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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

REAL PARTY IN INTEREST VALLCO PROPERTY OWNER LLC'S OPPOSITION TO AMENDED PETITION FOR WRIT OF MANDATE

Date: August 2, 2019
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Helen E. Williams

Action Filed: June 25, 2018

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INTRODUCTION

Petitioners are seeking a writ of mandate premised on the theory that the City of Cupertino (the "City") failed to comply with some ministerial mandatory duty under Government Code section 65913.4, commonly known as SB 35. But no such duty exists, and they have no legal basis for seeking a writ. Petitioners misunderstand SB 35 – its intent, its function, its standards, and the nature of the obligations it imposes on cities. Indeed, if Petitioners' theory of this case were adopted, it would nullify SB 35, by allowing the City to conduct a second review of the Vallco Town Center Project (the "Project"), well past the statutory deadline, and by requiring the City to review an approval that it is prohibited from revisiting or revoking. Petitioners' complaint is not with anything the City did, or failed to do. Its grievance is with the Legislature, which enacted a statute of which Petitioners disapprove.

SB 35's purpose is to remedy a "severe shortage of affordable housing." Development of affordable housing is being strangled by "the existing permit process and by existing land use regulations," and the aim of SB 35 is to "expedite the local and state residential development process." (Gov't Code § 65913(a).) SB 35 achieves its purpose with an expedited entitlement process that eliminates the discretionary grounds for delaying or rejecting proposed housing development projects. A city is subject to a 90-day time limit to identify deficiencies in a project application. If the city does not notify the project applicant of specific deficiencies, the application is deemed to satisfy the substantive requirements of the statute. The City identified no such deficiencies.

Petitioners argue that the development application did not, in fact, comply with SB 35, and that the City "should have" so notified Vallco Property Owner, LLC ("Vallco"), the Project applicant. They are wrong, but it would make no difference if they were correct. The statutory period during which the City had the authority to notify Vallco of deficiencies in its application expired, and the "deemed to satisfy" element of SB 35 was triggered.

Petitioners' critiques of the Project are wrong as a matter of substance as well. They misunderstand the law that they have cited, they misstate the facts about the Project, and they are mistaken in supposing that their interpretation of the City's zoning and planning rules takes

precedence over the City's.

This is exactly the type of litigation that SB 35 was designed to foreclose. The Amended Petition for Writ of Mandate has no merit.

BACKGROUND

I. Senate Bill 35 Promotes Housing Development By Clearing Away Unnecessary Obstacles.

SB 35, enacted in 2017 with the aim of ameliorating California's severe housing supply and affordability crisis, is intended to increase "access to affordable housing," which is "a matter of statewide concern." (*See* Vallco's Motion to Augment the Record and Request for Judicial Notice ("RJN") Exh. A.) The statute seeks to increase affordable housing by "facilitat[ing] and expedit[ing] the approval and construction of affordable housing" in the state. (§ 65582.1.)[1] It requires municipalities that fail to meet their housing goals (like the City) to offer a "ministerial" and "streamlin[ed]" review process for proposed developments that include affordable housing. (§§ 65582.1(p), 65913.4.)

A. The Purpose Of SB 35 Is To Promote Housing Development.

The Legislature enacted SB 35 out of a recognition that "California has failed to create enough housing." (RJN Exh. C.) The state "needs to produce approximately 180,000 units of housing per year to keep up with population growth," but has been "produc[ing] less than half that amount." (*Id.* at 12.) The shortage has caused housing costs to reach "extreme" heights. (*Id.* at 12.) Because SB 35's purpose is to promote housing production, the statute instructs courts and localities to "interpret[] and implement[]" the statute "in a manner to afford the fullest possible weight to the interest of, and the *approval* and provision of, *increased housing supply*." (§ 65913.4(l) (emphasis added).)[2]

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[1] Except where otherwise indicated, all statutory references are to the Government Code.

[2] The statute also authorizes the state Department of Housing and Community Development ("HCD") to adopt guidelines "to implement" the statute (§ 65913.4(j)), but the guidelines do not apply to project applications submitted before the guidelines took effect on January 1, 2019. (HCD, Streamlined Ministerial Approval Process Guidelines ["These Guidelines are applicable to applications submitted on or after January 1, 2019."].)

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SB 35 targets the "major factor" contributing to the housing shortage: "local approval processes" that slow down review of housing project applications, or thwart applications entirely. (RJN Exh. B.) Zoning restrictions and "the significant length of time it takes to approve housing even if the project is entirely within zoning" have exacerbated the housing shortage. (RJN Exh. C.) Compounding the problem is the fact that local governments are too "quick to respond to vocal community members that may not want new neighbors." (RJN Exh. B.)

SB 35 fixes these problems. It preempts local rules that would otherwise allow subjective determination to block new housing developments. Under SB 35, local governments may not follow their typical project review and approval processes. Instead, local governments have only sixty or ninety days, depending on the size of the project, to review a project's compliance with delineated *objective* planning standards. In this way, SB 35 preempts rules, processes, and determinations that can result in "death by delay." And it eliminates – this case to the contrary notwithstanding – the burden of prolonged and expensive legal challenges. In short, by removing the usual discretionary grounds to deny, delay, and challenge proposed housing projects, the statute eliminates tactics used to block critically needed housing in California.

Cities are required to make the SB 35 process available if they have failed to meet state-mandated affordable housing goals. (§ 65913.4(a)(4)(A).)[3] The City's failure is beyond question, especially in the low- and very-low-income categories. (AR0005; AR0876; AR0889; AR1094; AR1111.) Once the Project is built, its 1,201 affordable units will put the City above its very-low-income and low-income housing targets for the current cycle. (AR1133.)

[3] State law establishes a regional housing needs assessment process, commonly referred to as "RHNA," which determines existing and projected housing needs during the "planning period" for each jurisdiction throughout the state. (§ 65584 *et seq*.) Initially, the Department of Housing and Community Development ("HCD"), in consultation with each Council of Governments (here, the Association of Bay Area Governments), determines the existing and projected housing needs for each region. (§ 65584.01.) Then each Council of Government allocates to each city and county its fair share of that regional housing need. (§ 65584(b).) Thereafter, each city and county must prepare a Housing Element in its General Plan that demonstrates site development capacity equivalent to, or exceeding, the projected housing need. (§ 65583(a)(3).) The Housing Element must identify an inventory of available sites having realistic and demonstrated potential for redevelopment during the planning period. (§ 65583.2(a).) Each city must then provide an annual report to HCD describing its progress in meeting its share of regional needs, including the actions taken by the city towards removing constraints to the development of housing. (§ 65400(a)(2).)

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B. SB 35 Prohibits Application Of Subjective Judgments To Project Applications.

Approval of development applications under SB 35 is "ministerial." (§ 65913.4(a).) A city is not permitted to reject a project based on any standard that requires an exercise of "subjective judgment." (§ 65913.4(a)(5); *see Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117 ["A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out."]; *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v County of Solano Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1359 [ministerial actions are "essentially automatic based on whether certain fixed standards and objective measurements have been met"].) A city may only consider whether the proposed project complies with zoning, design review, subdivision, and other planning standards that are "objective." (§ 65913.4(a), (a)(5).) Objective standards "involve no personal or subjective judgment" and are "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal." (§ 65913.4(a)(5).) If a project meets the objective standards, the city may not reject it. (§ 65913.4(b)(1).)

SB 35 lists the "objective planning standards" that dictate whether a city must approve a project. (§ 65913.4(a).)[4] Among other things, a project is subject to approval if at least 50 percent of the housing units are affordable (*id.* § 65913.4(a)(4)(B)(ii)),[5] at least two-thirds of the development are designated for residential use (*id.* § 65913.4(a)(2)(C)), and the site is not on a

[4] "(a) A development proponent may submit an application for a development that is subject to the streamlined, ministerial approval process provided by subdivision (b) and is not subject to a conditional use permit if the development satisfies all of the following objective planning standards . . .."

[5] This objective planning standard applies where, as here, "[t]he locality's latest production report reflects that there were fewer units of housing issued building permits affordable to either very low income or low-income households by income category than were required for the regional housing needs assessment cycle for that reporting period." (§ 65913.4(a)(4)(B)(ii).)

listed hazardous waste site (*id.* § 65913.4(a)(6)(E)).[6] The city considers whether projects comply with objective local zoning, subdivision, and design review standards as well. (§ 65913.4(a)(5).)

C. **<u>SB 35 Mandates Approval Of Certain Projects; It Imposes No Duty To Reject A Project.</u>**

SB 35 eliminates discretion-based project denials. (§ 65913.4(a)(5).) It does not foreclose legal interpretations. (§ 65913.4(a)(5).) SB 35 is to "be interpreted and implemented in a manner to afford the fullest possible weight to . . . the approval . . . of[] increased housing supply". (§ 65913.4(l).) And cities may not wield their municipal codes in a way that subjects an applicant to a standard that "involve[s] personal or subjective judgment by a public official." (§ 65913.4(a).) If the act of "interpretation" would cause that result, the consequence is not that the approval is invalid, but rather that the standard is not objective, and therefore cannot provide a basis to reject the project. (§ 65913.4(a)(5); RJN Exh. H at 5.)

A project will be "deemed to satisfy" all applicable standards unless, within ninety days[7] after the project application is submitted, the city tells the applicant which objective standards the project fails to meet, and the reasons for that failure. (§ 65913.4(b)(1), (2); RJN Exhs. G & I.) If the city determines that the development application is in conflict with any of the applicable objective planning standards, "it shall provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards . . .." (§ 65913.4(b)(1)(B).) If the city "fails to provide [this] documentation[,]" then the development "shall be deemed to satisfy the objective planning standards specified in subdivision (a)." (§ 65913.4(b)(2).)

In other words, *unless* a city notifies the project proponent, in writing, of deficiencies in a project application by the 90-day mark, the application is *deemed* to comply with the substantive

---

[6] SB 35 imposes other standards at subdivision (a), but these are the standards that are disputed in this action.

[7] The 90-day timeline applies to projects, like this one, that contain more than 150 housing units. Smaller projects have a shorter timeline.

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requirements of the statute.[8] This process of "deemed" compliance is a critical part of the "streamlined, ministerial process" that the statute contemplates: absent notification of a reasoned denial by day 90, the application is deemed to satisfy all standards, and it is approved for the SB 35 process. (§ 65913.4(a).) The "deemed" mechanism is triggered even if city affirmatively informs the applicant that the project complies with objective planning standards. (RJN Exh. G.) Once a project is "deemed to satisfy" the objective planning standards, the city cannot reverse the determination, regardless of whether the project actually complies with objective planning standards. (RJN Exhs. G and I at Question 1.)

II. The Vallco Town Center Project.

On March 27, 2018, Vallco submitted its application for SB 35 review of the Project. The Project is a residential mixed-use development to be built on the site of the out-of-date and largely vacant Vallco Fashion Mall, which covers 50.82 acres between Interstate 280 and Steven's Creek Boulevard in Cupertino (the "Site"). (AR0003; AR1093.) The City has long been committed to redeveloping the defunct mall. Its General Plan envisions a "complete redevelopment of the existing Vallco Fashion Mall into a vibrant mixed-use 'town center' that is a focal point for regional visitors and the community." (PR0782-PR0783.)

The Project fulfills this vision with a mix of residential, recreational, retail, and work spaces, spread among eleven buildings, two public plazas, and two parks in a pedestrian-friendly setting. (AR0025.) The Project has a total of 4.96 million square feet of residential space, comprising 2,402 units and associated amenities. (AR0025.) The Project includes 1,201 affordable studio and one-bedroom units – half of the total units – with 840 available to low-income residents, and 361 available to very-low income residents. (*Ibid.*; AR0001; AR0026.) The Project also includes 1,201 market-rate units, ranging from studios to five-bedroom

[8] Separate from this 90-day process, which is focused on the SB 35 objective planning standards, the city may conduct an optional 180-day process of design review and public oversight. (§ 65913.4(c)(1)(B); *see also* RJN Exh. F at Question 7.) That review and oversight must also "be objective" and "strictly focus[ed] on assessing compliance with . . . reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application," and "shall not in any way inhibit, chill or preclude the ministerial approval" provided in the statute. (§ 65913.4(c)(1).)

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apartments; the affordable units will be studios and one-bedroom apartments. (AR0026; AR0273.) Residential units and amenities will be located in seven buildings. (AR0025.)

In addition to housing, the Project includes two acres of at-grade park space, two public plazas, 1.98 million square feet of office space, and 485,912 square feet of retail space. (AR0308.) The Project will include a 30-acre green rooftop, at least 14 acres of which will be publicly accessible, with a children's playground, picnic areas, gardens, a turf playing field, and jogging paths. (AR0025; AR1093; AR1097; AR1098.) The office space will be contained in three buildings. (AR0025; AR0031.) The Project will contain several sustainability features, including water re-use, drought-tolerant landscaping, and designs to reduce the urban heat island effect, and will seek a sustainability certification of LEED gold or higher. (AR 1099.) Space for retail shops, restaurants and entertainment uses will be located on the first and second floors of five of the residential buildings. (AR0025; AR0030; AR1096.) All at-grade elements of the Project will be connected by streets and paths that are walkable and bike-friendly. (AR1097.)

The Project includes 10,500 parking spaces. (AR0025; AR1100.) The commercial and office parking will be located in underground garages; the residential parking will be in above-ground garages. (AR1100.)

III. The State Density Bonus Law Allows More Housing Units And Other Incentives.

The Project qualifies for incentives under the State Density Bonus Law. The state Density Bonus Law encourages development of affordable housing by making it more "economic[ally] feasible." (§ 65917.) If a developer proposes to construct significant affordable housing, the state Density Bonus Law authorizes additional market-rate units ("bonus units") beyond what would otherwise be permitted. The law also allows the developer to avoid compliance with local zoning and other regulations through "concessions." (§ 65915(d)(1)(A), (B).) The developer selects the regulations that will be the subject of the concessions; except under specific circumstances, the city *must* grant the requested concessions. (§ 65915(d)(1)(A), (B).)

Because the Project includes affordable housing, the state Density Bonus Law gives Vallco the right to develop an additional 623 residential units, beyond the 1,779 units allowed by local zoning. (§§ 65915(b)(1), 65915(f); AR0898-99; AR1104-05.) The Project qualifies for three

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concessions. (§§ 65915(b)(1), (d)(1), (d)(2)(C); AR1104-05.) For the first two concessions, the Project was relieved of the obligation to comply with the City requirements that affordable units be comparable in (i) type to market-rate units (in other words, have the same number of bedrooms), and (ii) size (*i.e.,* area) to market-rate units. (AR 899-900; 1105-1106.) For the third concession, the minimum retail square footage required by the General Plan was reduced from 600,000 to 400,000 square feet. (AR1106; AR0004.) Overall, the Density Bonus Law allowed Vallco to include more housing units, including smaller market and affordable units, and include a smaller commercial component, than the General Plan would otherwise permit.

IV. The Cupertino General Plan And Anticipated Rezoning Of The Project Site.

The City's General Plan calls for a "complete redevelopment" of the Project Site, from a retail shopping mall to a "Town Center" that will include residences, office space, and community gathering space in addition to retail uses. (PR0782.)[9] The existing zoning is outmoded and specifically tailored for the old mall, and has not been updated to allow for town-center uses, like housing. (AR0890-91, 1094, 1112.) The General Plan therefore contemplates that, as part of the redevelopment of the Site, the City will rezone the Site, and adopt a new specific plan for it. (PR0821 (zoning for the Site "will be determined by Specific Plan to allow residential uses."); PR0825.)[10]

The General Plan recognizes that the City will need to make substantial efforts to meet regional housing goals, and it makes clear that the Project Site plays an important part of that

[9] Petitioners claim that version of the General Plan included in the certified administrative record, and available on the City's website is, in some respect, incorrect. (POB 4:25-5:5.) Petitioners call it the "Spurious General Plan." Petitioners have not explained the ways in which they believe the General Plan that is part of the record is inaccurate and, if it is, how that supports their claim.

[10] Petitioners refer to the "Heart of the City" Specific Plan, and claim that the Project is not consistent with it. (POB 23:22-24; 26:3-11.) But the Project is not in the area governed by the Heart of the City Specific Plan. In fact, that Specific Plan was amended in 2014 to exclude the Project Site and establish it as its own special district. (RJN Exh. E.)

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effort by designating it as one of five "Priority Housing Element Sites" within the City. (PR0821, PR0825.)[11]

V. **The City Approves The Vallco Town Center Project.**

Vallco submitted supplemental information about the Project on June 1 (AR1019-55) and June 19 (AR0927-1018). On June 22, the City confirmed that the Project is consistent with the objective planning standards in subdivision (a) of SB 35, and therefore "eligible" for SB 35 approval. (AR0888-1018.) The City concluded, among other things, that the Project proposes a development "with at least 2/3rds of the area designated for residential use." (AR0892.) The City also determined that the "site is outside a hazardous waste site." (AR0895.)

In addition, the City found the Project to be consistent with the "objective zoning standards." Because the General Plan contemplates rezoning to accommodate redevelopment of the Site for a mixed-use development like the Project, the City concluded that the zoning "is inconsistent with the General Plan," and "the standards in the General Plan prevail." (AR0890-893; 1094, 1112.) In so finding, the City complied with SB 35, which provides that when a General Plan and zoning are "mutually inconsistent," the project is "deemed consistent with the objective zoning and subdivision standards . . . if the development is consistent with the standards set forth in the General Plan." (§ 65914.3(a)(5)(B).)

In its June 22 letter, the City confirmed that the Project was eligible for streamlined SB 35 review because it satisfied the objective planning standards of SB 35. The City also confirmed that the Project was subject to no applicable design review standards. (AR0894.) The City then proposed to use the next 90 days to review additional information about the Project to confirm that it would be "properly implemented." (AR0900.) During that period, Vallco provided the City with additional information on that subject, and the City determined the appropriate standard

[11] A critical component of ensuring that jurisdictions meet their RHNA housing production obligation is requiring that the Housing Element demonstrate that there is site development capacity within the city by including an inventory of sites "having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level." (§ 65583(a)(3).) The City's Housing Element contains this inventory by identifying five "Priority Housing Element Sites," including the Project Site.

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conditions that the Project would adhere to.

On September 21, 2018, the City issued an "approval" letter, reiterating the June 22 determination that the Project was eligible for SB 35. (AR0005.) It declared the following entitlements to be approved: a development permit, an architectural and site approval, a tentative subdivision map for condominium purposes, and a tree removal permit. (AR0003-0330.)

VI. Petitioners Challenge The Approval.

On June 25, 2018, Petitioners filed an *ex parte* petition for an alternative writ of mandate. They claimed that the City had "taken no action" on Vallco's application, and intended to "'run out the clock' on the statutory 90-day review period . . . without reviewing the project." (*See* Petition ¶¶ 1, 27.) In fact, the City had already issued a written determination on June 22, as noted above. Upon learning that the City had issued a letter on June 22, Petitioners withdrew their *ex parte* application, and indicated that they intended to amend their petition. (*See* Am. Petition ¶ 25.) Petitioners never served the original petition on the City or Vallco.

Petitioners filed the Amended Petition on October 16, 2018, challenging the 90-day letter issued on June 22, 2018. (*See, e.g.*, Am. Petition ¶ 1 [alleging that the City "purported to find the development project eligible with respect to each criterion to proceed under SB35"].) They served the City on October 16, and Vallco on October 23.

ARGUMENT

I. The City Did Not Fail To Perform A Ministerial Duty.

Writ relief is available where a beneficially interested party seeks to compel an act that the respondent had a ministerial duty to perform. (*Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 596.)[12] Petitioners contend that the City violated a general "duty to determine the Project's eligibility under SB35 'objective planning standards.'" (Am. Petition ¶ 118.) There is no such duty. More precisely, there is no such duty subject to enforcement by way of a writ petition,

[12] "While a writ of mandate may issue to compel compliance with a ministerial duty – an act the law specifically requires – it may not issue to compel an agency to perform that legal duty in a particular manner, or control its exercise of discretion by forcing it to meet its legal obligations in a specific way." *Center for Biological Diversity v. Dept. of Conservation* (2018) 26 Cal.App.5th 161, 172.

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because SB 35 is self-enforcing. Petitioners' reading of SB 35 conflicts with its express terms. Indeed, Petitioners' reading would render the main thrust of the statute meaningless.

Petitioners' theory is that the City was positively required to identify the Project's purported inconsistencies with SB 35's objective planning standards within 90 days of the application's submission. That misreads the statute, which contains no such mandate. It provides, rather, that, *if* a city "determines that a development . . . is in conflict with any of the objective planning standards specified in subdivision (a), it shall provide the development proponent written documentation of those inconsistencies." (§ 65913.4(b)(1).) If the city fails to identify any inconsistencies within 90 days, the application will be *deemed* consistent with the subdivision (a) standards. (§ 65913.4(b)(1); RJN Exh. G at 1.)[13]

"[A]bsent a clear duty imposed by law . . . mandamus is not a proper vehicle for resolution of the asserted grievance." (*Shamisan v. Dept. of Conservation* (2006) 136 Cal.App.4th 621, 640 (citation omitted).) A duty (subject to enforcement by writ of mandate) only exists if "a statute unequivocally require[s] a particular action" (*ibid.*) or "clearly defines the specific duties or course of conduct that a governing body must take" (*Schwartz*, 187 Cal.App.4th at 597).

The gist of Petitioners' argument is that, if *they* had been in charge of City government, they would have notified Vallco that its development proposal did not satisfy SB 35's objective planning standards. But the actual City government did not do that. It did the opposite: it reviewed the application and determined that the Project complied with SB 35's objective planning standards. But, whether or not the City had communicated its "approval" letter, it did *not* issue a letter identifying deficiencies in the Project application. It was the absence of *that* notice that, under the statute, caused the Project to be deemed to satisfy all of the objective planning standards.

Petitioners argue that the City *failed* in some duty, and that the Court should mandate its compliance with that "duty" now. But the "mandate" of SB 35 is exactly the opposite: if a city

[13] "If a local government determines that a development . . . is in conflict with any of the objective planning standards specified in subdivision (a), it shall provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards . . .."

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fails to advise an applicant that its project conflicts with objective standards, the development is deemed to satisfy those objective planning standards. Petitioners are insisting that the Court abrogate that legislative mandate.

In *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, the petitioners sought to bar state presidential electors from certifying their votes until the candidates' qualifications were verified, and to compel the Secretary of State to verify those qualifications. (*Id.* at 652-53). But the petitioners could point to no statutory language imposing any mandatory duty on the electors, except for the ministerial duties to assemble and vote. The court denied the petition because the petitioners had identified "nothing in any state or federal legislation . . . imposing a ministerial duty on the Electors to investigate the eligibility of their parties' candidate" prior to performing their voting duties. (*Id.* at 657-58.) Further, the Secretary of State had a mandatory duty to place the candidates' names on the ballots, but the petitioners could point to no statutory language that imposed any ministerial duty on the Secretary of State to determine the "eligibility" of a presidential candidate before placing that person's name on the ballot. (*Id.* at 659.) SB 35 likewise imposes none of the duties that Petitioners have hypothesized. Indeed, this is an *a fortiori* case – not only does SB 35 not impose these duties, its express provisions are directly contrary to them.

SB 35's policy is to facilitate project "approval[s]" and "increase[] housing supply." (§ 65913.4(*l*).) The statute achieves these goals by (1) imposing short deadlines and strict substantive requirements for rejecting, or requiring changes in, a project application, and (2) deeming the objective standards to be satisfied if a city fails to notify the project applicant of deficiencies within 90 days. (§ 65913.4(b)(2).) The statute does not separately mandate that the City identify deficiencies, or that it reject a project within 90 days of the application's submission. Petitioners cannot ask the Court to mandate what the statute itself does not require.

II. Petitioners Cannot Challenge The Project's Consistency With The Objective Standards, Because The Project Is Deemed To Satisfy Those Standards.

According to Petitioners, the Project fails to satisfy SB 35's objective planning standards in five respects:

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- The Project is located at a hazardous waste site listed on the "Cortese List" (*see* Petitioners' Opening Brief ("POB") at 9-12 (citing § 65913.4(a)(6));
- The Project does not dedicate two-thirds of its square footage to residential uses (*see id.* at 12-21 (citing § 65913.4(a)(2)(C)));
- The Project exceeds the City's zoning height standards (*see id.* at 24-26 (citing § 65913.4(a)(5));
- The Project does not meet the City's parkland dedication standards (*see id.* at 28-29 (citing § 65913.4(a)(5)); and
- The Project does not comply with 'the City's zoning standards for below-market-rate units (*see id.* at 31-32).

Each of these issues concerns an objective planning standard under subdivision (a). The Cortese List and the two-thirds-residential requirements are set forth in sections 65913.4(a)(6) and (a)(2)(C). The rest are "standards . . . embodied in . . . objective land use specifications adopted by a city," which the City's project applicants must adhere to pursuant to section 65913.4(a)(5). The 90-day deadline passed with no notification of inconsistency. As a matter of law, therefore, the Project is deemed to satisfy all objective planning standards.

The "deemed to satisfy" language in subdivision (b) is one of the statute's essential tools. If a city does not notify the applicant of inconsistencies with the objective planning standards within the allotted time, the project "is deemed to satisfy the objective planning standards." (RJN Exh. G at 1.)

A. <u>The Project Satisfies Objective Planning Standards As A Matter Of Law.</u>

A fact "deemed" true is not subject to falsification. The phrase "creates a conclusive presumption." *Irwin v. Pickwick Stages System* (1933) 134 Cal.App. 443, 448. It is "irrebuttable by definition," and "'no evidence may be received to contradict it. Hence, it is more accurately described as a rule of substantive law, rather than of evidence.'" *People v. McCall* (2004) 32 Cal.4th 175, 185 (citing (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 160, 301.) The rule of substantive law established by SB 35 is, after 90 days without written notice of deficiencies to the applicant, a project conclusively satisfies the objective planning standards in subdivision (a). Once a project is "deemed to satisfy the objective planning standards," no evidence can be introduced to contradict that conclusion. (RJN Exh. G at 1.)

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Petitioners themselves concede the point: a city "must provide the development proponent with reasoned objections in writing within 90 days of submission . . . failing which eligibility *objections are deemed waived*." (Am. Petition ¶ 2 [emphasis added]; *see also* POB at 3:14-15 ["Absent a reasoned rejection, eligibility objections are deemed waived."].) Thus, when the 90-day deadline passes without a reasoned denial, as it did here, the project is conclusively presumed to conform to the planning standards; the fact of its consistency cannot be challenged.[14] Petitioners cannot ask the Court to apply one element of the statute but not another. SB 35 establishes the objective planning standards, and defines the circumstance under which they are deemed to be met. Petitioners approve of the first but not the second. The Legislature, though, coupled them together.

B. The City's Issuance Of A Letter Finding The Project To Satisfy SB 35's Objective Planning Standards Does Not Nullify The Legal Effect Of Its Failure To Notify Vallco Of Deficiencies By Day 90.

Petitioners have suggested that the City did not just fail to notify Vallco of deficiencies in its application by day 90; it affirmatively issued a letter declaring the application to be compliant. But that is a distinction with no legal substance.

The California Department of Housing and Community Development ("HCD") is the agency in charge of "development and implementation of housing policy" for the state. (Health & Saf. Code § 50152.) SB 35 directs that HCD to "review, adopt, amend, and repeal guidelines to implement uniform standards or criteria that supplement or clarify the terms, references, or standards set forth in this section." (§ 65913.4(j).) HCD has provided guidance to Vallco, as well as other project applicants, on the interpretation of SB 35.

HCD has confirmed that the only method by which a city can avoid the "deemed to satisfy" mechanism is by issuing "written documentation of the conflicting standards" within the fixed

[14] SB 35's "deemed to satisfy" provision is modelled on, but has greater force than, a similar deemed-approved mechanism in the Permit Streamlining Act, Section 65956 *et seq*. The Permit Streamlining Act provides that, if a city fails to act on a development project within certain time limits, "the failure to act shall be deemed approval of the permit application" for the project (§ 65956(b).) In drafting SB 35, the Legislature sought to avoid a loophole in the Permit Streamlining Act that had turned it into a "'paper tiger' that rarely results in accelerated development approvals." (RJN Exh. D.)

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time period. If it does not issue the documentation, then – even if the City has affirmatively determined compliance – the project is "deemed to satisfy the objective planning standards." (RJN Exhs. G at 3; H at 3; and I at 1.) The "deemed to satisfy" mechanism prevents the city from belatedly withdrawing its approval, or attempting to reject a project after the expiration of the SB 35 subdivision (b)(1) review standards. (RJN Exh. G at 1.)

Petitioners question the Project's *actual* satisfaction of the SB 35 objective planning standards, but the Project has been deemed, by the express mandate of SB 35, to satisfy those standards. If Petitioners are unhappy with the way the Legislature has addressed this issue, they have a constitutional right to petition those lawmakers for a change in the law. If the Legislature decides that Petitioners' approach to the State's affordable housing challenge is an improvement over the one expressed in SB 35, the Legislature can exercise its authority accordingly. The Court is the wrong venue for Petitioners' policy arguments.

III. The Amended Petition Is Time-Barred.

The Petition is time-barred.[15] By June 2018, the City had determined that the Project satisfied objective planning standards in subdivision (a), including that the Project proposes a development "with at least 2/3rds of the area designated for residential use." (AR0892.) The City also determined that the "site is outside a hazardous waste site." (AR0895.) The City's determination of compliance with objective planning standards was final as of June 25, 2018. The City found, in June 2018, that there are no "specific 'objective design review standards'" for the Site. (AR0894.) The City did not go on to conduct "design review" or "public oversight" under subdivision (c)(1) of SB 35. Instead, having concluded that the Project satisfied objective planning standards, the City used days 91-180 to confirm that the standards would be "properly implemented." (AR0900.) The City did not engage in any further analysis regarding the issue of

[15] Vallco presented this defense by way of a motion for judgment on the pleadings. The Court denied that motion, ruling that the facts did not "clearly and affirmatively" show that the entire action was barred. The resolution of that pleading motion does not, of course, control the resolution of the issue on the merits. To the extent the Court determines that the Amended Petition does more than challenge objective planning standards, the Court should conclude that those claims that target objective planning standards are time-barred.

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the Project's compliance with objective planning standards. The Petition is challenging actions that were final, and irreversible, as of June 25, 2018. (RJN Exh. G at 1.)

Petitioners had 90 days to file and serve their Petition.[16] (§ 65009(c)(1)(E) and (c)(1)(F).) Petitioners did not serve the City until October 16, 2018.[17] (The proof of service showing service on the City is part of the Court's file.) These claims became time-barred as of September 23, 2018.

IV. The Project Is In Fact Consistent With All Objective Planning Standards.

The Project application having been conclusively deemed to satisfy the SB 35 objective standards, SB 35 does not allow for a factual inquiry into *whether* the Project satisfies those standards. The City has no legal authority – much less a legal *obligation* – to conduct such an inquiry, and the City cannot be said to have *failed* to perform a mandatory ministerial duty that it cannot lawfully perform at all. All of that being said, Petitioners have identified no aspect with respect to which the Project fails to satisfy SB 35's objective planning standards.

A. Two-Thirds Of The Square Footage Of The Project Is Designated For Residential Use.

One of the objective planning standards applicable to an SB 35 project is that two-thirds of its square footage be designated for "residential use." The Project satisfies this requirement: 66.8 percent of the Project is designated for residential use.[18]

Petitioners contend that, in calculating the residential portion of the Project, the City should have excluded the portion of the residential development that will be built pursuant to the

[16] The City's determination on each issue became final on June 25, 2018, under subsection (b)(1)(B) of SB 35. In the event the Court finds that a challenge to the decision to *approve* the Project is not time-barred, because that decision was made in September 2018, the Court can and should determine that Section 65009(c)(1)(F) bars a challenge to the underlying determinations of compliance with objective planning standards.

[17] The Proof of Service of Summons on the City of Cupertino and Grace Schmidt in her official capacity as City Clerk was filed in this matter by Petitioners on November 21, 2018. While the Court declined to take judicial notice of the truth of the contents of this document at the pleadings stage, the Court can and should consider it as evidence that the City was not served until October 16, 2018.

[18] 4.96 million square feet of the Project are designated for residential use, and 2.47 million square feet are dedicated to commercial uses.

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Density Bonus Law. In other words, according to Petitioners, the City should have measured the square footage dedicated to residential use by assessing a hypothetical, un-designed, much smaller project, not the Project itself. Nothing in SB 35 requires (or allows) the use of such imaginary arithmetic.[19]

Petitioners claim that two of Vallco's density bonus concessions are contrary to the "policy" of California's Density Bonus Law. The text of the law says otherwise.

Finally, Petitioners contend that the City should not have relied on the definition of "floor area" in the City's Zoning Ordinance to determine which portions of the Project are dedicated to "residential use," and should instead have applied the "floor area" definitions in the California Building Code ("CBC"). SB 35 imposes no such requirement. Instead, as HCD confirmed in its Technical Assistance response, "a locality could use definitions and terms contained in its local ordinance to clarify terms or requirements contained" in SB 35. (RJN Exh. F at 3.) The City properly applied its Municipal Code.

1. The Project Meets The Two-Thirds Residential Requirement.

The SB 35 process is available for projects with "at least two-thirds of the square footage of *the development* designated for residential use." (§ 65913.4(a)(2)(C) (emphasis added).) As the City found, the Project – as described in Vallco's application, and as Vallco intends to build it – will dedicate at least two-thirds of its square footage to residential use.[20]

Petitioners have concocted a convoluted interpretation of Section (a)(2)(C), and of the term

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[19] SB 35 provides guidance for review of compliance with objective planning standards. "It is the policy of the state that [SB 35] be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (§ 65913.4(l).) As HCD has recognized, "[a]pprovals of projects such as the Vallco project fulfill this legislative intent." (RJN Exh. F at 2.) Thus, to the extent the Court is interpreting or implementing any SB 35 requirement, it should do so in a manner that favors the City's approval of the Project.

[20] Other sections of SB 35 support that interpretation. For example, the first sentence of the statute reads: "A development proponent may submit *an application for a development* that is subject to the streamlined, ministerial approval process provided by subdivision (b) and not subject to a conditional use permit if *the development* satisfies all of the following objective planning standards." In other words, "the development" refers to the project that is described in "an application" and does not expressly exclude concessions, incentives, or waivers under the Density Bonus Law.

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"the development," in order to calculate the residential component of the Project as falling just a hair short of the two-thirds requirement. According to Petitioners, "the development" means: "the development, *before* reflecting in its plans any density bonus and related concessions." (POB 14:12-20.) But Vallco never proposed a "pre-bonus" development; its application accounted for application of the Density Bonus Law. SB 35 does not require analysis of a "pre-bonus" development.

Even supposing that SB 35 required the calculation to be made on the basis of a hypothetical "pre-bonus" project, a pre-bonus version of the Project would dedicate two-thirds of its square footage to residential use.[21] Petitioners, in other words, are wrong on the thing to be measured, and they are wrong on the arithmetic.

a. Sections (a)(2) And (a)(5) Have Different Purposes, And Should Not Be Combined.

Section (a) of SB 35 lists the "objective planning standards" that a development must meet in order to qualify for the SB 35 process. Only one of those standards – Section (a)(5) – excludes Density Bonus space and concessions from consideration. The "two-thirds" requirement is set forth in Section (a)(2). It would misread the statute to import the Section (a)(5) exclusion into Section (a)(2).

Section (a)(2) sets forth the requirement that the development designate at least two-thirds of its square footage to residential uses: a development qualifies for the SB 35 process if it is

> located on a site that . . . is zoned for residential use or residential mixed-use development . . . with at least two-thirds of the square footage of the development designated for residential use.

The purpose of this requirement is to ensure that SB 35 projects further the statute's purpose of increasing housing inventory.

Section (a)(5) has a different purpose. It requires the development to be consistent with

[21] Petitioners claim that Vallco "belatedly acknowledged" that it must read SB 35 in the manner that they propose. (POB at 13:4-9.) Petitioners cite to a letter submitted by Vallco in which it outlined the residential/commercial square footage ratio of a "pre-bonus" project. (AR0930.) This letter was simply a description of the evolution of the Project, not a concession about how the statute should be applied.

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objective local land use standards. Under Section (a)(5), a development is eligible for the SB 35 process if

> [t]he development, excluding any additional density or any other concessions, incentives, or waivers or development standards granted pursuant to the Density Bonus Law . . . , is consistent with objective zoning standards, objective subdivision standards, and objective design review standards . . . .

Section (a)(5) has nothing to do with minimum requirements for housing inventory or residential use. Projects that take advantage of the Density Bonus Law are, by definition, inconsistent with local standards covered by Section (a)(5). The purpose and effect of the Density Bonus Law is to permit greater density than would otherwise be allowed under local regulations, and incentivize development by permitting non-compliance with other local regulations. (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164.) Without the exclusion in Section (a)(5), no Density Bonus projects would qualify for SB 35 treatment, because they would all violate local density limits and other local regulations.[22]

The Legislature wrote the "exclusion" into Section (a)(5) so that density bonus projects would qualify for the SB 35 process. That "exclusion" language does not, either textually or logically, relate to the two-thirds residential requirement. If the Legislature had intended it to apply to that calculation, it would have said so in Section (a)(2).

Petitioners identify no policy reason to insert the "exclusion" language into Section (a)(2), and there is none. Unlike Section (a)(5), that language is not needed to make Section (a)(2) functional, nor is it necessary to ensure that density bonus projects can qualify for the SB 35 process. In fact, importing the "exclusion" language from Section (a)(5) into Section (a)(2) would make it *more* difficult for otherwise-qualifying projects to use the SB 35 process, because they

[22] Other laws have addressed this issue in a similar fashion. For example, like SB 35, the Housing Accountability Act requires consistency with objective zoning standards. That act also excludes the effect of a density bonus in the consistency determination: "[T]he receipt of a density bonus . . . shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable [requirement]." (§ 65589.5(j)(3).) Similarly, under CEQA, a density bonus project is deemed "consistent" with the general plan and zoning for purposes of the Class 32 categorical exemption, which requires consistency with those local regulations. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1347-49.)

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would have to satisfy the "two-thirds residential" threshold without counting all of the housing that will actually be built. That would violate SB 35's direction to interpret the statute "in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (§ 65913.4(*l*).)[23]

b. There Is No "Pre-Bonus" Project.

When Vallco submitted its application in March 2018, the Project was designed to include density bonus units and associated concessions. Vallco did not include an alternative set of "pre-bonus" drawings.

SB 35 cannot be read to (implicitly) require the two-thirds requirement to be measured with reference to a hypothetical pre-bonus project, and the application does not depict a pre-bonus project. A pre-bonus project could well look quite different from the actual project. If the two-thirds requirement were determined "pre-bonus," then SB 35 would still require the project to be evaluated in an objective manner "to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (§ 63913.4(l).) But that objective review would then need to take place in the context of a hypothetical project, one not depicted on any drawings or calculations accompanying the application.[24] One cannot simply guess at what a pre-bonus project might look like.

c. A Hypothetical Pre-Bonus Project Could Also Meet Residential Space Requirements.

Even if Petitioners' view of Section (a)(2) – that the residential square footage should be calculated based on the hypothetical "pre-bonus" project – were correct, the Project would still meet the two-thirds residential threshold. As long as at least one iteration of a pre-bonus project

[23] Sections (a)(2) and (a)(5) address different planning standards, and the exclusion of Density Bonus calculations makes sense in the context of the section in which that language appears but not in the section in which it doesn't. All of that aside, the language and syntax of the statute are inconsistent with Petitioners' interpretation. There is no principle of English usage – or of statutory interpretation – that would justify the importation of a limiting clause from Section (a)(5) to an earlier section of the statute.

[24] Nothing in SB 35 requires the project applicant to design a hypothetical project, and submit those drawings and calculations along with the actual project design.

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would meet the two-thirds requirement, then the project would satisfy the objective standard. Any other interpretation would require the local government to determine which iteration of a pre-bonus project should be considered, injecting an impermissible subjective component into SB 35.[25]

Vallco did not design a pre-bonus project, but it would be possible to design an SB 35-compliant pre-bonus project. In its June 19 letter to the City, Vallco explained how a qualifying project could be designed without the Density Bonus Law. Excluding the effect of the Density Bonus Law, such a hypothetical "pre-bonus" version of the project would include 4.82 million square feet dedicated to residential use, and 2.41 million square feet of non-residential use. (AR0930.) These numbers include an increase in non-residential space, as compared to the real Project, because Vallco used a concession under the Density Bonus Law to reduce the retail square footage. Residential square footage also increased, and, in this hypothetical project, the 1,779 pre-bonus units are larger than in the real Project.

In other words, even if the City were required to measure the residential square footage of a hypothetical pre-bonus project, the Project would still meet this objective planning standard.

2. The Density Bonus Concessions Are Appropriate.

By virtue of the Density Bonus Law, Vallco obtained relief from City zoning requirements that would have required below-market-rate units to be (1) the same size as market-rate units, and (2) the same type (studio, one-bedroom, two-bedroom, etc.) as market-rate units. According to Petitioners, the density bonus "policy" "clearly anticipates that general building standards . . . may be waived," but concessions may not include "key provisions of the density bonus ordinance itself." (POB 32:17-19.)

Petitioners' argument goes nowhere. If these statutory concessions were eliminated, the effect would be to force the Project to *increase* its residential square footage (the affordable units

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[25] To design a "pre-bonus" project would be a substantial task that would require innumerable design decisions requiring the exercise of judgment. To "reverse" the density bonus benefits is not a simple matter and would require essentially re-designing an entirely new project. (Declaration of Chanli Lin in support of Real Party in Interest Vallco Property Owner LLC's Opposition to Petition for Writ of Mandate ("Lin Decl.") at ¶ 10.)

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would have to be larger, with more bedrooms). The Project would remain eligible under SB 35.

In all events, Petitioners cite no authority supporting their position, which is contrary to the Density Bonus Law. A "concession" may be used to modify virtually any development requirement. The Density Bonus Law defines "concessions" broadly:

> (1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission . . . including, but not limited to, a reduction in setback and *square footage requirements* and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs . . .
>
> . . .
>
> (3) Other regulatory incentives or concessions proposed by the developer . . . that result in identifiable and actual cost reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(§ 65915(k) (emphasis added).)[26]

The Density Bonus Law specifically identifies a "reduction . . . in square footage requirements" – one of the concessions to which Vallco was entitled – as a permissible reduction. The other concession, which allowed Vallco to build below-market-rate units with fewer bedrooms than market-rate units, was a "reduction in site development standards or a modification of zoning code requirements or architectural design requirements."

Petitioners assert that the policy behind the Density Bonus Law is "to provide affordable housing on otherwise comparable terms." (POB 32:15-16.) Presumably, Petitioners mean to say that the purpose of the law is to generate affordable housing of the same size and type as the

---

[26] "Development standard" also has an extremely broad definition:

> [A] site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.

(§ 65915(o)(1).)

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market-rate units in the same development. Not so. The purpose of the statute is to "contribute" significantly to the *economic feasibility* of lower income housing in proposed housing developments." (§ 65917.) In other words, the purpose of the law is to make it economically feasible for developers to build affordable housing. The Density Bonus Law concessions advance that purpose, since they make it less costly for Vallco to build smaller units, with fewer bedrooms.

3. The City Correctly Applied Its Municipal Code To Determine Whether The Project Dedicates Two-Thirds Of Its Square Footage To "Residential Use."

SB 35 requires eligible developments to dedicate two-thirds of their square footage to "residential use." The statute does not define "residential use," nor does it dictate the types of spaces that can be considered "residential."

As HCD has confirmed, the City properly applied its zoning ordinance to these questions. Petitioners say that the City should have looked to the CBC instead. But no state law mandates that the City proceed in contravention of its own zoning ordinance, much less that it rely on the CBC, which serves an entirely different function.

a. The City Properly Applied Its Municipal Code To Confirm That The Project Meets The Residential Threshold.

The definition of "floor area" in the City's zoning ordinance is:

> "Floor area" means the total area of all floors of a building measured to the outside surfaces of exterior walls, and including the following:
> 1. Halls
> 2. Base of stairwells;
> 3. Base of elevator shafts;
> 4. Services and mechanical equipment rooms;
> 5. Interior building area above fifteen feet in height between any floor level and the ceiling above;
> 6. Basements with lightwells that do not conform to Section 19.28.070(I);
> 7. Residential garages;
> 8. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts, and similar features substantially enclosed by exterior walls;
> 9. Sheds and accessory structures.
>
> "Floor area" shall not include the following:
> 1. Basements with lightwells that conform to Section 19.28.070(I);
> 2. Lightwells;
> 3. Attic areas;

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4. Parking facilities, other than residential garages, accessory to a permitted conditional use and located on the same site;
5. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts and similar features not substantially enclosed by exterior walls.

(PR0597 § 19.08.030(F).)

The City applied this definition when it calculated the portion of the Project dedicated to residential use. Under this definition, floor area includes "residential garages," but not "parking facilities, other than residential garages . . . ." Residential areas include the residential parking facilities; commercial areas do *not* include the commercial parking facilities. Relying on its ordinance, the City concluded that the Project dedicated 66.8 percent of its square footage to residential use, and confirmed the Project's eligibility for the SB 35 process.[27]

Responding to a request for technical assistance, HCD, the agency tasked with implementing SB 35, confirmed that it was proper for the City to "use the definition and terms in its ordinances" in calculating the floor area designated for residential use. (*See* RJN Exh. F at 3.) Because this Project was considered before HCD issued SB 35 guidelines, "a locality could use definitions and terms contained in its local ordinance to clarify terms or requirements" in the statute. (*Id.*)

b. The Cross-Street Structure Is Residential Space.

With regard to the City's interpretation of its Municipal Code, Petitioners have only one quibble. The City designated as residential a structure that crosses Wolfe Road – Petitioners call it a "pedestrian bridge" – and Petitioners argue that half of the structure is "commercial." If that were true, the residential use ratio would be reduced to 66.5 percent, or one-tenth of one percent less than 66.67%. (POB 18:21-19:9.) But it is not true.

[27] Petitioners cite an email to the City, sent on the day after the Project application was submitted, from an outside consultant who believed that the Project did not qualify. (POB 14:1-8.) This position was based on a cursory initial review and was not adopted by the City.

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The structure is not a pedestrian link serving the commercial area.[28] It is a two-story structure suspended between two buildings with amenities that would only be available to the residents of the Project. The structure "is planned to house various types of residential amenity uses, including primarily some combination of the fitness and wellness facilities described above." (AR0928) The City correctly classified that space as residential.

Even if the structure functioned in the way that Petitioners imagine (*i.e.*, as a passageway between a residential building and a commercial building), its only users would be residents, going to and from the commercial areas. There would be no reason for non-resident office tenants or shoppers to access the residential buildings.

Courts give "great deference" to a city's interpretation and application of its municipal codes and zoning ordinances. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192; *J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486 (deferring to city's interpretation of the term "medical office" in its own zoning ordinance).) A court may reject a city's interpretation of its own zoning ordinance only if the city's conclusion is "clearly erroneous" or "unauthorized." (*Anderson First Coalition*, 30 Cal.App.4th at 1193.) That is not the case here. The City's classification of the structure as residential space is consistent with the design of the Project and the contemplated use of that space.

c. The City Was Not Obliged To Apply The California Building Code.

Petitioners claim that the City should have used the "floor area" definition in the CBC to assess whether the Project dedicated two-thirds of its square footage to residential use. According

[28] See Lin Decl. ¶¶ 7-9. It is appropriate for the Court to consider relevant evidence of disputed facts in this proceeding. (*Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 407 (disapproved of on unrelated grounds in *County of San Diego v. State of Cal.* (1997) 15 Cal.4th 68) ("[P]etitioners have submitted supplemental declarations to this court describing further deterioration of their condition. Because equitable principles apply in mandamus proceedings, we may properly consider all relevant evidence, including facts not existing until after the petition for writ of mandate was filed."); *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1592 ("[A] judge hearing a mandamus proceeding may properly consider . . . all relevant evidence, including facts not existing until after the petition for writ of mandate was filed. This is so because mandamus is an action where equitable principles apply, and because issuance of the writ is frequently a matter for the court's discretion.").) (citations omitted.) Mr. Lin is, without doubt, a knowledgeable source (perhaps *the* most knowledgeable source) about the design of the Project.

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to Petitioners, if the CBC had been applied, parking for both residential and commercial uses would have "counted," and the Project would have failed to meet the two-thirds requirement.

SB 35 says nothing about the CBC, and it nowhere suggests that CBC definitions, rather than local zoning codes, provide the metrics for the residential portion of a project. A writ of mandate is available to "compel the performance of an act *which the law specially enjoins*." (Code Civ. Proc. § 1085(a) (emphasis added).) There is no "prescribed manner" for measuring residential square footage for purposes of SB 35, nor does the law "specially enjoin" the City to use the CBC when doing so. Instead, as HCD has confirmed, it was appropriate for the City to look to its own ordinances to determine the project square footage ratio. [RJN Exh. F at 3.]

d. The CBC Has Nothing To Do With Land Use Policies.

The purpose of the CBC is to ensure *safety*:

> establish[] the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, access to persons with disabilities, sanitation, adequate lighting, ventilation and energy conservation; safety to life and property from fire and other hazards attributed to the built environment; and to provide safety to fire fighters and emergency responders during emergency operations.

(CBC § 1.1.2.)

The CBC does not govern land use, development, or housing policy decisions. Zoning ordinances do. The Cupertino Municipal Code provides:

> The zoning map and zoning regulations shall govern the *use of land*, including the construction, alteration, movement, replacement or maintenance of buildings; *the height, bulk and placement of buildings and uses on each site*; the provision of open space, amenities, off-street parking and loading; *the relationships between buildings and uses on adjoining sites* or within adjoining classes of districts; and such further aspects of *land use and development* as are appropriate to attain the purposes of this title.

(RJN Exh. O § 19.04.010 (emphasis added); *see also Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 293 (valid purposes of zoning ordinances include "furthering a municipality's general plan for controlled growth or for localized commercial development . . . .").)

Petitioners argue that the CBC *should* govern, so as to achieve statewide "uniformity" in the application of SB 35. (POB 14:22-15:1.) Putting to one side (a) whether it would have been

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good public policy for the Legislature to impose such uniformity, and (b) whether it would have made sense for the Legislature to designate the CBC as the source for the measurements, the Legislature did neither.

Finally, application of the CBC in this context would be nonsensical. Under the CBC's "floor area, net"[29] definitions, the City would have excluded key residential space like bathrooms, closets, corridors, lobbies, and stairways.[30] (POB 20:23-21:2.) The drafters of the CBC – building, not planning, experts – undoubtedly had a rationale for adopting those definitions, but their choices have no bearing on land use and development entitlement decisions. There is certainly nothing to suggest that, when the Legislature used the term "residential use" in SB 35, it intended to exclude bathrooms, closets, and similar types of spaces found within a residential apartment.

4. None Of Petitioners' Tables Set Forth An Accurate Calculation Of The Project's Residential/Non-Residential Ratio.

Most of Petitioners' tables purport to "correct" one or more of the calculations discussed above. Many of them rely on the "pre-bonus" measurements (which is not appropriate, for the reasons discussed in Section (IV)(A)(1), above), and many of the tables misleadingly "mix and match" assumptions (for example, comparing "pre-bonus" residential to "post-bonus" non-residential):

- The table on Page 16 uses the "pre-bonus" figures, and excludes the correction for "over-height" ceilings.
- The table on page 18 combines the "*post*-bonus" residential square footage (including parking), and the "*pre*-bonus" non-residential square footage (excluding parking).
- The table on Page 19 shows the "post-bonus" residential square footage, without parking.

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[29] Petitioners cite two different "floor area" definitions in the CBC ("gross" and "net"), but do not indicate which one they think the City should have used. (POB 15:2-13.)

[30] In the "floor area, gross" definition, Petitioners have emphasized the last sentence, which states that floor area does not include "shafts with no openings or interior courts." (POB 15:2-9.) Petitioners apparently believe that this exclusion would have made some difference in the calculation, but do not identify how they would have been different, or whether there are any areas of the Project that fit that definition. (POB 15:12-13.) In fact, the Project does not contain any of these elements. (Lin Decl. ¶ 11.)

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- The first table on Page 20 shows the "pre-bonus" non-residential square footage, without parking.
- The second table on Page 20 combines the "*post*-bonus" residential square footage (without parking) and the "*pre*-bonus" non-residential square footage (without parking).
- The table that starts at the bottom of page 21, and continues onto page 22, shows the total square footage of the non-residential parking.
- The table at the bottom of page 22 adds the non-residential parking to the "pre-bonus" non-residential square footage, to arrive at a hypothetical "total" non-residential area including parking.
- The table on page 23 compares the "*post*-bonus" residential square footage (including parking) against the "*pre*-bonus" non-residential square footage (including parking).

None of these tables present a reasonable method by which to calculate the Project's residential square footage. And none supersede the *City's* methods of making those calculations. The City's approach is consistent with SB 35, HCD's guidance on the issue, and with the City's own Municipal Code.

B. <u>The Project Site Is Not A "Hazardous Waste Site," Nor Is It "Listed Pursuant To Section 65962.5."</u>

One of SB 35's "objective planning standards" is that the development not be situated on a "hazardous waste site" that is "listed pursuant to Section 65962.5." (§ 65913.4(a)(6)(E).) Section 65962.5 directs several state agencies to compile lists of certain sites, facilities, and properties. These lists are collectively known as the Cortese List.

Petitioners contend that the Site is ineligible for SB 35 development because they claim there are two profiles related to the Site on a portion of the Cortese List. But both profiles are designated "inactive," meaning that remediation at the site is complete and no further action is required or contemplated.[31] Both the State Water Board and the Santa Clara Valley Water

[31] The entries were created pursuant to Section 65962.5(c):

> (c) The State Water Resources Control Board shall compile and update as appropriate . . . and shall submit to the Secretary for Environmental Protection, a list of all of the following:
>
> (1) All underground storage tanks for which an unauthorized release report is filed . . . .

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District concluded – two decades ago – that "the investigation and cleanup" and "remedial action" for the Site was "complet[ed]," and that "no further action" was required to remediate the Site, even if there is a change of use, such as to residential. (AR1586, 1595-96.) The State's Environmental Protection Agency ("CalEPA"), which is charged with maintaining the Cortese List, considers the Site to be "closed" and "deleted" from the Cortese List. (AR1613.)

The Site also satisfies the Section (a)(6)(E) criteria for the independent reason that it is not a "hazardous waste site." As the no-further-action letters indicate, the Site has been remediated, and contaminant levels are below thresholds set by regulation. Relying on the no-further-action letters, the City properly concluded that the oversight agencies determined that the Site was safe to develop. The Site is not contaminated, and is therefore not subject to disqualification as a "hazardous waste site."

1. The City Correctly Determined That The Site Is Not On The Cortese List.

Citing primarily to a statement in the Draft Environmental Impact Report prepared for the Vallco Town Center Specific Plan ("Specific Plan DEIR") and a Phase I Environmental Site Assessment contained within it, Petitioners claim that the Site is "listed" on the Cortese List. But those documents do not dictate whether a site is on the Cortese List. Only CalEPA has the authority to "list" a site. (§ 65962.5(e).). CalEPA notes that only "open, active leaking underground storage tank sites" are on the Cortese List. Closed sites like the Project Site are not on the Cortese List.

CalEPA's website, titled "Cortese List Data Resources," constitutes the official Cortese List. The website contains five links to databases that "provide information regarding the facilities or sites identified as meeting the 'Cortese List' requirements." (RJN Exh. K at 3.) One of those links, titled "List of Open Active Leaking Underground Storage Tank Sites from the State Water

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Board's GeoTracker[32] database," contains the portion of the list relating to leaking underground storage tanks. As suggested in the title, it only links to "open active" cases; it does not contain "closed" sites. CalEPA explains its view that only open and "active" sites are on the list:

> Sites that are no longer considered "active" because the Water Board, a regional board, or the County has determined that no further action is required because actions were taken to adequately remediate the release, or because the release was minor, presents no environmental risk, and no remedial action is necessary, are listed as *"closed" and deleted from the list*.

(RJN Exh. J); (AR1613 contains a prior version of the website [emphasis added].)

The Vallco Site does not appear on the CalEPA-linked database. (RJN Exh. K.). There is only one entry in Cupertino, at a site unrelated to Vallco. (RJN Exh. K at 2.)

CalEPA's interpretation of its own list, and of the procedures under Section 65962.5, take precedence over Petitioners' preferred reading. Section 65962.5 assigns responsibility for compiling the Cortese list to CalEPA. (§ 65962.5(e).) The regulation of hazardous waste, site cleanup, and remediation is an area in which CalEPA "has expertise and technical knowledge," and Section 65962.5 is "technical," "obscure," and "complex," and "entwined with issues of fact, policy, and discretion." (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 435 (citation omitted); *see also Cent. Coast Forest Assn. v. Fish & Game Com.* (2018) 18 Cal.App.5th 1191, 1198 (deferring to agency determination of endangered status of Coho salmon). CalEPA's understanding that closed sites are deleted from the list is not just entitled to significant deference. Rather, because CalEPA solely determines which sites are on the Cortese List, CalEPA's determination is not subject to review.

[32] GeoTracker is a data management system maintained by the State Water Resources Control Board that contains records for many types of sites over which the Water Board has jurisdiction. This includes not only leaking underground storage tank sites, but also sites such as Department of Defense sites and Land Disposal Sites. *See* State Water Resources Control Board GeoTracker <https://geotracker.waterboards.ca.gov/> (as of May 22, 2019.) Having an entry on GeoTracker does not mean that a site is on the Cortese List.

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CalEPA has updated (and clarified) its website since the City reviewed the Project. Previously, CalEPA included a link to *all* Geotracker profiles, regardless of whether a site was open, closed, or a Department of Defense or Land Disposal site. (*See, e.g.*, AR1610.) Other areas of the CalEPA website made clear that "sites that are no longer considered 'active' . . . are listed as 'closed' or deleted from the list." (AR1613.) The website updates help to streamline the process to determine whether a site is on the Cortese List – an interested party can simply click on a hyperlink to determine which sites are on the Cortese List, rather than reaching a determination through an in-depth review of the CalEPA website. The changes help make it easier to determine whether a site is on the Cortese List but do not change whether a site is listed.

After investigating the Site's profiles, and in reliance on CalEPA's guidance, the City concluded that the Site was eligible for SB 35 development:

> CalEPA's website states that 'sites that are no longer considered 'active' . . . are listed as 'closed' or deleted from the list.'[33]
>
> The Geotracker database does not indicate any active Leaking Underground Storage Tanks (LUSTs) cases at the project site. It indicates two 'closed' Leaking Underground Storage Tanks (LUSTs) cases at the former Sears and JC Penney Automotive centers for which closure letters were issued by the Santa Clara Valley Water District (SCVWD). The letters, issued in 1994 and 1999 respectively, indicate that there are no restrictions on changes to the land use at these sites. The closure letters are available online at: . . .
>
> State Water Resources Control Board GeoTracker <http://geotracker.waterboards.ca.gov/profile_report.asp?global_id= T0608552828> (as of May 22, 2019)
>
> State Water Resources Control Board GeoTracker <https://geotracker.waterboards.ca.gov/profile_report.asp?global_id =T0608500770> (as of May 22, 2019)

[33] A prior version of this website, which was live as the City considered the Project application, stated that sites were closed "or" deleted from the list. The "or" was later updated to "and." The update does not change the meaning, but rather makes even more clear that "closed" sites are not listed. Moreover, the Court should not remand to require consideration of outdated CalEPA website language. *See, e.g., SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 194-95 (in a Section 1085 writ, remand to City unnecessary where new information dictated how City would be required to resolve issue).

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(AR0896 [internal citations omitted].)[34]

The courts see it the same way. In *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 567, the petitioner argued that a project should not have been deemed "categorically exempt" from CEQA review, because it was "listed" on the Cortese List, and was therefore ineligible for an exemption. The operative language of the CEQA exemption that court was analyzing is almost identical to the text of SB 35:

> A categorical exemption shall not be used for a project located on a site which is *included on any list compiled pursuant to Section 65962.5 of the Government Code.*

(CEQA Guidelines § 15300.2(e) (emphasis added).)

The trial court ruled that the site's "inclusion on [the Cortese] list was *annulled* . . . when the health services agency determined . . . that no further assessment was needed." The Court of Appeal affirmed.

If Petitioners' view were accepted, every site that has ever been the subject of hazardous waste remediation would remain "listed" indefinitely. But CalEPA has concluded that sites do not forever remain on the list. It is the goal of SB 35 to promote the development of more affordable housing, not to eliminate housing sites for no reason. (*See* § 65913.4(*l*).) An interpretation of SB 35 that would consider this Site listed, despite its absence from the Cortese List as maintained by CalEPA, would run counter to the mandate of SB 35.

Finally, Petitioners contend that the Site appears on "sixty-four (64) environmental database[s]" (POB at 10:27-28 [emphasis omitted]), without providing any information about those databases and what those entries mean. In fact, none of the 64 databases bear on SB 35. The only question before the City was whether the Site is on the Cortese List. (§ 65913.4(a)(6)(E).) The database report indicates that there are *zero* Cortese entries for the Site.

[34] Petitioner contends that in the Specific Plan DEIR, the City "admitted" that the Project site is ineligible because it is "included" on the Cortese List. (POB at 10:2-12.) The Specific Plan DEIR is irrelevant to SB 35, was not considered by the City as part of its review for the SB 35 Project, and should be excluded for the reasons set forth in Vallco's opposition to the RJN. But, even if the Court considers it, the Specific Plan DEIR makes clear that "[t]he project site does not contain any open hazardous materials cases listed on the Cortese list databases." (PR0023.)

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1 (PR0121 [showing no entries for "Cortese" on the "target property"].) Consistent with that
2 analysis, there are two "Hist Cortese" (*i.e.*, historical Cortese) entries, corresponding to the closed
3 UST profiles. (PR0122, PR0125, PR0128.) Petitioners' list of 64 databases has nothing to do with
4 SB 35's standards. They concern, for example, the "EMI" (Emissions Inventory Data) database,
5 which shows past air emissions data. (PR0414.) Some of the databases, like the "FINDS"
6 database purporting to have 14 hits for the site, are merely duplicative of other databases.
7 (PR0111 [contains "'pointers' to other sources of information that contain more detail"].) None of
8 the 64 databases requires the City's determination that the site is not listed on Cortese to be
9 reversed.

10 **2. The City Correctly Determined That The Site Is Not A Hazardous**
11 **Waste Site.**

12 Even if the Project site were listed, it would nevertheless qualify for SB 35 ministerial
13 approval because it is not a hazardous waste site. A site is only disqualified if it is *both* "listed
14 pursuant to Section 65962.5" *and* "[a] hazardous waste site." (§ 65913.4(a)(6)(E).) Petitioners
15 contend that the Project site is hazardous because it has a "dire environmental history," and is
16 unsafe for residential uses. (POB at 10-12.) That assertion is simply false, and it is directly
17 contradicted by the remediation and regulatory history of the site, including the 1994 and 1999
18 closure letters.

19 Relying on the 1994 and 1999 closure letters, the City concluded that "[n]o portion of the
20 project site is part of a hazardous waste site" (AR0881), and that the Project site is safe for
21 residential uses. (AR0882 ["The closure letters, issued in 1994 and 1999 respectively, indicate
22 that there are no restrictions on changes to the land use at these sites and therefore, are no longer
23 considered hazardous waste sites."].) The closure letters concluded that all necessary "corrective"
24 and "remedial action" was completed. (AR1586.) The determination was based on test results
25 showing that the site had been cleaned to the point that contamination fell below "regulatory
26 cleanup levels." (AR1595 [contamination "concentration levels are below regulatory concern"];
27 AR1588 [showing contamination levels before and after cleanup].) "[N]o further action" was
28 "required" to remediate the site. (AR1586.)

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By law, the Water District and Regional Water Board could only reach those conclusions, and send no-further-action letters, once they determined that the Site no longer contained hazardous conditions. The regulations provide that "the regulatory agency" is to inform the property owner "in writing that no further work is required" only "[u]pon the completion of required corrective action." (23 Cal. Code Reg. § 2721(e).) Required "[c]orrective action" includes "any activity necessary . . . to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water." (*Id.* § 2720.) Thus, the 1994 and 1999 closure letters confirm that the Site is protective of human health, safety, and the environment, and is not hazardous. (AR1588 [concluding that the "corrective action protect[s] public health" and "potential beneficial uses"]; AR1599 [same].)

In support of their claim that the Site is hazardous, Petitioners rely on a report prepared while the City was considering an alternative project for the Vallco site, the "Specific Plan DEIR." The City prepared the Specific Plan DEIR because the alternative project (unlike this Project) is subject to CEQA. Even if the Court were to consider the report, it does not support Petitioners' position. The Specific Plan DEIR includes a Phase I site assessment by Cornerstone Earth Group (the "CEG Report"). (POB at 10:24-11:12; PR0028-0487.) The Specific Plan DEIR concludes that the Project "would not create a significant hazard to the public or the environment." (PR0004; PR0016 [noting that "residual contaminant concentrations generally do not exceed the Water Board's current Tier 1 Environmental Screening Levels (ESLs) or residential screening levels established by the DTSC and EPA," and therefore "do not appear to pose a significant risk"]; PR0020.)

Nothing in the Specific Plan DEIR or the CEG Report establishes that the Site is hazardous. The Specific Plan DEIR discusses "possible" environmental issues that "may be present" due to "Historic Site Usage." (PR0015-18.) Similarly, the CEG Report posits a series of possible environmental conditions, namely, the possibility of an in-place underground storage tank, the possibility of high levels of residual pesticides from historical agricultural activity, and the possibility of buried equipment on the site that may have "impacted" soil or groundwater. (PR0076, 0077.) The Specific Plan DEIR notes that the point of the assessment was to adopt a

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contingency plan *in case* any hazardous materials *may potentially be* encountered during demolition. (PR0004.) A report speculating about the possibility of "environmental issues" (POB at 11:9) is not evidence that issues exist, and is certainly not evidence that the site is a "hazardous waste site." (*See Spinner v. American Broadcasting Co., Inc.* (2013) 215 Cal.App.4th 172, 189 [factfinder may not draw inferences from "bare possibilit[ies]" that are "based on speculation, supposition, and guess work"].)

If the Court were to consider the Specific Plan DEIR or the CEG Report, it would also have to consider the environmental reports submitted by Vallco, which confirm that the site, as the City determined, is not contaminated. Recent investigations at the Site found no remaining underground storage tanks, and concluded that any contamination is below levels that would require clean-up. (RJN Exh. Q at 10.) These reports put to rest the speculative "possibilities" raised in the CEG Report. The Site is not hazardous.

Petitioners are wrong to suggest that the Site "is subject to clean-up." (POB at 12:1) They cite an email from Mickey Pierce, at the Santa Clara County Department of Environmental Health ("DEH"), to Petitioner Kitty Moore. In fact, the correspondence has nothing to do with any ongoing clean-up. It relates to a recent, and recently resolved, complaint filed with DEH. A complaint does not convert the Site into a hazardous waste site. The complaint alleges that a 1,000 gallon UST was abandoned on-site, a misunderstanding likely based on a comment in the CEG Report that a UST "may" remain on site and the recommendation that this be further investigated by conducting a "geophysical survey." (RJN Exh. L; PR0073 [noting the "potential presence" of a UST].) To resolve the complaint, Vallco conducted a geophysical survey using ground penetrating radar,[35] and advanced a series of test pits at the Site. The combined results of these investigations: there is no abandoned UST. (RJN Exh. Q at 10.) Vallco submitted a report

[35] Ground penetrating radar uses radar pulses to detect subsurface objects, such as an underground storage tank.

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documenting these investigations, and DEH has since formally closed the complaint. (RJN Exhs. L and M.)[36] The Site is not "subject to clean up."

The Site is neither on the Cortese List, nor a hazardous waste site. The City correctly determined that the relevant objective planning standard was satisfied.

C. The City Correctly Determined That The Project Does Not Exceed Height Limits.

Petitioners argue that the Project is not SB 35-compliant because its height exceeds that allowed by current zoning. Petitioners' position is, again, contrary to SB 35: where, as here, the zoning conflicts with the General Plan, the zoning is disregarded, and the General Plan controls. The Project's height is consistent with the General Plan.

Petitioners contend that the City was *wrong* when it concluded that the General Plan and the Site's zoning are inconsistent. According to Petitioners, *their* interpretation of the General Plan and zoning ordinances should prevail over the City's, and the Court should deem them to be *consistent*. But Petitioners have not provided any reason why the Court should reject the City's interpretation of its own General Plan and zoning ordinances. They also fail to establish the existing height limits under the Zoning Code.

1. Because The General Plan and Zoning Are Inconsistent, The General Plan Development Standards Govern.

The current zoning was adopted long ago as a Planned Development zoning, which means that it was accommodated the development of the "Vallco Fashion Mall" that the General Plan

[36] The letter from DEH references a closure plan for the Sears Automotive Site and a requirement to comply with certain regulations "as referenced in [California Code of Regulations Title 22] section 66262.34(a)(1)(A)." [RJN Exh. M.] The cited regulations broadly impose certain obligations upon *all* business that generate and temporarily store materials that qualify as a hazardous waste in California. The requirements specifically include preparation of a closure plan and the proper management of equipment and structures as part of the final closure process. 22 Cal. Code Regs. §§ 66262.34(a)(1)(A), 66265.111 and 66265.114. Neither the DEH letter nor its reference to the broadly-applicable regulations mean that the site is a hazardous waste site, subject to an ongoing clean-up order, or unfit for the planned residential use. And they do not mean that the site is on the Cortese List.

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1 slates for redevelopment. Planned Development zoning is a flexible approach to zoning,[37] in
2 which development standards are tailored to the specific project. (RJN Exh. O § 19.80.030(E)
3 (development standards for Planned Development zones are "developed in conjunction with the
4 approval of the conceptual and definitive plans").) Planned Development districts are identified
5 on the Zoning Map as a "P" followed by a parenthetical that contains letters, here "P(CG)." The
6 letters in the parenthetical do not set the development standards, but rather govern use. (RJN
7 Exh. O § 19.80.030.B, C.) Development standards, such as height, are set in the conceptual and
8 definitive plans approved in conjunction with the zoning and in subsequent project approvals.
9 (RJN Exh. O § 19.80.030.E.) For Vallco, the original development plans were approved years ago
10 have been amended several times. Stated another way, the development plans for the mall
11 effectively *are* the zoning and to approve a different project would require modifying the zoning.
12 In 2014, the City updated its General Plan to set out a vision to transform the Project site:
13 > The City envisions a *complete redevelopment of the existing Vallco*
14 > *Fashion Mall* into a vibrant mixed-use "town center" that is a focal point for regional visitors and the community.
15 (PR0782.)
16 The "complete redevelopment" will convert the existing indoor mall into a new town
17 center with a street grid, public plazas and a mix of uses, including office, residential, and retail.
18 The General Plan calls for "a newly configured complete street grid hierarchy of streets,
19 boulevards and alleys that is pedestrian-oriented, connects to existing streets, and creates walkable
20 urban blocks for buildings and open space." (PR0783.) The existing mall provides approximately
21 1.2 million square feet of retail. The General Plan envisions a completely different use and
22 intensity: two million square feet of office, 600,000 square feet of retail, and 35 residential units
23 per acre.
24
25
26
27
28

[37] "The planned development (P) zoning district is intended to provide a means of guiding land development or redevelopment of the City that is uniquely suited for planned coordination of land uses and to provide for a greater flexibility of land use intensity and design because of accessibility, ownership patterns, topographical considerations, and community design objectives." (RJN Exh. O § 19.80.010.)

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The zoning had not been changed at the time the General Plan was amended. Instead, the General Plan contemplates the adoption of a Specific Plan with detailed development standards, and an accompanying rezoning of the Site. (PR0782, 0821, 0825.) That is, the General Plan affirms that a rezoning will be required because the existing zoning for the mall is inconsistent with the town center vision. While the General Plan sets height limits for most areas throughout the City, the City deferred setting height limits for the Site to the Specific Plan.[38] In particular, while the General Plan states that "Figure LU-2 shows maximum heights and residential densities allowed in each Special Area," that figure describes the maximum height for Vallco as "Per Specific Plan." (PR0772; AR0894.) Because the Specific Plan had not been adopted at the time Vallco submitted the Project application, the City accurately stated, in the June Determination, that "there are no applicable height limits." AR 0894.[39] This is not to say that there are no limits at all. The General Plan's "building plane" development standard limits height by requiring the building bulk to remain below a 1:1 slope line drawn from adjacent curb lines.[40] (AR0894.)

Under SB 35, where general plan and zoning standards are "mutually inconsistent," a project is "deemed consistent with the objective zoning [] standards [] if the development is consistent with the standards set forth in the general plan." (§ 65913.4(a)(5)(B).) As stated by the City in its June Determination, "the general plan designation prevails." (AR0272.)

Petitioners argue that the General Plan and zoning are not in conflict. They assert, without any evidence, that a "town-center style project" could in theory be built within the height limits. (POB 27:23-26, 28:1.) Petitioners misunderstand the nature of Planned Development zoning. For every Planned Development zoning district, the City adopts conceptual and definitive plans, which establish the governing development standards and regulations. The plans are project-specific.

[38] It should be noted that the prior General Plan from 2005 set a height limit of 60 feet for the Site, but this was deleted when the City adopted its new vision for a complete redevelopment at Vallco in the updated General Plan in 2014. (*See* RJN Exh. P.)

[39] The City also concluded that the "zoning designation for the project site [] is inconsistent with the General Plan land use designation." (AR0893.)

[40] Petitioners allege that the Project fails to satisfy this requirement. (FAVP 21:10-26.) The Project plainly meets this requirement. (AR0079, AR0134.) In any event, Petitioners did not address this claim in the Opening Brief and appear to have abandoned it.

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The zoning contemplates the existing indoor mall, whereas the General Plan contemplates its complete redevelopment into a new town center that includes a new street grid and public plazas. Those concepts are fundamentally in conflict, and they cannot be reconciled. In SB 35 parlance, they are "mutually inconsistent."

2. Even if Zoning Height Limits Controlled, Petitioners Fail To Identify Those Limits.

Petitioners contend that existing zoning height limits are 30 feet and 85 feet, but cite no applicable zoning ordinance in support of that claim. The City disagreed, and *its* determination controls.

Petitioners claim that the height limit is 30 feet within the portion of the site zoned P(CG). They cite Cupertino Municipal Code Table 19.60.060, which sets development standards within the General Commercial (CG) zoning district. (POB 24:11-19.) But the Site is not in the (CG) district; it is in the P(CG) district. This is a critical distinction. As explained above, the letters following the "P" in the parenthetical set the use, not the development standards such as height, which are established in conjunction with the conceptual and definitive plans. (RJN Exh. O § 19.80.030.) The CG height limits cited by Petitioners are inapplicable.

Petitioners similarly fail to establish that the height limit is 85 feet on the P(Regional Shopping) portion of the site. Each of the documents Petitioners cite are either not regulatory documents, or are no longer effective. In the first instance, Petitioners rely on a description of the height limits contained in the Specific Plan DEIR, but it is not a regulatory document, and its description has no legal effect. (POB 25:15-23.) In a footnote supporting the statement about maximum building heights, the Specific Plan DEIR cites to a number of documents, including two "Council Actions," the 1993 General Plan and a Development Agreement. The referenced

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Development Agreement has since expired,[41] and the 1993 General Plan is irrelevant, having been superseded by two updates.

Ignoring the documents that the Specific Plan DEIR references, Petitioners say that the 85-foot height limit "appears to be reflected" in a 2004 ordinance that amends the Development Agreement. However, the document they include in the "Petitioners' Record" is not an accurate reproduction of Ordinance 1936. See RJN Exh. R. In particular, the documents they cite – that supposedly establish a height of "generally not to exceed eight stories" – are not part of the Ordinance. They appear to be a staff summary of the Development Agreement and a page from the 1993 General Plan. These expired and superseded documents have no legal effect. In fact, none of the regulatory documents referenced mention 85 feet.[42] Even if the underlying zoning height limit were relevant, Petitioners have failed to establish what those height limits would be.

D. <u>The Green Roof Is Parkland.</u>

The Project includes substantial public open space: two acres of public plazas, two acres of play space, more than two acres of new trails, and a 30-acre green roof, at least 14 acres of which will be publicly accessible. (AR 0025, AR 0072, AR 0078.)[43]

Petitioners claim that the Project does not satisfy the City's requirement for parkland dedication, and that, because the City had to exercise "discretion" to make that determination, it violated SB 35. But Petitioners mischaracterize the General Plan, and they disregard the core principles of SB 35. They have also ignored the CMC sections that govern parkland dedication.

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[41] The City and the prior owner of most of the Mall, entered into a Development Agreement in 1991 to guide some proposed modifications to the Mall. That Development Agreement was amended a number of times, but it expired on its own terms in 2009, so has no further legal effect. (RJN Exh. S.)

[42] Without explanation, Petitioners direct the Court to the Heart of the City Specific Plan. However, on December 3, 2014, the City amended the Heart of the City Specific Plan to, among other things, remove Vallco. (*See* Exhibits SPA-1 and SPA-2 to City Council Resolution 14-213, which show that the Site is outside the boundaries of the Specific Plan.). [RJN Exh. E.] The Heart of the City Specific Plan is irrelevant to the Site.

[43] The open space is depicted in renderings submitted to the City. (AR 0024, AR 0010, AR 0011, AR 0012, and AR 0016.)

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1. Petitioners Mischaracterize The City's Parkland Program.

General Plan Policy RPC-1.2 sets a goal of at least three acres of park for every thousand residents. Petitioners claim that the Project is not eligible for the SB 35 process because it does not provide open space at that ratio. (POB 28:7-29:8.) But the General Plan policy is a citywide goal, to be attained by a variety of strategies, like relying on existing open space, encouraging the owners of private open space to make it publicly available, land acquisition, requiring major developments to provide open space,[44] among others. (PR 0983-0984.) The General Plan does not require that *each* residential project provide three acres of park for every thousand residents.

The General Plan is a municipal "mission statement," setting forth competing City goals and policies that must be balanced against one another. Municipal officials are best positioned to balance these competing goals against one another. A city's interpretation of its own General Plan is entitled to "great deference" and a "strong presumption of regularity." (*East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305.) Strong policy reasons underpin that judicial deference:

> Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes.

(*Id.*)

The City's interpretation of its General Plan can be rejected only if "a reasonable person could not have reached the same conclusion." (*Id.*)

Petitioners ignore the City's *actual* ordinance governing parkland dedication, set forth in Chapter 13.08 of the Municipal Code. The amount of parkland the City may require to be dedicated is calculated by use of a formula that takes into account the number of housing units to

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[44] General Plan Strategy RPC-2.2.2 addresses the role that private developers may play in the provision of open space:

> Requir[e] major developments to incorporate private open space and recreational facilities, and seek their cooperation in making the spaces publicly accessible.

(PR0984.)

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be developed, along with other factors, including whether those units are affordable or market rate. (PR0514 [CMC § 13.08.050]; AR0885 [confirming that park dedication fees are waived for affordable units].)

The parkland dedication "requirement" can be satisfied in a variety of ways. The City can accept a parkland dedication, an in-lieu fee, credit private open space, or a combination of the three. The appropriate mix is project-specific, based on a variety of factors (topography, geology, feasibility, and the like). (PR 0514, 0515 [CMC § 13.08.060 (allowing in-lieu fees); § 13.08.070 (allowing a combination of dedication and fees)].) The in-lieu fee is, in turn, calculated by use of a formula based on the fair market value of land in the City. In all events, the General Plan policy does not set any minimum parkland dedication requirement for the Project.

2. The City Properly Determined That The Green Roof Is Parkland.

The green roof will function as a park in all respects, and the City appropriately determined that it, along with the other open space to be created by the Project, met the parkland designation standard. There are no grounds to revisit that determination.

While neither the General Plan nor the CMC defines the term, Petitioners assert that, because the term "parkland" includes the word "land," it *must* refer to a ground-level area. (POB 29:9-25.) Petitioners also cite two of the three "parkland acquisition" objectives in the General Plan. Those objectives refer to "pedestrian and bike connectivity," "creek lands," and "natural open space." According to Petitioners, these goals could not be accomplished by a green roof, so "parkland" must therefore not include a green roof. (POB 29:10-30:14.)

Nothing in the Municipal Code, or in the General Plan, contains such a limitation. In fact, the third "parkland acquisition" objective identified in the General Plan – the one that Petitioners do not mention – is to "distribut[e] parks equitably throughout the City." The Municipal Code defines "park" broadly: it includes "a park, . . . or any other area in the City, owned or used by the City or county and devoted to active or passive recreations." (RJN Exh. N § 13.04.020(D).) The publicly accessible portion of the green roof meets this definition. The green roof also provides pedestrian connectivity, by creating a new connection across the site, including across the busy

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Wolfe Road corridor. There is no objective planning standard that requires the City to reject a green roof as a "park" simply because it is above grade.[45]

3. Petitioners' Complaints About the "Discretionary" Nature Of The Parkland Issue Confirm That There Is No Role For The Court.

Rather than cite to an objective standard, Petitioners contend that the decision about the parkland designation requires the City to exercise discretion. According to Petitioners, the fact that this determination was "discretionary" means that the Project is not eligible for the SB 35 process. (POB 30:15-19.)

Petitioners have it backwards. If a determination is "discretionary," it is not an "objective" standard, and it would have no role in any SB 35 determination. In other words, if this issue requires an exercise of discretion by the City, SB 35 prohibits the City from relying on it to reject an application.

E. The Project Complies With The Municipal Code Requirement That The Below-Market-Rate Units Be "Dispersed".

The Density Bonus Law sets forth the structure and metrics of the density bonus, and associated concessions, incentives, and waivers. It also directs cities and counties to adopt local ordinances to implement the density bonus program.[46] Petitioners contend that the Court should vacate the City's finding that the Project complies with the local density bonus ordinance. Petitioners misunderstand the state and local density bonus laws.

Under state and local law, the additional units that may be constructed – the 623 "density bonus" units – "shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located ." (§ 65915(i); PR0620 [CMC § 19.56.030(f)(7)].) The City's density bonus implementation ordinance includes an additional

[45] Even if Petitioners were correct that the rooftop area should not count as parkland, the City could not reject the Project on such grounds because, as described above, the City Code allows the payment of fees in lieu of dedication. That is, the remedy would not be denial, but rather the payment of fees.

[46] The state Density Bonus Law provides: "A city, county, or city and county shall adopt an ordinance that specifies how compliance with this section will be implemented." (§ 65915(a).)

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requirement, not mandated by state law, that the affordable units "be dispersed throughout the project." (PR0624 § 19.56.050.)

The Project distributes the units as *permitted* under state law, and as *required* under local law. As allowed under state law, the majority of the market-rate "bonus" units will be located in areas above the green roof. Pursuant to local law, the affordable units, and the rest of the market-rate units, will be generally dispersed throughout the rest of the residential portions of the Project.[47] Therefore, the bonus units are located in a geographic area of the project that is "other than the areas where the [affordable units] are located."

Petitioners misread the Density Bonus Law to mean that, if "bonus" units are built in a different geographic area, they must be located on a completely different "part of [the] project site that was not part of the original project." (POB 32: 2-7.) In other words, Petitioners contend that Vallco was required to obtain entitlements for the "pre-bonus" Project, and then acquire additional land in order to build the "bonus" units. The statute imposes no such requirement. State and local law permits the "bonus" units to be located in "geographic areas of the housing development other than the areas where the units for the lower income households are located." There is no requirement that they be built on a separate site, one that is "not part of the original project." They can be built elsewhere within the "housing development," a term that refers to "a development project for five or more residential units." (§ 65915(i).) HCD has confirmed that in the SB 35 context, bonus units can be constructed in geographically separate areas. (RJN Ex. F.)

F. <u>The Concessions Relating To Unit Size And Mix Were Proper.</u>

Petitioners contend that the two concessions improperly allowed the below-market-rate units to be smaller, and of a different unit type, than the market rate units. Rather than cite to the statute itself, Petitioners assert that the "policy underlying" the allowance for concessions "clearly anticipates that *general building standards* such as setback requirements may be waived." (POB

[47] Petitioners' challenge concerns the Project's compliance with state law. Petitioners have not raised any challenge to the Project's compliance with the City's municipal code (dispersal of affordable units among the non-bonus market rate units). Any such challenge would, in all events, be futile, because the affordable units *are* dispersed, and the City found that the Project met that municipal code requirement.

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32:8-19.) That is not the law. The Density Bonus Law broadly defines the term "concession" to include not only relief from development standards like setbacks, but also "other regulatory incentives or concessions…that result in identifiable and actual cost reductions to provide for affordable housing costs." (§ 65915(k)(3).) Thus, the "policy" the law advances is to incentivize projects with affordable units by achieving cost reductions. Cities can only deny concessions in narrow circumstances, such as where they find that the concession does not achieve a cost reduction, would result in a health or safety impact, or would be contrary to state or federal law. (§ 65915(d)(1).) Petitioners contend that a concession cannot be used for relief from a local density bonus ordinance, but that is not true, unless that aspect of the ordinance codifies state law. Here, only local law requires that affordable units be comparable to market rate units, and so there is nothing to prohibit a waiver of those local standards.

V. SB 35 Does Not Require The Planning Commission Or City Council To Complete The Review Of The Project Application.

Petitioners assert that the approval was flawed because it was issued at the staff level, claiming that SB 35 requires hearings by the Planning Commission and City Council. (POB 30:20-26, 31:1-18.) They misread the law. SB 35 provides a city with flexibility in its consideration of an application. For example, a city "may" have its "planning commission or any equivalent board," or its "city council or board of supervisors" conduct "design review or public oversight." (§ 65913.4(c)(1).) But this permissive provision is not a required part of SB 35 review. The City elected to have its staff review and analyze the objective planning standards as applied to this Project. HCD agrees with this approach. When asked whether the Planning Commission or City Council must perform a design review or public oversight in order to approve an SB 35 project, HCD explained: "No. Pursuant to Government Code section 65913.4(c)(1) design review or public oversight of the development is optional." (RJN Exh. F at 4.) The City, not Petitioners, gets to decide whether its Planning Commission or City Council should be involved in design review or public oversight. SB 35 is indifferent.

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VI. The Challenge To The Subdivision Map Approval Is Barred By The Statute Of Limitations, And It Fails On the Merits.

The City approved the tentative map through the streamlined, ministerial SB 35 process. Petitioners argue that the City was required to comply with local procedures in approving the tentative map. This argument fails for two reasons. First, it is an untimely and improper claim under the Subdivision Map Act. Second, SB 35 makes subdivision map approvals subject to its streamlining procedures, and thereby preempts any inconsistent local procedures.

Petitioners' opening brief is the first occasion on which they have raised a claim that the City failed to follow local map-approval procedures. But the proper vehicle for raising such a challenge would have been a claim under the Subdivision Map Act. (§ 66499.33 (authorizing a private right of action "to restrain or enjoin any attempted or proposed subdivision . . . violation of this division or *local ordinance enacted pursuant thereto*") (emphasis added).) Petitioners have asserted no such claim.[48] Nor could they assert one now, as the 90-day limit to challenge the map approval – December 20, 2018 – has passed. (§ 66499.37.) The claim has not been properly made, and it is barred by the statute of limitations.[49]

The claim fails on the merits as well. For eligible projects, SB 35 preempts all local map-approval processes, and replaces them with SB 35's streamlined process. SB 35 provides that "an application for a subdivision . . . [is] subject to the [180-day] public oversight timelines" of SB 35 if a project is consistent with objective standards in the local subdivision ordinance. (§ 65913.4(c)(2).)

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[48] Even if there were a basis for construing the claim as subsumed within the causes of action in the petition, which there is not, writ relief is only available when there is no remedy at law. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 590 ["[T] he extraordinary remedy of mandate is not available when other remedies at law are adequate."] (internal quotation marks omitted).) Because the Subdivision Map Act provides a legal remedy (§ 66499.37), writ relief cannot be granted for a Subdivision Map Act violation.

[49] Any claim under the Subdivision Map Act would not relate back to the amended petition, because the amended petition focuses solely on SB 35's objective planning standards, and not on the approval process more broadly. Petitioners' new theory presupposes, incorrectly, that map approval should occur outside the strict confines of SB 35.

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Even if SB 35 did not *expressly* preempt the City's map approval process, that process would be *impliedly* preempted, because it is lengthy and laden with subjectivity, and therefore inconsistent with the intent of SB 35. (PR0572-0574 [CMC § 18.16.050; § 18.16.060; § 18.16.070].) Under the City's Municipal Code, the Planning Commission can recommend denial if the City finds that the "site is not physically suitable for the type of development" or for the "density of development," and the City Council may deny the map on either of those discretionary grounds (PR0573 [§ 18.16.060(B); § 18.16.070]) after it holds a public hearing on any map application (after notice and comment from the public).

This process fails SB 35's "objectivity" test, under which the *only* standards to which a project can be held are those that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable." (§ 65913.4(a)(5).) Petitioners point to no "objective" standard that the tentative map contradicts. *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1081 (reversing denial of project, including denial of vesting tentative map, because denial did not rest on objective standards under the Housing Accountability Act).

The map approval procedures under the Cupertino Municipal Code are precisely the type of lengthy, discretionary local process that SB 35 is intended to supplant. (*Cohen v. Bd of Supervisors* (1985) 40 Cal.3d 277, 293 (court considers the "whole purpose and scope of the legislative scheme" to determine whether local law has been "preempted by implication"); *Cal. Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 558 (local regulations upheld only "if not inconsistent with the purpose of the [state's] general law"); *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1175 (when Legislature adopts a "general scheme for the regulation of a particular subject," all local legislation is preempted).) Petitioners' claim that the Project was required to adhere to the discretionary local approval process fails.

CONCLUSION

The Petition is time-barred; it concocts a mandatory ministerial duty that does not exist, and that is directly at odds with SB 35; it seeks relief that would violate the express provisions,

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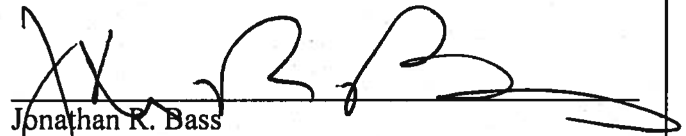
and the plain intent, of SB 35; and it misconceives both the technical aspects of the Project and the applicable standards of state and local planning and zoning law.

The Amended Petition for Writ of Mandate should be denied, and judgment should be entered in favor of Respondents and Real Party in Interest.

DATED: May 24, 2019

Respectfully submitted,

COBLENTZ PATCH DUFFY & BASS LLP

By: 

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