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

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

15 Petitioners,

16 v.

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

19 Respondents.  
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21 VALLCO PROPERTY OWNER LLC,

22 Real Party in Interest.  
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Case No. 18CV330190

**REAL PARTY IN INTEREST VALLCO  
PROPERTY OWNER, LLC'S  
[PROPOSED] SUPPLEMENTAL BRIEF  
RE: AMENDMENT TO SB 35**

Action Filed: June 25, 2018

1 On July 31, 2019, SB 35 was amended, eliminating two of the grounds of the Petition.  
2 (Assembly Bill No. 101 (“AB 101”), amending SB 35 (Gov’t Code § 65913.4).) First, the  
3 “hazardous waste site” argument is now out of the case. A project proposed for development on a  
4 former hazardous waste, or Cortese list, site is subject to ministerial approval under SB 35 if the  
5 site has been cleared for residential or mixed use by the State Water Resources Control Board (the  
6 “Water Board”).<sup>1</sup> In the 1990s, the Water Board cleared two remediated areas of the Project site  
7 for all potential land uses. Second, residential units and concessions authorized pursuant to the  
8 Density Bonus Law are to be “included in the square footage calculation,” thereby eliminating the  
9 core of Petitioners’ argument that the Project does not satisfy the two-thirds residential criterion.

10 These two issues can no longer be advanced by Petitioners in support of the Petition.

11 **I. The Water Board cleared the Vallco site for residential and mixed uses.**

12 Among SB 35’s “objective planning standards” is that the development not be located on a  
13 “hazardous waste site” on the Cortese list, unless the site has been “cleared” for “residential use or  
14 residential mixed uses.” (Gov’t Code § 65913.4(a)(6)(E).) The amended statute lists the Water  
15 Board among the agencies that can clear a site for residential or mixed uses. (*See id.* (as amended  
16 by AB 101.)

17 When the City determined that the Project satisfied the objective planning standards, it  
18 relied on the Water Board’s clearances to conclude, correctly, that the site was no longer on the  
19 Cortese list. (AR0895-AR0896.) It is now doubly clear that the City got it right: not only is the  
20 site *not* on the Cortese list, but it is *also* eligible for SB 35 streamlining because the Water Board  
21 cleared it for residential and mixed uses. In 1994 and 1999, the Water Board and the Santa Clara  
22 Valley Water District jointly issued site closure letters notifying the owner of the Vallco site –  
23 which had undertaken action to clean up two automotive centers on the site – that, following the  
24 clean-up, no further action was required to remediate the site. (AR1586-AR1589; AR1595-

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26 <sup>1</sup> Previously, SB 35 only referred explicitly to sites cleared by the Department of Toxic Substances  
27 Control (DTSC) as SB-35 eligible.

1 AR1609.) And no additional remediation would be needed even “if land use changes.” (AR1588;  
2 AR1599.) The completed remediation rendered the site “protect[ive]” of “existing” and  
3 “*potential*” beneficial uses of the property. (AR1588 & AR1599 (emphasis added).) No covenant  
4 restricting land use was placed on the property.

5 The City correctly interpreted these letters as “indicat[ing] that there are no restrictions on  
6 changes to the land use at these sites.” (AR0896.) AB 101 leaves no ambiguity that the site is  
7 eligible for SB 35 streamlining in light of these closure letters.

8 **II. Density bonus units are included in the square footage calculation.**

9 Petitioners have argued that the Project dedicates less than two-thirds of its square footage  
10 to residential use, because (according to Petitioners) one must disregard the effect of the Density  
11 Bonus Law in calculating the square footage. (Petitioners’ Opening Br. at 13:4-9.) As Vallico  
12 explained in its opposition, Petitioners’ interpretation was always wrong. AB 101 eliminates any  
13 doubt. As amended, the law provides that “[a]dditional density, floor area, and units, and any  
14 other concession, incentive, or waiver of development standards granted pursuant to the Density  
15 Bonus Law in Section 65915 shall be *included in the square footage calculation.*” (See Gov’t  
16 Code §65913.4(a)(2)(C) (as amended by AB 101) (emphasis added).) The square footage  
17 calculation did, and should, encompass both the “density bonus” units and concessions. The  
18 City’s calculations were correct, and the Petitioners’ demand that the calculation target a  
19 hypothetical “pre-bonus” project should be rejected.

20 **III. AB 101 governs this case.**

21 SB 35, as amended, governs this litigation. The amendments were included in this  
22 session’s budget trailer bill, and took effect on July 31, 2019. (See AB 101, Section 32 (“This act .  
23 . . has been identified as related to the budget in the Budget Bill, and shall take effect  
24 immediately.”).) The legislature defined the amendments as a “clean up” for SB 35, indicating  
25 that the changes clarified existing law. (July 1, 2019 Senate Committee on Budget and Fiscal  
26 Review report, referring to amendments as “SB 35 Clean Up.”)

27 AB 101 clarified, rather than changed, SB 35, and it therefore applies to transactions  
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1 predating its enactment. *See Scott v. City of San Diego* (Aug. 1, 2019) \_\_\_ Cal.Rptr.3d \_\_\_, 2019  
2 WL 3491428, at \*4 (a statute that clarifies existing law “may be applied to transactions predating  
3 its enactment without being considered retroactive because it is merely a statement of what the law  
4 has always been”) (internal quotations omitted). In *Scott*, the Court of Appeal concluded that  
5 amendments to the Fair Employment and Housing Act (FEHA) clarified existing law, in part  
6 because of the legislature’s intent, and in part because the amendments resolved competing  
7 interpretations of the statute. Here, the legislature identified the amendments as “clean up,” not a  
8 change. The amendments are not designed to reinvent SB 35, but rather give clarity to certain  
9 ambiguities that had arisen as jurisdictions began to review and implement projects. The  
10 amendments to SB 35 do not change its scope but rather resolve competing interpretations of the  
11 statute; the law as amended continues to authorize streamlined approval for projects that devote at  
12 least two-thirds of their square footage to residential uses and are not located on hazardous waste  
13 sites. The amendments clarify the framework for local governments to determine whether a  
14 project satisfies those standards.

15 But even if AB101 had changed the law, it would *still* govern this case. The reason has to  
16 do with the nature of writ relief. The right to a writ turns on the existence of a *current* ministerial  
17 duty. “Because mandamus must operate in the present, an intervening change in law may moot or  
18 otherwise make [writ] relief unavailable.” (*See Torres v City of Montebello* (2015) 234 Cal. App.  
19 4th 382, 403 (citing *Consumer Watchdog v. Dep’t of Managed Health Care* (2014) 225  
20 Cal.App.4th 862, 879-80).) Writ relief is not available to direct the City’s compliance with a  
21 superseded statute. (*See Torres*, 234 Cal. App. 4th at 403 (voters’ approval of an initiative  
22 abrogating the law on which a writ action was premised rendered the petitioner’s request for writ  
23 relief unavailable).)

24 In sum, AB 101 eliminates two of the issues in this case, and it does so regardless of  
25 whether it clarifies or changes SB 35. The City cannot be commanded to “comply” with aspects  
26 of a law that have been superseded.

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1 **IV. Conclusion**

2 The Project was properly approved by the City in 2018, and AB 101 makes clear that the  
3 approval was proper. The amendments to SB 35 take the hazardous waste site and Density Bonus  
4 issues out of the case.


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6 DATED: August 9, 2019

COBLENTZ PATCH DUFFY & BASS LLP

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By:   
\_\_\_\_\_  
Katharine Van Dusen  
Attorneys for Real Party in Interest  
VALLCO PROPERTY OWNER LLC

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**PROOF OF SERVICE**

**Friends of Better Cupertino, et al. v. City of Cupertino, et al.**

**STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is One Montgomery Street, Suite 3000, San Francisco, CA 94104-5500.

On August 9, 2019, I served true copies of the following document(s) described as

**REAL PARTY IN INTEREST VALLCO PROPERTY OWNER, LLC'S  
[PROPOSED] SUPPLEMENTAL BRIEF RE: AMENDMENT TO SB 35**

on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY ELECTRONIC SERVICE:** I electronically filed the document(s) with the Clerk of the Court by using the First Legal system. Participants in the case who are registered users will be served by the First Legal system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on August 9, 2019, at San Francisco, California.



Marlene Lopez

**SERVICE LIST**  
*Friends of Better Cupertino, et al. v. City of Cupertino, et al.*  
**Santa Clara County Superior Court Case No. 18CV330190**

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