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9 Kitty Moore, Ignatius Ding and Peggy Griffin

10  
11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **IN AND FOR THE COUNTY OF SANTA CLARA**  
13

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

17 Petitioners,

18 vs.

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

22 Respondents

23 VALLCO PROPERTY OWNER LLC  
24 Real Party in Interest

No. 18CV330190

**PETITIONERS' RESPONSE TO VALLCO  
PROPERTY OWNER LLC'S SURREPLY**

Hearing Date: November 1, 2019  
Time: 9:00 a.m.  
Dept.: 10  
Judge: Hon. Helen E. Williams

Action Filed: June 25, 2018

1 Vallco sought and - with Petitioners' concurrence - was granted leave to file a 15-page  
2 surreply brief to "address" "the merits of the new issues" in Petitioners' reply brief. Vallco had  
3 previously filed supplementary briefs on the merits on three occasions, on June 18, 2019,  
4 August 9, 2019, and September 6, 2019. Petitioners address only a selection of points herein.

5 While availing itself of the opportunity to submit a surreply, Vallco also moves to strike  
6 Petitioners' legitimate arguments rather than address them on the merits. That motion is addressed  
7 in the accompanying opposition.

8 Vallco's surreply improperly seeks to re-argue issues such as the statute of limitations  
9 (§ 65009), principles of mandamus and retroactivity as well as square footage calculation. All  
10 those issues were addressed by Petitioners in *reply* to extensive argument in Vallco's opposition  
11 brief and its supplementary briefing on AB 101 and are not "new issues" within the scope of the  
12 surreply.

13 On the merits, the Vallco project was never eligible for "streamlined, ministerial approval"  
14 under SB35 and pertinent local law. The City should be ordered to revoke its earlier approvals.  
15 In addition, the Court should declare that the purported approvals were void *ab initio* in substance  
16 and procedurally. OB 33, RB 30 - 35.

17 Vallco incorrectly claims that "square footage calculations" were "not mentioned in  
18 [Petitioners'] opening brief." Surreply 1. Square footage ratios were discussed at length in the  
19 opening brief. OB 12 - 23. In response to Vallco's opposition briefing, the reply brief included  
20 an expanded discussion. RB 10 - 16.

21 Vallco's objections to Petitioners' discussion of the HCD Guidelines as an aid to  
22 interpretation of SB35 - expressly sanctioned under SB35 itself - is surprising as Vallco's  
23 opposition relies extensively on *ex parte* communications with HCD staff purporting in effect to  
24 adjudicate matters in the present dispute.<sup>1</sup>

25 Vallco also represents that none of the "new issues" appear in the petition for writ of  
26

27 <sup>1</sup> Health and Safety Code § 50406(e) authorizes HCD to provide "technical advice ... and technical  
28 services as provided in [Division 31 of the HSC ("Housing and Home Finance)]", not to adjudicate  
disputes *ex parte*.

1 mandamus. In fact, the basic facts are set out in great detail in the first amended petition (FAP)  
2 and its exhibits each of which is expressly incorporated by reference as Vallco admits elsewhere.  
3 Surreply 7:10 - 21.

4 **1. Roadway Easements were Not Vacated (RB 22 - 23).**

5 Vallco cites *Citizens for Responsible Equitable Environmental Development v. City of San*  
6 *Diego*, 184 Cal. App. 4th 1032 as teaching that the Streets and Highways Code § 8300 *et seq.* is not  
7 the *exclusive* procedure for vacating the existing roadway easements. AR0055 - AR0057.

8 However, Vallco cites no evidence that the roadway easements were *in fact* vacated under the  
9 Subdivision Map Act. The record does not indicate review of any proposed vacation of easements  
10 by the Planning Commission or the City Council. RB 8. Gov. Code § 65402(a).

11 **2. Vallco's Project Falls Short of Two-Thirds Residential Square Footage Ratio.**

12 As an initial point, calculations of square footage ratios presented in Petitioners' briefing are  
13 based on Vallco's application data and *include* the density bonuses and concessions. AR1401,  
14 AR0928 - AR0930.

15 Vallco misrepresents Petitioners' argument. Petitioners have argued throughout that the  
16 definitions in CMC 19.08.030 must be applied ministerially if local rather than statewide standards  
17 were to be used. This means that enclosed office and retail parking areas *cannot* be excluded from  
18 the square footage count under CMC 19.08.030-F-9-4 (PR0598) as parking "accessory to a  
19 permitted conditional use." No conditional use permit was or could be sought for the SB35  
20 project, so Vallco cannot invoke the CMC *exception* to exclude non-residential parking from the  
21 square footage calculation.

22 Vallco does not dispute that much of its office space exceeds 15 feet in height (RB 12 - 13)  
23 but claims that office space "would" [sic] not be double-counted in the future once commercial  
24 tenants install false ceilings. AR0935. The City's counting rules aim at construction projects,  
25 not hypothetical future fit-out. Only the building *shell* is documented in the application before the  
26 City. Future tenants may prefer the "spare bare" look without fake ceilings.

27 **3. Bridge Easement Bars Residential Use (RB 16 - 18).**

28 Vallco's original square footage calculation did not include the "bridge" area at all.

1 AR1400. PR4601.

2 Vallco’s right to build the “bridge” structure over N Wolfe Road derives solely from an  
3 easement granted by the City as owner of the public road. An easement “represents a *limited*  
4 *privilege* to use the land of another for the benefit of the easement holder’s land, but does not create  
5 an interest in the land itself [citation].” *Kazi v. State Farm Fire & Casualty Co.* (2000) 24 Cal.4th  
6 871 (emphasis added). Here, the easement was created and its limitations defined through a set of  
7 development agreements that were recorded *in their entirety* to create the easement and  
8 circumscribe its scope. Portions of these documents - all stamped to indicate recordation details -  
9 establish the air rights easement (PR4480) and detail the scope of permitted retail uses  
10 (PR4484 - PR4485). Vallco seeks to have it both ways, claiming that the easement in the abstract  
11 still subsists, but that the limitation to “retail” use has lapsed with the development agreement.  
12 This misapplies basic legal principles - an easement is a right *in rem*, and is by definition limited.  
13 *Id.* Has the inconvenient limitation to building “above a plane fifteen (15) feet above ... Wolfe  
14 Road” also lapsed with the development agreement in which it was defined? PR4480.

15 Vallco misquotes the easement language as permitting uses “including **without limit** retail  
16 shops” (emphasis in surreply). In fact, uses are restricted to “retail shops, restaurants and other  
17 uses **found in regional shopping centers.**” PR2223 (emphasis added). Under standard  
18 principles of construction, the detailed definition of “retail uses” prevails over this general  
19 language. PR4484 - PR4485. RB 17.

20 **4. Project Approval is Precluded by Inconsistency General Plan Requirement**  
21 **Mandating Retail or “Active Uses” on Ground Floor. (RB 33)**

22 Vallco does not dispute that Blocks 9 and 10 feature no retail uses, and claims that the  
23 alternative GP requirement for “active use” is either met or can be ignored as it is not an “objective”  
24 standard under SB35. In fact, “active use” is a well-established land use term that is readily  
25 amenable to “objective” ascertainment. Simply put, “active use” refers to establishments such as  
26 beauty salons, dance studios, restaurants and cafe that are typically included in a retail development  
27 alongside traditional retail functions to generate customer traffic. Declaration of Stuart M.  
28 Flashman, ¶¶ 10 - 14. A *residential* lobby serving tenants is not an “active use.” Failure to meet

1 this objective standard precludes approval under both SB35 and the Subdivision Map Act.

2 OB 32 - 35.

3 **5. SB35 Language in Force in 2018 Governs Present Case.**

4 Vallco goes beyond the scope of the surreply to claim that the 2019 version of SB35 should  
5 be projected onto this action filed in 2018. Vallco’s opposition brief had *sub silentio* cited two  
6 provisions (*new* §§ 65913.4(c)(2) and § 65913.4(l)) added to SB35 by SB765. OppB 53:20.  
7 Petitioners’ reply noted that the statute in force at the time of the challenged acts must be applied.  
8 RB 3:20 - 5:18, RB 32. Vallco now complains that Petitioners “failed to make” this axiomatic  
9 point prophetically in their opening brief. Surreply 14:18. Vallco also represents to the Court  
10 that Petitioners themselves had “affirmatively relied on [*new* § 65913.4(c)(2)] to support their own  
11 argument.” The context of OB 3:2 is inconsistent with Vallco’s representation.

12 Vallco’s argument that SB765 clarifies SB35 also fails on the merits. There is a  
13 fundamental conceptual difference between “clarifying” an existing statute, and changing the law  
14 retroactively.<sup>2</sup> If the plain meaning of a statute’s language is clear on its face and makes sense, no  
15 clarification is necessary or allowable. *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 - 737.  
16 A recitation that a statute is intended as a statement of existing law does not constitute a retroactive  
17 enactment. See also *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 470, 473  
18 [while Legislature may modify an existing law, it is for the courts, not the Legislature, to interpret  
19 existing laws]; see also, *National Asian American Coalition, supra*, 33 Cal.App.5th at p. 1012  
20 [citing *McClung*.]

21 **6. Subsequent Statutory Amendments do Not Make Listed Hazmat Site Eligible.**

22 SB35 in 2018 was unambiguous in designating the Department of Toxic Substances Control  
23 as sole agency authorized to clear listed hazmat sites to regain eligibility for *residential* use under  
24 SB35. § 65913.4(a)(6)(E). Adding new agencies to this provision is a legislative change, not a  
25 clarification of ambiguous language.

26 The record before the City in 2018 showed multiple listings of the site for unresolved  
27

28 <sup>2</sup> Cf. Petitioners’ Response to Briefs of Amici Curiae 8 - 9.

1 environmental issues. AR1581 - AR1582 [Geotracker Database Profile of J.C. Penney Store],  
2 AR1586 - AR1589 [Closure letter by Santa Clara Valley Water District]. While there is evidence  
3 in the record that site investigations had been “closed” and the site allowed to continue in *retail* use,  
4 there is no evidence in the record indicating that the site was cleared for any *residential* use by  
5 DTSC. The state of affairs is not affected by changes in listing procedures made by CalEPA -  
6 presumably at Vallco’s request - in 2019. In mandamus, “[t]he petitioner's right and the  
7 respondent's duty are measured as of the time the proceeding is filed. [Citation].” *Lungren v.*  
8 *Deukmejian* (1988) 45 Cal.3d 727, 732.

9 **CONCLUSION**

10 Vallco’s new arguments do not change the situation: the Vallco project was ineligible for  
11 SB35 approval when filed and processed in 2018, and should have been denied. Subsequent  
12 enactments cannot render the project eligible after the fact, nor remedy its multiple failures to  
13 comport with basic requirements of SB35 itself, and to comply with basic “objective” criteria such  
14 as zoning heights and park land dedication requirements. The City’s actions in granting the  
15 project approvals were incorrect in substance and procedure and should be reversed and declared  
16 invalid.

17 DATE: October 15, 2019

18 Respectfully submitted

19 Bern Steves

20 Stuart M. Flashman

21 Attorneys for Petitioners  
22 Friends of Better Cupertino et al.

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26 BY: Bern Steves  
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