TOTAL NON-RESIDENTIAL PARKING	3,384,000 SF	(Calculated from above values)

To arrive at the target ratio, Vallco *excluded* parking areas to arrive at an artificially reduced amount of non-residential floor area, while *including* parking space to arrive at an inflated figure for residential floor area. The overall effect of this unbalanced approach is to arrive at an artificially inflated percentage of residential floor area relative to total usable floor area.

Correcting this methodological flaw by including parking areas in the calculation of non-residential as well as residential totals yields the following:

Description	Area (in SF)	Remarks
Non-Residential Total (without parking)	2,410,000 SF	1,810,000 SF + 600,000 SF = 2,410,000 SF <i>(NOT including parking and amenity space for non-residential)</i>
Parking, Utilities, Infrastructure (West and East)	3,384,000 SF	Cf. previous table
TOTAL NON-RESIDENTIAL AREA INCLUDING PARKING	5,794,000 SF	(Calculated from above values)

The ratio of residential-use area to the total usable area amounts to **44.79%** if parking is consistently included when computing the totals of residential and non-residential areas, as shown in the following table.

Description	Area (in SF)	Remarks
Residential Total (including amenities and parking)	4,700,000 SF	AR0934
Non-Residential Total (including parking)	5,794,000 SF	Cf. previous table
Total Use Area (residential and non-residential)	10,494,000 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	44.79%	4,700,000 SF/10,494,000 SF = 44.79%

Again, the residential ratio falls far short of the SB35 requirement that “two-thirds of the square footage of the development [must be] designated for residential use.”
 § 65913.4(a)(2)(C).

D. PROJECT APPROVAL IS IMPROPER - PROJECT EXCEEDS ZONED HEIGHTS.

Even if the Project were held to have been *eligible* for processing under the “streamlined, ministerial approval process” provided by SB35, it fails to meet multiple “objective” requirements and thus could not properly have been approved.

Multiple buildings proposed as part of the Project considerably exceed building height limits permissible under existing zoning regulations: 30 feet for P(CG) zoning, and 85 feet for P(Regional Shopping).

Vallco’s answer admits that some buildings exceed 85 feet in height. Vallco Answer ¶ 86. The City’s approval documentation acknowledges the zoning and obliquely acknowledges that the Project violates zoned building heights by insisting that the zoning is in conflict with the General Plan. AR0274.

Petitioners submit herewith a zoning map showing the zoning in effect for the Project site at the time the Application was filed (March 27, 2018). PR0493. PR1212 (Fig. 3 - zoning map adopted as part of “Heart of the City” Specific Plan).

The Project site - colored red on the zoning maps - is located on the Eastern end of Cupertino is bounded by Stevens Creek Boulevard in the South, and by Interstate 280 in the North, and is transected by Wolfe Road North to South. At the southern end of the Project site,

1 an area of approximately square shape North of Stevens Creek Boulevard and South of Vallco
2 Parkway is shown as zoned P(CG). The balance of the site is zoned P(Regional Shopping). A
3 bird's-eye view of the existing parcels is included in the approval documentation. AR0053.
4 ("PARCEL ONE" outlined pink.)

5 **1. Building Height is Limited to 30 Feet for Two Parcels at Southern End of**
6 **Project Area**

7 The P(CG) segment of the Project site principally comprises two parcels (APN
8 316-20-080 and 316-20-081) at the Southern end of the Project area bounded by Stevens Creek
9 Boulevard. These parcels are zoned "P(CG)" as indicated in the parcel reports downloaded
10 from the City's GIS website.²³ PR0495 - PR0500. The total N-S extent of these two parcels
11 as measured on the GIS site is approximately 850 feet.

12 The maximum building height for P(CG) zones is 30 feet. Cupertino Municipal Code
13 19.60.060 as last amended by Ordinance 2011-2085 provides:

14 Table 19.60.060 sets forth the rules and regulations pertaining to the
15 development of property located in the General Commercial (CG) zoning
16 district.

17 **Table 19.60.060: Development Standards²⁴**

18 ...

19 Height of Buildings and Structures 30 feet unless otherwise permitted by
20 the General Plan or applicable
21 Specific Plan.

22 Cupertino Municipal Code 19.60.060. PR0632P6.

23 The height limit of 30 feet remained in place when the Project application was filed on
24 March 27, 2018 as no greater height limit had been set under any General Plan or Specific Plan.
25 The current General Plan adopted in 2014 and amended in 2015 did not permit any greater
26 building height: the parameter box (bottom left) for the "Vallco Shopping District Special Area"
27 defers to a (future) Specific Plan to set height limits for the "Vallco Shopping District Special
28 Area," but no such Specific Plan had been adopted when the Project application was filed on

²³ <https://gis.cupertino.org/propertyinfo/#>

²⁴ Bolding in original.

1 March 27, 2018. PR0637 (red parameter box at bottom left).

2 **2. Building Heights in P(CG) Zone Greatly Exceed Zoned Limit of 30 Feet.**

3 The Project includes building heights far in excess of 30 feet to be built on parcels zoned
4 P(CG) and thus subject to the 30 feet building height limit.

5 In fact, the “building section” plan (Section 1, fourth section from the top) indicates
6 building eaves heights of 64.7 feet along the E-W section line of the Project site just North of
7 Stevens Creek Boulevard corresponding to the two P(CG) parcels. AR0149.²⁵ (NOTE: the
8 “KEY PLAN AND NORTH ARROW” box in the legend on the right is keyed to the site plan,
9 AR0036.²⁶)

10 Even greater building heights are seen in the N-S section (Section 1) which features a
11 tower block rising to an elevation of 217.8 ft on the right (S). AR0150.

12 **3. Building Heights in P(Regional Shopping) Zone Exceed 85 Feet Limit.**

13 As noted, the remainder of the Project site is zoned P(Regional Shopping). The
14 P(Regional Shopping) - Planned Development Regional Shopping zoning designation permits
15 buildings up to three stories and 85 feet tall. As noted in the City’s DEIR adopted on
16 September 19, 2018:

17 The Planned Development Regional Shopping zoning designation allows
18 all permitted uses in the Regional Shopping District, which include up to
1,645,700 square feet of commercial uses, a 2,500 seat theater complex,
and buildings of up to three stories and 85 feet tall.⁸¹

19 The footnote states:

20 ⁸¹ Council Actions 31-U-86 and 9-U-90. The maximum building height
21 identified was in conformance with the 1993 General Plan and were
22 identified in the Development Agreement (Ordinance 1540 File no.
1-DA-90) at that time.

23 PR0026.

24 The 85 feet height limit appears to be reflected in Ordinance 1936 of 2004 which adopts
25 a development agreement for the Vallco site. PR1283 - PR1289. That ordinance expressly
26 “vests permitted uses, density, height and size of buildings.” PR1285. The ordinance further

27 _____
28 ²⁵ Original version submitted by applicant at AR0696.

²⁶ Cf. AR1406 (higher quality vector graphics version as submitted).

1 provides that building heights are “[g]enerally not to exceed eight stories” in the “Vallco Park”
2 area (i.e., the current project site). PR1286, PR1287.

3 On January 17, 2012, a Specific Plan adopted by the City Council instituted an amended
4 zoning map for the Project site and the surrounding “Heart of the City” area.
5 PR1213 - PR1280, PR1212 (map).

6 Notwithstanding the clear limitation of building height, the building section plans show
7 building heights in these zoning areas in excess of 219.2 ft. (residential tower, Section 4, left),
8 160.0 ft (office building, Section 3, right). AR0149. Similarly, two residential towers of
9 239.1 ft. and 240.4 ft. (NOT including the rooftop amenity space and elevator overruns) are
10 shown in the N-S section corresponding to the Project site portion zoned P(Regional Shopping).
11 AR0150 (Section 3).

12 **4. Zoning is NOT Inconsistent with General Plan.**
13 **Finding Zoning Inconsistent is not within Discretionary Decision-Making**
14 **Entrusted to City Administration.**

14 Vallco and the City admit that the Project site is variously zoned P(CG) and P(Regional
15 Shopping) but preemptively claim that the zoning rules do not apply as they are inconsistent with
16 the General Plan. VFAP ¶ 83, Vallco Answer ¶ 83, City Answer ¶ 83.

17 Both argue in identical terms that “[b]ecause the General Plan calls for a complete
18 redevelopment of the Vallco site with a mix of uses, the zoning designations are inconsistent
19 with the General Plan, and thus only the General Plan standards apply.” Similarly, the Project
20 approval claims that “THE EXISTING ZONING DESIGNATION [*sic*] IS IN CONFLICT
21 WITH THE GENERAL PLAN AND NOT APPLICABLE IN ACCORDANCE WITH
22 SB-35.”²⁷ AR0025 (Under “DATA TABLE,” “GOVERNING AGENCIES/DESIGNATION.”)

23 This claim fails *in limine* because the administration of zoning decisions is entrusted to
24 the Planning Commission and is not within the authority of the City administration. CMC
25 2.32.070B. PR0511.

26 The claim that the zoning is inconsistent with the General Plan also fails in substance, for
27

28 ²⁷ Capitalization in original.

1 several reasons.

2 First, SB35 itself provides guidance on the issue of inconsistency between GP and zoning
3 ordinances by providing that a project may proceed even in the absence of residential *zoning*
4 provided that the project site is *designated* for residential or mixed residential use under the
5 General Plan as noted above. § 65913.4(a)(2)(C).

6 With this exception, SB35 *expressly* requires that projects be consistent with existing
7 non-discretionary zoning standards (“objective zoning standards”) and other non-discretionary
8 legal standards (“objective design review standards”). § 65913.4(a)(5). In short, while SB35
9 allows a project to proceed in the absence of residential *zoning* where the GP designation
10 includes residential use, other zoning standards such as building heights are unaffected.

11 Second, there is no material inconsistency. The fact that the General Plan recites as a
12 general goal that the Vallco site is to be redeveloped *in future* does not render current zoning
13 inconsistent with *currently operative* provisions of the General Plan. Indeed, while the General
14 Plan was last amended in 2015,²⁸ a generally Vallco-friendly City Council had not adopted any
15 zoning changes affecting the Project site at the time when the Project application was filed.

16 Courts have found zoning ordinances inconsistent with the General Plan only where a
17 clear, articulated difference is found to exist between the current, concrete mandates embedded
18 in the General Plan and the zoning ordinance, respectively. For example, in one case, a city
19 had changed the GP designation from “Industrial” to “Commercial.” The zoning was later
20 changed from “ML-Light Industrial” to “CG-General Commercial” which would have permitted
21 a hotel to be built. It was held that restoring the previous zoning would be inconsistent with the
22 GP designation. *City of Morgan Hill v. Bushey* (2017) 12 Cal. App. 5th 34, 38.

23 Here, no clear and present inconsistency exists between general aspirations expressed in
24 the General Plan, and current zoning provisions. Practically speaking, a zoning height of 30
25 feet is in no manner inconsistent with a town-center style project. With a smaller unit size of
26 800 square feet, the permitted maximum of 35 units per acre can realistically be built up using

27
28 ²⁸ Resolution 15-087. PR0634 - PR0676

1 three story construction while leaving adequate room for town-center appropriate streets.

2 Third, a finding that the zoning provisions are inconsistent in these circumstances - where
3 there is no *necessary* inconsistency between GP requirements and current zoning - amounts to a
4 *discretionary* decision far beyond the ambit of “ministerial” review permitted and required under
5 SB35.

6 **E. PROJECT FAILS TO DEDICATE REQUIRED PARKLAND.**

7 As recited in the Application, the General Plan “Parkland Standards” policy (RPC-1.2)
8 requires the acquisition or dedication of three acres of “parkland” per 1,000 (project) residents.
9 The Project application admits that this policy is “applicable.” AR1141. In fact, the Project
10 falls far short of providing the necessary space.

11 The Project Description tries to circumvent the “parkland” requirements by substituting
12 the term “park space” but admits that the Project would “generate the need for 12.96 acres of
13 *park space.*”²⁹ AR1098.

14 The Application expressly references General Plan Policy RPC-1.2 but claims that the
15 requirement for parkland dedication would be met by “2 acres of at-grade park space and
16 children’s play area” and “2 acres in two Town Center plazas,” “**and 14 to 22 acres of publicly**
17 **accessible green roofs on all blocks connected by bridges.**”³⁰ AR1098. Quite simply, a
18 building roof, even if planted, does not magically transmute into “**parkland.**”³¹ A decision to
19 treat roof space as equivalent to “parkland” would be *discretionary* and thus beyond the City’s
20 authority under the “ministerial” approval process required by SB35. Even if the City had been
21 authorized to make such a finding, zoning issues are required to be heard by the Planning
22 Commission in the first instance, as discussed *supra*.

23 **1. General Plan Requires Dedication of Parkland.**

24 General Plan Policy RPC-1.2 of the General Plan adopted on December 4, 2014 is
25 entitled “**Parkland Standards**” (emphasis in original). In relevant part, the policy provides the
26

27 ²⁹ The correct term “parkland” is used in the chart purporting to show compliance. AR1141.

28 ³⁰ Emphasis added.

³¹ Emphasis added.

1 following:

2 **POLICY RPC-1.2: Parkland Standards**

3 Continue to implement a parkland acquisition and implementation
4 program that provides a minimum of three acres per 1,000 residents.

5 PR0982.

6 Securing parkland is an important City policy denoted in the General Plan. In fact, one
7 of the ‘strategies’ under this policy is to “[e]xplore **increasing the parkland standard to five**
8 **acres** per 1,000 residents as part of the citywide Parks and Recreation Master Plan.”³² Strategy

9 RPC-1.2.2. *Id.*

10 **2. Roof Space does not Qualify as “Parkland.”**

11 The term “parkland” as used in the General Plan and related Cupertino Municipal Code
12 provisions unambiguously refers to *land* dedicated to park use, not urban “plazas” and other
13 general open spaces. Certainly a roof space is not separate “land” that can be “dedicated.”
14 General Plan Strategy RPC-2.1.1 (*infra*). PR0983.

15 The very fact that the Application paraphrases the “parkland” requirement as “park
16 space” tacitly acknowledges that a roof area is not “parkland” within the meaning of the General
17 Plan policy.

18 Further, Policy RPC-2.1, “**Parkland Acquisition**” (emphasis in original), confirms that
19 “parkland” refers to “at-grade” land by providing in part as follows:

20 The City’s parkland acquisition strategy should be based upon three broad
21 objectives:

22 ...

23 • Connecting and providing access by providing paths, improved
24 pedestrian and bike connectivity and signage;

25 and

26 • Obtaining creek lands and restoring creeks and other natural open
27 space areas, ...

28 PR0983.

Clearly, a roof-top area will not have workable “pedestrian and bike connectivity” with

³² Emphasis added.

1 the rest of the City. Similarly, a rooftop space cannot serve the task of “[o]btaining creek lands
2 and restoring creeks and other natural open space areas.”

3 Other General Plan policies and strategies³³ confirm that “parkland” means “parkland,”
4 rather than “planted roof space.”

5 **Strateg[y] RPC-2.1.1: Dedication of Parkland.** New developments, in
6 areas where parkland deficiencies have been identified, should be required
7 to dedicate parkland rather than paying in-lieu fees.

7 PR0983.

8 This strategy would make little sense if the General Plan had in fact intended the term
9 “parkland” to include “rooftop space” as effectively contended by the City and Vallco.

10 Similarly, “2 acres in two Town Center plazas,” may be pleasant as part of a pedestrian
11 zone, but simply do not constitute “parkland” within the meaning of that term in the General
12 Plan. AR1098.

13 Viewed overall, these RPC policies simply cannot be read as allowing roof space - even a
14 self-declared “green roof” - to be treated as “parkland.”

15 Additionally, by purporting to treat roof “areas” as “parkland” as that term is used in the
16 General Plan, the City administration purported to engage in improper discretionary
17 decision-making which is not permitted within the “streamlined, ministerial approval process”
18 mandated by SB35, and in particular violates § 65913.4(a)(5). The approval is independently
19 invalid for this reason.

20 **F. PURPORTED APPROVALS BY INTERIM CITY MANAGER WERE *ULTRA***
21 ***VIRES* AND IMPROPER. REVIEW WAS REQUIRED TO BE CARRIED OUT**
22 **BY PLANNING COMMISSION OR CITY COUNCIL.**

23 The purported approvals herein were issued by the Interim City Manager.
24 AR0003 - AR0008 (Sept. 21, 2018 decision letter).

25 SB35 provides several alternatives (“may”) for the conduct of the “design review and
26 public oversight” of a project application. The review may be conducted “by the local
27 government planning commission or any equivalent board or commission, ... or the city council

28 ³³ “Strategy” is General-Plan jargon for “objective.”

1 ...” § 65913.4(c). SB35 does NOT permit the City administration to usurp the authority of the
2 planning commission or the City Council and conduct the review itself.

3 By expressly mandating that the project review be conducted by the Planning
4 Commission or City Council, SB35 must be taken to have envisaged an open, public process.
5 Unlike a city administration, the Planning Commission and City Council are bound by strict due
6 process rules including noticed public hearings with a formal agenda, multiple co-equal decision
7 makers, opportunity for public engagement, meeting minutes, etc. All of these hallmarks of
8 representative decision-making are absent from the record here.

9 The AR records herein - certified by the City as complete³⁴ - indicates that the entire
10 approval process was exclusively handled by City staff, culminating in the purported approvals
11 issued by the Interim City Manager as cited above. Neither the approval letter nor any other
12 part of the AR indicates that the matter was ever put before the Planning Commission, let alone
13 the City Council. Further, neither body’s meeting agendas and minutes for the period in
14 question (June 25, 2018 through September 21, 2018) indicate that review of the SB35 was
15 discussed.

16 Having been withheld from consideration by the decision-making bodies statutorily
17 charged with reviewing the project, the purported approval is itself invalid and should vacated by
18 this Court’s order on this independent ground.

19 **G. BMR (BELOW MARKET RATE) UNITS ARE NOT DISPERSED, IN**
20 **VIOLATION OF CUPERTINO MUNICIPAL CODE AND BMR POLICY, AND**
21 **ARE OF SMALLER SIZE.**

22 The Project claims a “density bonus” under the Density Bonus Law. §§ 65915 *et seq.*
23 The City has adopted a density bonus ordinance to implement the statute. Cupertino Municipal
24 Code 19.56.010. PR0616.

25 As Petitioners have shown the BMR (below market rate) units provided by its project do
26 *not* meet the CMC requirement that affordable units must be dispersed throughout the project.
27 VFAP ¶¶ 98- 103. AR0339. The Application effectively admits as much. AR0334, FN2.

28 ³⁴ “City Certification of Administrative Record” dated December 13, 2018.

1 Cupertino Municipal Code 19.56.050G. PR0623 - PR0624.

2 The Applicant claims in the footnote that the dispersal requirement does not apply
3 because the Density Bonus Law permits bonus units to be located in a geographically separate
4 area. This, however, is a different concept. The Density Bonus Law anticipates that bonus
5 units may be built on part of a project site that was not part of the original project. It does not
6 purport to supersede the dispersal requirement under the CMC. It is logically quite possible to
7 include affordable units among market rate units.

8 The BMR units are also smaller in unit size mix, and smaller than equivalent market rate
9 units. VFAP ¶¶ 104 - 110.

10 The Applicant also claimed, and the City granted, “concessions” purporting respectively
11 to allow (1) affordable units to be studios and one bedroom units instead of a mix of regular
12 units, and (2) these units to be of smaller size than corresponding regular units. AR0004.

13 These purported “concessions” are improper and unlawful. While the Density Bonus
14 Law and the density bonus ordinance provide for concessions as an incentive for the provision of
15 BMR units, the policy underlying those enactments - to provide affordable housing on otherwise
16 comparable terms - clearly anticipates that *general building standards* such as setback
17 requirements may be waived. The logic of the Density Bonus Law and of the density bonus
18 ordinance does not permit “concessions” to extend to key provisions of the density *bonus*
19 *ordinance itself* as to do so would simply render the provisions of the ordinance nugatory.

20 **H. SUBDIVISION MAP APPROVAL IS INVALID BOTH IN SUBSTANCE AND ON**
21 **PROCEDURAL GROUNDS.**

22 As part of the Project approval, the Interim City Manager purported to approve a
23 Tentative Subdivision Map. AR0003 (Sept. 21, 2018 decision letter). AR0196 - AR0268
24 (approved tentative subdivision map). This approval was improper in substance as the
25 dedication of land or payment in lieu is a precondition of approval of a tentative subdivision
26 map. Indeed, the approval appears to include approval of the “final parcels.” AR0054.

27 The approval is also improper and invalid on procedural grounds. The Cupertino
28 Municipal Code requires a tentative subdivision map to undergo review by the Planning

1 Commission and the City Council, and also requires a public hearing.

2 **1. Approval of Tentative Subdivision Map is Responsibility of Planning**
3 **Commision. City Administration’s Action was *ultra vires* and Improper.**

4 As noted in the preceding section, SB35 expressly entrusts review of a project to the
5 Planning Commission and/or City Council. § 65913.4(c)

6 The purported approval of the tentative subdivision map by the Interim City Manager is
7 unauthorized and *ultra vires*. The administration of subdivisions is specifically one of the
8 powers and functions of the Planning Commission and is not within the authority of the City
9 administration. CMC 2.32.070. PR0511. The City’s AR - certified by the City as
10 complete - does not indicate that the tentative subdivision map was ever put before the Planning
11 Commission.

12 Like most cities, Cupertino has adopted a detailed procedural regime that must be
13 followed before a tentative subdivision map may be approved so as to ensure public exposure
14 and input. CMC Chapter 18.16. PR0570 - PR0582.

15 First, the Department of Community Development “shall forward copies of the tentative
16 map to the affected public agencies which may, in turn, forward ... their findings and
17 recommendations thereon.” 18.16.030A. PR0571. The AR - certified by the City as
18 complete - does not indicate that such agency input was sought or received.

19 Second, within five days of the tentative map application being found to be complete,
20 notice of the determination must be sent to all affected school districts. 18.16.030B. PR0571.
21 The record shows no indication that such notices were sent.

22 Third, and importantly, the CMC requires that the Director of Community Development
23 must (“shall”) “set the matter for public meeting.” Public notice of the meeting must be given
24 at least 10 calendar days in advance. 18.16.040A. PR0572. The notice must be published in
25 a newspaper of general circulation. 18.16.040B. PR0572. Owners of properties within 300
26 feet of the project must be notified directly. 18.16.040C. PR0572. The record does not
27 disclose any public notice having been given, nor any public meeting having been held, and
28 Petitioners - although closely involved in following city politics - are not aware of any such

1 action having been taken.

2 **2. Approval of Tentative Subdivision Map was Improper in Substance due to**
3 **Failure to Dedicate Parkland.**

4 Once the above procedural steps have been complied with, the Planning Commission is
5 charged (“shall”) to determine in substance whether

6 ... the proposed subdivision, together with its provisions for its design and
7 improvements, is consistent with applicable general or specific plans
8 adopted by the City.

9 CMC 18.16.050A.

10 Here, as noted above, the Application fails entirely to dedicate sufficient “parkland” to
11 satisfy the General Plan requirements. Accordingly, the tentative subdivision map could not
12 properly have been authorized in the circumstances.

13 The Planning Commission is required (“shall”) to deny approval of the tentative map if it
14 finds - as it would have done had the Application been put before it - (i) that the *map* is not
15 consistent with applicable general or specific plans; or (ii) that the *design or improvement* of the
16 proposed subdivision is not consistent with applicable general or specific plans. CMC
17 18.16.060. PR0573.

18 In line with this requirement, CMC § 18.24.030 requires that the *final* subdivision map
19 may only be approved if the project complies with the General Plan. Again, approval could not
20 properly be granted due to the shortfall (by more than 10 acres) in parkland dedication. CMC
21 18.24.030. PR0584.

22 While it appears that the tentative subdivision map was never put before the Planning
23 Commission despite the CMC mandate, the substantive requirements of the CMC must
24 nonetheless be applied as a matter of statutory construction. In enacting Chapter 18.16, the
25 City Council cannot have intended that the City administration should have the option of
26 circumventing the CMC by withholding the matter from the Planning Commission.

27 The Planning Commission’s recommendation to approve or deny a tentative map were
28 required to be reported to the City Council by the Department of Community Development, and
must then be placed on the City Council agenda for review. The City Council could and should

1 then have rejected the tentative map based on any of the grounds in CMC 18.16.060. CMC
2 18.16.070. PR0573.

3 None of these provisions were followed by the City administration which throughout
4 appears to have disregarded the constitutional authority of the City Council. The City
5 administration's actions and purported approval were *ultra vires* as well as unwarranted in
6 substance and are thus invalid as a matter of law.

7 **CONCLUSION**

8 The Project was never eligible for the privileged "streamlined, ministerial approval
9 process" provided by SB35.

10 Even if eligible for review under SB35, the Project fails to meet multiple "objective"
11 criteria and could not properly have been approved in the exercise of the City administration's
12 "ministerial" review. Indeed, the City administration improperly purported to make multiple
13 *discretionary* determinations which it is not authorized to make.

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

16 DATED: January 29, 2019

17 Respectfully submitted.

18
19
20 

21 Bern Steves
22 Attorney for Petitioners
23 Friends of Better Cupertino
24 Kitty Moore, Ignatius Ding and
25 Peggy Griffin
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

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

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

PETITIONERS’ BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS

DECLARATION OF PETITIONER KITTY MOORE AUTHENTICATING DOCUMENTS IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS

PETITIONERS’ REQUEST FOR JUDICIAL NOTICE AND/OR FOR ADMISSION OF EVIDENCE BY DECLARATION IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS

PETITIONERS’ RECORD.

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

Placing a USB stick containing the above-referenced “PETITIONERS’ RECORD” only in a sealed envelope, and placing said envelope in a Federal Express dropbox in Santa Clara County, California, addressed as follows.

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) to be sent by transmitting an electronic version through Bender’s Legal Service to the eService Recipients or persons listed below. The document(s) were transmitted before close of business.

1 Patricia E. Curtin, Esq.
2 Todd A. Williams, Esq.
3 WENDEL, ROSEN, BLACK & DEAN LLP
4 1111 Broadway, 24th Floor
5 Oakland, CA 94607-4036
6 TEL: (510) 834-6600
7 Fax: (510) 834-1928
8 Email: pcurtin@wendel.com
9 tawilliams@wendel.com

10 Attorneys for Respondents
11 City of Cupertino and Grace Schmidt in her
12 official capacity as Cupertino City Clerk

Jonathan R. Bass, Esq.
Charmaine G. Yu, Esq.
Katharine Van Dusen, Esq.
Sarah E. Peterson, Esq.
COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
San Francisco, CA 94104-5500
TEL: (415) 391-4800
Fax: (415) 989-1663

Email: ef-jrb@cpdb.com
ef-cgy@cpdb.com
ef-ktv@cpdb.com
ef-sep@cpdb.com

Attorneys for Real Party in Interest
Vallco Property Owner LLC

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

15 Executed on January 29, 2019 in California.

16
17
18
19
20
21
22
23
24
25
26
27
28



Bern Steves