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

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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.

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21 VALLCO PROPERTY OWNER LLC,

22 Real Party in Interest.

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Case No. 18CV330190

**VALLCO PROPERTY OWNER, LLC'S
RESPONSE TO CITY OF CUPERTINO,
ET AL.'S STATEMENT OF NON-
OPPOSITION IN RESPONSE TO
PETITIONERS' BRIEF IN SUPPORT OF
PETITION FOR PEREMPTORY WRIT
OF MANDAMUS**

Action Filed: June 25, 2018

1 In response to the Petitioners’ opening brief, the City of Cupertino has filed a document
2 that it has styled as a “Statement of Non-Opposition.” In it, the City speculates that the Vallco
3 Project may “exacerbate the housing shortage . . . by contributing to a worsened jobs-housing
4 imbalance.” (Respondents City of Cupertino, et al.’s Statement of Non-Opposition in Response to
5 Petitioners’ Brief in Support of Petition for Peremptory Writ of Mandamus (“City’s Statement”) at
6 2:12-14.) The City urges the Court to “take the project’s impact on the jobs/housing balance into
7 account in interpreting and applying SB 35.^{[1]” (Id. at 2:15-16.)}

8 The normal meaning of a “non-opposition” – that the party does not oppose the writ – is
9 apparently not the way the City is using that term here. The City previously opposed the writ –
10 the City’s Answer asserts, for example, that the “claims have no merit under [SB 35]” and asked
11 the Court to deny the writ and enter judgment in its favor. (See Respondent City of Cupertino’s
12 Answer to First Amended Verified Petition for Writ of Mandate, at 21:13, 22:27-28.) Now, for
13 the most part, the City leaves it to Petitioners and Real Party to present their arguments. This
14 would ordinarily be a mystifying stance for a city to take in a writ proceeding, but the
15 circumstances here are not typical, for two reasons: (1) Challenges to real estate development
16 approvals are normally directed at the public agency’s affirmative resolution to approve a project
17 under its local processes; here, the project application was ministerially approved under SB 35, a
18 new statewide law that preempts local decision-making authority; and (2) The City Council is now
19 controlled by project opponents.

20 Moreover, the City’s Statement is not actually neutral. Aside from saying that it takes no
21 position, and that the Court ought to “carefully review the arguments” of both sides, the City
22 makes a veiled attack on SB 35 itself. It refers to the statute’s justification for its “preemption of
23 local control under the rationalization of alleviating the general housing shortage.” (City’s
24 Statement at 2:11-12.) But there is no argument in this case concerning the State’s power to have
25 enacted SB 35, and the use of the derogatory term “rationalization” is an unsubstantiated attack on
26 a valid and enforceable statute.

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28 ¹ “SB 35” refers to Gov. Code § 65913.4.

1 The City goes on to speculate that the Vallco Project may “exacerbate the housing shortage
2 . . . by contributing to a worsened jobs-housing imbalance.” (City’s Statement at 2:12-13.)
3 Having offered this observation without support, the City suggests that the Court “may wish to
4 take the project’s impact on the jobs/housing balance into account in interpreting and applying
5 SB 35.” (*Id.* at 2:15-16.) The City is silent as to how, exactly, the Court would do that, or what
6 legal warrant there would be for such an inquiry.

7 The City has it wrong: “jobs-housing balance” is not a factor that the City or the Court has
8 authority to consider under SB 35. SB 35 enumerates the objective standards that may be
9 considered. (*See* Gov. Code § 65913.4(a)(1)-(10).) Jobs-housing balance does not appear on the
10 list. SB 35 expressly authorizes non-residential development: it permits projects to include up to
11 one-third office, retail, or other non-residential space. (*See id.* § 65913.4(a)(2)(C).) That
12 provision reflects the Legislature’s policy choice to *encourage* economic activity in tandem with
13 construction of housing. The City may disagree with that policy choice, and at a local level it may
14 account for a balance of jobs and housing in its land use policy, but it is in no position to revise the
15 state law.

16 The Legislature declared that SB 35 is to “be interpreted and implemented in a manner to
17 afford the fullest possible weight to the interest of, and the approval and provision of, increased
18 housing supply” (*id.* § 65913.4(l)), and that “ensuring access to affordable housing is a matter of
19 statewide concern and not a municipal affair” (*id.* § 65850.01(g)). The California Department of
20 Housing and Community Development, the state agency charged with implementing SB 35 (*id.*
21 § 65913.4(j)), determined that “[a]pproval of projects such as the Vallco project fulfil[l] th[e]
22 legislative intent” to increase housing supply. (*See* Real Party in Interest Vallco Property Owner
23 LLC’s Motion to Augment the Record and Request for Judicial Notice (“RJN”) Ex. F at 2.) The
24 Vallco Project’s addition of 2,402 housing units increases the supply of housing available to
25 Californians, and its addition of 1,201 housing units affordable to lower income households
26 increase the desperately needed supply of affordable housing in Cupertino, consistent with the aim
27 of SB 35.


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The City’s filing is odd, but explainable. The composition of the City Council changed following the November 2018 election. Newly elected council members joined the mayor to oppose both this SB 35 project and another project that would have brought substantial, much needed housing to the site. This type of local opposition to new housing is precisely what the Legislature sought to overcome when it enacted SB 35 to take discretion away from local governments.

DATED: June 18, 2019

COBLENTZ PATCH DUFFY & BASS LLP

By: 

Katharine Van Dusen
Attorneys for Real Party in Interest
VALLCO PROPERTY OWNER LLC

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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

5 On June 18, 2019, I served true copies of the following document(s) described as

6 **VALLCO PROPERTY OWNER, LLC'S RESPONSE TO CITY OF CUPERTINO,
7 ET AL.'S STATEMENT OF NON-OPPOSITION IN RESPONSE TO PETITIONERS'
BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS**

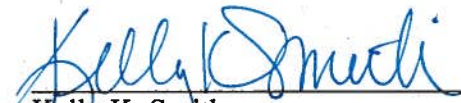
8 on the interested parties in this action as follows:

9 **SEE ATTACHED SERVICE LIST**

10 **BY ELECTRONIC SERVICE:** I electronically filed the document(s) with the Clerk of the
11 Court by using the One Legal system. Participants in the case who are registered users will be
12 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.

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

14 Executed on June 18, 2019, at San Francisco, California.

15 
16 _____
17 Kelly K. Smith

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

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