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

20 Respondents.

21 VALLCO PROPERTY OWNER LLC,

22 Real Party in Interest.
23

Case No. 18CV330190

**VALLCO PROPERTY OWNER, LLC'S
OBJECTIONS TO, AND REQUEST TO
STRIKE, DECLARATION OF STUART
M. FLASHMAN**

Date: November 1, 2019
Time: 9:00 a.m.
Department: 10

24 **OBJECTIONS TO, AND REQUEST TO STRIKE, DECLARATION OF STUART M.**
25 **FLASHMAN**

26 Lacking any legal or evidentiary basis for their restrictive reading of the term "active
27 uses," in section LU-19 of the General Plan, Petitioners offer the opinion of their attorney, Stuart
Flashman, who claims to be an expert on land use law. So are we all. The declaration constitutes

1 improper opinion on a legal issue. It is also untimely, having been submitted on sur-surreply.
2 And Mr. Flashman, who is counsel of record for Petitioners, cannot testify on substantive issues
3 absent extraordinary circumstances.

4 A. **The Flashman declaration is an attempt to offer an improper expert opinion**
5 **on a legal issue.**

6 Petitioners would like to offer, as *evidence*, the opinion of Mr. Flashman on the meaning of
7 a term used in the General Plan, which is local law in Cupertino. But opinion testimony on the
8 meaning of a term in a statute is inadmissible; interpretation of statutory language is within the
9 exclusive province of the court. (*Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85
10 Cal.App.4th 1179, 1214 ["Interpretation of a statute or regulation is, of course, an issue of law for
11 the court."]; *Birdsall v. Carrillo* (1991) 231 Cal.App.3d 1426, 1429 [interpretation of "ordinances"
12 is "solely an issue of law which this court determines independently"].)

13 The Court should disregard Mr. Flashman's "opinion" on what "active uses" means.
14 (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179 [trial court properly refused to
15 allow witnesses to testify to the meaning of terms in a city ordinance]; *People v. Torres* (1995) 33
16 Cal.App.4th 37, 46 ["[O]pinion evidence on the meaning of a statute is inadmissible."]; *Cty. of*
17 *Yolo v. Los Rios Community College Dist.* (1992) 5 Cal.App.4th 1242, 1257 [rejecting an expert
18 opinion "that the word 'costs' in the statutes before [the court] encompasses . . . 'administrative
19 costs,'" because "it is the ultimate responsibility of the courts to interpret these statutes and say
20 what is the law"].)

21 An attorney may not transmute his arguments into evidence by "swearing" to the
22 argument. It is a "misuse of expert witnesses" to offer the testimony of a purported attorney
23 expert who is actually "advocating, not testifying." (*See Summers v. A.L. Gilbert Co.* (1999) 69
24 Cal.App.4th 1155, 1185 [holding that an attorney expert witness should have been excluded,
25 because he "was advocating, not testifying" and because he "made plaintiffs' closing argument
26 from the witness stand"]; *Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th
27 1155, 1165 [attorney witnesses are properly excluded where they are "advocating, not testifying,"
28 and where they opine on "an ultimate conclusion of law, a point on which expert testimony is not

1 allowed”). Stripped of the trappings of an affidavit, Mr. Flashman’s submission is unsupported
2 argument about how the Court should construe the term “active uses.” (*See* Flashman Decl. ¶ 14
3 [claiming, without support, that “a grocery store, an exercise center, a beauty salon, or a
4 performance center . . . would not qualify as ‘active uses’ unless they were open to the general
5 public.”].) He is advocating, not testifying, and his use of a declaration simply provides additional
6 opportunity to argue beyond the five-page limit authorized for Petitioners’ sur-surreply.

7 **B. The Flashman declaration is untimely.**

8 New evidence is not proper on sur-surreply. Given that “[n]ew evidence is generally not
9 permitted with reply papers,” it is far too late to be offering any evidence – particularly previously
10 undisclosed expert opinion – at the sur-surreply stage. (*See Valentine v. Plum Healthcare Group,*
11 *LLC* (2019) 37 Cal.App.5th 1076, 1089 [trial court erred when it admitted new evidence submitted
12 with a reply brief].) Petitioners could have made their argument about “active uses” in their
13 opening brief, filed ten months ago, in January 2019. And if they had any actual evidence on that
14 issue – as opposed to their attorney’s *ipse dixit* – they should have offered it then. The argument is
15 now waived, and the declaration should be stricken from the record. (*See Neighbours v. Buzz*
16 *Oates Enterprises* (1990) 217 Cal.App.3d 325, 335 n.8 [“Obvious considerations of fairness in
17 argument demand that the appellant present all of his points in the opening brief. To withhold a
18 point until the closing brief would deprive the respondent of his opportunity to answer it or require
19 the effort and delay of an additional brief by permission.”] [quoting 9 Witkin, Cal. Procedure (3d
20 ed. 1985) § 496, p. 484].)

21 **C. The Flashman declaration is improper testimony by an attorney for a party.**

22 Mr. Flashman is not just any attorney; he is the *Petitioners’* counsel. (*See* Petitioners’
23 Notice of Association of Counsel, filed October 4, 2019 [stating that Petitioners “have associated
24 Stuart Flashman, Esq. as counsel of record”]; Flashman Decl. ¶ 1 [Flashman conceding that he is
25 “one of the attorneys representing the Petitioners in this case”].) Yet Mr. Flashman’s declaration
26 makes no showing that his testimony complies with the requirements of Rule 3.7(a) of the Rules
27 of Professional Conduct, including the requirement to obtain “informed written consent” from his
28 client. Mr. Flashman “shall not” act as an advocate in a case in which he testifies absent this

1 consent. Even if he had obtained the consent, moreover, the Court still retains the discretion to
2 disqualify him as an attorney in this case because he seeks both to testify and to serve as an
3 advocate. (Cal. Rules of Prof. Conduct, rule 3.7(a) and comment 3.)

4 Mr. Flashman may regard himself as a land use expert, but he presumably does not view
5 himself as the *only* land use expert. (He may be the only land use attorney willing to express his
6 unusual “opinion” about the meaning of the term “active uses,” but that itself would be grounds
7 for rejecting his opinion.) His declaration is nothing more than advocacy dressed up as an expert
8 opinion.

9 **CONCLUSION**

10 An attorney cannot become an expert witness on the meaning of a statute by swearing his
11 argument in the form of a declaration. The Court should strike the Flashman declaration.

12 DATED: October 24, 2019

COBLENTZ PATCH DUFFY & BASS LLP

13
14 By: 

15 KATHARINE VAN DUSEN
16 Attorneys for Real Party in Interest
17 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 October 24, 2019, I served true copies of the following document(s) described as

**VALLCO PROPERTY OWNER, LLC'S OBJECTIONS TO, AND
REQUEST TO STRIKE, DECLARATION OF STUART M. FLASHMAN**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Coblentz Patch Duffy & Bass LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the Express Network system. Participants in the case who are registered users will be served by the Express Network 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 October 24, 2019, at San Francisco, California.



Marlene Lopez

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Santa Clara County Superior Court Case No. 18CV330190

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