

1 JONATHAN R. BASS (State Bar No. 75779)
CHARMAINE G. YU (State Bar No. 220579)
2 KATHARINE VAN DUSEN (State Bar No. 276021)
SARAH E. PETERSON (State Bar No. 309733)
3 COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
4 San Francisco, California 94104-5500
Telephone: 415.391.4800
5 Facsimile: 415.989.1663
Email: ef-jrb@cpdb.com
6 ef-cgy@cpdb.com
7 ef-ktv@cpdb.com
ef-sep@cpdb.com

8 Attorneys for Real Party in Interest
VALLCO PROPERTY OWNER LLC

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

12

13 FRIENDS OF BETTER CUPERTINO,
KITTY MOORE, IGNATIUS DING, and
14 PEGGY GRIFFIN,

15 Petitioners,

16 v.

17 CITY OF CUPERTINO, GRACE SCHMIDT,
and DOES 1-20 inclusive,

18 Respondents.

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20 VALLCO PROPERTY OWNER LLC, and
DOES 1-20 inclusive,

21 Real Party in Interest.
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Case No. 18CV330190

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VALLCO PROPERTY OWNER LLC'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date: March 29, 2019
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Helen E. Williams

Action Filed: June 25, 2018

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INTRODUCTION

The Amended Petition for writ of mandamus is barred by the statute of limitations. Petitioners were required, by Government Code § 65009(c)(1)(F), to serve the Petition on the City of Cupertino (the “City”) by September 23, 2018. They did not serve the City until October 16. The Petition should be dismissed with prejudice.

Real Party in Interest Vallco Property Owner LLC (“Vallco”) moves for judgment on the pleadings, because Petitioners did not timely serve the Petition, which challenges the approval of Vallco’s housing project application by the City. As a matter of law, the project was deemed to satisfy the objective planning standards set forth in Senate Bill 35, codified at Government Code § 65913.4 (“SB 35”). Petitioners failed to serve their Petition challenging that determination within the ninety-day statute of limitations set forth in Government Code § 65009(c)(1)(E)-(F).

On June 25, 2018,¹ the Vallco project application was conclusively deemed to satisfy SB 35’s objective planning standards. It therefore qualified for streamlined, ministerial approval (the “June Determination”). Petitioners’ challenge to the June Determination had to be filed, and served, by September 23. The City was not served until October 16.

Because the City was not served until after the statutory deadline had expired, the Petition should be dismissed with prejudice.

FACTUAL BACKGROUND

I. SENATE BILL 35 PROVIDES FOR EXPEDITED PROJECT REVIEW.

SB 35, enacted in 2017 to address California’s housing supply and affordability crisis, embodies a legislative policy to increase affordable housing by “facilitat[ing] and expedit[ing] the construction of affordable housing.” (§ 65582.1.)² It requires California municipalities to offer a “ministerial” and “streamlined” review process for proposed developments that include affordable housing. (§§ 65582.1(p); 65913.4.)

SB 35 sets forth two parallel processes for review of projects. First, a city has ninety days

¹ Unless otherwise noted, all dates are in 2018.

² All undesignated section references are to the Government Code.

1 from the project submission date to make a determination whether the project satisfies enumerated
2 “objective planning standards.” (§ 65913.4(a)-(b).) A city’s review for compliance with those
3 objective planning standards constitutes the “streamlined, ministerial approval process”
4 established by SB 35. (§ 65913.4(a) [If a development “satisfies all of the following objective
5 planning standards,” it is “subject to the streamlined, ministerial approval process provided by
6 subdivision (b)[.]”].)

7 The process authorizes the city to determine whether the “development . . . is in conflict
8 with any of the objective planning standards specified in subdivision (a)[.]” (§ 65913.4(b)(1).) If
9 the city notes a conflict, it is obligated, within 90 days, to “provide the development proponent
10 written documentation of which standard or standards the development conflicts with.” (§
11 65913.4(b)(1)(B).) If the city “fails to provide [this] documentation[.]” then the development
12 “shall be deemed to satisfy the objective planning standards specified in subdivision (a).” (§
13 65913.4(b)(2).) In other words, unless a city identifies deficiencies in a project application in
14 writing by the ninety-day mark, the application is *deemed* to comply with the substantive
15 requirements of the statute. The City identified no such deficiencies in Vallco’s application (Am.
16 Petition ¶¶ 123-124), and the deemed-compliance provision of SB 35 was therefore triggered.

17 In addition to this 90-day process focused on the objective planning standards, the city may
18 also conduct a parallel 180-day process during which it may complete design review and public
19 oversight. (§ 65913.4(c)(1)(B).) That process is “strictly focus[ed] on assessing compliance with
20 criteria required for streamlined projects, as well as reasonable objective design standards,” and
21 “shall not in any way inhibit, chill or preclude the ministerial approval” completed by day ninety.
22 (§ 65913.4(c)(1).) The city may not revisit or review the determination that the project complies
23 with objective planning standards. (*Id.*)

24 **II. THE VALLCO PROJECT WAS APPROVED PURSUANT TO THE MANDATE**
25 **OF SB 35.**

26 On March 27, Vallco submitted an application to the City for SB-35 review of the Vallco
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1 Town Center Project (“the Project”).³ (Am. Petition ¶ 34.) The application describes the Project
2 as follows: “the vision for the Vallco Town Center is to revitalize the aging and outdated indoor
3 mall into a vibrant, sustainable, walkable, and safe Town Center neighborhood with a mix of
4 retail, dining, entertainment, recreation, employment, housing, and open space, all integrated with
5 an innovative and publicly accessible green roof.” (Am. Petition, Exh. 5 at 3.) The Project will
6 provide 2,402 residential units, half of which will be affordable to low- and very-low income
7 households. (*Id.*)

8 The City reviewed the Project for consistency with the objective planning standards set
9 forth in SB 35. It identified no conflicts. To the contrary, it issued an “Eligibility Letter” on
10 June 22, finding that the Project complied with each objective planning standard in SB 35. (Am.
11 Petition ¶ 24 & Exh. 1 (Eligibility Letter).) The Eligibility Letter stated that the City’s next step
12 would be to confirm that the final, permitted project “will be properly implemented.” (Am.
13 Petition, Exh. 1 at 13.)

14 The June Determination became final three days later on June 25,⁴ because the City did not
15 provide any written documentation of an inconsistency with the statute’s objective standards. (*See*
16 § 65913.4(b)(1)(B).) Under SB 35, the June Determination meant that the Project was “deemed to
17 satisfy the objective planning standards” of SB 35. (*See* § 65913.4(b)(2).) The City issued a letter
18 on September 21, approving Vallco’s development permit. (Am. Petition, Exh. 2.)

19 **III. PETITIONERS DID NOT FILE SUIT CHALLENGING THE CITY’S**
20 **DETERMINATION UNTIL OCTOBER 2018.**

21 **A. The Original Petition Did Not Challenge The City’s Determination.**

22 On June 25, 2018, Petitioners filed a Petition for an alternative writ of mandate (the
23 _____

24 ³ Because this is a motion for judgment on the pleadings, the facts set forth below are taken from
25 the Amended Petition, and are assumed true for purposes of this motion only. Facts taken from
26 exhibits attached to the Amended Petition are provided as background only.

27 ⁴ Petitioners suggest that the application may not have been submitted to the City until March 29
28 (Am. Petition ¶ 38.) If that were true, the June Determination would have become final as of June
27, and service of the Petition on the City would have to have been completed by September 25.
This makes no difference to the statute of limitations analysis, since service was not actually
completed until October 16.

1 “Original Petition”) and sought an emergency *ex parte* writ directing the City to find that the
2 Project did *not* comply with the objective planning standards in SB 35. The Petition alleged,
3 erroneously, that the City had “taken no action” on Vallco’s application and intended to ““run out
4 the clock’ on the statutory 90-day review period . . . without reviewing the project.” (See Original
5 Petition ¶¶ 1, 27.) The Original Petition did not challenge any determination of SB 35 compliance
6 by the City, instead claiming that no determination had been made.

7 Upon learning that the City had issued a letter on June 22, Petitioners withdrew their *ex*
8 *parte* application, and stated that they would amend their Petition to challenge the June
9 Determination. (See Am. Petition ¶ 25.) Petitioners never served the Original Petition on the
10 City, or on Vallco. (Request for Judicial Notice, Exhs. 2 & 4.)

11 **B. The Amended Petition Challenges The June Determination.**

12 Petitioners filed an Amended Petition on October 16, challenging the June Determination.
13 (Am. Petition ¶¶ 114-130.) Petitioners served the Amended Petition on the City on October 16,
14 and on Vallco on October 23. (Request for Judicial Notice, Exhs. 1 & 4.)

15 The Amended Petition is a challenge to the June Determination because each of the issues
16 Petitioners raise in the Amended Petition challenges the Project’s consistency with one or another
17 objective planning standard: the Petition “is brought . . . to require the City of Cupertino (‘City’)
18 to exercise its ministerial duty to reject a major development proposal . . . due to *non-compliance*
19 *with* multiple statutory eligibility criteria (‘*objective planning standards*’)” (Am. Petition ¶ 1
20 [emphasis added].) The Amended Petition explicitly directs its challenge to the June
21 Determination. Each of the two causes of action (for “Eligibility Determination” and “Project
22 Approval”) target whether the project complies with the objective planning standards:

- 23 • “The City administration . . . purported to find the development project eligible with
24 respect to each criterion to proceed under SB35.” (Am. Petition ¶ 1.)
- 25 • “Instead of raising and documenting pertinent objections to the Project based on these
26 eligibility criteria, the City administration . . . issued a letter dated June 22, 2018
27 (‘Eligibility Letter’) which improperly and unlawfully purported to find the Project eligible
28 with respect to each eligibility criterion.” (*Id.* ¶ 4.)

- 1 • “The City’s Eligibility Letter improperly and unlawfully failed to find the Project
2 ineligible” (*Id.* ¶¶ 119, 120, 121.)
- 3 • “Upon determining that the Project is ‘in conflict with any of the objective development
4 standards’ (eligibility criteria) the City was under a duty to provide the Applicant with
5 written documentation of which standards the Project conflicts with, and an explanation of
6 the reasons.” (*Id.* ¶ 123.)
- 7 • The City was under a “duty to notify the Applicant of multiple items of inconsistency”
8 with objective planning standards (*Id.* ¶ 129.)

9 Petitioners challenge the Project’s consistency with three of SB 35’s objective planning
10 standards: (1) whether, under subdivision (a)(2)(C), at least two-thirds of the square footage of the
11 development is designated for residential use (Am. Petition ¶¶ 48-62); (2) whether, under
12 subdivision (a)(6)(E), the development is located on a hazardous waste site (Am. Petition ¶¶ 63-
13 73); and (3) whether, under subdivision (a)(5), the development is consistent with objective zoning
14 and design review standards (¶¶ 80-82), including building height (¶¶ 83-87), parkland dedication
15 (¶¶ 88-93), set-back requirements (¶¶ 94-97), and the size, number, location, and ratio of
16 residential units (¶¶ 98-113).

17 In short, while the Project application was deemed, as a matter of law, to be fully
18 consistent with SB 35’s objective planning standards, the theory of the Petition is that it “really”
19 wasn’t.

20 ARGUMENT

21 I. A MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE GRANTED 22 WHERE THE CLAIM IS TIME-BARRED.

23 “A motion for judgment on the pleadings may be made either prior to trial or at trial, on the
24 same grounds as could be urged by a general demurrer.” (*Ponderosa Homes, Inc. v. City of San*
25 *Ramon* (1994) 23 Cal.App.4th 1761, 1767.) In deciding a motion for judgment on the pleadings,
26 the Court looks “to the face of the pleading under attack” and “determines whether those facts
27 constitute a cause of action.” (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440.) “A
28 pleading which on its face is barred by the statute of limitations does not state a viable cause of

1 action and is subject to judgment on the pleadings.” (*Id.*) The Court may also consider “judicially
2 noticeable matters” when ruling on the motion.⁵ (*People ex rel. Harris v. Pac Anchor*
3 *Transportation, Inc.* (2014) 59 Cal.4th 772, 777.)

4 **II. PETITIONERS ARE CHALLENGING THE NINETY-DAY DETERMINATION,**
5 **WHICH WAS MADE AS A MATTER OF LAW.**

6 Petitioners have challenged the City’s June determination, a determination that Petitioners
7 claim amounted to a violation of “a clear, present, and ministerial duty that inures to [their]
8 benefit.”⁶ (*See California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th
9 676, 707.) Determinations become subject to challenge as soon as they are final; a determination
10 is final if it cannot be altered in a subsequent phase of administrative review. (*See SJCBC, LLC v.*
11 *Horwedel* (2011) 201 Cal.App.4th 339, 351 [“A decision attains the requisite administrative
12 finality when the agency . . . possesses no further power to reconsider or rehear the claim.”]
13 (internal quotation marks omitted).) Under SB 35, after day ninety, there is no further municipal
14 or administrative process to review the determination that the Project complies with the objective
15 planning standards. (§ 65913.4(c)(1) [review during days 90-180 “shall not in any way . . .
16 preclude the ministerial approval”].) The June Determination was therefore final as soon as it was
17 made.

18 The gravamen of the Amended Petition is that the Project did not qualify for the
19 “streamlined, ministerial approval process” of SB 35. Subdivision (b) of SB 35 *is* the

20 _____
21 ⁵ Vallco requests that the Court take judicial notice of four documents filed as Court records in this
22 action: (1) the Proof of Service on the City and City Clerk showing a service date of October 16
23 (Request for Judicial Notice, Exh. 1); (2) Petitioners’ case management statement filed September
24 26, which informed the Court that as of September 26, the City and City Clerk had not been
25 served (*id.*, Exh. 2); (3) the City’s case management statement filed September 25, which
26 informed the Court that neither “[t]he City, nor the real party in interest, have been served with the
27 petition” (*id.*, Exh. 3); and (4) the case management statement jointly filed by the City and Vallco
28 on November 21, 2018, which informed the Court that “Petitioners filed and served an amended
petition for writ of mandate in mid-October on Respondents and Real Party” (*id.*, Exh. 4).

⁶ Nothing in this memorandum should be construed as a concession that SB 35 gives rise to a
cause of action at any time, or that Petitioners have standing to challenge the SB 35 approval.
Rather, this motion assumes that, *if* a cause of action existed at any time, it only existed until
September 23, at which point it became barred by the statute of limitations.

1 “streamlined, ministerial approval process.” (§ 65913.4(a).) When no denial letter was issued in
2 June, the Project was “deemed to satisfy the objective planning standards.” (§ 65913.4(b)(2).) In
3 other words, the Project was *deemed*, as a matter of law, to comply with all of the substantive
4 requirements of the statute—the very requirements that Petitioners now argue were not met.

5 A “deemed” fact is “conclusively presumed” to be true. (*See Parmett v. Superior Court*
6 (1989) 212 Cal.App.3d 1261, 1266 [“[A]ll cases construing the term ‘deemed’ have held without
7 exception that the meaning of ‘deemed’ is that the deemed state of affairs is conclusively
8 presumed to exist.”]; *Irwin v. Pickwick Stages System* (1933) 134 Cal.App. 443, 448 [holding that
9 the phrase “‘shall be deemed’ establish[es] an absolute requirement and create[s] a ‘conclusive
10 presumption’”].)

11 Once the Project was deemed to comply with the SB 35 objective planning standards, no
12 further City review could affect that determination. The City had an additional ninety days to
13 complete its design review and public oversight, under subsection (c) of SB 35, but the statute is
14 clear that such review could not “in any way . . . preclude the ministerial approval[.]” The June
15 Determination was final. It is not vulnerable to Petitioners’ allegation that it was erroneous, or
16 that the City *should* have found inconsistencies with respect to any objective planning standards.
17 That is the whole point of a “deemed approved” statute. Once the time for a public agency to
18 notify the applicant of noncompliance expires, the application is conclusively deemed to comply.
19 There is no opportunity thereafter for the city to reverse that determination, or for a project
20 opponent to seek a reversal of that determination.

21 The June Determination, which resulted in the Project’s being “deemed to satisfy” SB 35’s
22 objective planning standards, was final no later than June 25, 2018. The statute of limitations
23 governing any challenge that determination began to run on that date.

24 **III. PETITIONERS’ ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.**

25 **A. Petitioners Had Ninety Days To File and Serve a Challenge to the City’s**
26 **Determination.**

27 Challenges to governmental planning and zoning decisions are subject to strict deadlines.
28 (§ 65009(c)(1); *Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, 551 [“Generally, under
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1 section 65009, actions to challenge governmental planning and zoning decisions are governed by a
2 90-day limitations period.”].) The 90-day deadline is designed to ensure finality in land use
3 determinations, “reduce delays and restraints upon expeditiously completing housing projects,”
4 and provide “confidence” to “property owners and local governments [that they] can proceed with
5 projects.” (§ 65009(a)(1), (2).) The deadline applies to both filing and service, because permitting
6 a petitioner “to withhold service for months or even years would effectively suspend the effective
7 date of local land use and development decisions and leave such matters at the mercy of the
8 complainant.” (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 526 [quoting
9 *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 790].) The statutory deadline is an
10 “absolute cut-off, beyond which relief for failure to serve a petition cannot be granted.” (*Royalty*
11 *Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1115.)

12 **1. The Statute Of Limitations Begins To Run When The City Makes a**
13 **Determination, Not When It Issues a Permit.**

14 Government Code Section 65009(c)(1)(F) establishes the statutory deadline to file and
15 serve the Petition. Under that section, if a petitioner’s challenge is to “any of the proceedings,
16 acts, or determinations taken, done or made prior” to the issuance of a permit, the ninety-day
17 period begins to run from the date of the challenged prior proceeding, act, or determination.
18 (§ 65009(c)(1)(F), (E).) Petitioners’ challenge is to the City’s June Determination that the Project
19 is not in conflict with—and is therefore deemed to satisfy—the objective planning standards. The
20 June Determination predated the issuance of a permit under SB 35. (*See* Am. Petition, Exh. 2 at
21 1.)

22 Section 65009(c)(1)(F) provides that no action shall be maintained unless it is
23 “commenced and service is made on the legislative body within 90 days after the legislative
24 body’s decision . . . concerning any of the proceedings, acts, or *determinations* taken, done, or
25 *made prior to [issuance of a permit under Subdivision E⁷].*” The term “decision,” as used in the
26 _____

27 ⁷ Section 65009(c)(1)(E) covers issuance of conditional use or other permits, including
28 development permits. (*See Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210
(footnote continued)
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1 statute, covers a broad range of governmental decisions, including factual determinations. (*See*
2 *Citizens for Beach Rights v. City of San Diego* (2017) 17 Cal.App.5th 230, 239 [the term
3 “decision” covered city’s determination that a permit remained valid].)

4 Subsection (F) of section 65009(c)(1) covers determinations made “prior to” decisions to
5 issue permits. It provides that, under certain circumstances, a determination supporting issuance
6 of a permit will have to be challenged, if at all, before a city actually issues the permit. The
7 structure of SB 35—which mandates a final determination of compliance with planning standards
8 at day 90, but provides an additional 180 days to issue a permit—matches the framework
9 contemplated in Government Code section 65009(c)(1)(F). The City’s June Determination was
10 the crux of the City’s review of the Project. Under Subsection (F), Petitioners had ninety days
11 from June 25 to file and serve a writ petition.

12 **2. The Limitations Period to Challenge City’s Decision to Permit**
13 **Streamlined, Ministerial Approval Began to Run in June.**

14 In addition, the statute of limitations in Government Code section 65009(c)(1)(E) also
15 began to run as of June 25. Subsection (E) covers actions to set aside “any decision on the matters
16 listed in Section 65901 and 65903.” Subsection (E) is to be read broadly and “is to be applied
17 broadly to all types of challenges to permits and permit conditions, as long as the challenge rests
18 on a ‘decision’ of a local authority relating to a permit.” (*Save Lafayette Trees v. City of*
19 *Lafayette* --- Cal.Rptr.3 ---- (Cal. Ct. App., Feb. 8, 2019, No. A154168) 2019 WL 493957, at *3
20 [finding Subsection (E) covered the city’s agreement with PG&E approving removal of trees].)
21 Here, the City’s decision to allow the Project to undergo the streamlined, ministerial approval
22 process in June is a final decision on the matter of the Project’s approval and permitting, and is
23 thus covered under Subsection (E). Nor does it matter which body within the City made the
24 decision: Subsection (E) “expressly incorporates the “matters” listed in sections 65901 and

25 _____
26 Cal.App.4th 1484, 1497–98 [holding that the Community Development Director’s approval of a
27 project was subject to Subdivision (E)].) The City issued a development permit for the Vallco
28 project on September 21. Because the June Determination was a necessary prerequisite to the
issuance of a permit, the June Determination is a “determination . . . made prior to” issuance of a
permit under Subdivision (F).

1 65903, regardless of the legislative body charged with making the decision. The courts “have
2 rejected the notion that the reviewing body, rather than the underlying decision being reviewed,
3 determines the applicability of Section 65009.”’ (*Save Lafayette Trees v. City of Lafayette* (Cal.
4 Ct. App., Feb. 8, 2019, No. A154168) 2019 WL 493957, at *4.)

5 Whether under Subsection (F) or Subsection (E), any action to challenge the June
6 Determination needed to be filed and served within ninety days of June 25. The deadline was
7 September 23. Because the City was not served until October 16, the action cannot be maintained.
8 (§ 65009(c)(1); *Save Lafayette Trees*, 2019 WL 493957, at *4 [action served one day after the
9 statutory deadline was time-barred and properly dismissed with prejudice].)

10 **B. Petitioners’ Challenge is to the June Determination, Not the Permit.**

11 The Amended Petition targets the June Determination. (*See supra* pp. 8–9; *see, e.g.*, Am.
12 Petition ¶ 1, 4, 119–21, 129.) Their claim turns on whether the Project in fact complied with SB
13 35’s objective planning standards, the determination of which was complete as of June.

14 Although Petitioners may claim they are separately challenging the development permit
15 issued in September, they are not.⁸ The Court of Appeal addressed a similar set of facts in *Honig*,
16 *supra*, 127 Cal.App.4th 520, 524. There, the Court had to determine whether the ninety-day
17 statute of limitations ran from San Francisco’s decision to issue a zoning variance, or from its
18 issuance of a building permit six months later. (*Id.* at 524–25.) A petition was filed to challenge
19 the variance and permit; the petition was timely as to the permit, but not as to the zoning variance.

20 *Honig* reasoned that the suit was untimely because “[t]he attack on the building permit is,
21 in reality, nothing more than a challenge to the variance.” (*Id.* at 528; *see also id.* at 524 [“the
22 gravamen of the petition is that the *variance* was improperly granted”].) If the variance were
23 proper, then it would have been undisputedly proper for San Francisco to issue the building
24 permit. Because the variance was subject to the statute of limitations within Government Code
25 section 65009(c)(1)(E), the petition needed to be filed and served within 90 days of the variance.

26 _____
27 ⁸ They may not separately challenge those permits because the City had no choice but to issue the
28 permits in September, given that the deemed-compliance provision was triggered.

1 Likewise here, the Amended Petition is an attack on the City’s June Determination that the
2 Project is eligible for SB-35 approval because it was consistent with the subdivision (a) objective
3 planning standards. (See § 65913.4(b).) In Petitioners’ own words, their suit “is brought . . . to
4 require the City of Cupertino (‘City’) to exercise its ministerial duty to reject a major development
5 proposal . . . due to *non-compliance with* multiple statutory eligibility criteria (‘*objective planning*
6 *standards*’)” (Am. Petition ¶ 1 [emphasis added].)

7 The June Determination is precisely the kind of “determination” for which the clock begins
8 to run under Section 65009(c)(1)(F). (See *Urban Habitat Program v. City of Pleasanton* (2008)
9 164 Cal.App.4th 1561, 1571 [“The 90-day time limit begins to run from the date the decision is
10 made.”].) It is a final determination because after ninety days, the project is “deemed to satisfy”
11 the objective planning standards (§ 65913.4(b)(2)) and because the City cannot subsequently
12 reverse its determination (§ 65913.4(c) [review in days 91–180 cannot “preclude” project
13 “approval”]). Just as in *Honig*, where the permit issued in reliance on the variance, the permit here
14 was issued on the basis of the June Determination. Because the June Determination is governed
15 by the statute of limitations in Government Code section 65009(c)(1)(F), Petitioners had to serve
16 the City within ninety days.

17 They failed to do so. (Request for Judicial Notice, Exhs. 1-3.) Petitioners did not serve the
18 City until almost a month after the statutory deadline. (Request for Judicial Notice, Exh. 1.) The
19 Court should therefore dismiss the Amended Petition with prejudice. (See *Save Lafayette Trees*,
20 2019 WL 493957, at *4 [affirming the trial court’s determination to dismiss the action without
21 leave to amend because “the action was not served on either the city or PG&E [the real party]
22 within the 90-day period for filing and service required by the applicable statute of limitations set
23 forth in section 65009(c)(1)(E), and is thus time-barred”] (internal alterations and quotation marks
24 omitted).)

25 C. **The Filing of the Original Petition Does Not Render the Amended Petition**
26 **Timely.**

27 Petitioners may argue that the Original Petition was timely, and that, because the City
28 appeared in Court in June to oppose Petitioners’ *ex parte* application for emergency writ relief,

1 Petitioners were not required to serve the City within the statutory deadline. They would be
2 wrong.

3 **1. The Original Petition Cannot Satisfy the Statute of Limitations.**

4 The Original Petition did not challenge the June Determination at all. To the contrary, it
5 alleged that the City was obligated to *make* a determination. (Original Petition ¶¶ 1, 3, 29–30, 32.)
6 And Petitioners did not prosecute their Original Petition. They abandoned it, informing the Court
7 that they would instead “file an amended petition challenging the City’s purported eligibility
8 determinations.” (Am. Petition ¶ 25.) The Original Petition alleged that the City had a ministerial
9 duty to review the Project for compliance; it did not challenge the determinations that the City
10 made in reviewing the Project. The only pleading that challenges the June Determination is the
11 Amended Petition, which was filed on October 16 (almost a month after the statute of limitations
12 expired).

13 But even if the Original Petition had met Petitioners’ obligation to “file” an action within
14 the statutory deadline, the statute of limitations in Government Code section 65009(c)(1)(E)-(F)
15 requires service on the City within the deadline. Petitioners never served the Original Petition.
16 (Request for Judicial Notice, Exhs. 2 & 4.) Petitioners did not serve the Amended Petition until
17 mid-October. (Request for Judicial Notice, Exhs. 1 & 4.) Their failure to timely serve the City is
18 fatal to their claims. (*Royalty Carpet Mills*, 125 Cal.App.4th at 1119 [“[E]ven if a petition is
19 timely filed . . . if it is not personally served as required by statute, the petition must be
20 dismissed.”].)

21 **2. The City and Vallco Appeared in Court in June to Oppose Petitioners’**
22 ***Ex Parte* Application, but Were Not Served At That Time.**

23 In late June, in conjunction with the Original Petition, Petitioners notified both Vallco and
24 the City of their intent to seek a writ of mandamus, on an emergency *ex parte* basis, that would
25 compel the City to make a determination of compliance with objective planning standards under
26 SB 35’s subsection (b). Both the City and Vallco filed opposition papers, and appeared at the
27 hearing. In doing so, they did not waive the requirement that the Petition be served. (*See* Code
28 Civ. Proc. § 418.11.)


1 Petitioners withdrew their *ex parte* application once they learned the City had in fact made
2 an affirmative determination of compliance. Petitioners were free to file an amended petition at
3 any time; they did not to do so until October 16.

4 The fact that the City and Vallco had “notice” of Petitioners’ challenge does not excuse
5 Petitioners’ compliance with their statutory obligation to serve the Petition within the limitations
6 period. Informal notice—even informal transmission of the pleadings—does not meet the
7 deadline set forth in Government Code § 65009(c)(1). Formal service was necessary. (*Wagner v.*
8 *City of South Pasadena* (2000) 78 Cal.App.4th 943, 950 [rejecting the argument that service was
9 timely because an attorney representing the city had been faxed a copy of the petition].) Actual
10 notice is not enough; timely *service* of the Petition is required by section 65009(c)(1), because
11 timely service ensures speedy prosecution and resolution of the action. (§ 65009(a).)

12 **CONCLUSION**

13 The statute of limitations required service of the Petition on the City by September 23,
14 2018. Petitioners did not serve the City until October 16. The Petition is barred by the statute of
15 limitations and should be dismissed without leave to amend.

16 DATED: February 13, 2019 COBLENTZ PATCH DUFFY & BASS LLP

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18 By: 
19 _____
20 Katharine Van Dusen
21 Attorneys for Real Party in Interest
22 VALLCO PROPERTY OWNER LLC
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