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

Respondents.

VALLCO PROPERTY OWNER LLC,

Real Party in Interest.

Case No. 18CV330190

VALLCO PROPERTY OWNER, LLC'S SURREPLY BRIEF IN FURTHER OPPOSITION TO WRIT OF MANDAMUS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE ARGUMENTS RAISED IN PETITIONERS' REPLY BRIEF

Action Filed: June 25, 2018

Date: November 1, 2019
Time: 9:00 a.m.
Dept.: 10

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I. THE COURT SHOULD STRIKE PETITIONERS' BELATED ARGUMENTS.

Petitioners' 35-page reply brief raises a multitude of issues not mentioned in their opening brief, involving (1) roadway easements; (2) a bridge easement; (3) square footage calculations; (4) guidelines issued by the California Department of Housing and Community Development ("HCD"); (5) whether certain General Plan standards were properly implemented (an issue that Petitioners misleadingly term a "Subdivision Map Act" issue); and (6) whether SB-35 amendments, effective on January 1, 2019, govern this case. Vallco Property Owner LLC ("Vallco") moves to strike these arguments.[1]

All of these arguments should have been raised earlier. None appear in the original petition for writ of mandamus, the amended petition for writ of mandamus, or Petitioners' opening brief. The function of a reply brief is to address arguments raised in an opposition brief, and courts "do not entertain new points raised for the first time in a reply brief absent good cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [granting a motion to strike an argument raised for the first time on reply, where there was "no sound reason th[e] issue could not have been raised in the . . . opening brief"]; *Am. Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered . . . ."].)

Petitioners concede that they have "includ[ed] certain additional matters" in their reply brief (Reply Br. at 3:17-19), but they offer no good cause for doing so. Instead, they appeal to "the interest of fairness," a principle that, of course, militates *against* considering these issues. (*See Simpson v. The Kroger Corp.* (2013) 219 Cal.App.4th 1352, 1370 ["Raising a new theory in a reply brief is improper and unfair to [the opposing party]."] There is "no sound reason" for failing

[1] For the sake of simplicity, Vallco has combined in this document its Surreply and its Memorandum of Points & Authorities in support of its Motion to Strike. The Motion to Strike targets the following portions of the Reply Brief: p. at 1:10–12 & n.3; p. at 1:15–18; pp. at 3:20–4:10 & n.10 & 11; pp. at 5:18–6:17 & n.14 & 15; pp. at 7:23–8:4; pp. at 9:17–10:11 & n.18; p. at 11:1–8 & n.19 & 20; pp. at 11:9–12:10; pp. at 12:26–13:6; p. at 14:1–2 & n. 21; pp. at 14:20–15:3; pp. at 15:4–16:3; pp. at 16:4–18:6 & n.22 & 23; pp. at 22:17–23:14 & n.25; p. at 32:2–7 & n.39 & 40; p. at 33:13–28; and p. at 35:8–9. In addition, Vallco's determination not to address certain arguments made in the Reply Brief is not a concession as to the validity of those arguments, but rather a reflection of the purpose of the Surreply, which is to address only new arguments.

to raise these arguments earlier; the Court should strike them. (*See Jay*, 218 Cal.App.4th at 1542.)

Each argument not only comes too late, it fails on the merits in any event.

A. The Roadway Easements.

Petitioners now argue that the Project includes construction "over roadway easements not vacated by the City" (the "roadway easement"). (*See* Reply Br. at 1:15–16, 22:17–23:14.) This argument could have been raised earlier, and it is wrong.

1. Petitioners Were Aware Of The Roadway Easement Issue Long Before Filing The Opening Brief.

Petitioners say that the City's SB 35 approval of the Vallco Project improperly required the City to relocate a roadway easement. But Petitioners did not become aware of this issue only recently. To the contrary, they themselves raised it before filing their writ petition. (*See, e.g.*, Original Petition Ex. 3 [arguing that the City should deny the Project application because it "relies on easements to be vacated by the City," which "would constitute a discretionary act"]; *id.* Ex. 5 [arguing that the Project is "not consistent with objective zoning standards" because "[e]asements may not be ministerially vacated for the project"]; *id.* Ex. 6 [arguing that the City should deny the Project application because "a roadway easement vacation requires a noticed, public hearing" under "CSH § 8320"]; *id.* Ex. 7 [same].) In a document dated June 18, 2018, and titled "Vallco Town Center SB 35 Non-Compliance Issues," Friends of Better Cupertino presented a lengthy argument, including figures and maps, that the Project should be rejected because it "has multiple easements which would need to be vacated and/or relocated" under procedures set forth in the "California Streets and Highway Code." (*Id.* Ex. 7.) In short, Petitioners were well aware, before they filed their petition, of the easement issue.

Moreover, references to the easements appear in the administrative record certified by the City on December 17, 2018, as well. Petitioners cite to these references in their reply brief. (*See* Reply Br. at 22:20–26 [admitting that "Vallco's application" discusses "existing road easements and other easements," citing AR1401, AR0196, AR1407, & AR1486], 23:3-4 [citing AR0831 for the proposition that "[t]he Vallco site is subject to two road easements"].)

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2. The Roadway Easement Argument Lacks Merit.

The roadway easement argument, aside from being untimely, is wrong. Consistent with the requirement in the General Plan to fashion a "newly configured complete street grid" for the Vallco area (PR0783), the City relocated a roadway easement through SB 35, which authorizes processing of subdivision maps. (§ 65913.4(c)(2).[2]) The City did not need to follow the process set forth in the Streets and Highways Code.[3] In *CREED v. City of San Diego* (2010) 184 Cal.App.4th 1032, the Court of Appeal rejected claims that the city was required to abandon streets and easements through the Streets and Highways Code, because the Subdivision Map Act provides an alternative process. *CREED* holds that "local agencies may vacate public rights-of-way and easements pursuant to the tentative and final map approval process, without also having to comply with the notice requirements of the" Streets and Highways Code. (*Id.* at 1046 [citing to the procedure for street vacations authorized by Government Code section 66434(g)].) SB 35 allows processing of subdivision maps, and relocating the roadway easement through a subdivision map is permissible.

B. The Bridge Easement.

Petitioners argue that the Project includes construction that "trespass[es] beyond the terms of an air rights easement granted by the City" (hereinafter, "bridge easement"). (*See* Reply Br. at 1:15–16, 16:4–18:6.) This argument likewise could have been raised earlier, and is meritless.

1. Petitioners' Bridge-Easement Argument Rests On A 27-Year-Old Publicly Available Development Agreement.

Petitioners claim that the bridge over North Wolfe Road cannot be dedicated to residential uses because, they say, the easement authorizing the bridge restricts it to retail uses. (Reply Br. at 15:4-18:6.) This argument shifts gears from the one made in the opening brief, where Petitioners argued that the "floor area" of the bridge "should have been allocated *in equal proportions to*

---

[2] Unless otherwise indicated, statutory references are to the Government Code.

[3] Petitioners also incorrectly argue that the relocated roadway easements do not appear in the record. The relocated easements appear at AR0235 and AR0238.

residential and non-residential use." (Opening Br. at 19:2–3 [emphasis added].) The new argument rests entirely on the now-expired[4] Development Agreement between Vallco's predecessor in interest and the City, which was executed in 1992, and has been publicly available since then. (PR4410.) There is no excuse for Petitioners' delay in raising the argument.

2. The Bridge Easement Allows For Residential Use.

On the merits, Petitioners say that the entire bridge should count as non-residential space, because an easement restricts Vallco's use of the bridge to "retail" uses. But Petitioners rely upon an expired development agreement, not the actual easement. The easement permits Vallco to use the bridge area for "buildings, structures and improvements, including **without limit** retail shops . . . ." (PR2223 [emphasis added].) The "without limit" language makes plain that retail **and** other uses are permitted. The easement allows Vallco to use the bridge for residential amenities, and the bridge is properly counted as residential space.[5]

C. Floor Area Calculations.

Petitioners advance numerous new arguments about floor area calculations that were not raised in the petition or the opening brief. Petitioners claim that Vallco improperly double-counted certain residential areas (Reply Br. at 11:1–8), and failed to double-count certain office areas (*id.* at 12:26–13:6). And Petitioners offer new interpretations of the Municipal Code definitions of "floor area" applied by the City. (Reply Br. at 11:17–12:10.)

1. The New Floor Area Arguments Could Have Been Raised Earlier.

None of the new floor area arguments depend on new information. As to double-counting, Petitioners have long been aware that the Cupertino Municipal Code requires areas over 15 feet in height to be counted twice for purposes of calculating square footage. Indeed, Petitioners claim

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[4] *See* Decl. of Katharine Van Dusen ISO Real Party In Interest Vallco Property Owner LLC's Opp. To Petition For Writ Of Mandate, filed May 24, 2019 ("Van Dusen Decl.") ¶ 12.

[5] Petitioners also now complain that "Wolfe Road" is not part of the General Plan amendment providing for a mixed-use development at the Vallco site. But Vallco does not seek to develop "Wolfe Road"; rather, it relies on the bridge easement for a permissible use as part of its development. This "bridge" has been developed for retail purposes for decades, confirming that this area may be used consistent with the General Plan designation for the surrounding parcels.

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credit for alerting Vallco, before June 19, 2018, to the "need to 'double-count' floor areas above 15 feet in height." (*See* Reply Br. at 25:8–10 [claiming that, on June 19, 2018, Vallco "discovered – likely from Petitioners' submissions to the City – that it had failed to consider the need to 'double-count'"].) Petitioners, of course, had access to all of the Project plans showing ceiling height – including the sections of the record cited in their reply in support of their new arguments – at least by the time the City certified the administrative record in December 2018. (AR009–AR0268 [approved plans].) There is no excuse for raising new "double-counting" arguments now.

As for the new argument that the Municipal Code definition of floor area does not apply, Petitioners could have made that argument in their opening brief as well. Petitioners were aware by June 22, 2018, that the City relied on that definition when it approved the Project. (AR0891–AR0892.) Petitioners, however, did not argue in their opening brief that the definition should not apply, instead only arguing that the California Building Code should have been used. (Opening Br. at 14:21–15:13.)

2. The New Floor Area Arguments Lack Merit.

a. The City Properly Double-Counted Only Certain Space.

The Municipal Code counts as floor area "interior building area above fifteen feet in height between any floor level and the ceiling above." (Cupertino Mun. Code ("CMC") 19.08.030 ["floor area" definition].) In other words, interior areas with internal ceilings above 15 feet are "double counted" for purposes of square footage calculations.[6] The Project has several areas with ceilings higher than 15 feet. It also has areas with finished ceilings below 15 feet, which were therefore not "double counted." Petitioners belatedly complain that these areas were misidentified. Not so.

On June 19, 2018, Vallco identified for the City areas in which the square footage should, and should not, be double counted, clarifying any ambiguity in the initial proposal at AR1448. Vallco explained that, following the office build-out to include finished ceilings at 15 feet, the

[6] Petitioners mistakenly argue for a measurement that is "floor to floor" rather than "floor to ceiling," but the Code is clear that the distance between floor and ceiling controls.

office space would not be "double counted." (AR0935.) The letter also identifies the residential areas that are subject to "double counting." (AR0934–AR0947).

Petitioners also assert that some residential areas were improperly double counted. Petitioners misread the plans. Only areas with ceilings above 15 feet were double counted, which includes areas where the height of one floor extends to the ceiling of the floor above, typically identified in the plans for the upper floor as "open to [area] below."[7] The June 19 letter was not a "promise" to make a change, but rather a clarification of ceiling heights necessary for the City to determine which areas to "double count."

b. The City Properly Interpreted And Applied Its Municipal Code.

In performing the square footage calculation in 2018, the City relied on its Municipal Code, CMC 19.08.30, to determine that, while "residential garages" are included in the calculation, "parking facilities, other than residential garages, accessory to a permitted conditional use" are not. Petitioners argue that a "permitted conditional use" means a use that requires a "Conditional Use Permit." Because the SB 35 project did not require a Conditional Use Permit, Petitioners assert that CMC 19.08.30 should not apply.

But "permitted conditional use" is not a defined term in the code. The Municipal Code contains definitions for both "permitted use" and "conditional use." It was reasonable for the City to interpret its Municipal Code to provide that parking facilities accessory to permitted retail and offices uses are excluded from the "floor area" calculation. The Court should defer to that interpretation. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192 ["an agency's view of the meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous or unauthorized"].)[8]

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[7] Petitioners claim, for example, that the 8th floor ceiling on AR1448 has a height of 14'2". They are incorrect. The plan for the 9th floor, at AR 1430, shows that no ninth floor ceiling will be built over the 8th floor residential amenities, instead identifying the space as "Residential Amenity Below." The plans thus show that there is no floor in this area of the 9th floor, but rather an open area above the 8th floor. This occurs in a number of areas and accounts for the issue petitioners claim to have identified. *See also* AR1429 (showing areas "Open to Parking Below").

[8] Contrary to Petitioners' argument, *Anderson* made no distinction between the amount of

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Petitioners assert that parking should be treated "equally" – counted for residential *and* non-residential uses, or not counted at all. That is not true. The Municipal Code distinguishes between residential and commercial parking. SB 35 does not require a different standard.

c. The Decision To Apply The Municipal Code Was Appropriate.

Petitioners contend that the City should have applied the California Building Code to its square footage calculation. But SB 35's objective standards requirement does not mandate application of *statewide* standards. It was appropriate for it apply its definition of floor area to determine the square footage here.

HCD confirms that a city "could" apply local ordinances to this determination. Because Cupertino's Municipal Code provides a "floor area" definition to measure the square footage of developments generally, it was proper, under SB 35, for the City to apply that same objective standard when measuring square footage for the SB 35 project.[9]

D. The "Subdivision Map" Argument Regarding the General Plan.

Petitioners argue that the Project is inconsistent with "objective criteria" because the Cupertino General Plan purportedly requires "retail and active uses on the ground floor" but "two major blocks [of the Project] lack any retail areas." (Reply Br. at 33:12-23 [internal quotation marks omitted].)

1. Petitioners Had Access To The General Plan Before They Filed Their Opening Brief.

Petitioners attempt to disguise this argument as a rebuttal to a point in Vallco's opposition

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deference accorded an interpretation by a city council versus city staff. (Although Petitioners argue that the City Council or Planning Commission were required to decide whether to hold review or public oversight hearings, no such requirement appears in SB 35.) And *Madera Oversight Coalition, Inc. v. Cty. of Madera* (2011) 199 Cal.App.4th 48, sheds no light on the issue, as that case concerned the standard of review applicable to ministerial actions, not the level of deference afforded to interpretations of municipal law by the municipalities themselves.

[9] If Petitioners were correct – that application of the Municipal Code was "discretionary" – then the City's *decision* to rely on its Municipal Code would not constitute an objective standard that could provide grounds to deny the SB 35 Project. Similarly, Petitioners have offered multiple methods by which to calculate whether two-thirds of the Project is residential. If Petitioners cannot themselves identify a single objective standard, then there is no legal basis to require the City to adopt one of the many proposals advanced by Petitioners.

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brief about the Subdivision Map Act. It is in reality a new argument that the Project violates SB 35 because it is inconsistent with a requirement in the Cupertino General Plan. Petitioners have always had access to the General Plan and could have timely raised this argument.

2. No Objective Standard Requires Ground-Floor Retail Throughout The Project.

On the merits, Petitioners' claim is that the Project violates the General Plan because Blocks 9 and 10 "lack any retail areas" on the ground floor. (Reply Br. at 33:19–21; *see also id.* 33:17.) Not so. The General Plan permits retail or "*active* uses" on the ground floors of the development (and nowhere forbids some residential on the ground floors). (PR0783.)

Petitioners' argument fails, first, because this General Plan provision is not an "objective" standard within the meaning of SB 35. A standard is only objective under SB 35 if it "involve[s] no personal or subjective judgment by a public official and [is] . . . uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable . . . before submittal." (§ 65913.4(a)(5).) Because the term "active uses" is not defined in the General Plan, the Project's compliance with that provision is not "uniformly verifiable" or "knowable." (*See id.*; Van Dusen Decl. Ex. H [Question 2].)

Even if the term "active uses" had an objective meaning, it would have to include residential lobbies, entries, and amenities, which will be built on the ground floors of Blocks 9 and 10.[10] For one, "active uses" must be something different from retail uses, since the General Plan lists them as distinct uses. (PR0783 [referring to "retail and active uses"].) Moreover, the General Plan appears to encourage "active uses" (in addition to retail uses) in order to foster a town center environment in which there is ground-floor pedestrian activity. (*See* PR0783.) Residential amenity areas, which would include "fitness gym[s] or similar uses," will increase pedestrian activity at the street level. (*See* Decl. of Chanli Lin ISO Real Party in Interest Vallco Property

[10] The ground floor of Block 9 will have 22,261 square feet of amenity areas; the ground floor of Block 10 will have 11,138 square feet of amenity areas. (*See, e.g.*, AR0032, AR0110, AR0150.)

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Owner LLC's Opp. to Petition for Writ of Mandate, dated May 24, 2019, at ¶ 7.)[11]

E. Petitioners Cannot Rely On The New HCD Guidelines.

Petitioners invoke HCD's SB-35 Guidelines to support some of their arguments about how SB 35 should be interpreted. (Reply Br. at 5:18–6:17, 14:1–2 [arguing that "the HCD Guidelines direct that square footage ratios be assessed before applying any bonus concessions" (footnote and emphasis omitted)], 14:21 [same].) But HCD issued its final SB-35 guidelines on November 29, 2018 (PR5771), two months before Petitioners filed their opening brief on January 29, 2019. Petitioners could therefore have raised these arguments in their opening brief.

On the merits, Petitioners' HCD Guidelines arguments fail. Petitioners argue that the Guidelines support their theory that SB 35 required[12] square footage to be measured "pre-bonus." But the HCD Guidelines do not apply to this Project, which was submitted prior to 2019. The Guidelines cannot be used for the purpose Petitioners suggest: "Nothing in these Guidelines may be used to invalidate or require a modification to a development approved through the Streamlined Ministerial Approval Process prior to the effective date." (Guidelines, § 101(b).)

F. SB 765 Clarified SB 35.

Petitioners claim that Sections 65913.4(c)(2), 65913.4(j), and 65913.4(*l*) of SB 35 are not applicable to this case because they were amendments to the statute contained in SB 765, which became effective on January 1, 2019. Petitioners not only failed to make these arguments in their opening brief (even though SB 765 was enacted in September 2018, well before their opening

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[11] Petitioners make two additional meritless Subdivision Map-related arguments. First, Petitioners incorrectly contend that their challenge to the subdivision-map approval is not time-barred because it "'refer[s] back' to the date of the FAP." (Reply Br. at 34:16–17.) But Petitioners bring Subdivision Map Act arguments, not claims. The relation-back doctrine does not salvage arguments addressed to claims that were never pled. Second, Petitioners argue that the City should charge Vallco in-lieu fees, because, according to Petitioners, the green roof cannot constitute park space. But Petitioners have not sought a writ to compel the City to levy fees on Vallco. The argument has no bearing on whether the Project was properly approved under SB 35.

[12] As set forth in separate briefing, AB 101 clarified that square footage calculations should measure the as-built project, after application of the density bonus law. The current version of SB 35 controls on this point. HCD's interpretation of the prior version of SB 35, which differed from the City's, confirms that this provision required the clarification provided in AB 101.

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brief was filed), they affirmatively relied on the first of these provisions to support their own arguments. (*See* Opening Br. at 2:3 [citing § 65913.4(c)(2)].) In any case, SB 765 expressly states that it is declaratory of existing law. (*See* § 65913.4(a)(5)(C) ["The amendments to this subdivision made by the act adding this subparagraph do not constitute a change in, but are declaratory of, existing law."].) Sections 65913.4(c)(2) and 65913.4(*l*) were both added by SB 765.[13] But even if SB 765 changed, rather than clarified, the law, a writ cannot compel the City to comply with a superseded statute. (*See Torres v City of Montebello* (2015) 234 Cal.App.4th 382, 403 [voters' approval of an initiative abrogating the law on which a writ action was premised rendered the petitioner's request for writ relief unavailable].)

II. NEITHER UPDATES TO THE ADMINISTRATIVE RECORD NOR AB 101 EXCUSE PETITIONERS' UNTIMELY ARGUMENTS.

Petitioners note two "intervening events" that occurred after they filed their opening brief – the addition of documents to the administrative record, and the enactment of AB 101 – but fail to draw any link between those events and the new issues. (Reply Br. at 1:20–3:19.) There is none.

A. The Updated Administrative Record.

On June 13, 2019, Petitioners submitted what the City construed as a request for documents under the Public Records Act ("PRA"). On June 19, the City produced documents in response to the request, including Vallco's September 19, 2018, final submittal to the City ("September submittal"). As Petitioners concede, most of the documents in the September submittal are identical to documents included in the original administrative record. (*See* Reply Br. at 2:3–4 [conceding that "versions of many of the omitted documents" were "part of the 'approval set' stamped by the City" included in the administrative record at AR0009–AR0268].) The only documents that Petitioners identify as new are a "title report" with "clickable hyperlinks." (*Id.* at 2:8–10.) Other than vaguely claiming that, without these documents, they could not "pursue

[13] Petitioners are incorrect that Section 65913.4(j), which authorizes HCD to implement guidelines interpreting SB 35, only became effective on January 1, 2019. That provision was part of the statute as of January 1, 2018.

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various lines of enquiry [*sic*]" (Reply Br. at 2:14), Petitioners offer no explanation of how the title documents justify raising new arguments at this stage.[14]

The title documents do not constitute good cause for the late presentation of any of these new issues. Tellingly, Petitioners cite to the title documents only *one time*, with respect to just *one* of the new arguments (the road easement argument), specifically, as support for the statement that "[t]hese road easements were originally created through dedication and acceptance in 1975" (Reply Br. at 23:4–5), a fact that Petitioners neither deny knowing prior to obtaining the June 19, 2019 production, nor establish is material to their new argument.[15] And as noted above, Petitioners made the easement argument in June 2018, a year before obtaining the title report.

B. AB 101.

Petitioners characterize the passage of AB 101 as an intervening event. But petitioners concede that AB 101 amended SB 35 in "two principal ways": AB 101 clarifies that density bonus units count toward residential square footage, and that the State Water Board has the authority to clear for residential use a hazardous site that was previously listed on the Cortese list. (Reply Br. at 3:5–12.) Neither of these amendments has anything to do with the above issues.

For the reasons set forth in Sections I-II above, the Court should not reward Petitioners' delay and lack of diligence by entertaining the numerous new arguments presented in their reply brief. The arguments should be stricken.

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[14] Petitioners have been on notice of the existence of these documents for a year. The City's September 21, 2018 "Approval Letter – Vallco Town Center SB 35 Project Application" states that "the Applicant provided a cumulative ('clean') package including a plan set dated September 15, 2018" to the City. (AR003.) As the City's letter explains, Cupertino's standard practice in "processing . . . all development applications" is to require the submission of a cumulative package of application documents prior to approval. (*Id.*)

[15] Petitioners do not even deny that they had the title documents in their possession before June 19, 2019, and, indeed, suggest that they *had* obtained the documents. (*See* Reply Br. at 2 n.6 [asserting the "Petitioners paid $15.00 for a certified copy of a single page" of title records].) Title documents are, by their nature, public documents that Petitioners could have obtained, and apparently did obtain, independently.

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III. PETITIONERS' ADDITIONAL NEW ARGUMENTS ALSO FAIL ON THE MERITS.

A. HCD Is Authorized To Offer Technical Assistance.

HCD is authorized to "provide advice, technical information, and consultative and technical services." (Health & Saf. Code § 50406(e).) Vallco requested HCD's assistance in interpreting and applying SB 35 to this Project. Section 50406(e) of the Health and Safety Code is not a narrow grant of authority pertaining to some specific set of housing-related issues. Rather, section 50406(e) gives HCD the "general power" to provide technical assistance on any statute within its purview. SB 35 places itself within HCD's purview, as it grants HCD the authority to "clarify the terms, references, or standards" in the statute. (§ 65913.4(j).) Petitioners complain that a single "staffer" provided responses, but as SB 35 is within HCD's purview, HCD appropriately authorized its Senior Policy Specialist to respond to Vallco's inquiries.[16]

B. The Statute Of Limitations Ran In September 2018.

Petitioners served the City with the Petition on October 16, 2018, almost a month after the statute of limitations to challenge the City's determination of compliance with objective planning standards had run. Petitioners now respond to the statute of limitations argument with four new issues, none of which salvages their case.

1. Vallco Has Standing To Raise The Statute Of Limitations Issue.

Petitioners suggest that Vallco does not have standing to raise the issue that the City was not timely served with the Petition. Vallco is an indispensable party in this action. (*See Simonelli v. City of Carmel-by-the-Sea* (2015) 240 Cal.App.4th 480, 485, as modified on denial of reh'g (Sept. 28, 2015) [owner of property that received development permit was an indispensable party in action challenging that permit].) The statute of limitations (§ 65009(c)) is intended to "provide certainty for **property owners** and local governments regarding decisions by local agencies made pursuant to the planning and zoning law." (*Save Lafayette Trees v. City of Lafayette* (2019) 32

[16] Vallco is not alone in seeking such technical information from HCD. The developer of another proposed SB 35 project, in Los Altos, also sought and received similar assistance. (Van Dusen Decl. Exs. H & I.) Such requests and responses are entirely proper.

Cal.App.5th 148, 155 [emphasis added].) Vallco has standing to assert that defense. Whether the City also asserts it is of no significance.

2. Vallco Never "Resubmitted" The Project.

Petitioners assert that Vallco "resubmitted" its project application in June and July 2018. But the submission of additional materials, at the City's request, does not constitute a "resubmission" or new application, and it did not waive Vallco's rights related to the original submission date. "To constitute a waiver, there must be an existing right, knowledge of the right, and an actual intention to relinquish the right." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Petitioners have proven none of these criteria.

Vallco provided information to the City in response to its requests. The City did not consider Vallco to have resubmitted an application, and Vallco never agreed to waive any rights associated with its submittal date. The City determined that Vallco's application was submitted on March 27, 2018, and that the additional documents were "supplemental." (AR0888.) Indeed, as of September 21, 2018, the City continued to recognize that Vallco had submitted its Project on "March 27, 2018." (AR0003.)

3. There Is No Estoppel.

Petitioners argue that the City and Vallco are estopped from asserting a statute of limitations defense in light of statements made in June 2018, when Petitioners sought, then quickly withdrew, an emergency writ to compel the City to deny the SB 35 application. Petitioners suggest that the parties reached an agreement under which Petitioners would file an amended petition. (Steves Decl. Ex. 4.) The text of that agreement is clear: both the City and Vallco reserved all rights, and did not waive any defenses to the amended pleading. The City – but not Vallco – "encouraged" Petitioners to dismiss the petition without prejudice since the City had "until late September" to take final action. (Steves Decl. Ex. 4.)

Equitable estoppel, for statute of limitations purposes, arises when: "(1) the party to be estopped must be apprised of the facts; (2) that party must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party

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asserting the estoppel must reasonably rely on the conduct to his or her injury." (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529.) In *Honig*, the City was not estopped from raising a statute of limitations defense, even though it had informed petitioner that "the time within which judicial review must be sought is governed by [section] 1094.6" rather than the stricter service deadline under Section 65009(c)(1). The City was not obligated to inform petitioner of the statute of limitations governing her action, and the petitioner was on notice of the deadlines.

Petitioners were likewise at all times on notice that determination of compliance with *objective planning standards* was final as of June 25, 2018. (§ 65913.4(b).) At the time, neither the City nor Vallco could know that Petitioners would later decide to submit an amended petition challenging the determination of compliance with objective standards. Petitioners were aware of the significance of the "determination" of compliance with objective planning standards. No party "waived" any rights associated with an amended pleading. There are no grounds for a claim of estoppel.

4. The City Was Not Served In June.

Handing a copy of a petition to outside counsel for the City does not constitute service. Petitioners did not satisfy the requirement to serve the City in Court at the ex parte hearing. The City's outside attorney was not an agent of the City for service of process. (*Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 951 [facsimile service on outside counsel for City did not constitute service].) Nor did participation in the ex parte hearing constitute waiver of the service requirement. (Code Civ. Proc. § 418.11 [appearance at ex parte hearing is not a general appearance].)

Nothing excused Petitioners from serving the City within 90 days of the determination that the Project complied with objective planning standards.

C. The City's Non-Opposition Proves Nothing About The Regularity Of The Proceedings.

Petitioners point to the City's "non-opposition" filing as evidence that the City's approval of the Project was improper. But "[i]t is presumed that an administrative agency regularly

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performed its duty" – here, the ministerial approval of a development application. (*Hoitt v. Dep't of Rehabilitation* (2012) 207 Cal.App.4th 513, 521.) To prove a claim that it did not, a petitioner must come forward with evidence showing "how and in exactly what manner the alleged facts rebut the existing presumption of regularity." (*Lavine v. Jessup* (1958) 161 Cal.App.2d 59, 67.) Otherwise, "the presumption of regularity will prevail," and the petition will be denied. (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1107.) The presumption of regularity continues to apply where, as here, the Cupertino City Council came under the control of affiliates of Friends of Better Cupertino who oppose the Vallco Project.

A change in administration, and the City's filing reflecting it, have nothing to do with the regularity of the approval proceedings that occurred "more than 180 days" prior. (Reply Br. at 9:20–22.) Indeed, to allow shifting local political attitudes to weigh against upholding the SB-35 approval would destroy what SB 35 was intended to accomplish. (*See* § 65913(b) [legislative finding that SB 35 is "necessary . . . to provide greater encouragement for local and state governments to approve needed and sound housing developments"]; Sen. Comm. on Governance and Finance, Analysis of Sen. Bill No. 35 (2017–2018 Reg. Sess.) Apr. 26, 2017, p. 3[17] [SB 35 seeks to addresses "causes" of the state's housing shortage, including "local approval processes" and the fact that "local governments . . . are quick to respond to vocal community members that may not want new neighbors"].) Whether current City officials disagree with, or "disapprov[e]" of the actions taken by City officials in 2018 (*see* Reply Br. at 9:23-24) is irrelevant to the question before the Court: whether that approval was proper under the law.

CONCLUSION

The Court should grant the motion to strike, as each of Petitioners' belated arguments could have been raised earlier. Petitioners have failed to identify grounds – including their belatedly raised issues – that would warrant issuance of the writ. The Petition should be denied.

[17] This Senate Committee report was submitted as Exhibit B to Vallco Property Owner LLC's August 24, 2019 Motion to Augment the Record and Request for Judicial Notice.

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DATED: September 30, 2019

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