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CITY OF CUPERTINO and GRACE SCHMIDT,
7 in her official capacity as Cupertino City Clerk

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**

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

13 Petitioners,

14 v.

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

17 Respondents.

19 VALLCO PROPERTY OWNER LLC,

20 Real Party in Interest.

Case No. 18CV330190

**DECLARATION OF BENJAMIN FU
IN SUPPORT OF CITY OF
CUPERTINO'S RESPONSE TO BAY
AREA COUNCIL, ET AL.'S AND UA
LOCAL 393'S AMICUS CURIAE
BRIEFS**

Assigned for All Purposes to:
Hon. Helen E. Williams, Dept. 10

Date: October 4, 2019
Time: 9:00 a.m.
Action Filed: June 25, 2018

1 I, Benjamin Fu, declare as follows:

2 1. I am the Community Development Director for Respondent City of Cupertino. I
3 have personal knowledge of the facts set forth herein, except as to those stated on information
4 and belief and, as to those, I am informed and believe them to be true. If called as a witness, I
5 could and would competently testify to the matters stated herein. I make this declaration in
6 support of the City of Cupertino's Response to Bay Area Council et al.'s and UA Local 393's
7 Amicus Curiae Briefs.

8 2. I have been employed as an Assistant Director in the City of Cupertino's
9 Department of Community Development since February 2016 and have served as the Director
10 of Community Development for Cupertino since February 2019. Prior to my employment with
11 the City of Cupertino, I was the Planning Manager with the City of Rocklin and a city planner
12 with the City and County of San Francisco.

13 3. In my role as the Director of Community Development, I am responsible for
14 overseeing all aspects of development including planning, building, housing, and code
15 enforcement in the City. As part of this responsibility, I am familiar with the City's Housing
16 Element and housing entitlement in the City.

17 4. I have reviewed the Bay Area Council, et al.'s (BAC) amicus brief in this case. I
18 believe there are several misleading statements in that brief.

19 5. For example, on page 7, BAC asserts that Cupertino has "refused to permit the
20 development of almost any affordable housing in recent years—only 19 of the target 356 low or
21 very low income units for the current RHNA cycle."

22 6. In fact, Cupertino has approved 396 very low income and 847 low income
23 affordable housing units during this RHNA cycle (2014-present). The City has not denied any
24 building permit applications for these projects. Due to circumstances beyond the City's control,
25 some developers have not yet chosen to apply for building permits for the very low income and
26 low income units that the City has already approved. Since 2014, the City has received building
27 permit applications for 19 very low income and low income units and the City issued building
28 permits for all 19 of those units.

1 7. BAC also does not mention that during the current RHNA cycle the City has
2 already approved projects comprising 32 units of moderate income affordable housing and
3 issued building permits for 59 moderate income accessory dwelling units. Moderate income
4 housing is housing that is affordable to households with incomes between 81 percent and 120
5 percent of the area median income, and is an important affordable housing stock for teachers,
6 nurses, and middle-income families in Cupertino. The City facilitates the production of
7 Accessory Dwelling Units through its ADU Ordinance in Chapter 19.112 of the Zoning Code.

8 8. BAC also fails to mention the City’s approval of 2,125 units of market rate
9 housing proposed by developers during this RHNA cycle.

10 9. BAC also states on page 9 of its brief that “only 31 low and 57 very low income
11 affordable housing units have been permitted in the City over the last 12 years.”

12 10. Again, however, this number reflects only units where developers have applied for
13 building permits. Cupertino has approved 406 units of extremely and very low and 854 units of
14 low income housing over the previous 12 years (since 2007). BAC again ignores moderate
15 income affordable housing and market rate units. For multifamily developments alone, the City
16 has approved 35 units of moderate income affordable housing and 2,272 units of above
17 moderate income housing since 2007. The City issued, or is in the process of issuing, building
18 permits for all of the approved projects that have applied for them. Again, due to circumstances
19 beyond the City’s control, some developers have not yet chosen to apply for building permits for
20 approved units.

21 11. The City recently issued final certificates of occupancy for the Veranda project,
22 which provides 18 extremely-low and very-low income senior units, as well as a property
23 manager’s unit with an affordability level of extremely-low income.

24 12. The Veranda project was developed using the City’s density bonus program in the
25 Cupertino Municipal Code Chapter 19.56, and flexible development standards in City plans and
26 ordinances to facilitate the development of affordable housing. For example, the Heart of the
27 City Plan requires ground-floor retail in this area, but provides for an exception process from
28 this requirement which was applied for and received by the Veranda project. The City’s

1 Municipal Code Chapter 19.124 also normally requires one covered and one open parking space
2 per multi-family residential unit, but the City's density bonus ordinance pursuant to Section
3 19.56.040 allowed this affordable housing project to provide one parking space per unit.

4 13. The Veranda project was the first project in Santa Clara County to utilize 2016
5 Measure A - Affordable Housing Bond funds with a \$1 million contribution. The City
6 contributed approximately 43% of the total development costs for a total of \$5,172,000. The
7 City initially provided \$3 million for site acquisition and contributed \$1 million through the
8 Housing Trust Silicon Valley. Subsequently, the City added \$672,000 to its subsidy, when the
9 project was not able to acquire adequate funding, and \$500,000 in HOME Investment
10 Partnerships Program (HOME) funds, when project labor costs escalated.

11 14. The Veranda project was approved within a year of the application being
12 submitted by unanimous votes of the Planning Commission and the City Council. The Project
13 also had strong support from the community.

14 15. The City recently accepted a complete application for the 242-unit Westport
15 project, which makes use of the City's density bonus program by way of incorporating 39 below
16 market rate senior housing units.

17 16. On August 12, 2019, the City Manager sent a letter to California Department of
18 Housing and Community Development (HCD) detailing some of the City's efforts to support
19 and facilitate the development of affordable housing. I helped prepare this letter and the facts
20 stated in this letter regarding the City's programs and actions are true and correct. Much of the
21 information in paragraphs 11 to 15 was included in this letter.

22 17. I have attached as Exhibit 1 to this declaration a chart prepared by my staff with
23 my review and oversight showing the status of multifamily housing project applications received
24 or approved by the City of Cupertino between 2007 and 2018. To prepare this chart, the City
25 planners reviewed all development applications and building permit applications that were
26 received or approved beginning in 2007 through to 2018.

27 18. I have attached as Exhibit 2 to this declaration a chart of housing approvals and
28 production during the current housing element production cycle starting in 2014. The number of

1 approved building permit applications comes from the City's most recent Annual Report
2 submitted to HCD as required by Government Code section 65400. The number of approved
3 housing project development applications was prepared using the same method as Exhibit 1,
4 discussed above.

5 19. I have attached as Exhibit 3 to this declaration a chart of the status of applications
6 received and approved for the five Priority Housing Sites listed in the City's current Housing
7 Element. This chart was prepared using the City's Housing Element and data from the first two
8 charts in Exhibits 1 and 2. To the best of my knowledge, the information contained in all three
9 charts is true and correct.

10 20. On November 18, 2002 in Resolution No. 02-208, the City Council adopted and
11 amended the City's Housing Mitigation Procedural Manual (this manual was further amended
12 by the Council on May 5, 2015 in Resolution No. 15-037). Both the 2002 and 2015 versions of
13 the manual require new housing developments of seven or more units to restrict 15 percent of
14 the units in a rental development to rents affordable to lower income households and 15 percent
15 of the units in ownership developments to prices affordable to median and moderate income
16 households. However, from 2009 to the end of 2017, the City was unable to enforce any
17 inclusionary requirement in rental developments due to the California Supreme Court's decision
18 in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396,
19 which prohibited local governments from requiring new rental housing developments to include
20 affordable units. However, in 2017 (effective January 1, 2018), in response to *Palmer*, the
21 Legislature amended Government Code section 65850 and added Government Code section
22 65850.1 to allow cities to require that a rental development include a certain percentage of
23 affordable residential rental units. The City is now applying its affordable housing requirements
24 to rental developments.

25 21. The City submitted its adopted eight-year Housing Element to HCD. HCD has
26 found that the City's Housing Element complies with state housing laws for the past three
27 planning cycles. I am not aware of any HCD finding that any Cupertino Housing Element did
28 not comply with state housing laws.

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

3 Executed on this 4th day of October, 2019, at Cupertino, California.

4
5 

6 Benjamin Fu

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EXHIBIT

1

MULTI-FAMILY HOUSING PROJECT DEVELOPMENT APPLICATIONS AND APPROVAL HISTORY
2007 - 2018

Year Project Application Received*	Project Name	Type	INCOME CATEGORY (Net New)					Total	City Action	Building Permit Application
			Extremely Low 0-30% AMI	Very Low 31-50% AMI	Low 51-80% AMI	Moderate 81-120% AMI	Above Moderate 120%+ AMI			
2006	Las Palmas, 10855 N. Stelling Rd.	Attached Townhomes				3	17	20	Approved (2007)	Issued
2007	Villa Serra, 20800 Homestead Ave.	Multi-Family		10	7		99	116	Approved (2007)	Issued
2008	Main Street	Multi-Family					160	160	Approved (2009)	Not Applied
2009	NO APPLICATIONS									
2010	NO APPLICATIONS									
2011	Main Street - Revised Project	Multi-Family					143	143	Approved (2012)	Not Applied
	Biltmore Adjacency, 10159 Blaney	Multi-Family					80	80	Approved (2012)	Issued
2012	Main Street - Final Project	Multi-Family					120	120	Approved (2012)	Issued
2013	NO APPLICATIONS									
2014	Biltmore Clubhouse Modifications	Multi-Family					7	7	Approved (2014)	Issued
	Foothill Apartments	Multi-Family					15	15	Approved (2015)	Issued
2015	Hamptons Redevelopment **	Multi-Family		17 total (0 net new)	24 total (7 net new)	30 total (30 net new)	871 total (563 net new)	942 total (600 net new)	Approved (2016)	Not Applied
	Marina	Multi-Family		16		2	170	188	Approved (2016)	Not Applied
2016	The Veranda	Multi-Family	7	12				19	Approved (2017)	Issued
2017	NO APPLICATIONS									
2018	Vallco SB 35	Multi-Family		361	840		1,201	2,402	Approved (2018)	In Process
	Westport	Multi-Family		39			203	242	In Process	N/A
	Canyon Crossings	Apartments/ Attached Townhomes		1		2	15	18	In Process	N/A
Total 2007 - 2018 Net New Multi-family/Attached Housing Project Developments **			7	439	854	37	2,490	3,827		

NOTES:

* All Multi-family Housing Project Development Applications received by the City. Does not include applications for Single Family Homes, Accessory Dwelling Units or requests to authorize City review of proposed General Plan amendments pursuant to Resolution No. 15-078.

** Project list reflects three Main Street Project applications submitted and approved by the City. The applicant proposed reductions in the number of units in the second (2011) and third (2012) applications. The 2012 project was constructed and therefore, the number of units from the two prior approvals are not included in the total net new units approved.

The Hamptons Redevelopment project proposed to replace 342 existing units on the site (including 17 very low, 17 low, and 308 above moderate units) with 942 units for a net total of 600 new units. Only the net new units are included in the total net new units approved.

- No applications received in 2009 - 2010 likely due to the Recession.

- No BMR units generated between 2009 and 2014 due in part to the Palmer decision which prohibited cities from requiring the inclusion of affordable housing in new rental housing projects. Affordable units generated in 2016 due to negotiated Development Agreements.

EXHIBIT

2

**City of Cupertino Housing Approvals & Production during Current RHNA Cycle*
(2014 - Present)**

Income Category	RHNA Allocation	Approved Building Permit Applications	Approved Housing Project Development Applications
Very Low	356	19 ¹	377 ²
Low Income	207	0	847 ³
Moderate	231	59 ⁴	32 ⁵
Above Moderate	270	191 ⁶	1,934 ⁷
Total:	1,064	269	3,190
Total Approved Building Permit and Development Applications:		3,459	
Total Approved Building Permit and Development Applications without Vallco SB 35:		1,057⁸	

¹ Veranda – 19 units

² Includes 16 from Marina and 361 from Vallco SB 35

³ Includes 7 from Hamptons and 840 from Vallco SB 35

⁴ Accessory Dwelling Units (ADUs)

⁵ Includes 30 from Hamptons and 2 from Marina

⁶ 49 single family homes, 7 from Biltmore, 120 from Main St., 15 from Foothill Apartments

⁷ Includes 563 at Hamptons, 170 at Marina and 1,201 from Vallco SB 35 project

⁸ Total affordable units without Vallco equal 133

* The current RHNA cycle (“projection period”) is January 1, 2014 through October 31, 2022. See Gov. Code § 65588 and Housing Element at H-14.

EXHIBIT

3

**City of Cupertino Priority Housing Sites (2015 – 2023 Housing Element)
Status Report (Oct. 2019)**

Housing Priority Site	RHNA Allocation by Site (<i>Realistic Capacity in units</i>)	Status	Building Permit Application
The Hamptons	600	600 net new units approved in 2016	Not Applied
Vallco	389	General Plan and Zoning Amendments to allow 459 units by right approved in 2019	N/A
		SB 35 Project with 2,402 units approved in 2018	In Process
The Oaks (Westport)	200	Application for 242 units submitted; environmental review underway.	N/A
Marina Plaza	200	188 units proposed by applicant and approved in 2016	Not Applied
Veranda	11	19 units approved in 2017 and construction complete (2019).	Issued. Project complete.
Totals (<i>not including Vallco SB 35 Project</i>)	1,400*	807 units approved 242 units in process 459 units allowed by right	
Totals (<i>including Vallco SB 35 Project</i>)		3,209 units approved 242 units in process	

*Total realistic capacity exceeds total Cupertino RHNA Allocation of 1,064 units by 336 units.