

1 JONATHAN R. BASS (State Bar No. 75779)
CHARMAINE G. YU (State Bar No. 220579)
2 KATHARINE VAN DUSEN (State Bar No. 276021)
SARAH PETERSON (State Bar No. 309733)
3 COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
4 San Francisco, California 94104-5500
Telephone: 415.391.4800
5 Facsimile: 415.989.1663
Email: ef-jrb@cpdb.com
6 ef-cgy@cpdb.com
7 ef-ktv@cpdb.com
ef-sep@cpdb.com

8 Attorneys for Real Party in Interest
VALLCO PROPERTY OWNER LLC

9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SANTA CLARA**

12

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

15 Petitioners,

16 v.

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

19 Respondents.

20

21 VALLCO PROPERTY OWNER LLC,

22 Real Party in Interest.

23

24

25

26

27

28

Case No. 18CV330190

**VALLCO PROPERTY OWNER LLC'S
REPLY IN SUPPORT OF
SUPPLEMENTAL BRIEF RE:
AMENDMENT TO SB 35**

Date: October 4, 2019
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Helen E. Williams

Action Filed: June 25, 2018

1 Real Party in Interest Vallco Property Owner LLC (“Vallco”) submits this reply
2 memorandum regarding AB 101, the amendment to SB 35 that took effect on August 1, 2019.
3 As Vallco explained in its supplemental memorandum, AB 101 clarified two key issues in SB 35
4 and eliminated certain of Petitioners’ arguments. First: with respect to SB 35’s requirement that
5 two-thirds of a project’s square footage be residential, AB 101 makes clear that the square-footage
6 ratio of the as-built project controls, rather than a hypothetical pre-Density Bonus project.
7 Second: AB 101 makes clear that a project can be built on a site cleared for residential uses by the
8 State Water Resources Control Board.

9 While conceding that AB 101 “undermine[s]” their case (Petitioners’ Reply Br. at 3:15),
10 Petitioners argue that AB 101 does not apply to this project, because the statute took effect after
11 the City concluded that the Vallco project satisfied SB 35. The concession is warranted; the
12 argument is plainly wrong.

13 **I. The City Cannot Be Compelled To Apply Outdated Law.**

14 Petitioners argue that the City’s duty is measured as of the time the proceeding is filed.
15 But Petitioners are asking the Court to compel the City to issue a notice, *now*, that the Vallco
16 project does not satisfy the objective planning standards of SB 35. (Amended Petition at 27:9-13.)
17 The City cannot be compelled to issue such a notice *now*, unless the law requires it *now*.

18 If Petitioners are seeking to compel the City to revisit its 2018 review, their claim fails.
19 The Court has no power to compel the City to deny the project application within the time frame
20 mandated by statute, because the deadline for the City to do so was June 25, 2018. (*Treber v.*
21 *Superior Court* (1968) 68 Cal.2d 128, 134 (“[M]andate does not lie when the respondent no longer
22 has the legal authority to discharge the alleged duty because the time for doing so, as specified by
23 statute or ordinance, has expired”).) The City no longer has the power to withhold ministerial
24 approval in 2018.

25 Petitioners cite *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 732, for the proposition that
26 the existence of a ministerial duty is measured at the time of the petition. And *Lungren* stands for
27 the proposition that the *facts* existing at the time of the petition control—a party currently
28 ineligible for writ relief cannot promise to take future steps to render himself eligible. In *Lungren*,

1 a federal officeholder was statutorily ineligible to assume state office, even though he had
2 promised to resign from his federal position if he obtained a writ authorizing him to assume the
3 state position. *Lungren* does not involve an intervening change in law. *Torres v. City of*
4 *Montebello* (2015) 234 Cal.App.4th 382 does. A city cannot be compelled to perform an act
5 rendered unlawful under an intervening change in law. *Id.* at 403. Petitioners cannot obtain relief
6 concerning the interpretation of SB 35 based on an out-of-date version of SB 35.

7 Under SB 35, a project is measured against *local* standards in effect at the time an
8 application is submitted. (Gov’t Code § 65914.3(a)(5).) It does not follow that the version of
9 SB 35 in effect as of the date the application is submitted controls. To the extent Petitioners seek
10 to compel the City to determine that the Vallco project does not meet objective standards, that
11 determination must be made with reference to the current version of SB 35.

12 The clarifications to SB 35 made by AB 101 govern Petitioners’ claims.

13 **II. AB 101 Clarifies Existing Law.**

14 Petitioners’ “non-retroactivity” argument misses the point. The “heavy presumption”
15 against retroactivity that Petitioners lean on is not relevant, because the legislative history of
16 AB 101, combined with the nature of the changes, reveal that AB 101 clarified the statute.

17 Petitioners cite *City of Sacramento v. Public Employees’ Retirement System* (1994)
18 22 Cal.App.4th 786, for the proposition that legislative history does not control the meaning of a
19 statute. This is true, but it has no bearing on this case. *City of Sacramento* concerned whether
20 legislative history could be used to interpret unambiguous language in a statute; the court
21 concluded that that statute spoke for itself. Here, the legislative history—defining AB 101 as
22 “clean up” legislation—supports the determination that the Legislature intended to clarify, rather
23 than change, SB 35.

24 The Legislature may make “material changes in statutory language in an effort only to
25 clarify a statute’s true meaning[.]” (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th
26 232, 243.) When a clarification occurs, the “legislative act has no retrospective effect because the
27 true meaning of the statute remains the same.” (*Id.*) Typically, as here, a legislative clarification
28 occurs as a result of the emergence of a novel question of statutory interpretation. “If the

1 amendment was enacted soon after controversies arose as to the interpretation of the original act, it
2 is logical to regard the amendment as a legislative interpretation of the original act—a formal
3 change—rebutting the presumption of substantial change.” (*Id.*)

4 Petitioners assert that the earlier version of SB 35 was unambiguous. If that were the case,
5 a lot of paper has been wasted by the parties debating its meaning and intent. The reason
6 Petitioners filed this action in the first place was that it disagreed with the City’s (and Vallco’s)
7 reading of it.

8 **A. AB 101 Clarifies Measurement Of A Project’s Square Footage.**

9 The City concluded that SB 35 required it to measure the square-footage ratio of the
10 project as it will be built, including all changes afforded under the Density Bonus Law. (AR 891-
11 892 (considering project including Density Bonus Law units and concessions).) Petitioners argued
12 that a hypothetical pre-Density Bonus project should have controlled. The pre-AB 101 version of
13 SB 35 did not say *expressly*, one way or another, whether the square-footage ratio included the
14 effect of the Density Bonus Law. AB 101 adds this clarifying sentence: “Additional density, floor
15 area, and units, and any other concession, incentive, or waiver of development standards granted
16 pursuant to the Density Bonus Law in Section 65915 shall be included in the square footage
17 calculation.” (Gov’t Code § 65914.3(a)(2).)

18 In late 2018, California’s Department of Housing and Community Development (“HCD”)
19 issued SB-35 Guidelines, which “implement and interpret” SB 35. In Section 400(b)(1) of those
20 Guidelines, HCD explained that “[a]dditional density, floor area, or units granted pursuant to
21 Density Bonus Law are excluded from” the square footage calculation. That administrative
22 interpretation did not apply to the Vallco SB 35 application, though, because the Guidelines are
23 only “applicable to applications submitted on or after January 1, 2019. Nothing in these
24 Guidelines may be used to invalidate or require a modification to a development approved through
25 the Streamlined Ministerial Approval Process prior to the effective date.”¹ (Guidelines, § 101(b).)

26 _____
27 ¹ Vallco’s application was submitted nine months earlier.

28

1 Contrary to Petitioners’ argument, HCD’s interpretation—which differed from the
2 City’s—only reveals the need for clarifying legislation. By amending SB 35 to clarify that the
3 square-footage calculation *includes* the Density Bonus, the Legislature said what it meant.

4 **B. AB 101 Clarifies Which Sites Are Excluded From Ministerial Streamlining.**

5 An SB 35 project can be constructed on a site that is not a “hazardous waste site that is
6 listed pursuant to Section 65962.5 . . . unless the Department of Toxic Substances Control [DTSC]
7 has cleared the site for residential use or residential mixed uses.” This original language gave rise
8 to questions of interpretation, including what it meant to be “listed.” The California
9 Environmental Protection Agency—which maintains the “list”—states that “[s]ites that are no
10 longer considered ‘active’ because the Water Board, a regional board, or the County has
11 determined that no further action is required because actions were taken to adequately remediate
12 the release, or because the release was minor, presents no environmental risk, and no remedial
13 action is necessary, are listed as ‘closed’ and deleted from the list.” (*See*
14 <https://calepa.ca.gov/sitecleanup/corteselist/section-65962-5c/>.) The City also determined that the
15 site was not listed. (AR0895-0896.) Petitioners have nevertheless argued that, under SB 35, *only*
16 DTSC could clear a listed site. AB 101 forecloses Petitioners’ argument by making clear that a
17 site is not considered “listed” if the State Water Resources Control Board (among other agencies)
18 has cleared the site for residential or residential mixed uses.

19 **CONCLUSION**

20 AB 101 guts Petitioners’ claims. Petitioners’ arguments regarding square footage and the
21 Cortese List have been eliminated and can no longer support issuance of the writ. To disregard
22 AB 101, as Petitioners invite the Court to do, would be plain error.

23 DATED: September 6, 2019

Respectfully submitted,

24 COBLENTZ PATCH DUFFY & BASS LLP

25
26 By: 

27 KATHARINE VAN DUSEN
Attorneys for Real Party in Interest
28 VALLCO PROPERTY OWNER LLC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

Friends of Better Cupertino, et al. v. City of Cupertino, et al.

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 September 6, 2019, I served true copies of the following document(s) described as

**VALLCO PROPERTY OWNER LLC’S REPLY IN SUPPORT OF
SUPPLEMENTAL BRIEF RE: AMENDMENT TO SB 35**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I caused the document(s) to be electronically filed with the Clerk of the Court by using the One Legal system. Participants in the case who are registered users will be served by the One 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 September 6, 2019, at San Francisco, California.



Katharine Van Dusen

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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