

1 Bern Steves (State Bar #214454)
19925 Stevens Creek Blvd.
2 Cupertino, CA 95014
Telephone: (408) 253 6911
3 Email: bernsteves@californiabizlaw.com

4 Attorney for Petitioners Friends of Better Cupertino,
Kitty Moore, Ignatius Ding and Peggy Griffin
5

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 10/16/2018 2:32 PM
Reviewed By: V. Taylor
Case #18CV330190
Envelope: 2062961**

6 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **IN AND FOR THE COUNTY OF SANTA CLARA**
8

9
10 FRIENDS OF BETTER CUPERTINO, KITT
11 Y MOORE, IGNATIUS DING and PEGGY
12 GRIFFIN

13 Petitioners,

14 vs.

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

18 Respondents

19 VALLCO PROPERTY OWNER LLC

20 Real Party in Interest

No. 18CV330190

FIRST AMENDED VERIFIED PETITION
FOR PEREMPTORY WRIT OF
MANDATE
(CCP §§ 1085, 1089)

21
22 Petitioners Friends of Better Cupertino, Kitty Moore, Ignatius Ding and Peggy Griffin
23 (collectively, “Petitioners”) hereby state and aver as follows:

24 **INTRODUCTION**

25 1. This petition is brought in the public interest to require the City of Cupertino
26 (“City”) to exercise its ministerial duty to reject a major development proposal (“Project”) due to
27 non-compliance with multiple statutory eligibility criteria (“objective planning standards”) as a
28

1 precondition to benefiting from the “streamlined, ministerial approval process” available to
2 eligible projects under the new Gov. Code § 65913.4,¹ commonly known as “SB35.” The City
3 administration, acting without City Council approval, purported to find the development project
4 eligible with respect to each criterion to proceed under SB35.

5 2. SB35 provides that where a development project is in conflict with any “objective
6 planning standards,” the city must provide the development proponent with reasoned objections
7 in writing within 90 days of submission of the project application, failing which eligibility
8 objections are deemed waived. §§ 65913.4(b)(1)(B), 65913.4(b)(2).

9 3. The very structure of SB35 with its listing of numerous “objective planning
10 standards” requires the administering city to determine whether each of the standards is satisfied
11 by an application. SB35 does NOT purport to confer any *discretionary* authority on a city’s
12 *administration* with respect to the making of these determinations.

13 4. Instead of raising and documenting pertinent objections to the Project based on
14 these eligibility criteria, the City administration acting through the then City Manager issued a
15 letter dated June 22, 2018 (“Eligibility Letter”) which improperly and unlawfully purported to
16 find the Project eligible with respect to each eligibility criterion. A true and correct copy of the
17 Eligibility Letter is attached hereto as **Exhibit 1** and incorporated herein by this reference.

18 5. The City administration acting through its acting City Manager issued a further
19 determination dated September 21, 2018 (i.e. just before the end of the 180-day review period
20 from the purported submission date), again improperly purporting to find the Project eligible
21 notwithstanding clear inconsistency with numerous objective standards of general application.
22 A true and correct copy of the September 21, 2018 letter (“Approval Letter”) is attached hereto
23 as **Exhibit 2** and incorporated herein by this reference.

24 **PARTIES**

25 6. Friends of Better Cupertino (FBC) is a 501(c)(3) non-profit organization made up
26 of residents, citizens and qualified electors of the City of Cupertino. FBC works to further the
27

28 ¹ Unmarked statutory references are to the Government Code.

1 interest of all Cupertino residents in maintaining a healthy, humane environment throughout
2 Cupertino with thought-out, lawful development policies carried out and enforced by a fair,
3 neutral administration serving the interests of Cupertino voters and residents.

4 7. Petitioner Kitty Moore is a resident, citizen, taxpayer, and duly registered voter
5 residing in Cupertino. Moore is a civil engineer and artist, has two children who attended
6 Cupertino public schools from K-12, and cares about the environment and community.

7 8. Petitioner Ignatius Y. Ding is a 41-year Cupertino resident and registered voter.
8 He is a retired high technology industry (computer and clean energy) professional and 41-year
9 Cupertino resident living in the Inspiration Hills neighborhood.

10 9. Petitioner Margaret “Peggy” Griffin is a resident, citizen, taxpayer and duly
11 registered voter residing within the City of Cupertino. Petitioner Griffin is a retired software
12 engineer who has resided with her family in Cupertino for 33 years.

13 10. The City of Cupertino (“City”) is a general law city officially represented by the
14 City Clerk.

15 11. Vallco Property Owner LLC (VPO or “Applicant”) is a special-purpose corporate
16 vehicle and is an affiliate of Sand Hill Property Company (SHPC). SHPC has for a number of
17 years been active in attempts to develop the Vallco area in Cupertino - currently a commercial
18 area - into a high-density, mixed-use project with residential and office space. SHPC was the
19 sponsor of an initiative measure, “Measure D” that was intended to facilitate the development.
20 Measure D failed in the 2016 general election. Petitioners do not concede that VPO is a proper
21 party to this action, but have informed VPO of the previous verified petition and propose to
22 serve VPO herewith as a precaution.

23 12. The true names of DOES 1-20 are unknown at this time to Petitioners; however,
24 they allege on information and belief that each of Respondents named as Does 1-20 is
25 responsible for the acts or omissions of each of the other Respondents. Therefore Petitioners
26 sue such Respondents by such fictitious names, and will ask leave of the Court to amend this
27 petition by inserting the true names and capacities of said Does when ascertained.
28

1 **SB35 STATUTORY SCHEME**

2 13. SB35 - now codified in part as Gov. Code § 65913.4 - was approved by the
3 Governor on September 29, 2017 and filed with the Secretary of State the same day. The
4 general aim of SB35 is to simplify the processing of certain eligible residential and mixed-use
5 development projects, subject to the condition that a proportion of units must be classifiable as
6 affordable housing under statutory criteria.

7 14. SB35 provides substantial procedural advantages to eligible developments that
8 include at least two-thirds residential floor space. Specifically, § 65913.4(b) provides for a
9 “streamlined, ministerial approval process” with strict review deadlines 90 days and 180 days
10 from submission of an application. Consistently with this “streamlined, ministerial approval
11 process,” SB35 does not permit or authorize discretionary decision-making by a city
12 administration reviewing a project application.

13 15. Importantly for present purposes, SB35 effectively supersedes local zoning
14 authority by permitting eligible projects to be built on land that “has a *general plan designation*
15 that allows residential use or a mix of residential and nonresidential uses”² even if the land has
16 not been *zoned* for residential or mixed use. 65913.4(a)(2)(C).

17 16. Save for the preemption of *zoning* restrictions in areas already *designated* for
18 residential or mixed residential and nonresidential uses under an existing General Plan, SB35
19 does *not* purport to preempt, and in fact requires compliance with, statewide law, General Plan
20 provisions, local zoning regulations and other provisions of the municipal code as further
21 detailed below.

22 17. Specifically, § 65913.4(b) - (d) mandates “streamlined” review of an eligible
23 application. The review is subject to strict turnaround times, and strictly limited in scope.
24 § 65913.4(c). Streamlining can greatly facilitate the progress of a project compared to the
25 regular local review regime applicable to projects not eligible under SB35. Without
26
27

28 ² Emphasis added.

1 streamlining, such projects would generally require the adoption of a “specific plan” by the city
2 council which in turn would be preceded by an extensive environmental impact review process.

3 18. To be eligible for “streamlining” under SB35, a proposed project must meet a
4 long list of qualifying criteria known as “objective planning standards” (i.e. eligibility criteria)
5 set out in § 65913.4(a)(1)-(10).

6 19. In particular, SB35 requires that “at least two-thirds of the square footage of the
7 development [must be] designated for residential use.” § 65913.4(a)(2)(C).

8 20. Further, a development must *not* be “located on a site that is ... (E) A hazardous
9 waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the
10 Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety
11 Code, unless the Department of Toxic Substances Control has cleared the site for residential use
12 or residential mixed uses.” § 65913.4(a)(6).

13 21. In addition to setting specific eligibility criteria, SB35 *expressly requires* that a
14 development project must comply with, and be reviewed for compliance with, generally
15 applicable statewide and local law, including in particular statutes and regulations pertaining to
16 environmental hazards, existing General Plan and zoning restrictions and conditions, etc.
17 Specifically, a project must be “consistent with objective zoning standards and objective design
18 review standards in effect at the time that the development is submitted to the local government
19 pursuant to [section 65913.4]” save for specific “concessions, incentives or waivers granted
20 pursuant to the Density Bonus Law in Section 65915.” For these purposes, “ ‘objective zoning
21 standards’ and ‘objective design review standards’ mean standards that involve no personal or
22 subjective judgment by a public official and are uniformly verifiable by reference to an external
23 and uniform benchmark or criterion available and knowable by both the development applicant
24 or proponent and the public official prior to submittal.” § 65913.4(a)(5).

25 **PROCEDURAL HISTORY**

26 22. Following the City’s receipt, ostensibly on March 27, 2018, of an application for
27 a major development project requesting “streamlined, ministerial approval” under SB35 as
28

1 detailed below, the last day of the 90-day period for the City to issue a notice of ineligibility
2 under the SB35 eligibility criteria was Monday, June 25, 2018.

3 Despite repeated written reminders by Petitioners, the City administration had not
4 communicated any eligibility objections to the proponent by the end of June 21, 2018, thus
5 prompting Petitioners to notify the City and Real Parties on Friday, June 22, 2018 of Petitioners'
6 intention to apply to the Court for issuance of alternative writ of mandate *ex parte* on
7 Monday, June 25, 2018, the last day of the 90-day statutory period for eligibility review.

8 23. In response to Petitioners' notice, counsel for the City emailed Petitioners counsel
9 at 4:46 pm the same day (Friday, June 22, 2018) advising that the City intended to oppose
10 Petitioners' Application without providing further details. A true and correct copy of that email
11 was attached to as Exhibit 3 to the Declaration of Counsel in Support of Ex Parte Application for
12 Writ of Mandate filed with this court on June 25, 2018 and is incorporated herein by reference.

13 24. Thereafter, the City administration issued an extensive document ("Eligibility
14 Letter") *after hours* on Friday, June 22, 2018 purporting to find the project eligible with respect
15 to each statutory "objective planning standard." This fact was not communicated to Petitioners'
16 counsel that day nor in response to Petitioners' transmission to the City's counsel and Real
17 Parties' counsel of electronic copies of Petitioners' filings throughout the intervening weekend.

18 25. Counsel for the City and counsel for Real Parties handed opposition papers to
19 Petitioners' Counsel in Court on Monday, June 25, 2018. These papers were later filed. Both
20 sets of opposition papers included copies of the Eligibility Letter. This is the first time that
21 Petitioners learned of the Eligibility Letter. In response, Petitioners agreed with opposing
22 counsel to withdraw the *ex parte* application (which was premised on the City's default in failing
23 to make a determination) while reserving the right to file an amended petition challenging the
24 City's purported eligibility determinations.

25 **CUPERTINO GENERAL PLAN**

26 26. A revised General Plan (the "2014 General Plan") was adopted by resolution of
27 the City Council on December 4, 2014.
28

1 27. On October 20, 2015, the City Council by resolution adopted a package of
2 amendments to the 2014 General Plan (“2015 General Plan Amendments”).

3 28. Following the adoption of the 2015 General Plan Amendments, the City Council
4 had not adopted a unified General Plan document or any other General Plan amendment at the
5 time of the filing of the SB35 Application on or about March 27, 2018. Thus, no consolidated
6 General Plan adopted by the City Council of the City of Cupertino was in existence at that time.

7 29. Notwithstanding the fact that no consolidated General Plan document had been
8 adopted by the City Council following its adoption of the (disparate) 2015 General Plan
9 Amendments, the City administration posted and maintained on its principal website (rather than
10 the document archive function managed by an external vendor) a purported “GENERAL PLAN -
11 COMMUNITY VISION 2015 - 2040” at [https://www.cupertino.org/our-](https://www.cupertino.org/our-city/departments/community-development/planning/general-plan/general-plan)
12 [city/departments/community-development/planning/general-plan/general-plan](https://www.cupertino.org/our-city/departments/community-development/planning/general-plan/general-plan) (accessed on
13 July 26, 2018).

14 30. The purported “GENERAL PLAN - COMMUNITY VISION 2015 - 2040”
15 (“Internal Draft Plan”) was never adopted by the City Council. Upon information and belief,
16 the Internal Draft Plan was created by the Planning Department for its own convenience.

17 31. The single-file PDF version of the Internal Draft Plan downloaded from the
18 aforesaid URL on July 26, 2018 is 104,849 KB in size and comprises a total of 531 pages. The
19 checksums for this PDF file are 8ac1c116bed21f2ce33ccfc34978a11d (MD5) and
20 ee1c9e402ea342495311294641d5ef96822862c4 (SHA-1).³

21 32. Not having been adopted by the City Council, the Internal Draft Plan does not
22 reflect any official policy decision by the City Council.

23 33. The Internal Draft Plan has no standing as a General Plan or other enactment or
24 regulation of the City of Cupertino.

25
26
27 ³ With capitalized letters, the checksums appear as
28 8AC1C116BED21F2CE33CCFC34978A11D (MD5) and
EE1C9E402EA342495311294641D5EF96822862C4 (SHA-1)

1 **STATEMENT OF FACTS**

2 **PROJECT APPLICATION**

3 34. On or after March 27, 2018, VPO submitted to the City a purported “Vallco Town
4 Center Project Application pursuant to SB35” (“Application”). The Application is for a large
5 development project (“Project”) including high-density housing and office space and some retail.
6 The total square footage claimed by the Applicant is about 6,910,000 square foot (SF).

7 35. Application documents for the Project were placed on the City’s website. A true
8 and correct copy of the City’s web page listing the application documents and related documents
9 as of October 10, 2018 is attached hereto as **Exhibit 3** and incorporated by this reference.

10 36. The aforesaid web page states that “Sand Hill Property Company [*sic*] filed an
11 application with the City of Cupertino on March 27, 2018 entitled ‘Vallco Town Center Project
12 Application pursuant to SB 35.’ ” Sand Hill Property Company is the parent entity of VPO.

13 37. The exact date on which the Application was submitted to the City is unclear. A
14 true and correct copy of the cover letter submitted with the Application is attached hereto as
15 **Exhibit 4** and incorporated herein by this reference. Surprisingly, the cover letter is undated
16 and is printed without any corporate letter head and without page numbering.

17 38. Several digital files submitted to the City in .pdf format as part of the Application
18 include metadata indicating that those documents were *created* after 5 pm on March 27, 2018,
19 thus indicating that those files could not have been accepted by the City for filing until
20 March 28, 2018. In fact, some files were created after close of business on March **28**, 2018 and
21 thus could not have been accepted for filing until March **29**, 2018.

22 39. Specifically, the following files submitted as part of the Application feature
23 metadata inconsistent with the City’s claim that the application was submitted on
24 March 27, 2018.

1 **PROJECT APPLICATION IS NOT COMPLIANT WITH**
2 **FUNDAMENTAL SB35 ELIGIBILITY CRITERIA**

3 44. The Project fails to meet multiple eligibility criteria under SB35 and is thus not
4 entitled to benefit from the “streamlined, ministerial approval process” under SB35.

5 45. A key requirement for eligibility under SB35 - which aims to stimulate the
6 building housing units - is that “at least *two-thirds of the square footage* of the development
7 [must be] designated for residential use.” § 65913.4(a)(2)(C) (Emphasis added).

8 46. As a statewide statute, SB35 must be interpreted by reference to uniform,
9 statewide standards applicable to construction projects including in particular the California
10 Building Code. To hold otherwise would defeat SB35’s purpose of effecting statewide
11 regulation and would encourage local game-playing through manipulation of municipal
12 regulations by development opponents or proponents in line with the ebb and flow of political
13 influence in each city.

14 47. Section 201.4 of the California Building Code (CBC) provides the following
15 definitions for gross and net floor area:

16 FLOOR AREA, GROSS. The floor area within the inside perimeter of the
17 exterior walls of the building under consideration, exclusive of vent shafts
18 and courts, without deduction for corridors, stairways, ramps, closets, the
19 thickness of interior walls, columns or other features. The floor area of a
20 building, or portion thereof, not provided with surrounding exterior walls
21 shall be the usable area under the horizontal projection of the roof or floor
22 above. The gross floor area shall not include shafts with no openings or
23 interior courts.

24 FLOOR AREA, NET. The actual occupied area not including unoccupied
25 accessory areas such as corridors, stairways, ramps, toilet rooms,
26 mechanical rooms and closets.

27 **PROJECT FAILS TO PROVIDE TWO-THIRDS RESIDENTIAL FLOOR SPACE**

28 48. The Applicant’s own figures disclose that the floor space of residential units
relative to total usable area within the Project falls far short of the two-thirds ratio required for a
project to be eligible for “streamlined, ministerial approval” under SB35.

49. The table submitted with the Applicant's June 19, 2019 letter to the City (eighth page⁴ of Exhibit 7 hereto) gives the following figures for residential floor space (not including parking areas):

Description	Area (in SF)	Remarks
Residential Units	2,714,340 SF	Actual net floor area is substantially less, cf. ¶ 52
Residential Amenities	550,055 SF	
TOTAL RESIDENTIAL AREA (without parking)	3,264,395 SF	(Calculated from above values)

50. The same table gives the total floor area for offices and retail space as follows:

Description	Area (in SF)	Remarks
Office	1,810,000 SF	
Retail	400,000	
TOTAL NON-RESIDENTIAL AREA (without parking)	2,210,000 SF	(Calculated from above values)

51. Based on the Applicant's own figures, the total ratio of residential floor space to total floor space comes to 59.63%, far short of the two-thirds (66.7%) required under SB35. § 65913.4(a)(2)(C):

Description	Area (in SF)	Remarks
Residential Total (including amenities, without parking)	3,264,395 SF	Cf. ¶ 49
Non-Residential Total (without parking)	2,210,000 SF	Cf. previous table
Total Use Area (residential and non-residential)	5,474,395 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	59.63%	3,264,395 SF/5,474,395 SF = 59.63%

⁴ Neither the June 19, 2018 letter nor the internal Exhibit A attached to that letter include page numbering.

52. In fact, the true amount of floor space attributable to actual residential units is substantially less than the figure of 2,714,340 SF asserted in the Application. As the Applicant notes in a footnote to the tables for floor space by block (on the tenth through twenty-first page of **Exhibit 7** hereto), “UNIT AREA INCLUDES UNITS, CORES, CORRIDORS AND LOBBIES.” “Corridors” are expressly excluded from the definition of “Floor area, net” in the CBC. “Cores” and “lobbies” must equally be treated as being excluded from the CBC definition of net floor area.

53. The number of average sizes of each type of residential unit are set out in a table on the second page of the Site Plan, as follows:

RESIDENTIAL PROGRAM TYPES

TRADITIONAL (TRD)				LOFTS (LT1 & LT2)			
	UNITS / SF				UNITS / SF		
	UNIT %	UNIT #	AVE. SIZE (SF)		UNIT %	UNIT #	AVE. SIZE (SF)
STUDIO	53.0%	1,057	423	1 BED	23.7%	67	1,085
1 BED	29.0%	488	654	2 BED	20.5%	68	1,395
2 BED	4.0%	71	1,117	3 BED	37.1%	105	1,705
3 BED	4.0%	71	1,450	4 BED	18.7%	53	2,170
TOTAL	100 %	1,687		TOTAL	100 %	283	

CO-HOUSING (COH)				TERRACES (TRC)			
	UNITS / SF				UNITS / SF		
	UNIT %	UNIT #	AVE. SIZE (SF)		UNIT %	UNIT #	AVE. SIZE (SF)
CO-HOUSING (5 BED)	100 %	50	2,015	2 BED	34.7%	59	1,508
				3 BED	25.9%	44	1,842
				4 BED	39.4%	67	2,177
TOTAL	100 %	50		TOTAL	100 %	170	

TOWNHOUSE (TH1 & TH2)				TOWERS (TWR)			
	UNITS / SF				UNITS / SF		
	UNIT %	UNIT #	AVE. SIZE (SF)		UNIT %	UNIT #	AVE. SIZE (SF)
2 BED TOWNHOUSE	56.3%	45	1,539	2 BED	24.2%	32	1,412
3 BED TOWNHOUSE	32.5%	26	1,923	3 BED	12.1%	16	1,712
4 BED TOWNHOUSE	11.2%	9	2,310	4 BED	56.1%	74	2,255
				FULL FLOOR	7.6%	10	4,646
TOTAL	100 %	80		TOTAL	100 %	132	

*NOTE:
 (1) SEE PROJECT DESCRIPTION FOR INFORMATION RELATED TO AFFORDABLE HOUSING.
 (2) THE RESIDENTIAL TYPES INDICATED IN THESE TABLES ARE DISTRIBUTED AMONGST THE DIFFERENT BUILDING BLOCKS AS NOTED IN THE TABLES BELOW.
 (3) THE DISTRIBUTION OF RESIDENTIAL UNITS IS SHOWN FOR REFERENCE AND SUBJECT TO CHANGE IN SUBSEQUENT BUILDING PERMIT APPLICATIONS.

54. Multiplying the average size by the number of units for each unit category yields a net floor area total of 2,238,738 SF for residential units based on the Applicant’s own average figures. This net figure is 17.52% less than the figure of 2,714,340 SF asserted by the Applicant for purposes of the calculation as noted above. The calculation is shown in the following table.

Residential Square Footage Totals		
Unit #	Avg Size SF	Total SF
1,057	423	447,111
488	654	319,152
71	1,117	79,307
71	1,450	102,950
50	2,015	100,750
45	1,539	69,255
26	1,923	49,998
9	2,310	20,790
67	1,085	72,695
58	1,395	80,910
105	1,705	179,025
53	2,170	115,010
59	1,508	88,972
44	1,842	81,048
67	2,177	145,859
32	1,412	45,184
16	1,712	27,392
74	2,255	166,870
10	4,646	46,460
TOTAL	2,402	2,238,738

55. Even if - contrary to Petitioners' view - SB35 were to be interpreted as allowing *parking space* to be included in the calculation of residential and non-residential totals for purposes of ascertaining compliance with the two-thirds residential floor ratio requirement, the Project fails to meet this standard.

56. The table submitted with the Applicant's June 19, 2019 letter to the City (eighth page⁵ of **Exhibit 7** hereto) gives the total floor space of the residential units *including amenity and parking space* as 4,700,000 SF.

⁵ Neither the June 19, 2018 letter nor the internal Exhibit A attached to that letter include page numbering.

1 57. The Site Plan includes a table of “Areas Excluded from Floor Area Calculation”
 2 on the first page⁶ of **Exhibit 6**. According to that table the following areas were excluded from
 3 the floor area calculation:
 4

Description	Area (in SF)	Remarks
Parking, Utilities, Infrastructure	1,478,000 SF	West Side (per Exhibit 6)
Parking, Utilities, Infrastructure	1,906,000 SF	East Side (per Exhibit 6)
TOTAL NON-RESIDENTIAL PARKING	3,384,000 SF	(Calculated from above values)

10 58. The total Project area dedicated to non-residential uses, including parking, is
 11 calculated as follows:
 12

Description	Area (in SF)	Remarks
Non-Residential Total (without parking)	2,210,000 SF	Cf. ¶ 50
Parking, Utilities, Infrastructure (West and East)	3,384,000 SF	Cf. previous table
TOTAL NON-RESIDENTIAL AREA INCLUDING PARKING	5,594,000 SF	(Calculated from above values)

19 59. The ratio of residential-use area to the total usable area amounts to **45.66%** if
 20 parking is consistently included when computing the totals of residential and non-residential
 21 areas, as shown in the following table.
 22
 23
 24
 25

26 _____
 27 ⁶ The first page appears in low-resolution rasterized form in the original PDF file submitted by
 28 the Applicant to the City and for this reason appears blurry. Petitioners have taken care to
 reproduce in the exhibit the original PDF file as submitted by the Applicant without intervening
 re-scanning or other processing that would have further reduced the image quality.

Description	Area (in SF)	Remarks
Residential Total (including amenities and parking)	4,700,000 SF	Cf. ¶ 56
Non-Residential Total (including parking)	5,594,000 SF	Cf. previous table
Total Use Area (residential and non-residential)	10,294,000 SF	(Calculated from above values)
RATIO OF RESIDENTIAL TO TOTAL	45.66%	4,700,000 SF/10,294,000 SF = 45.66%

Again, the residential ratio falls far short of the SB35 requirement that “two-thirds of the square footage of the development [must be] designated for residential use.”

§ 65913.4(a)(2)(C).

60. On March 28, 2018, a land use consultant retained by the City sent an email to the City’s Assistant City Manager, Aarti Shrivastava, with copy to Piu Ghosh, Principal Planner.

61. The email advised in relevant part:

“... my read of SB35 is that mixed-use projects have to be at least two-thirds residential as measured by total square footage in order to qualify for the streamlined review. Vallco would seem to be well below that based on normal unit sizes ...” (Ellipsis in original.)

62. The Applicant attempts to create an appearance of compliance with SB35 by *including* parking areas when calculating residential totals, but *excluding* parking areas when calculating corresponding non-residential floor areas. This is fundamentally inconsistent with the policy of SB35 which aims to encourage the creation of quality living space, rather than parking lots and non-residential space. Further, allowing developers to count parking space towards totals would perversely encourage the creation of non-living space and thus exacerbate the shortage of quality housing.

PROJECT SITE IS LISTED HAZARDOUS WASTE SITE NOT CLEARED BY DEPARTMENT OF TOXIC SUBSTANCES CONTROL.

63. To be eligible to benefit from the “streamlined, ministerial approval process” under SB35, a development must not be “located on a site that is ... (E) A hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department

1 of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the
2 Department of Toxic Substances Control has cleared the site for residential use or residential
3 mixed uses.” § 65913.4(a)(6).

4 64. In fact, the Project is located on a site which is included on a list of hazardous
5 materials sites compiled pursuant to Government Code 65962.5.

6 65. As of March 27, 2018, the Project site remained subject to at least one § 65962.5
7 listing that had not been cleared by the Department of Toxic Substances Control.

8 66. A Final Environmental Impact Report (FEIR) pertaining to the Project site was
9 certified by the City Council of the City of Cupertino by Resolution 18-084 on
10 September 19, 2018 in connection with the adoption of the “Vallco Area Specific Plan.” A true
11 and correct copy of excerpted pages of the FEIR is attached hereto as **Exhibit 8** and incorporated
12 herein by this reference.

13 67. Page 25 of the FEIR includes the statement: “The revised project is located on a
14 site which is **included on a list of hazardous materials sites compiled pursuant to**
15 **Government Code Section 65962.5; ...**” (Emphasis added.)

16 68. As of March 27, 2018, the Department of Toxic Substances Control had not
17 cleared the Project site for residential use or residential mixed uses. § 65913.4(a)(6).

18 69. A Draft Environmental Impact Report (DEIR) was presented to the City Council
19 as part of the agenda packet for the “Vallco Area Specific Plan.” The DEIR was incorporated
20 by reference in the FEIR which was certified by the City Council. True and correct copies of
21 the cover page and of excerpted pages of the DEIR are attached hereto as **Exhibit 9** and
22 incorporated herein by this reference.

23 70. The DEIR includes the following statements (on page 138, highlighted in
24 exhibit):

25 Several past tenants were listed on various regulatory agency databases,
26 including the California Hazardous Material Incident Report System
27 (CHMIRS) database, Emergency Response Notification System (ERNS)
28 database, Emissions Inventory (EMI) database, HAZNET database, and
Resource Conservation and Recovery Act (RCRA) database.

1 71. The aforesaid DEIR includes as Appendix E a “Phase I Environmental Site
2 Assessment” prepared by “Cornerstone Earth Group” and dated February 26, 2018 (ESA). The
3 ESA in turn includes as internal Appendix E a report of searches of environmental databases
4 conducted by Environmental Data Resources, Inc. (EDR). True and correct copies of the cover
5 page and table of contents of the ESA, and of excerpted pages of the EDR report are attached
6 hereto as **Exhibit 10** and incorporated herein by this reference.

7 72. The excerpted EDR report identifies no fewer than sixty-four environmental
8 database entries pertaining to the Project site (denoted as TP for “target property” in the report.)

9 73. By providing that sites listed pursuant to Section 65962.5 or designated pursuant
10 to Section 25356 must have been cleared *by the Department of Toxic Substances Control*, SB35
11 by its own terms excludes all sites that have not been expressly cleared by the Department of
12 Toxic Substances Control. Neither a city nor other local or state agencies have authority to
13 “clear” a listed or designated site for purposes of SB35 eligibility.

14 **FBC DOCUMENTED NUMEROUS ITEMS OF NON-COMPLIANCE**
15 **WITH SB35 REQUIREMENTS**

16 74. On June 14, 2018, FBC wrote to the City and City Council reminding the City of
17 the impending deadline for denying the Application due to the Project’s failure to comply with
18 SB35 eligibility criteria. The last day of the 90-day review period was **Monday, June 25, 2018**
19 based on the March 27, 2018 filing date claimed by the City. FBC’s letter also drew attention
20 to the need for the City to make organizational arrangements to ensure that a timely notice of
21 denial with appropriate documentation could be issued as required under the SB35 statute.
22 FBC’s letter announced that FBC would provide written materials supporting a denial of the
23 Application on June 18, 2018. A true and correct copy of FBC’s June 14, 2018 letter was
24 attached as **Exhibit 2** to the original verified petition herein (filed June 25, 2018) and is
25 incorporated herein by this reference.

26 75. On June 18, 2018, FBC emailed a further letter to the City and City Council as
27 previously announced, again reminding the City of the need for urgent action, and giving five
28 illustrative examples of non-compliance of the Project with statutory requirements under SB35.

1 The letter was accompanied by three documents (subsequently updated, see *infra*) amounting to
2 some 200 pages including outlines and detailed presentations demonstrating multiple instances
3 of non-compliance of the Project with “objective planning standards” under SB35. A true and
4 correct copy of the letter (without attachments) was attached as **Exhibit 3** to the original verified
5 petition herein (filed June 25, 2018) and is incorporated herein by this reference.

6 76. On June 19, 2018, FBC again wrote to the City, enclosing updated versions of the
7 three attachments sent the previous day. This letter was formally filed with the City in paper
8 form. A true and correct copy of the aforesaid letter was attached as **Exhibit 4** to the original
9 verified petition herein (filed June 25, 2018) and is incorporated herein by this reference.

10 77. Under cover of the June 19, 2018 letter, FBC filed with the City an updated
11 version of the “Application Compliance Topic Chart” sent the previous day. A true and correct
12 copy of the updated chart was attached as **Exhibit 5** to the original verified petition herein (filed
13 June 25, 2018) and is incorporated herein by this reference.

14 78. On June 19, 2018, FBC also submitted an updated version of the “Statute
15 Compliance Chart” sent the previous day. A true and correct copy of the updated “Statute
16 Compliance Chart” was attached as **Exhibit 6** to the original verified petition herein (filed
17 June 25, 2018) and is incorporated herein by this reference.

18 79. Lastly, on June 19, 2018, FBC also submitted an updated version of a detailed,
19 132 page presentation entitled “VALLCO TOWN CENTER SB 35 NONCOMPLIANCE
20 ISSUES.” A true and correct copy of the updated presentation was attached as **Exhibit 7** to the
21 original verified petition herein (filed June 25, 2018) and is incorporated herein by this
22 reference.

23 **PROJECT APPLICATION FAILS TO COMPLY WITH GENERAL**
24 **OBJECTIVE CRITERIA AS REQUIRED BY SB35**

25 80. As noted, in addition to setting specific eligibility criteria, SB35 *expressly*
26 *requires* that a development project must comply with, and be reviewed for compliance with,
27 generally applicable statewide and local law, including in particular statutes and regulations
28

1 pertaining to environmental hazards, existing General Plan and zoning restrictions and
2 conditions, etc.

3 81. Specifically, a project must be “consistent with objective zoning standards and
4 objective design review standards in effect at the time that the development is submitted to the
5 local government pursuant to [section 65913.4]” save for specific “concessions, incentives or
6 waivers granted pursuant to the Density Bonus Law in Section 65915.” For these purposes, “
7 ‘objective zoning standards’ and ‘objective design review standards’ mean standards that involve
8 no personal or subjective judgment by a public official and are uniformly verifiable by reference
9 to an external and uniform benchmark or criterion available and knowable by both the
10 development applicant or proponent and the public official prior to submittal.” § 65913.4(a)(5).

11 82. The Project fails to comply with “objective” standards in multiple respects. The
12 City was under a ministerial duty but failed to ascertain compliance with each of those objective
13 standards.

14 **PROJECT EXCEEDS HEIGHT LIMITS PERMITTED BY ZONING**

15 83. The Project site consists of portions respectively zoned P(Regional Shopping) -
16 Planned Development Regional Shopping, and P(CG) - Planned Development General
17 Commercial.

18 84. The P(Regional Shopping) - Planned Development Regional Shopping zoning
19 designation permits buildings up to three stories and 85 feet tall, as confirmed by Council
20 Actions 31-U-86 and 9-U-90. The maximum building height identified was in conformance
21 with the 1993 General Plan and were identified in the Development Agreement (Ordinance 1540
22 File no. 1-DA-90) at that time as recited in the aforesaid Vallco DEIR, p. 162.

23 85. The P(CG) - Planned Development General Commercial zoning designation
24 permits building heights of up to 30 feet under CMC § 19.60.060.

25 86. Several proposed buildings that are part of the Project exceed the permitted
26 maximum building height of 85 feet, as indicated in the Architectural Plans Part 3, P-0831 and
27 P-0832 submitted by the Applicant.
28

1 87. The Project thus fails to comport with “objective zoning standards” and for this
2 reason cannot be approved under SB35. § 65913.4(a)(5).

3 **PROJECT FAILS TO DEDICATE PARKLAND**

4 88. The Applicant admits in its Project Description that the Project would “generate
5 the need for 12.96 acres of *park space*.” (Emphasis added.) The Applicant references General
6 Plan Policy RPC-1.2 and claims that the requirements under that policy would be met by “2
7 acres of at-grade park space and children’s play area” and “2 acres in two Town Center plazas,”
8 “**and 14 to 22 acres of publicly accessible green roofs on all blocks connected by bridges.**”
9 **Exhibit 5**, page 8.

10 89. In fact, Policy RPC-1.2 of the General Plan adopted on December 4, 2014 is
11 entitled “**Parkland Standards**” (emphasis added). In relevant part, the policy provides the
12 following:

13 Continue to implement a parkland acquisition and
14 implementation program that provides a minimum of three
15 acres per 1,000 residents.

16 90. Further, Policy RPC-2.1, “**Parkland Acquisition**” (emphasis added), provides in
17 part as follows:

18 The City’s parkland acquisition strategy should be based
19 upon three broad objectives:

- 20 • Distributing parks equitably throughout the City;
- 21 • Connecting and providing access by providing paths,
22 improved pedestrian and bike connectivity and signage;
23 and
- 24 • Retaining and restoring creeks and other natural open
25 space areas.

26 **Strategy RPC-2.1.1: Dedication of Parkland.** New
27 developments, in areas where parkland deficiencies have
28 been identified, should be required to dedicate parkland
rather than paying in-lieu fees.

1 91. Taken by themselves and together, the RPC policies simply do not allow roof
2 space - even a so-called “green roof” - to be treated as “parkland.”

3 92. Further, the Application includes a Tentative Map for subdivision purposes.
4 CMC §§ 18.24.030 requires the dedication of land as a condition of approval of a final
5 subdivision.

6 93. By purporting to treat roof “areas” as “parkland” as that term is used in the
7 General Plan, the City administration purported to engage in improper *discretionary* decision-
8 making which is not permitted within the “streamlined, ministerial approval process” mandated
9 by SB35, and in particular violates § 65913.4(a)(5).

10 **PROJECT FAILS TO COMPLY WITH SET-BACK REQUIREMENTS**

11 94. The Project description acknowledges (p. 7) that the Project is subject to a 1:1 set-
12 back requirement under the General Plan.

13 4.1.2 Building Set Backs

14 Stevens Creek Boulevard and North Wolfe Road are considered “Boulevard (Arterial)” per the
15 General Plan Mobility Element Chapter 5, Figure M-2 Circulation Network. The building blocks
16 that front these streets are designed to meet the *General Plan’s required 1:1 set-back plane from*
17 *the existing curb.*
(Emphasis added)

18 95. The Project is non-compliant in that as a matter of interpretation of the General
19 Plan’s intent, the set-back requirements must be calculated by reference to the *final* curb after
20 widening of the adjacent roads required as part of the Project.

21 96. Further, the Applicant has failed to submit, and the City has failed to require the
22 submission of, dimensioned drawings indicating precise and verifiable distances between the
23 existing curb line and the final curb line on the one hand, and the road center line, the property
24 line, and the building line on the other hand.

25 97. Upon information and belief, Block 5 and Block 6 of the Project rise above the
26 1:1 set-back requirement even when ascertained by reference to the existing curb line.

1 **DENSITY BONUS UNITS ARE SEGREGATED**

2 98. The Application relies extensively on the mechanism of the Density Bonus Law
3 (§ 65915) and the City’s Density Bonus Ordinance. Cupertino Municipal Code (CMC),
4 Chapter 19.56.

5 99. CMC § 19.56.050.G.1 requires “affordable units” to be “dispersed throughout the
6 project.”

7 100. The Applicant admits that the total of 623 density bonus units claimed by the
8 Project are “geographically separate.”

9 101. The Applicant’s contention is that Cupertino Municipal Code section
10 19.56.030.F.7 permits bonus units to be geographically separate from the affordable units.
11 However, that section does not purport to supersede the aforesaid dispersal requirement.

12 102. Further, none of the “below market rate” (BMR) units are found in the upscale
13 residential tower portions of Blocks 2, 3, 9 and 10. BMR units are largely relegated to the
14 middle portions of floors 3 - 9 of those blocks which have less desirable views.

15 103. The affordable units are thus *not* “dispersed” under any reasonable understanding
16 of the term as required by CMC § 19.56.050.G.1.

17 **AFFORDABLE UNITS ARE FAR SMALLER IN SIZE THAN COMPARABLE**
18 **MARKET RATE UNITS**

19 104. CMC § 19.56.050.G.2 requires affordable units to be “identical with the design of
20 any market rate rental units in the project with the exception that a *reduction of interior*
21 *amenities* for affordable units will be permitted upon prior approval ...” The City’s *Below*
22 *Market Rate (BMR) Housing Mitigation Program Procedural Manual*, 2015 adopted by City
23 Council Resolution 15-037 on May 5, 2015 of the City Council (“BMR Manual”), p. 5, specifies
24 further that “BMR units shall be comparable to market rate units in terms of unit type, *number of*
25 *bedrooms per unit*, quality of exterior appearance and overall quality of construction” 2.3.4(A)
26 (emphasis added). Further, “BMR unit size should be generally representative of the unit sizes
27 within the market-rate portion of residential project.” 2.3.4(B).
28

1 105. In fact, the average area in square foot (SF) for market-rate “Traditional Studio”
2 (TRD) units is 620 SF. The corresponding figure for BMR studio affordable unit is a mere 388
3 SF.

4 106. Similarly, the average area of one bedroom TRD units is 863 SF, and 1085 SF for
5 one bedroom lofts. The area for corresponding one bedroom BMR (below market rate)
6 affordable units is 528 SF.

7 107. Further, the Project features a broad assortment of two bedroom, three bedroom,
8 four bedroom and even five bedroom market rate units, but no corresponding affordable units at
9 all.

10 108. The Applicant purports to have claimed an exemption from the requirement of
11 CMC § 19.56.050.G.2 that affordable units “shall be identical with the design of any market rate
12 units in the project.” However, that subsection only allows an exception to be made permitting
13 “a *reduction of interior amenities* for affordable units” if required to retain project affordability.
14 The subsection does *not* permit affordable units to be restricted to the two smallest categories
15 (studio and one bedroom).

16 109. Similarly, the Applicant purported to have reserved an open-ended concession
17 under the Density Bonus Law to be relieved from any inconsistency with the statute, and the
18 City’s Approval Letter purports to have granted such a concession in respect of the size of
19 affordable units.

20 110. The City’s purported *allocation* of a concession to address an inconsistency of the
21 Project with CMC § 19.56.050.G.2 - a generally applicable standard - is improper under SB35’s
22 “streamlined, ministerial approval process” because it requires the exercise of discretion by the
23 City.

24 **PROJECT FAILS TO PROVIDE MINIMUM RATIO OF SIXTY PERCENT**
25 **VERY-LOW INCOME UNITS WITHIN AFFORDABLE UNITS**

26 111. The BMR Manual further requires (2.3.B.1) that

27 B. When a development proposes to provide on-site Rental BMR units,
28 the affordability requirements for units shall be as follows:

1
2 1. Sixty percent (60%) of BMR units as very low-income and forty
percent (40%) as low-income.

3 112. The “Vallco Town Center SB 35 Application Project Description,” Part 1, p.15
4 submitted by the Applicant discloses that “the Project will include 1201 affordable units, 360 at
5 the very low income level and 841 at the low income level.” Thus, very-low income units
6 account for only $360/1201 = 29.98\%$, far short of the ratio of 60% required under the City’s
7 mandatory regulations.

8 **GENERAL PLAN ALLOCATION POOL HAD INSUFFICIENT UNITS FOR**
9 **PROJECT TO REACH 2,402 RESIDENTIAL UNITS**

10 113. The City’s General Plan “controls residential development through an allocation
11 system,” as noted in the Vallco Specific Plan EIR (p. 15). However, only about 400 residential
12 units were available in the allocation pool as of June, 2018. Upon information and belief, the
13 number available was similar on or about March 27, 2018 when the Application was filed. As a
14 result, there were insufficient units for the Applicant to reach the density of 2,402 residential
15 units for the total Project, and the number of 2,402 residential units could not properly be
16 approved.

17 **CHARGING ALLEGATIONS**

18 **FIRST CAUSE OF ACTION**

19 **FAILURE TO PERFORM DUTY - ELIGIBILITY DETERMINATION**
20 **(CODE OF CIVIL PROCEDURE § 1085)**

21 114. Petitioners restate the averments of all preceding paragraphs as if set out in full
22 herein.

23 115. The City was and is under a ministerial duty to examine the Application to
24 determine whether or not it complies with each of the “objective planning standards” set forth in
25 SB35. Gov. Code § 65913.4(a)(1)-(10).

26 116. The City administration is capable of ascertaining compliance of the Project with
27 individual SB35 “objective planning standards” by reference to statewide laws and regulations,
28

1 and other external and uniform benchmarks and criteria available and knowable by the City and
2 the public, and without resort to subjective discretionary judgments.

3 117. Review of the Project for eligibility under the “objective planning standards”
4 (eligibility criteria, § 65913.4(a)(1)-(10)) set forth in SB35 is an action which the City was and is
5 under a legal duty to perform. Being objective and ministerial in nature, the City’s eligibility
6 determination falls within the scope of traditional mandamus supervision by this Court under
7 Code of Civil Procedure § 1085.

8 118. The City was under a duty to determine the Project’s eligibility under SB35
9 “objective planning standards” (eligibility criteria). § 65913.4(a)(1)-(10).

10 119. The City’s Eligibility Letter improperly and unlawfully failed to find the Project
11 ineligible under multiple SB35 “objective planning standards.”

12 120. The City’s Eligibility Letter improperly and unlawfully failed to find the Project
13 ineligible for failing to allocate two-thirds (2/3) of square footage to residential use.

14 121. The City’s Eligibility Letter improperly and unlawfully failed to find the Project
15 ineligible for including hazardous waste sites that listed pursuant to § 65962.5 and/or a
16 hazardous waste sites designated by the Department of Toxic Substances Control pursuant to
17 § 25356 of the Health and Safety Code and not cleared for residential use or residential mixed
18 uses by Department of Toxic Substances Control. § 65913.4(a)(6)(E).

19 122. Petitioners notified and advised the City of the Project’s non-compliance under
20 SB35’s two-thirds requirement, the fact that the project site includes hazardous waste locations,
21 and numerous other items of non-compliance in extensive and detailed written communications.
22 These communications attached as **Exhibit 2** through **Exhibit 7**, inclusive to the original
23 Verified Petition for Alternative Writ of Mandate (filed with this Court on June 25, 2018) which
24 are incorporated herein by this reference.

25 123. Upon determining that the Project is “in conflict with any of the objective
26 development standards” (eligibility criteria) the City was under a duty to provide the Applicant
27 with written documentation of which standards the Project conflicts with, and an explanation of
28

1 the reasons. Gov. Code § 65913.4(b)(1). These items had to be provided to the Applicant
2 within 90 days for a development of more than 150 housing units.

3 Gov. Code § 65913.4(b)(1)(B).

4 124. Under a duty to notify the Applicant of multiple items of non-compliance with
5 SB35 eligibility criteria, the City purported to find the project eligible in each respect as detailed
6 in the Eligibility Letter attached hereto as **Exhibit 1**.

7 125. Allowing a severely non-compliant project to proceed by intentionally failing to
8 object to and document multiple aspects of non-compliance with eligibility criteria set out with
9 particularity in SB35, as well as failing to conform to general requirements under the existing
10 General Plan and Cupertino Municipal Code imposes on the citizens of Cupertino a massive
11 project that is *outside* the carefully delineated parameters of SB35 while at the same time
12 evading conventional discretionary review under the control of the City Council. This outcome
13 results in unreviewed, hasty commitment to a massive building project without thorough review
14 of its wider impact, and makes a mockery of both SB35 and traditional review procedures.

15 **SECOND CAUSE OF ACTION**
16 **FAILURE TO PERFORM DUTY - PROJECT APPROVAL**
17 **(CODE OF CIVIL PROCEDURE § 1085)**

18 126. Petitioners restate the averments of all preceding paragraphs as if set out in full
19 herein.

20 127. The City was under a duty to determine the Project's compliance with general
21 provisions of state and local law.

22 128. Specifically, the City was and is under a duty to ascertain that the Project is
23 "consistent with objective zoning standards and objective design review standards in effect at the
24 time that the development is submitted to the local government pursuant to [section 65913.4]"
25 save for specific "concessions, incentives or waivers granted pursuant to the Density Bonus Law
26 in Section 65915." § 65913.4(a)(5).

1 5. For such other relief as the Court may deem just and proper.

2 Dated: October 16, 2018

6 [SIGNATURE]

7
8 Bern Steves
9 Attorney for Petitioners
10 Friends of Better Cupertino
11 Kitty Moore, Ignatius Ding and
12 Peggy Griffin
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, Caryl Gorska, am a resident and registered voter in Cupertino. I am a member of Friends of Better Cupertino, and am authorized to make this verification on their behalf as well. I have read the foregoing First Amended Verified Petition for Peremptory Writ of Mandate and am familiar with the matters stated therein. All facts stated in the Amended Petition are true of my own personal knowledge, save as otherwise indicated. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on October 16, 2018 at Cupertino, California.

[SIGNATURE]

Caryl Gorska