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December 12, 2018

VIA E-MAIL

Ms. Rocío Fierro
Cupertino City Attorney
20410 Town Center Lane
Suite 210
Cupertino, CA 95014-3230

Re: Additional Information About Councilmembers' Conflicts of Interest in *Friends of Better Cupertino v. City of Cupertino* litigation

Dear Ms. Fierro:

This letter supplements my previous letter, dated December 6, 2018, explaining why Mayor Scharf, Vice Mayor Chao, and Councilmember Willey are disqualified from controlling or participating in any litigation that concerns either the Vallco "SB 35" Project or the Vallco Specific Plan Project. Because of the conflicts of interest, breaches of fiduciary duties owed to the City, probability of bias, and overwhelming perception of impropriety, Mr. Scharf, Ms. Chao, and Mr. Willey: (1) should be recused from decision-making on all existing and future litigation that concerns the SB 35 Project or the Specific Plan Project; (2) should not receive non-public information about the SB 35 Project, the Specific Plan Project, or any litigation about them; and (3) should be recused from future decision-making related to either Project, including but not limited to issuing formal or informal direction to City staff.

I. Background on the Litigation and the Conflicted Councilmembers

A. Pending Litigation and Other Issues From Which Mr. Scharf, Ms. Chao, and Mr. Willey Should Be Excluded

As you know, Friends of Better Cupertino ("FBC"), a 501(c)(3) non-profit organization, has sued the City alleging, in two different actions, that it erred with respect to both Vallco projects. The SB 35 Litigation was filed in June 2018, and the Specific Plan Litigation was filed in October 2018.

In the SB 35 litigation, FBC alleges that the City erred when it approved the SB 35 Project, and that, contrary to the City's conclusion, the Project does not conform to the requirements of State law. In the Specific Plan litigation, FBC seeks an injunction against the City, prohibiting it from taking any action in reliance on the project approvals issued in connection with the Specific Plan Project. Both the SB 35 litigation and the Specific Plan litigation are the subject of active

Rocio Fierro
December 12, 2018
Page 2

communication between attorneys for the City and us, on behalf of our client Vallco Property Owner, LLC (“VPO”) (the proponent of both projects and real party in interest in both lawsuits).

In addition to communication about the pending litigation, VPO is in ongoing communication with City staff and consultants as it proceeds forward with its Project development work.

B. Councilmembers’ Affiliation with the City’s Opponent in the Litigation and Their Statements Against the Projects

The connections between Mr. Scharf, Ms. Chao, Mr. Willey, and FBC (the organization that has filed two lawsuits against the City that concern the SB 35 Project and the Specific Plan Project) are numerous, longstanding, and well-documented.

1. Ms. Chao, Mr. Willey, and Mr. Scharf are Leaders of Better Cupertino

FBC is the litigation arm of Better Cupertino. (Exh. 53) Mr. Scharf, Ms. Chao, and Mr. Willey are all members of Better Cupertino. (Exh. 1) Ms. Chao founded Better Cupertino. (Exh. 2) Until earlier this year, Mr. Willey was the President and Chief Executive Officer of Friends of Better Cupertino. (Exhs. 3 & 4) Mr. Scharf is the petitioner in active litigation against the City arising from the 2016 Election/Measure C, and he is represented in the matter by Bern Steves, the same attorney representing Friends of Better Cupertino in the SB 35 litigation. (*Committee Supporting Cupertino Citizens’ Sensible Growth Initiative v. City of Cupertino* (Cal. Ct. App., Oct. 9, 2018, No. H043940) 2018 WL 4895961, review filed (Nov. 19, 2018).)

2. Ms. Chao and Mr. Willey Have Repeatedly Spoken Against Vallco While Touting Their Close Ties to Better Cupertino

Ms. Chao, Mr. Willey, and Mr. Scharf are actively involved in the political activities of Better Cupertino. Ms. Chao’s and Mr. Willey’s campaigns for City Council in 2018 relied heavily on their connections to, and work on behalf of, Better Cupertino.

Ms. Chao has spoken regularly to the City Council, the media, and on public platforms such as Next-Door and the BetterCupertino.org blog in support of Better Cupertino messaging and in opposition to the Projects.

- Ms. Chao lists herself as a “co-founder of Better Cupertino” on her public City Council biography. (Exh. 2)
- Ms. Chao has repeatedly posted on Better Cupertino’s blog in opposition to both Projects. (Exhs. 5, 6, 7)

Rocio Fierro
December 12, 2018
Page 3

- On September 19, 2018, Ms. Chao wrote to the City Council to oppose the SB 35 Project and assert that the City Manager engaged in misconduct. (Exh. 8)
- In late September 2018, Ms. Chao posted on Next Door in opposition to both Projects. (Exh. 6) She described the Projects as “bad and worse plans.” (Exh. 9)
- Ms. Chao’s candidate website contained a “roadmap” to defeat the Projects. (Exhs. 10 & 11)
- Ms. Chao has compared our client to “Adolf Hitler.” (Exh. 12 (“Make the lie big, make it simple, keep saying it and eventually they will believe it. Adolf Hitler. Do we let Cupertino to be conquered by Sand Hill through Hitler-stye campaign? [sic]”))
- In October 2018, Ms. Chao was instrumental in gathering signatures as part of Better Cupertino’s effort to challenge the Specific Plan Project. She directed the conduct of signature gatherers, including by advocating: “Even those who hesitate to sign the referendum, we can ask them to support our candidates, since our candidates will keep both the city staff and developers accountable. . . . The city council is definitely accountable the potential misconduct of its own employees when the city staff declare questionable project compliant to SB 35.” (Exh. 13) Ms. Chao also personally participated in Better Cupertino’s October 2018 referendum signature drive. (Exh. 14)
- On June 19, 2018, Ms. Chao attended a City Council meeting and advocated that the City reject the SB 35 Project, claiming that the Project has “numerous compliance issues.” (Exh. 15) She demanded that the City “take action immediately to reject Vallco SB 35 application.” (*Id.*)
- On November 3, 2018, Ms. Chao and Mr. Willey issued an election advertisement, jointly funded by them, to advocate against the SB 35 Project and the Specific Plan Project. (Exh. 16)
- In September 2018, shortly before a public hearing on the Specific Plan Project, Ms. Chao was interviewed by ABC7 News, and was identified as “Liang Chao: Better Cupertino Action Committee.” During the interview, she spoke out against the Specific Plan Project. Mr. Willey stood next to her during that interview. (Exh. 17)
- When Ms. Chao attended the September 18, 2018 City Council meeting, she sat in the audience for hours holding a “Better Cupertino” sign. She gave public comment, in opposition to the SB 35 Project and the Specific Plan Project, while holding her Better Cupertino sign. (Exhs. 18 & 19)

Rocio Fierro
December 12, 2018
Page 4

- In her public comments on September 18, 2018, Ms. Chao raised concerns about the termination of Randolph Hom. Shortly after her September comments, Ms. Chao posted on the Better Cupertino blog, questioning whether Mr. Hom was terminated as city attorney because of his handling of the SB 35 Project application. (Exh. 5) Better Cupertino adopted these same talking points in an October 2018 blog post, which advocated against the SB 35 Project, and in favor of the election of Ms. Chao and Mr. Willey. (Exh. 20)
- At the close of her swearing-in speech on December 6, 2018, Ms. Chao declared that she and the new City Council “will work together to make a ‘Better Cupertino.’”

Like Ms. Chao, Mr. Willey’s connections to Better Cupertino were a cornerstone of his campaign.

- Until earlier this year, Mr. Willey was the President/Chief Executive Officer of Friends of Better Cupertino. (Exhs. 3 & 4)
- During the 2018 campaign, Mr. Willey highlighted that he joined Better Cupertino in 2014 at Ms. Chao’s invitation, and has “attended meetings ever since.” (Exhs. 21 & 22)
- On November 13, 2018, Mr. Willey sent a “Thank You Letter” to his supporters. In it, he described himself as a “Proud Better Cupertino Supporter.” (Exh. 23)
- On June 19, 2018, Mr. Willey attended a City Council meeting and spoke against the Specific Plan and SB 35 Projects. During his speech, Mr. Willey presented documents highlighting his disputes with the SB 35 Project. (Exh. 15) Mr. Willey posted similar materials at his campaign kickoff event, which contained multiple Better Cupertino logos and were posted on Better Cupertino’s Facebook page. (Exh. 24)
- In Mr. Willey’s candidate statement, he described himself as “a leader in the Better Cupertino grassroots organization of neighbors.” (Exh. 25)
- Mr. Willey wrote to City Council on October 24, 2018 to ask that staff be placed on leave in light of allegations of collusion between Councilmembers, staff, and Sand Hill, noting that “the fate of Vallco will clearly be affected by the revelations that have come to light.” He then provided this correspondence to Better Cupertino to post publicly. (Exh. 8)
- Mr. Willey actively participated in the effort to gather signatures for the referendum against the Specific Plan Project. (Exh. 26)

Rocio Fierro
December 12, 2018
Page 5

3. Mr. Scharf Highlights His Relationship with Better Cupertino, Speaks Publicly Against the Projects, and is a Named Party in an Ongoing Court Battle with the City over Vallco

Mr. Scharf publicly advertises his connections with Better Cupertino, speaks publicly against the SB 35 Project, and is currently embroiled in litigation with the City.

- In 2016, Mr. Scharf was an active proponent of Measure C, an initiative that sought to kill an earlier Vallco redevelopment project proposed by our client. Mr. Scharf remains currently embroiled in ongoing litigation, originally filed in June 2016, against the City arising from Measure C. (*Committee Supporting Cupertino Citizens' Sensible Growth Initiative v. City of Cupertino* (Cal. Ct. App., Oct. 9, 2018, No. H043940) 2018 WL 4895961, review filed (Nov. 19, 2018).) In that litigation, Mr. Scharf is the petitioner, and he is represented by Bern Steves, the attorney who represents Friends of Better Cupertino in the SB 35 Project litigation. (Exh. 27)
- In April 2018, "representing only myself and . . . supporters of Better Cupertino," Mr. Scharf went to Sacramento to testify against SB 828. (Exh. 28)
- Mr. Scharf is also a member of an organization called "Livable California." In a video produced by that organization in October 2018, Mr. Scharf, while publicly identified as a member of City Council, spoke out against the SB 35 project. (Exh. 29)
- When Mr. Scharf was first seated on the City Council in 2016, Better Cupertino celebrated his swearing in and described him as "a member of Better Cupertino." (Exh. 30) Better Cupertino continues to claim Mr. Scharf as its member. (Exh. 31)
- Mr. Scharf frequently appears in public with Better Cupertino members, wearing a Better Cupertino shirt. (Exhs. 32-34, 35). He attended a campaign rally for Mr. Willey and Mr. Chao just before the November 2018 election. (Exh. 36)

4. Better Cupertino Embraces Ms. Chao, Mr. Willey, and Mr. Scharf as Core Members of Its Organization

Just as Ms. Chao, Mr. Willey, and Mr. Scharf embrace their connections with Better Cupertino, the organization frequently touts its strong connections with the three Councilmembers. During the 2018 election, Better Cupertino claimed Ms. Chao and Mr. Willey as "their" candidates. In blog posts and in election materials, Better Cupertino highlighted the connection between the organization and Ms. Chao and Mr. Willey. Better Cupertino's "roadmap" to defeating any development at Vallco consists of three steps: overturn the Vallco decision [in litigation], collect

Rocio Fierro
December 12, 2018
Page 6

referendum signatures to challenge the Specific Plan Project, and elect Ms. Chao and Mr. Willey. (Exh. 37)

- Better Cupertino advertised and organized the “campaign kick-off party” for Mr. Willey and Ms. Chao on August 26, 2018. (Exh. 38) At the party, Ms. Chao, Mr. Willey, and Mr. Scharf spoke in front of “Liang Chao for City Council,” “Jon Willey for City Council,” and “Better Cupertino” campaign signs. Better Cupertino described Ms. Chao and Mr. Willey as “core members of Better Cupertino.” (Exhs. 39, 40, & 41)
- Better Cupertino’s website described Ms. Chao and Mr. Willey as “Our Candidates for Council” and promoted their campaign flyers. (Exh. 42) Better Cupertino circulated a flyer with pictures of Ms. Chao and Mr. Willey, promising: “Friends of Better Cupertino has filed a lawsuit against the City regarding its approval of the SB 35 Plan. Litigation on the matter moves forward. Once Liang Chao and Jon Willey are elected to the council, they will hold the city staff accountable for their actions.” (Exh. 43)
- Better Cupertino mailers supported Ms. Chao and Mr. Willey, and opposed both Projects. (Exhs. 44-47, 48)
- The Better Cupertino Action Committee made donations of \$6,500 each to Ms. Chao’s campaign and Mr. Willey’s campaign. (Exh. 49) An organization called “Cupertino Residents for Sensible Zoning Action Committee,” which Ms. Chao is the Treasurer of, donated \$14,223 to Better Cupertino in 2017. (Exh. 49)
- Better Cupertino manages a blog. In a November 3, 2018 blog post, Better Cupertino advocated for a “Vote for Change—Elect Liang Chao and Jon Willey.” The post was half funded by Ms. Chao’s and Mr. Willey’s electoral campaigns, and half by Better Cupertino Action Committee. The post calls for “overturn[ing] the Vallco SB 35 Decision . . . This litigation is under way since June 25, 2018,” referring to the *Friends of Better Cupertino v. City of Cupertino* case. (Exh. 16)
- Better Cupertino posted correspondence from Mr. Willey and Ms. Chao to the city council concerning SB 35. Ms. Chao and Mr. Willey provided this correspondence to Better Cupertino to post on its website. (Exh. 8)
- On December 6, 2018, Better Cupertino announced: “Better Cupertino Seats Majority on City Council.” In the post, Better Cupertino claims Ms. Chao, Mr. Willey, and Mr. Scharf as its members. (Exh. 31)
- Friends of Better Cupertino is planning a reception to welcome the new City Council on December 16th. (Exh. 50)

Rocio Fierro
December 12, 2018
Page 7

- Better Cupertino issued statements on Twitter almost daily in late November and early December 2018, to follow whether Mr. Willey would win election and noting that, if Mr. Willey wins, Better Cupertino “has three council seats out of five.” (Exh. 51)

II. Legal Standards

A. City Councilmembers Must Recuse Themselves From Participating In Any Matter, Including Litigation, In Which They Have a Conflict of Interest.

City officials are barred from making or participating in decisions in which they have a conflict of interest. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234; see also Cal. Op. Att’y Gen. No. 14-301, at 8 (2018) (“Where a common law conflict of interest exists, the official may not take part either in the discussion nor in a vote on the relevant matter.”)).

1. Conflicts of Interest Exist Where an Official’s “Organizational Responsibility” Creates the “Appearance” of Conflict, Or Where an Official is Biased or Has Already Taken a Position on an Issue.

Conflicts of interest may arise in a variety of different scenarios. A conflict arises if the official has some personal advantage or disadvantage at stake in a matter, even if that interest is non-economic. (Cal. Op. Att’y Gen. No. 14-301, at 8 (2018); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171.) “[A]nimosity” or “bias” toward one of the participants in the matter creates a conflict. (*Clark*, 48 Cal.App.4th at 1173.) Courts will also find a conflict of interest if an official is personally “embroiled” in a dispute with a participant in the matter. (*Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351.) Further, under local law, a Cupertino official has an impermissible conflict of interest if she has (1) “an organizational responsibility to or personal commitment to others” that creates a conflict or the “appearance” of a conflict, or (2) “a strong personal bias as to one party or position.” (Cupertino City Council Resolution No. 18-115 (emphasis added).)

Courts require recusal due to bias from any decisions where the official has taken a position before the decision is made. For instance, in *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, a planning commissioner wrote an article in which he referred to a project as a “threat” to a local wildlife corridor. The court ruled that the commissioner should have been recused from participating in the decision whether to approve the project. Because he did not recuse himself, the decision was “tainted by bias and [had to] be vacated.” (*Id.* at 483-485.) In *Woody’s Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, the planning commission approved a project. A city council member challenged that decision, and stated that he was “strongly opposed” to the project. The court determined that the councilmember was biased, and should have been recused. (*Id.* at 1022, 1023.)

Rocio Fierro
December 12, 2018
Page 8

2. An Official May Not Supervise Litigation In Which the Official Has a Conflict of Interest.

When a conflict exists on an issue, state law requires that officials recuse themselves from all decision-making about that issue. (*Breakzone Billiards*, 81 Cal. App. 4th at 1234.) Local law is in accord: Cupertino officials are prohibited from “us[ing] their official positions to influence government decisions in which” they have a conflict of interest. (Cupertino City Council Resolution No. 18-115.) It further provides that “[i]f a conflict of interests exists regarding a particular matter or decision,” a city official “will not participate in the decision or discuss the matter with other decision-makers or other persons” (*Id.*) The “vote count” is irrelevant, because simply “allowing a biased decision maker to participate in the decision is enough to invalidate the decision.” (*Woody’s*, 233 Cal. App. 4th at 1022.)

SB 35 sets forth a purely ministerial process for the City; there are no legislative or policy decisions addressed to city staff or the City Council. Instead, each project, including the Vallco SB 35 Project, is individually ministerially reviewed by city staff for compliance with objective standards set forth in state law. The pending SB 35 litigation challenges whether that ministerial review was conducted properly.

Supervising the defense of the litigation against the City will require management of, and communication with, the City’s outside counsel. Furthermore, the City will be required to make critical decisions about how to defend the litigation – for example, to determine whether to take certain legal positions, the amount of municipal resources to devote to those efforts, and whether to settle the litigation, and on what terms. A City Councilmember with a conflict of interest may not participate in making these decisions, particularly when they will be made in closed session, where members of the public and VPO are prohibited from even observing the decision-making process.

A conflicted city council member cannot participate in decision-making concerning the resulting litigation, or receive confidential information about the litigation. In *Hamilton v. Town of Los Gatos* (1989) 213 Cal. App. 3d 1050, a city councilmember was properly excluded from any decision-making about litigation in which the member had a conflict of interest. (*Id.* at 1056.) The court ruled that the conflict “disqualified” the council member from “making, participating in making, or in any way attempting to use his official influence on decisions concerning the parking assessment district” that was the subject of the litigation. (*Id.*) The court determined that the councilmember was barred from both “actively participating” in litigation decisions and “silent observation” of litigation strategy sessions. (*Id.* at 1057, 1058.) Because of the conflict of interest, the council member had “no greater right” to “participat[e] in the discussion between the council and its attorney . . . than the public at large.” (*Id.* at 1053.) In other words, when

Rocio Fierro
December 12, 2018
Page 9

disabled by a conflict of interest, a city councilmember loses all authority conferred by her official position.¹

Pursuant to *Hamilton*, a councilmember with a conflict may not receive confidential materials about the litigation because it would “give the appearance of impropriety,” and because “[t]he council member might use the confidential information to his advantage personally, or he might disclose the information improperly to others interested in the decision.” (*Hamilton*, 213 Cal.App.3d at 1058.) Nor may a conflicted council member be present for privileged discussions with the city attorney, because that would waive the attorney-client privilege. (*Id.*)

B. City Councilmembers Must Recuse Themselves From Any Matter Where They Are Unable to Fulfill Their Fiduciary Duty to the City

Members of the City Council also owe the City of Cupertino a fiduciary duty of undivided loyalty. “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” (*Clark*, 48 Cal. App. 4th at 1170 (quoting *Noble*, 89 Cal. App. at 51); *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 950-51 (2013) (city Councilmembers have fiduciary duties to the city, and may be sued for breaching that duty).) Indeed, the obligations of loyalty apply with “greater force” to public officials than to private agents. (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) When conflicts of interest arise that compromise the public official’s ability to discharge her fiduciary duties, she must recuse herself. (*Haraguchi v. Super. Ct.* (2008) 43 Cal.4th 706, 709.)

C. The City Has An Interest In Defending Its Approval.

The City is not “neutral” in litigation with Friends of Better Cupertino. To the contrary, the City has an interest in defending the actions properly taken by its staff and officials, including in land use matters. (See *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 922 (“[A]fter project approval . . . the agency’s and applicant’s interests are aligned Both are legitimately committed to the same thing at that point—defending the project as approved.”); *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694 (city defended CEQA exemption for tree removal); *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559 (City defended approval of mixed-use development).)

¹ Other jurisdictions have the same rule. For example, in *Scotch Plains-Fanwood Bd. of Educ. v. Syversten* (1991) 251 N.J. Super. 556, a member of the Board of Education was excluded from a closed session of the Board during which the Board was discussing a legal action brought by the member against the Board.

Rocio Fierro
December 12, 2018
Page 10

III. Because of Their Conflicts of Interest, Ms. Chao, Mr. Willey, and Mr. Scharf Are Disqualified from Participating in Decisions About the *Friends of Better Cupertino* Litigation.

A. Ms. Chao, Mr. Willey, and Mr. Scharf Are So Closely Aligned with Better Cupertino That Their Commitment to the Organization Creates a Conflict of Interest and Divided Loyalties in Both *Friends of Better Cupertino v. City of Cupertino* Matters

Ms. Chao, Mr. Willey, and Mr. Scharf's close affiliation with Better Cupertino disqualifies them from taking part in decisions about the litigation. Their "organizational responsibility to" and "personal commitment to" the organization that has sued the City undeniably "creates a conflict of interest" and "the appearance of one" under local law (see Cupertino City Council Resolution No. 18-115), and an impermissible divided loyalty under State law (see *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51). Ms. Chao, Mr. Willey, and Mr. Scharf cannot represent the interests of opposing parties in a lawsuit. They are on both sides of the lawsuit; a classic conflict of interest.

As detailed above, the close ties between Mr. Scharf, Ms. Chao, Mr. Willey, and FBC are longstanding and well-documented. Ms. Chao, Mr. Willey, and Mr. Scharf are core members of Better Cupertino, and Better Cupertino touts them as such. Ms. Chao and Mr. Willey are high-ranking officials in the organization, with Ms. Chao as its founder and Mr. Willey as its former President.² Mr. Scharf is a self-proclaimed "representative" of the organization. All continue to actively participate in the organization's political activities. While campaigning for City Council in 2018, Ms. Chao and Mr. Willey drew heavily on their connections to, and work for, Better Cupertino.

Better Cupertino in turn claimed Ms. Chao and Mr. Willey as "their" candidates in the race and contributed significant sums to their campaigns. (Exh. 49) Ms. Chao, in turn, directed over \$14,000 in donations from another organization to Better Cupertino. (Exh. 49) In blog posts and in election materials, Better Cupertino repeatedly highlighted the connection between its organization and Ms. Chao and Mr. Willey. Better Cupertino, Ms. Chao, Mr. Scharf, and Mr. Willey share political talking points on Vallco-related issues.

Ms. Chao, Mr. Willey, and Mr. Scharf must recuse themselves in order to fulfill their legal duty to of loyalty to Cupertino's interests. (See Cupertino City Council Resolution No. 18-115.) Otherwise, there is a great risk that the three Councilmembers' commitment to furthering Better Cupertino's goals will dominate their thought processes and dictate their actions on the

² Ms. Chao and Mr. Willey almost certainly instigated and authorized the filing of both the SB 35 Litigation and the Specific Plan Litigation.

Rocio Fierro
December 12, 2018
Page 11

litigation, even though the City is owed their complete and undivided loyalty. (*See Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) Here, as litigation involves a review of a ministerial decision, the conflict is especially stark given their public statements that Ms. Chao, Mr. Willey, and Mr. Scharf will hold "city staff accountable" for their performance of the ministerial duty required of them under SB 35.

Moreover, if Mr. Scharf, Ms. Chao, and Mr. Willey receive confidential information in closed sessions, that information will almost certainly be unlawfully transmitted to Friends of Better Cupertino. (*See Hamilton*, 213 Cal.App.3d at 1058 (disclosing confidential information to a conflicted official is unlawful because "he might disclose the information improperly to others interested in the decision").) This concern has already been borne out, as Friends of Better Cupertino became immediately aware that the City had postponed its December 7, 2018 closed session, disclosed publicly what had presumably been non-public reasons for the postponement, and sought a stay of litigation as a result. (Exh. 52, at 2:3-24)

B. Ms. Chao's, Mr. Willey's, and Mr. Scharf's Bias is Demonstrated by Their Many Statements Opposing the Vallco Projects

Ms. Chao, Mr. Willey, and Mr. Scharf have repeatedly spoken out against the Vallco Projects. These statements betray the Councilmembers' bias against the Vallco Projects and VPO (see *Clark*, 48 Cal.App.4th at 1173; Cupertino City Council Resolution No. 18-115 (a conflict arises if the decision maker has "a strong personal bias as to one party or position")), and go well beyond the threshold for a finding of potential bias established by the case law (see *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470; *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012).

As explained in detail above, Ms. Chao has spoken regularly in opposition to the Projects at Council meetings, in letters to the City Council, in statements to the media, and on internet platforms like Next Door and Better Cupertino's blog. To repeat a few examples, on September 19, 2018, Ms. Chao wrote to the City Council to oppose the SB 35 Project and assert that the City Manager engaged in misconduct. (Exh. 8) In late September 2018, Ms. Chao posted on Next Door in opposition to both Projects, describing them as "bad and worse plans." (Exh. 9) During a news interview in September 2018, Ms. Chao spoke against the Specific Plan Project. (Exh. 17) During the September 18, 2018 City Council meeting, Ms. Chao spoke to City Council against the Projects while holding a Better Cupertino sign. (Exhs. 18 & 19)

All the while, she repeatedly posted on Better Cupertino's blog in opposition to both Projects. (Exhs. 5 & 6) Ms. Chao wrote an October 5, 2018 blog post for the BetterCupertino.org blog, outlining her opposition to both the SB 35 Project and the Specific Plan Project. That followed a September 25, 2018 blog post, also on the Better Cupertino blog, outlining her position that the SB 35 Project violates state law. In that post, Ms. Chao references the SB 35 lawsuit brought

Rocio Fierro
December 12, 2018
Page 12

by Friends of Better Cupertino. Ms. Chao also authored a September 29, 2018 blog post claiming that the City Council “blew it over and over again” concerning the Specific Plan Project and the SB 35 Project. (Exh. 7) In an e-mail to Better Cupertino supporters, Ms. Chao even compared our client to Adolf Hitler and accused our client of engaging in a “Hitler-stye [*sic*] campaign.” (Exh. 12)

Ms. Chao made her opposition to the Vallco Projects a central platform of her campaign for City Council. Her candidate website touted her opposition to Vallco, and described a “roadmap” to defeat the Projects. (Exh. 10 & 11) In October 2018, she said: “The city council is definitely accountable the potential misconduct of its own employees when the city staff declare questionable project compliant to SB 35.” (Exh. 13) On June 19, 2018, Ms. Chao attended a City Council meeting and urged the City to reject the SB 35 Project, claiming “numerous compliance issues.” (Exh. 15) On November 3, 2018, Ms. Chao and Mr. Willey issued an election advertisement, jointly funded by them, to advocate against the SB 35 Project and the Specific Plan Project. (Exh. 16)

In addition to the joint campaign advertisement, Mr. Willey has disparaged the Vallco Projects in various settings. On June 19, 2018, Mr. Willey attended a City Council meeting and spoke against the SB 35 Project. (Exh. 15) Mr. Willey presented information in opposition to the SB 35 project again at his August 2018 campaign kickoff, describing the project approval as a “complete disregard for what Cupertino’s residents want once again!” Mr. Willey also actively participated in the effort to gather signatures to for the referendum against the Specific Plan Project. (Exh. 26)

Mr. Scharf has spoken publicly against the SB 35 Project, too. For example, in a video produced by Livable California in October 2018, Mr. Scharf, while publicly identifying as a member of the Cupertino City Council, spoke out against the SB 35 project. (Exh. 29)

Every one of these statements far surpasses the threshold for a finding of potential bias established in *Nasha* and *Woody’s*. In those cases, a single, dispassionate statement opposing the land-use decision in advance of the decision was enough. In *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, the court found an official was “tainted by bias” against a project based on a single article in which the official voiced his concern that the project would threaten a local wildlife corridor. (*Id.* at 483-485.) In *Woody’s Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, a city council member’s statement that he was “strongly opposed” to the project was the basis for the court’s determination that the councilmember was biased, and should have been recused. (*Id.* at 1022, 1023.) Here, each council member’s statements – to the media, on the internet, and before the former City Council – establish beyond any question that they each harbor actual bias against the Vallco Projects, and are disqualified from deciding matters involving the Projects.

Rocio Fierro
December 12, 2018
Page 13

C. Mr. Scharf's Court Battle with the City over Vallco Confirms that He Is Biased

Mr. Scharf's bias is exacerbated by the fact that he has been "personally embroiled" (see *Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351) in a protracted court battle with the City since 2016, arising from Mr. Scharf's efforts to pass a ballot measure in the 2016 election that would have limited redevelopment of the Vallco Shopping District. (See *Committee Supporting Cupertino Citizens' Sensible Growth Initiative v. City of Cupertino* (Cal. Ct. App., Oct. 9, 2018, No. H043940) 2018 WL 4895961, review filed (Nov. 19, 2018).) In that litigation, Mr. Scharf is the petitioner, and he is represented by Bern Steves, the attorney who represents Friends of Better Cupertino in the SB 35 Project litigation. (Exh. 27)

IV. Mr. Willey Should Not Receive Non-Public Information About the FBC Litigation, or Participate in Decisions about the FBC Litigation, For the Additional Reason that His Seat on the City Council Is Provisional.

All non-public information about the Vallco litigation should be withheld from Mr. Willey for the additional reason that his seat on the City Council is provisional. Mr. Willey was seated as a member of the City Council on December 6, even though votes are being recounted, and he may ultimately not hold a seat on the Council. Mr. Willey should not receive any confidential or privileged information about the FBC litigation, nor should he participate in any decision-making about the litigation, unless and until the recount is completed, the vote is certified, and he is confirmed as a City Council member.

Again, the *Hamilton* case is instructive. There, the court held that a council member with a conflict of interest has no rights greater than any member of the public, and was therefore prohibited from attending closed session, receiving any information from the closed session, or participating in any decisions on the matter. If the recount concludes that Mr. Willey is *not* a member of the City Council, then Mr. Willey will be simply a member of the general public (and, perhaps, will resume his position as President/CEO of Friends of Better Cupertino). Mr. Willey may take the position – without justification, we believe – that the information that he received was, in fact, not privileged or confidential, and that he can disseminate it freely.

V. Conclusion

If Mr. Scharf, Ms. Chao, or Mr. Willey participate in any decision about the SB 35 Project or the Specific Plan Project, or any litigation concerning those Projects, those decisions will be stricken down by a Court as tainted. These City Councilmembers are not acting solely in the interests of the City; they are clearly acting on behalf of Better Cupertino as well. Their many statements opposing the Vallco Projects confirm that they have prejudged the Projects and are biased

Rocio Fierro
December 12, 2018
Page 14

against them. Because of their documented bias, they are likely to pass along information they receive as City Councilmembers directly to Better Cupertino, even if the information is confidential and privileged litigation information. Indeed, they may have already done so. The law requires that they recuse themselves from decisions involving the City's legal strategy and decision-making regarding the SB 35 Project and the Specific Plan Project, and that they be walled-off from receiving any non-public information about the litigation.

We ask that you advise the City, and the Councilmembers, on the scope and nature of these limitations.

Very truly yours,

COBLENTZ PATCH DUFFY & BASS LLP



Katharine Van Dusen

ktv:sep
Attachments

cc: Patricia Curtin
Todd Williams