JONATHAN R. BASS (State Bar No. 75779)
CHARMAINE G. YU (State Bar No. 220579)
KATHARINE VAN DUSEN (State Bar No. 276021)
SARAH E. PETERSON (State Bar No. 309733)
COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
San Francisco, California 94104-5500
Telephone: 415.391.4800
Facsimile: 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

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

Petitioners,

v.

CITY OF CUPERTINO, GRACE SCHMIDT, and DOES 1-20 inclusive,

Respondents.

VALLCO PROPERTY OWNER LLC, and DOES 1-20 inclusive,

Real Party in Interest.

Case No. 18CV330190

REPLY MEMORANDUM IN SUPPORT OF VALLCO PROPERTY OWNER LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

Action Filed: June 25, 2018

Date: March 29, 2019
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Helen E. Williams

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

TABLE OF CONTENTS

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

INTRODUCTION

Petitioners' two claims, which challenge the legal determination that Vallco's project application satisfies all "objective planning standards" under SB 35, are time-barred because they were served on the City more than ninety days after the determination was final. (*See* § 65009(c)(1)(E), (F).)[1] The Petition should therefore be dismissed with prejudice.[2]

SB 35 requires a city to review a proposed housing development (here, the Vallco Project) for compliance with the ten objective planning standards set forth in subdivision (a) of SB 35. If the project satisfies those standards, then it receives ministerial approval under subdivision (b). The determination that the Vallco Project satisfied the objective planning standards was final on June 25, 2018 (the "June Determination"). Both causes of action in the Petition challenge the June Determination, and nothing else. These claims became time-barred on September 24. The Petition was not served until October.

Petitioners concede that the SB 35 process resulted in the issuance of a set of "permits and approvals" (Opp. at 10:7), and that the June Determination was a decision made before those permits were granted (*id.* at 9:22–26). They concede as well that the June Determination was a final determination, one that "the City could not revoke or change" (*id.* at 14:4). And they concede, finally, that "strict adherence" to the service requirements under § 65009 is required. (*Id.* at 11:21.) Petitioners nevertheless argue that the June Determination is not subject to § 65009(c)(1). But decisions concerning land use and planning – whether ministerial or discretionary – fall within § 65009(c)(1)'s net. The Petition is time-barred.

ARGUMENT

The June Determination constituted a land use decision governed by the statute of limitations set forth in §§ 65009(c)(1)(E)-(F). Under SB 35, a city's determination of compliance with objective planning standards triggers the ministerial approval of a project. That ministerial approval starts the clock on the statute of limitations, although the Project permits are issued later.

---

[1] All code references are to the Government Code unless otherwise stated.

[2] References to "the Petition" are to the First Amended Verified Petition.

(*See City of Chula Vista v. Cty. of San Diego* (1994) 23 Cal.App.4th 1713, 1720–21 [statute of limitations ran from board of supervisors' "approval" of a proposed agreement (not yet executed or drafted), even though the agreement was executed over two years later].)

I. GOVERNMENT CODE § 65009 APPLIES TO THE PETITION.

Petitioners argue that ministerial decisions by city employees are outside the scope of § 65009(c)(1). But that reading of § 65009(c)(1) has been rejected in multiple cases. Decisions related to land use – whether made by an elected official or city employees, and whether ministerial or discretionary – are covered by § 65009(c)(1).

A. Section 65009 Is Not Limited To Decisions Made By City Councils Or Planning Commissions.

Petitioners say that the phrase "legislative body" in § 65009 limits the statute's application to decisions made by the city council or planning commission. (Opp. at 8:2.) But the courts have "rejected the notion that the reviewing body, rather than the underlying decision being reviewed, determines the applicability of Section 65009." (*Save Lafayette Trees v. City of Lafayette* (2019) 243 Cal.Rptr.3d 636, 642 [internal quotation marks omitted].) In *Save Lafayette*, the court rejected the argument – indistinguishable from Petitioners' – "that section 65009 is not applicable because the city was not acting in one of the roles *specified* in sections 65901 and 65903, i.e., as a board of zoning adjustment, zoning administrator or a board of appeal." (*Id.*)

"[S]ection 65009 expressly incorporates the 'matters' listed in sections 65901 and 65903, *regardless of the legislative body charged* with making the decision." (*1305 Ingraham, LLC v. City of Los Angeles* (Feb. 15, 2019, No. B287327) __Cal.Rptr.3d___ [2019 WL 1123512, at *7] [emphasis added].) Just as in this case, the petitioner in *1305 Ingraham* claimed that the term "legislative body" meant "board of trustees, city council, or other governing body of a city," and not "the findings of a single person such as Respondent's City Director." (*Id.* [internal quotation marks omitted].) The Court of Appeal rejected that argument. (*See also Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1492–97 [letter from director of Community Development Department was a decision within the scope of § 65009(c)(1)(E)].)

Save Lafayette, *1305 Ingraham*, and *Stockton* all hold that the statute of limitations under

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

§ 65009(c)(1) controls, without regard to the position held by the decision maker. Here, because the "local government" failed to timely inform Vallco otherwise, the Vallco Project was "deemed to satisfy the objective planning standards." (§ 65913.4(b)(2).) The "local government" made that determination, which followed the City Manager's determination that the Vallco Project complied with the objective planning standards in SB 35. Section 65009(c)(1) is concerned with the *decision*, not the *title* of the decision maker. (*Save Lafayette,* 243 Cal.Rptr.3d at 642.)[3]

B. Section 65009 Applies To Both Discretionary And Ministerial Decisions.

Relying on a case that has nothing to do with either land use decisions or § 65009,[4] Petitioners argue that § 65009 should be read "narrowly," applying only to discretionary decisions. (Opp. at 6:1-2, 7:5-22.) The opposite is true. The 90-day limitations period in § 65009(c) applies to "a broad range of local zoning and planning decisions." (*See Honig v. San Francisco Planning Dep't* (2005) 127 Cal.App.4th 520, 526; *Save Lafayette*, 243 Cal.Rptr.3d at 641 [noting that any "approval allowing land use" would be a decision that "falls squarely within the scope of section 65009"] [internal quotations and alteration omitted]; *Honig*, 127 Cal.App.4th at 528 [reasoning that it "would exalt for over substance to refuse to apply" § 65009 to a decision that "involved issues of zoning and planning"].)

Petitioners assert without any legal support that the limitations period in § 65009 does not apply to the June Determination because that decision was ministerial. But § 65009 clearly applies to ministerial land use decisions, such as the decision to issue a building permit. (*See, e.g.*, *Citizens for Beach Rights v. City of San Diego* (2017) 17 Cal.App.5th 230, 238 ["any challenge . . . was required to occur within 90 days of the issuance of the building permit," under § 65009]; *see also Stockton*, 210 Cal.App.4th at 1493–94 [applying § 65009 to approval pursuant to authority "to issue ministerial project approvals"] [internal quotation marks omitted].) Section 65009 applies equally to ministerial and discretionary land use decisions.

---

[3] *1305 Ingraham* holds that failure to act can be a "decision" under § 65009. (2019 WL 1123512, at *5.)

[4] *See Steketee v. Lintz, Williams & Rotherberg* (1985) 38 Cal.3d 46, which interpreted the statute of limitations applicable to medical malpractice claims.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

C. Applying § 65009 To The June Determination Furthers The Purposes of That Statute.

Petitioners contend that "policy reasons militate against" applying § 65009 to SB 35 determinations because SB 35 already "includes a . . . scheme to accelerate project approvals." (Opp. at 6:22-24.) They have it backwards. The policies of § 65009 and SB 35 both plainly require the application of a short statute of limitations with respect to SB 35 decisions. Section 65009(c)(1) is a "delay reduction measure" to alleviate the "housing crisis" in California. (*Honig*, 127 Cal.App.4th at 528 [citing § 65009(a)(1)].) To refuse to apply the 90-day limitations period to a decision under SB 35 would be illogical and contrary to the purpose of the two statutes, whose goals are identical (increasing affordable housing in California), and whose means of execution are complementary.

II. THE PETITION IS BARRED UNDER §§ 65009(C)(1)(E) AND 65009(C)(1)(F).

Petitioners contend that §§ 65009(c)(1)(E)-(F) cannot apply to SB 35 decisions, because the June Determination was not a zoning decision or the issuance of a conditional use permit. Petitioners misread the scope of §§ 65009(c)(1)(E)-(F), which apply generally to land use decisions relating to permits. The 90-day limitations period in § 65009(c)(1)(E) is triggered by decisions on permits, like the development permit issued to Vallco. The 90-day limitations period in § 65009(c)(1)(F) is triggered by determinations made prior to a decision on a permit. The June Determination falls into subdivisions (E) and (F). (*See 1305 Ingraham*, 2019 WL 1123512, at *8 [action time-barred under "(section 65009(c)(1)(E)) *and/or* . . . (section 65009(c)(1)(F))."] [emphasis added].) It triggered the 90-day limitations period on the day it was made.

A. Petitioners Are Seeking To Invalidate Permits.

Petitioners acknowledge that the SB 35 process culminated in the issuance of a set of permits. (Opp. at 10:4-6.) The Petition asks the Court to set aside those permits. (*See* Am. Petition at 27 [requesting that the Court declare "null and void" the "Development Permit," "Tree Removal Permit," and other entitlements].) The issuance of those permits followed directly from the June Determination. (§ 65913.4(b)(1), (2).)

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

B. Section 65009(c)(1)(E) Applies To Actions Challenging Decisions On Permits.

Because the June Determination triggered the City's obligation to issue a set of permits, it falls within the ambit of § 65009(c)(1)(E).[5] Section (c)(1)(E) applies to challenges that seek to "attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903," including "deci[sions]" on "applications for . . . permits." (§ 65901(a); *see Save Lafayette*, 243 Cal.Rptr.3d at 642 ["The 'matters listed' is sections 65901 and 65903 include 'conditional uses or other permits' . . . ."].)

The matters listed in §§ 65901 and 65903 are more extensive than decisions regarding conditional use permits (Opp. at 11:5) or decisions that are "keyed to" zoning ordinances (Opp. at 10:14-15).[6] That argument ignores the plain scope of § 65901 and the cases interpreting it. The statute is to be read "*broadly* to all types of challenges to permits and permit conditions." (*Save Lafayette*, 243 Cal.Rptr.3d at 641[internal quotation marks omitted] [emphasis added].) But even if § 65901 were confined to decisions relating to permits provided by zoning ordinance, Vallco's Development Permit is such a permit. Title 19 of the City's Municipal Code is the zoning ordinance, and the source of Vallco's application under SB 35 for a development permit. (*See* Cupertino Mun. Code, ch. 19.156.)

It does not matter for purposes of § 65009(c)(1)(E) that the first Project permits were not issued contemporaneously with the June Determination. The clock starts to run under § 65009(c)(1)(E) when the decision is made to approve a project. (*See City of Chula Vista*, 23 Cal.App.4th at 1720–21 [clock started when decision was made to approve project, rather than upon execution of later agreement]; *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 510 [The statute of limitations in 65009(c)(1)(E) begins to run from a

---

[5] *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, on which Petitioners rely, did not purport to interpret the scope of §§ 65009(c)(1)(E) or (F); it addressed § 65009(c)(1)(B). "*Travis* . . . did not consider the scope of section 65901" and "cannot be interpreted as limiting the scope of [65901 and 65903] as urged by plaintiffs." (*Stockton*, 210 Cal.App.4th at 1494 ["Cases are not authority for propositions not considered."] [internal quotation marks and alternation omitted].)

[6] Petitioners also argue that Section 65009 does not apply because the June Determination was not a local planning decision. (Opp. at 7:19-20.) The June Determination was plainly a land use planning decision made by the City of Cupertino.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

city's "final decision, correct or mistaken, that . . . [a] project c[an] go forward."].) The June Determination constituted the ministerial approval of the project and was, as Petitioners concede, final. (Opp. at 14:4–5 ["Petitioners accept that the City could not revoke or change its findings after the 90-day deadline[.]"].) Once the June Determination was made, the Project could go forward and the permits necessarily would follow. (§ 65913.4(c) [any review subsequent to the 90-day determination "shall not in any way inhibit, chill, or preclude the ministerial approval . . . or its effect"].)[7] The June Determination thus falls within the broad scope of § 65009(c)(1)(E).

C. Section 65009(c)(1)(F) Applies To Actions Challenging Decisions Made Before A Permit Was Issued.

Even if the June Determination were not a decision on a matter governed by § 65901, it would be a "determination[] . . . made prior to" such a decision. (*See* § 65009(c)(1)(F).) Petitioners concede that much. (Opp. at 9:8 ["June 22, 2018 Determinations are Prior Proceedings under § 65009(c)(1)(F)"], 9:23-25.) The SB 35 process culminated in the decision to issue a development permit and other permits. (*See* Am. Petition at 27.) The June Determination was a necessary determination made prior to the issuance of those permits. (§ 65913.4(b)(1), (2).)

Petitioners would like the Court to read § 65009(c)(1)(F) to provide that the limitations period to challenge a determination made before a permit is issued runs from the date of the permit, not from the date of the decision. That interpretation is contrary to the text of the law, and it would strip (c)(1)(F) of all meaning. The statute provides that "no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is

---

[7] Petitioners argue that the 90-day determination provided for in subdivision (b) is not the ministerial approval. (Opp. at 5:14–15.) SB 35 expressly refers to the "process provided by subdivision (b)" as "the streamlined, ministerial approval process." (§ 65913.4(a).) Petitioners take the word "preclude" in subdivision (c) out of context. Since public oversight or design review could be done under subdivision (c) at any point during the 180-day period after the application is filed, the oversight or design review could come before or after the 90-day approval in (b). Thus, actions taken under (c) and *before* the 90-day marker cannot "inhibit, chill, or preclude" the "approval," and actions under (c) taken *after* the 90-day marker cannot "inhibit, chill, or preclude" the approval's "*effect*." (§ 65913.4(c)(1) [emphasis added].) In any case, Petitioners concede that the June Determination was final and irrevocable (Opp. at 14:4-5), and that it mandated the issuance of permits (*id.* at 10:4-7).

commenced and service is made on the legislative body within 90 days after the legislative body's *decision . . . [c]oncerning any of the proceedings, acts, or determinations taken, done, or made* prior to any of the decisions listed in subparagraphs (A), (B), (C), (D), and (E)." Thus, the text expressly states that the relevant decision for purposes of (c)(1)(F) is the "decision . . . [c]oncerning" a prior determination, which itself triggers the 90-day period.

If § 65009(c)(1)(F) meant what Petitioners suggest, it would have no function. The same end would be achieved by omitting (c)(1)(F) from the statute, so that the 90-day period would be triggered only by the events identified in §§ 65009(c)(1)(A)-(E).

Petitioners argue that their reading of § 65009(c)(1)(F) must be correct, because otherwise, an SB 35 petitioner would have to amend its petition following a decision to issue the first set of permits, in order to present an additional challenge to those permits. (Opp. at 6.) But SB 35 makes plain that the ministerial approval process (*i.e.*, review of compliance with the objective planning standards) is the primary determination in the statutory scheme. (§ 65913.4(b)(1), (2).) There would be no reason for a separate challenge to any permit issued on the basis of the 90-day decision.[8] Generally (as in this case), a petitioner's objection will be to the compliance decision made on day 90. If that foundational determination is vacated, the resulting permit would fall along with it. But if that initial determination is not the subject of a timely challenge, then an attack on the validity of the subsequently issued permit could not succeed either.

III. PETITIONERS' PURPORTED CHALLENGE TO THE SEPTEMBER APPROVAL LETTER IS IN FACT JUST A CHALLENGE TO THE JUNE DETERMINATION.

Petitioners complain that Vallco has not said "which of Petitioners' averments and causes of action" are time-barred.[9] (Opp. at 5:8-9.) They both are. (*See, e.g.*, Mot. at 5:5 ["The Petition

---

[8] In any case, if a petitioner does need to specifically challenge a later decision, that will not be an issue. Amendments to pleadings are commonplace, and are liberally allowed. (*See, e.g.*, *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 352 ["liberal . . . amendment of pleadings is strongly favored in this state. . ."].) But amendment cannot cure a time-barred action.

[9] Petitioners also claim that Vallco's motion is "belated." It is not. "A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself." (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650 [internal quotation marks omitted].)

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

should be dismissed with prejudice."].)

A. Petitioners' Complaints About The September Approval Are Nothing More Than Attacks On The June Determination.

Both claims in the Petition challenge the June Determination. The first cause of action directly challenges the "eligibility determination" (which is the June Determination). (Am. Petition ¶¶ 114-125.) Although Petitioners' second cause of action purports to attack the subsequent "project approval" (*id.* ¶¶ 126–30), it is actually another attack on the June Determination. The second cause of action alleges that the City should have found the Project inconsistent with subdivision (a) standards. (*See id.* ¶ 128 ["the City was and is under a duty to ascertain that the Project is 'consistent with objective zoning standards and objective design review standards'"] [citing § 65913.4(a)(5)].) The determination of consistency with the subdivision (a) standards *was* the June Determination.

Petitioners assert that their challenges to the Project's compliance with requirements related to setbacks and density bonus units are challenges to the September Approval. (Opp. at 8:23-9:3.) Not so. The June Determination covered all "objective planning standards," including objective local zoning, design, and subdivision standards in the jurisdiction where the project is located. (§ 65913.4(a)(5).) That objective planning standard incorporates the City's setback and density bonus requirements for Cupertino-based projects. (*See id.* ["These standards . . . may include but are not limited to . . . density bonus ordinances."].) Nowhere else in SB 35 is there a requirement to comply with Cupertino's setback and density bonus requirements. The Project's compliance with those requirements was part of the June Determination. (*See* Am. Petition Exh. 1 at 6–7 [June 22, 2018 letter addressing the Project's compliance with density and setback requirements].)

Because the September Approval "rested entirely" on the June Determination regarding the objective planning standards, the challenge to the September Approval is also barred by the statute of limitations. (*See Honig*, 127 Cal.App.4th at 528.)

B. The Petition Does Not Raise "Non-SB35 Issues."

Petitioners wrongly claim that their Petition raises challenges to "certain aspects of the

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

Project outside the scope of SB35." (Opp. at 4:13-14.) The Petition alleges two causes of action, both of which are asserted under SB 35. (*See* Am. Petition ¶¶ 114-130.) The Petition contains no claim arising under any other statute or ordinance.[10]

IV. PETITIONERS' FAILURE TO FILE AND SERVE WITHIN THE LIMITATIONS PERIOD IS NOT EXCUSABLE.

Petitioners argue that "counsel for the City and Real Party were served with the original petition on or before June 25, 2018." (Opp. at 11:17-20.) Petitioners have not filed a proof of service, or any other evidence to support this contention.[11] Even if their assertion were true (and it is not), it would not satisfy § 65009(c)(1). Handing a copy of a pleading to counsel is not service. (*See Wagner v. City of S. Pasadena* (2000) 78 Cal.App.4th 943, 950 [providing the city's outside counsel with a copy of the petition did not constitute service].) Nor is service waived by attendance at an *ex parte* hearing. (Code Civ. Proc. § 418.11; *Kao v. Dep't of Corr. & Rehab.* (2016) 244 Cal.App.4th 1326, 1332 [Code of Civil Procedure provisions apply to writs of mandate unless otherwise provided].)

Petitioners ask the Court to find that they "substantially complied" with § 65009. Actual, formal service of process is required. (*See Wagner*, 78 Cal.App.4th at 950 [under § 65009(c)(1), service under Code Civ. Proc. § 412.10 et seq., and notice is not adequate].) Petitioners are wrong, moreover, that the purposes of § 65009 were met in this case. (Opp. at 12 n.6.) This case has been delayed because Petitioners did not prosecute within 90 days.

---

[10] The Petition raises no claim related to the "tentative map." (*See Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1767 [a motion for judgment on the pleadings "is confined to the face of the pleading under attack"].) And any such claim would be time-barred. Petitioners' non-specific and procedurally improper Request for Judicial Notice (Opp. at 4 n.3) should be denied. (California Rules of Court, rule 3.1113(*l*) [requiring request be made in a "separate document listing the specific items for which notice is requested"]; *Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal.App.4th 1073, 1086 n.9 [denying "on procedural grounds" request for judicial notice made in a footnote].)

[11] Moreover, as stated in Vallco's moving papers, service of the original petition is immaterial because that petition did not challenge (or even mention) the June Determination.

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

V. ALTHOUGH THE "DEEMED-TO-SATISFY" FINDINGS ARE CONCLUSIVE AND BINDING, THE COURT NEED NOT REACH THE ISSUE.

Citing *Marbury v. Madison*, Petitioners claim that SB 35 violates the state and federal constitutions by placing "a broad class of administrative acts entirely beyond the scope of judicial review." (Opp. at 14:13–14 [emphasis omitted].) Nonsense. The Legislature did not declare judicial review of SB 35 determinations to be categorically unavailable. It declared that under the circumstances present here, a project application is deemed to comply with the objective planning standards. In that situation, there is nothing to review.[12] It was within the Legislature's authority to draft a statute with that effect. (*See, e.g.*, *People ex rel. Department of Public Works v. Chevalier* (1959) 52 Cal.2d 299, 307.)

Regardless, because Petitioners concede that "the City could not revoke or change its findings after the 90-day deadline" (Opp. 14:4–5), the Court need not reach Petitioners' constitutional arguments to decide that the June Determination was final, and falls within § 65009(c)(1)(E). Petitioners' constitutional musings are irrelevant to the limitations issue.

VI. AMENDMENT WOULD BE FUTILE.

Petitioners' request for leave to amend should be denied. Where, as here, "amendment would be futile because the amended petition would be barred by the statute of limitations, the trial court does not abuse its discretion in denying the motion for leave to amend." (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1124.) In addition, Petitioners have failed to show good cause for their request to amend their Petition and opening brief.

[12] Petitioners suggest that the "deemed satisfied" aspect of SB 35 renders the courts powerless to fashion a remedy if a project applicant bribes a city official to let the 90-day period expire. That hypothetical is (a) patently ridiculous – a conspiracy to perpetrate such a fraud would obviously not be beyond the power of the courts– and (b) patently irrelevant to the facts of this case.

CONCLUSION

For the foregoing reasons, the motion for judgment on the pleadings should be granted. The Petition should be dismissed with prejudice.

DATED: March 22, 2019

COBLENTZ PATCH DUFFY & BASS LLP

By: Sarah Peterson

Sarah Peterson
Attorneys for Real Party in Interest
VALLCO PROPERTY OWNER LLC

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is One Montgomery Street, Suite 3000, San Francisco, CA 94104-5500.

On March 22, 2019, I served true copies of the following document(s) described as

REPLY MEMORANDUM IN SUPPORT OF VALLCO PROPERTY OWNER LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Coblentz Patch Duffy & Bass LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the First Legal system. Participants in the case who are registered users will be served by the First Legal system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on March 22, 2019, at San Francisco, California.

Diana Campos

COBLENTZ PATCH DUFFY & BASS LLP
ONE MONTGOMERY STREET, SUITE 3000, SAN FRANCISCO, CALIFORNIA 94104-5500
415.391.4800 · FAX 415.989.1663

SERVICE LIST
Friends of Better Cupertino, et al. v. City of Cupertino, et al.
Santa Clara County Superior Court Case No. 18CV330190

Attorneys for Petitioners:

Bern Steves, Esq.
19925 Stevens Creek Blvd.
Cupertino, CA 95014
Telephone: (408) 253 6911
Email: bernsteves@californiabizlaw.com

Attorneys for Respondents:

Patricia E. Curtin, Esq.
Todd A. Williams, Esq.
WENDEL, ROSEN, BLACK & DEAN LLP
1111 Broadway, 24th Floor
Oakland, CA 94607-4036
Telephone: (510) 834-6600
Email: pcurtin@wendel.com
tawilliams@wendel.com

Heather M. Minner, Esq.
Robert S. Perlmutter, Esq.
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102-4421
Telephone: (415) 552-7272
Email: minner@smwlaw.com.com
perlmutter@smwlaw.com