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

9 FRIENDS OF BETTER CUPERTINO,
10 KITTY MOORE, IGNATIUS DING and
11 PEGGY GRIFFIN
12 Petitioners,
13 vs.
14 CITY OF CUPERTINO, a General Law City;
15 GRACE SCHMIDT, in her official capacity as
16 Cupertino City Clerk, and DOES 1-20
inclusive,

17 Respondents

18 VALLCO PROPERTY OWNER LLC

19 Real Party in Interest
20

No. 18CV330190

**PETITIONERS' CASE
MANAGEMENT STATEMENT**

Date: December 14, 2018
Time: 10:00 a.m.
Dept.: 10

**ASSIGNED FOR ALL PURPOSES TO:
JUDGE HELEN E. WILLIAMS, DEPT. 10**

21 **TO THE COURT:** As ordered by the Court, counsel for all parties have engaged in a
22 meet-and-confer process to identify a set of records as basic reference herein. Unfortunately,
23 the parties were unable to reach agreement. The issue is addressed in separate briefing papers.

24 In the course of the meet-and-confer process, the parties agreed that it would be
25 counter-productive to attempt to reach agreement on a joint CMC statement. Accordingly, it
26 was agreed that separate statements would be submitted along with the briefing papers as
27 ordered by the Court.
28

1 Counsel for Petitioners now submit this CMC statement for the Court’s consideration.

2 **1. STAY REQUESTED to Address Real Party’s Objection to New City**
3 **Council.**

4 Two new members, Liang Chao and Jon Willey, were elected to the Cupertino City
5 Council and sworn in on December 6, 2018. The same day, Vallco’s counsel wrote to the
6 Cupertino City Attorney, Ms. Rocio Fierro, demanding that these duly elected City Council
7 members as well as incumbent City Council member (and new Mayor) Steven Scharf recuse
8 themselves from any involvement in controlling the City’s litigation in light of their earlier
9 public opposition to Vallco’s plans. **Regrettably, neither counsel for Real Party Vallco nor**
10 **counsel for the City have not so far copied this letter to Petitioners’ counsel herein.**

11 It is clearly the expectation of Real Party Vallco that the City’s further handling of the
12 matter could be significantly affected depending upon upcoming decision-making by the new
13 City Council.

14 **In the circumstances, Petitioners respectfully request that the present action be**
15 **stayed for a short period (perhaps 10 days), and no further steps be taken, so as to allow**
16 **the City Council to seek legal advice.**

17 It would be profoundly unfair, and inconsistent with fundamental notions of democracy,
18 for Real Party to be allowed to take advantage of the temporary deadlock and delay occasioned
19 by the City Council’s diligent response to Vallco’s demand in order to press forward with
20 procedural moves in this Court.

21 Nor can it be presumed that the City administration acting under its own direction is
22 somehow “neutral” and unbiased. Petitioners’ challenge herein is specifically premised on the
23 fact that the City’s administration overlooked numerous points of statutory non-compliance to
24 find the project eligible and to grant approval.

25 **2. Identification of parties and counsel, including for trial, and status of service**
26 **of process on all named parties.**

27 The first amended petition for writ of mandate pursuant to CCP § 1085 was filed and
28 personally served on October 16, 2018.

Trial counsel for Petitioners will be the same attorney listed on the caption page.

1 **3. Status of Pleadings**

2 The verified first amended petition (VFAP) has been served on the City and on Real
3 Party Vallco. Both have since filed answers.

4 The City’s answer was filed at 8:48 am on November 30, 2018, i.e. less than one hour
5 before the previous case management conference. Despite this, the filing was not mentioned in
6 the course of the case management conference.

7 The petition specifically states that *traditional* mandate is sought. See petition, ¶ 117.
8 Petitioners’ counsel also emphasized this position during the last CMC before this Court and
9 noted that no administrative record would need to be prepared. This notwithstanding,
10 Respondents’ counsel insist in their email of November 19, 2018 and in their present CMC
11 statement on implicitly mis-characterizing the petition as sounding in *administrative* mandate
12 and announcing that the City’s answer was not due until after the administrative record had been
13 filed. However, a respondent cannot simply re-frame a petition for its own convenience and
14 choose not to file an answer when due. Petitioners reserve the right to enter Respondents’
15 default.

16 **4. Brief factual statement of the case.**

17 Petitioners contend that:

- 18 (1) The City administration improperly failed to find a development project *ineligible* for the
19 “streamlined, ministerial approval process” under Gov. Code § 65913.4 (aka SB35). In
20 particular, the project location is includes hazardous waste sites that are listed pursuant to §
21 65962.5 and/or hazardous waste sites designated by the Department of Toxic Substances
22 Control pursuant to § 25356 of the Health and Safety Code and not cleared for residential use
23 or residential mixed uses by Department of Toxic Substances Control. The project is thus
24 simply ineligible under SB35. § 65913.4(a)(6)(E). Petition ¶ 121.
- 25 (2) The City administration improperly failed to find the project incompatible with multiple
26 objective standards. For example, the maximum building height for the project site is 85
27 feet, yet multiple buildings are considerably higher (about 250 feet). Petition ¶¶ 84 - 86.
28 SB35 does NOT purport override general planning standards such as building heights.

1 **5. Statement of settlement discussions and proposed means of alternative**
2 **dispute resolution.**

3 The parties have not held any settlement discussions.

4 **6. Identification of any jurisdictional issues.**

5 None.

6 **7. Identification of related cases.**

7 Petitioners do not seek consolidation or coordination with the case of *Friends of Better*
8 *Cupertino, et al. v. City of Cupertino, et al.* (Santa Clara County Case No. 18CV337015).

9 Petitioners understand that that case is currently inactive by agreement between the
10 parties.

11 **8. Identification of any intended law and motion matters such as an application**
12 **for a temporary restraining order or preliminary injunction or to augment**
13 **the administrative record.**

14 As noted above, the petition sounds in *traditional* mandamus. Accordingly, no
15 administrative record need or should be prepared. Any pertinent documents can and should be
16 presented in the form of requests for judicial notice (RJNs) and/or affidavits.

17 Respondents have chosen to issue a demolition permit notwithstanding the pendency of
18 the present action concerning the eligibility and statutory compliance of the project, and
19 demolition of certain structures on the project site took place.

20 Petitioners may seek injunctive relief to ensure that the ineligible and non-compliant
21 project does not proceed.

22 **9. Proposed briefing schedule, including length of briefs, or information as to**
23 **why a briefing schedule is considered premature.**

24 As noted, the action is in *traditional mandamus*.

25 Respondents suggest that Petitioners' opening brief be due 45 days after the end of the
26 proposed 10-day stay herein.

27 The City and Real Party appear to agree that opposition briefs by Respondents and Real
28 Party would be due 30 days following Petitioners' brief.

1 Petitioners' reply brief to both opposition filings (for which a total of 50 pages of briefing
2 has been requested, likely accompanied by extensive additional papers, RJN etc.) would be due
3 40 days after the opposition.

4 As to page lengths, Petitioners' opening brief should be no longer than 30 pages given
5 the multiplicity of issues. Respondents' and Real Party's briefs should be no longer than 25
6 pages each, which may *NOT* be allocated between them.

7 Petitioners' reply brief - dealing with a total of 50 pages of opposition briefing - should
8 be no more than 30 pages in length, provided that Petitioners reserve the right to request the
9 Court's permission to file a longer brief if necessitated by the substance of Respondents' and
10 Real Party's respective opposition filings.

11 **10. A proposed trial or hearing date.**

12 Assuming that Respondents' and Real Party's answers are received by November 30,
13 2018, briefing would be completed on March 30, 2018 based on the briefing schedule above. A
14 hearing date could then be scheduled thereafter in the Court's discretion.

15 **11. Any other pertinent information or issues affecting case processing.**

16 None.

17 DATED: December 10, 2018

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22 Bern Steves
23 Attorney for Petitioners
24 Friends of Better Cupertino
25 Kitty Moore, Ignatius Ding and
26 Peggy Griffin
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