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7
8 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9
10 **IN AND FOR THE COUNTY OF SANTA CLARA**

11 FRIENDS OF BETTER CUPERTINO,
KITTY MOORE, IGNATIUS DING, and
12 PEGGY GRIFFIN,

13 Petitioners,

14 v.

15 CITY OF CUPERTINO, GRACE SCHMIDT,
and DOES 1-20 inclusive,

16 Respondents.

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20 VALLCO PROPERTY OWNER LLC, and
DOES 1-20 inclusive,

21 Real Party in Interest.
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Case No.: 18CV330190

**BAY AREA COUNCIL, ET AL.'S NOTICE
OF APPLICATION AND APPLICATION
FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF REAL PARTY IN
INTEREST; BRIEF OF AMICUS CURIAE**

[Filed concurrently with the Declaration of
Christopher A. Rheinheimer.]

Date: October 4, 2019
Time: 9:00 a.m.
Courtroom: 10
Judge: Hon. Helen E. Williams

Action filed: June 25, 2018

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2. Bay Area Housing Action Commission
3. First Community Housing
4. Habitat for Humanity
5. Housing Leadership Council San Mateo County
6. Housing Trust Silicon Valley
7. Joint Venture Silicon Valley
8. Nonprofit Housing
9. The Redwood City-San Mateo County Chamber of Commerce
10. Silicon Valley At Home
11. Silicon Valley Leadership Group
12. The Silicon Valley Organization
13. YIMBY Action

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1 NOTICE OF APPLICATION AND APPLICATION

2 TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 The Bay Area Council, Joint Venture Silicon Valley, Silicon Valley Leadership Group,
4 The Silicon Valley Organization, Silicon Valley At Home, YIMBY Action, San Francisco
5 Housing Action Coalition, Housing Leadership Council of San Mateo County, Housing Trust
6 Silicon Valley, Non-Profit Housing Association of Northern California, First Community
7 Housing, and Habitat for Humanity EastBay/Silicon Valley file this application for leave to file a
8 brief *amicus curiae* in support of Real Party in Interest Vallco Property Owner, LLC, in the above-
9 captioned case. The proposed *amicus* brief is attached to this motion. It is 10 pages long, and its
10 consideration thus will not unduly burden the Court or the parties.

11 Applicant Bay Area Council is a business-sponsored, public policy advocacy organization
12 for the nine-county Bay Area. The Council proactively advocates for a strong economy, a vital
13 business environment, and a better quality of life for everyone who lives here. Its membership
14 includes an array of prominent businesses with longstanding ties to the region. The Council works
15 with local political and civic leaders to address issues of importance, focusing on policies that
16 promote the economic health of the region.

17 Applicant Joint Venture Silicon Valley is a business organization that provides analysis
18 and action on issues affecting the region's economy and quality of life. The organization brings
19 together established and emerging leaders—from business, government, academia, labor and the
20 broader community—to spotlight issues and work toward innovative solutions.

21 Applicant Silicon Valley Leadership Group, founded by David Packard of Hewlett
22 Packard, is a diverse public policy association of more than 360 dynamic companies shaping the
23 future innovation economy of Silicon Valley, the Bay Area, and the nation. Through collaboration
24 between a broad range of companies, the organization works to find solutions to issues
25 effecting the Bay Area's economic vitality and quality of life.

26 Applicant The Silicon Valley Organization is the region's largest chamber of commerce
27 and is made up of a community of 1,200 businesses and 300,000 employees throughout greater
28 Silicon Valley. By undertaking activities such as community engagement, economic development,

1 and advocacy, the organization works toward making Silicon Valley the best place to live, work,
2 and do business.

3 Applicant Silicon Valley At Home is a non-profit and member organization that advocates
4 for policies, programs, land use, and funding that lead to an increased supply of affordable
5 housing. The organization educates elected officials and the community about the need for
6 housing and the link between housing and other quality of life outcomes, including education,
7 health, transportation, and the environment.

8 Applicant YIMBY Action is an organization that empowers community members to
9 advocate for affordable and market rate housing, with the goal of bringing down the cost of
10 housing in opportunity-rich cities. Its methods for bringing about improved housing conditions
11 include direct engagement with community members, political activism, and education of all
12 citizens about the causes of and solutions to the current housing crisis.

13 Applicant San Francisco Housing Action Coalition is a member-supported non-profit
14 organization that advocates for building new well-designed, well-located housing at all levels of
15 affordability. By connecting various stakeholders, the organization has created a strong alliance of
16 businesses, organizations, and individuals who work together to support smart housing policy,
17 transit-oriented development, and creative solutions to keeping housing affordable in San
18 Francisco.

19 Applicant Housing Leadership Council of San Mateo County is a membership organization
20 that was founded to build a network of people who support the development of new housing,
21 particularly affordable housing, and to advocate for policies that address the root causes of the
22 housing shortage. The organization works with its partners to preserve and expand the range and
23 supply of adequate, accessible, and affordable housing for residents and workers of San Mateo
24 County.

25 Applicant Housing Trust Silicon Valley is a non-profit community loan fund based in San
26 Jose that works to improve quality of life for low-income people in the 13-county greater Bay
27 Area by increasing affordable housing opportunities. Since 2000, the organization has invested
28 \$183 million in programs that help everyone from the homeless to renters to first-time

1 homebuyers—creating more than 17,000 affordable housing opportunities serving over 30,000
2 individuals.

3 Applicant Non-Profit Housing Association of Northern California consists of 750
4 affordable housing developers, advocates, community leaders and businesses, working to secure
5 resources, promote good policy, educate the public and support affordable homes as the
6 foundation for thriving communities. In addition to legislative advocacy work, it offers technical
7 assistance, public policy development, professional training, networking opportunities, and
8 resources for housing policy analysts, advocates, and activists.

9 Applicant First Community Housing is a non-profit corporation created to develop,
10 construct, and manage affordable housing for San Jose and the greater San Francisco Bay Area.
11 Since its inception in 1986, First Community Housing has developed housing for over 1400
12 households, focusing on low-income populations including individuals, families, senior citizens,
13 and those with special needs.

14 Applicant Habitat for Humanity East Bay/Silicon Valley is a non-profit organization that
15 promotes housing by leveraging volunteers to build homes, which are then sold to low-income
16 families on affordable mortgages. Through a variety of innovative programs and services, Habitat
17 for Humanity empowers families to change their lives while strengthening local communities.

18 Applicant The Redwood City-San Mateo County Chamber of Commerce promotes
19 economic prosperity for its community through business representation and advocacy with
20 emphasis on information, communication and education:

21 These organizations (together, "Applicants" or "*Amici*") recognize the severe negative
22 impact of California's worsening housing crisis on Bay Area businesses, communities, and
23 residents. This case involves recent legislation, the efficacy of which will depend significantly
24 upon its treatment by the courts of this state. If allowed to function as intended, SB 35 has the
25 potential to propel the kind of responsible, affordable development of which Cupertino and the
26 greater Bay Area are in desperate need. Due to the law's new status and the likelihood of future
27 litigation, the outcome of this case will set a precedent that is certain to have significant
28 consequences for the region and the state.

1 To this end, superior courts have discretion to accept amicus briefs. (*See In re Marriage*
2 *Cases* (2008) 43 Cal.4th 757, 791 n.10 ["the superior court, in exercising its traditional broad
3 discretion over the conduct of pending litigation, retain[s] the authority to determine the manner
4 and extent of these entities' participation as *amici curiae* that would be of most assistance to the
5 court."].) As the California Supreme Court has explained, "[a]micus curiae presentations assist the
6 court by broadening its perspective on the issues raised by the parties [T]hey facilitate
7 informed judicial consideration of a wide variety of information and points of view that may bear
8 on important legal questions." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 n.14.)


9 Here, the proposal, passage and implementation of SB 35 have been carefully monitored
10 by Applicants and their membership, which includes many of the Bay Area's largest employers. It
11 is a matter of utmost personal and economic concern to the leaders of these companies and
12 organizations that their employees are able to secure reasonable and affordable housing that
13 adequately provides for their needs. Applicants have thus experienced firsthand the effects of the
14 housing crisis on Bay Area residents and continue to contemplate the viability of potential
15 solutions. Applicants' fundamental understanding of the link between housing, economic
16 prosperity, and social equity make them uniquely suited to weigh in on the interpretation and
17 application of this critical piece of legislation.

18 Accordingly, Applicants seek to employ their knowledge and experience to assist the Court
19 in the proper interpretation of SB 35. Applicants respectfully request leave to appear and file the
20 attached brief as *amicus curiae*.

21 DATED: August 15, 2019

HANSON BRIDGETT LLP

22
23
24 By:


25 Kristina D. Lawson
26 Christopher A. Rheinheimer
27 Cole A. Benbow
28 Attorneys for Amicus Curiae BAY AREA
COUNCIL, ET AL.

1 **BRIEF OF AMICUS CURIAE BAY AREA COUNCIL, ET AL.**

2 **I. INTRODUCTION AND SB 35 BACKGROUND**

3 California is in the midst of an unprecedented affordable housing crisis that negatively
4 impacts the well-being of all state residents. Without significant policy changes, the crisis can only
5 be expected to worsen. The majority of jurisdictions are falling woefully short of their state-
6 mandated affordable housing targets. (Rheinheimer Decl., Ex. 12 at 5 [Perry, et al., *Missing the*
7 *Mark*, Next Ten, 5 (Feb. 2019)].) Analysts estimate that at the current rate, it will take many
8 jurisdictions decades—and in some cases, more than a century—to meet their affordable housing
9 goals. (*Id.*) Overall, the state presently builds less than half of the 180,000 units needed annually
10 just to keep up with population growth, compounding the already enormous housing gap.
11 (Rheinheimer Decl., Ex. 8 [Matt Levin, *5 Reasons California's Housing Costs Are So High*,
12 KQED News (May 4, 2018)].) Since the 1970s, the state has added 6.7 million households and
13 19 million people, but only 6.2 million homes, resulting in a housing shortfall of between one
14 million and 2.5 million homes. (Rheinheimer Decl., Ex. 9 at 10 [McKinsey Global Institute, *A*
15 *Tool Kit to Close California's Housing Gap*, 2 (Oct. 2016)].)

16 As a result of the shortage, California housing prices have risen exponentially. In May
17 2019, the median housing price set a new record at \$611,190—more than 2.5 times the national
18 average. (Rheinheimer Decl., Ex. 14 at 8 [California Association of Realtors, *California Housing*
19 *Market Update, May 2019*, 8 (May 2019)].) Rental prices are similarly exorbitant, with an average
20 apartment currently renting for approximately \$2,624 per month in Oakland, \$2,730 in San Jose,
21 and \$3,609 in San Francisco. (Rheinheimer Decl., Ex. 21 [*Rental Market Trends*, Rentcafe.com].)
22 It is estimated that the housing shortage costs the state between \$143 and \$233 billion per year.
23 (Rheinheimer Decl., Ex. 9 at 14 [McKinsey Global Institute, *A Tool Kit to Close California's*
24 *Housing Gap*, 6 (Oct. 2016)].)

25 While dismaying in and of themselves, these statistics do not tell the whole story. The
26 decreasing availability of reasonably affordable places to live has a drastic effect on communities
27 throughout the state, and in particular across the Bay Area. Statewide, more than 20 percent of
28 households spend over half their income on housing. (Rheinheimer Decl., Ex. 15 [Sara Kimberlin,

1 *Californians in All Parts of the State Pay More Than They Can Afford for Housing*, California
2 Budget and Policy Center (Sept. 2017)].) Stress caused by rising rents has been linked to
3 hypertension and depression, while overcrowded homes increase their residents' risk of respiratory
4 illness. (Rheinheimer Decl., Ex. 13 [Rachel Swan, *Public health problems in Oakland linked to*
5 *housing crisis*, San Francisco Chronicle (Sept. 1, 2016)].) The high cost of housing forces working
6 families into difficult dilemmas over how to spend the diminishing share of their wages not used
7 to pay rent. Many Californians have relocated farther from their workplaces, resulting in long
8 commutes that diminish the amount of time they spend with their families and contribute to ever-
9 worsening traffic. (Rheinheimer Decl., Ex. 7 [Mac Taylor, *California's High Housing Costs:*
10 *Causes and Consequences*, Legislative Analyst's Office (March 17, 2015)].) Others have left the
11 state altogether. (Rheinheimer Decl., Ex. 2 [Brian Uhler & Justin Garosi, *California Losing*
12 *Residents Via Domestic Migration*, Legislative Analyst's Office (Feb. 21, 2018)].) Homelessness
13 has risen dramatically. (Rheinheimer Decl., Ex. 1 [Alejandro Lazo, *Homelessness Grows in*
14 *California Despite New Government Spending*, Wall Street Journal (June 7, 2019)].)

15 The fundamental cause of the crisis is simple—housing production, and particularly
16 affordable housing production, has remained woefully behind demand for years. However, despite
17 its destructive consequences, the truth is that the housing shortage is a choice. The collective
18 decision to restrict housing production has been made by myriad stakeholders throughout the state,
19 particularly local governments. By declining to approve and promote the development of new
20 housing at all affordability levels, California cities are failing their communities.

21 Nonetheless, the purpose of this brief is not to assign blame to particular parties, nor does
22 it argue that local jurisdictions' opposition to affordable housing is necessarily motivated by bad
23 faith or ill will. To the contrary, "[l]ocal elected leaders often have concerns and local incentives
24 that may be rational within the confines of their jurisdictions, but when taken together across the
25 state, result in problematic macro-economic outcomes and only exacerbate the state's dire housing
26 crisis." (Rheinheimer Decl., Ex. 12 at 24 [Perry, et al., *Missing the Mark*, Next Ten, 24 (Feb.
27 2019)].) As explained in a recent report by the McKinsey Global Institute,

28 Under California's administrative system, there is broad consensus that the state

1 needs more housing—but minimal incentive for cities to allow developers to build
2 it. Instead of vying for new residents as a source of revenue and dynamism, many
3 cities are concerned about the impact new residents could have on municipal finances
4 and aging infrastructure. Residents who bought their homes when the city looked a
5 certain way want it to stay that way and may oppose development because of its
6 impact on parking, traffic, schools, sight lines, or community character. City council
7 members who make land-use decisions respond to homeowner voices, creating an
8 environment where it is easier to say “no” to housing than “yes.”

6 (Rheinheimer Decl., Ex. 9 at 33 [McKinsey Global Institute, *A Tool Kit to Close California's*
7 *Housing Gap*, 25 (Oct. 2016)].) But, regardless of their intentions, the lengthy history of new
8 housing in California (or the lack thereof) makes clear that local jurisdictions must be made to
9 approve more housing, more quickly.

10 SB 35 was passed for this express purpose in 2017. (*See* Cal. Gov't Code § 65913 ["It is,
11 therefore, necessary to enact this chapter and to amend existing statutes which govern housing
12 development so as to provide greater encouragement for local and state governments to approve
13 needed and sound housing developments."].) Part of a slate of bills aiming to combat the housing
14 crisis, SB 35 streamlines the approval process for certain projects by mandating that cities have no
15 more than 90 days to identify deficiencies in a qualifying project application. (Gov. Code §
16 65913.4(b)(1)(B).) If the city does not identify deficiencies within 90 days, the project is deemed
17 approved. (Gov. Code § 65913.4(b)(2).) Qualifying projects must, among other requirements,
18 include a certain percentage of units for low or very low income residents. The exact percentage
19 depends on the extent to which the jurisdiction has met its affordable housing goals for the current
20 cycle, as determined by the Regional Housing Needs Assessment ("RHNA"). In the case of
21 Cupertino, which is well behind its low and very low income targets, SB 35 projects must
22 comprise at least 50% affordable units. (Gov. Code § 65913.4(a)(4)(B)(ii).)¹

23 Quite simply, the goal of SB 35 is to promote the construction of more affordable housing.
24 The bill's lead author, state Senator Scott Wiener, recognized that cities' commitment to "local
25

26 _____
27 ¹ The massive scope of the housing shortage is evident in the fact that only 24 jurisdictions were
28 on track to meet their RHNA goals for the current cycle, and thus exempt from SB 35.
(Rheinheimer Decl., Ex. 24 [SB 35 Statewide Determination Summary, December 2018].) By
contrast, 199 jurisdictions have made insufficient progress toward their lower income RHNA
goals. (*Id.*)

1 control," while necessary in many respects, has too often functioned as a euphemism for local
2 opposition to housing development. Senator Wiener described the situation as follows:

3 California has a long tradition of broad local control, and in many areas, local
4 communities are in the best position to judge what makes sense for their residents.
5 However, when local communities refuse to create enough housing—instead punting
6 housing creation to other communities—then the State needs to ensure that all
7 communities are equitably contributing to regional housing needs. Local control
8 must be about how a community meets its housing goals, not whether it meets those
9 goals. Too many communities either ignore their housing goals or set up processes
10 designed to impede housing creating. Allowing local communities to ignore their
11 responsibility to create housing has led to a housing disaster—triggering huge
12 economic, environmental, and social problems.

13 (Rheinheimer Decl., Ex. 22 at 1 [Senate Committee on Transportation and Housing, *Background*
14 *Information Request, Senate Bill 35*].)

15 In line with these concerns, SB 35 does not remove local control of housing—it merely
16 requires cities that have failed for years to meet RHNA goals, like Cupertino, to more quickly
17 decide whether affordable projects meet their objective standards for zoning and design review. In
18 addition, SB 35 eliminates the discretionary review processes that are regularly used to delay
19 projects, add massive costs, and ultimately discourage or prevent the development of badly-needed
20 affordable housing. SB 35 may also have the counter-intuitive effect of making life easier for local
21 leaders who recognize the need for more affordable housing but find themselves at the mercy of
22 outspoken current residents who strongly oppose it. (Rheinheimer Decl., Ex. 5 [Elizabeth Chou,
23 *This affordable housing bill signed by Gov. Brown could be a NIMBY-killer in LA*, Los Angeles
24 Daily News (Oct. 23, 2017)].)

25 In passing SB 35, the state Legislature acknowledged that the only way to reduce the
26 affordable housing shortfall is to build more affordable housing. (Gov. Code § 65913(a)(1) ["The
27 Legislature finds and declares that there exists a severe shortage of affordable housing, especially
28 for persons and families of low and moderate income, and that there is an immediate need to
encourage the development of new housing . . . [including by] [e]xpediting the local and state
residential development process."].) By eliminating discretionary denials (Gov. Code §
65913.4(b)), the Legislature sought to avoid precisely the situation in which Respondents now find

1 themselves—facing a prolonged and expensive battle over a project that fulfills all objective
2 criteria and promises to start making a dent in Cupertino's vast affordable housing shortfall.

3 **II. ARGUMENT**

4 **A. SB 35 Promotes Affordable Housing Without Overriding or Preempting Local**
5 **Decision-Making Authority.**

6 The parties have addressed the specific application of SB 35 to the Project in their
7 respective briefs. Rather than re-hash those issues, in this brief *Amici* intend to focus its argument
8 on the context and intent of SB 35. In particular, Petitioners appear to disagree with the state
9 Legislature's policy choice to restrict some local control where certain affordable housing projects
10 are proposed. Indeed, the supposed loss of "local control" is a refrain directed toward virtually
11 every affordable housing bill and SB 35 in particular. Clearly, Petitioners would prefer that
12 Cupertino have "local control" over the Project, which "local control" would be used to reject it
13 and other affordable housing projects entirely—but the reality here is that SB 35 simply requires
14 jurisdictions to abide by the objective standards contained in their planning codes and general
15 plans without using the smokescreen of discretionary review to prevent the development of
16 affordable housing.

17 **1. SB 35 Streamlines Affordable Housing By Limiting Discretionary**
18 **Review, While Respecting Local Objective Standards.**

19 In order to execute its goal of expediting affordable housing production, SB 35 was
20 intended to "create[] a streamlined, ministerial approval process for infill developments in
21 localities that have failed to meet their regional housing needs assessment numbers." (Rheinheimer
22 Decl., Ex. 22 at 1 [Senate Committee on Transportation and Housing analysis].) By making the
23 approval process ministerial, SB 35 removes the discretionary review procedures that have been
24 used by municipalities to stifle affordable housing development, significantly worsening the
25 statewide housing crisis. A study published last year by researchers at Berkeley Law found that
26 "the pace of housing development appears to be driven by the amount and sequence of
27 discretionary review." (Rheinheimer Decl., Ex. 11 at 20 [O'Neil, et al., *Getting it Right:*
28 *Examining the Local Land Use Entitlement Process to Inform Policy and Process*, Center for Law,

1 Energy & the Environment Publications, 16 (Feb. 2018)].) The study noted that many Bay Area
2 cities "impose redundant or multiple layers of discretionary review on projects," which slow the
3 pace of development and add costs that discourage developers, particularly those with less capital
4 or experience. (*Id.* at 6.) As the Legislative Analyst's Office has described,

5 Hesitance about new housing can lead residents to pressure local officials to use
6 their land use authority to slow or block new development. Residents may call for
7 elected officials to enact restrictive zoning rules or encourage elected officials to
8 scale back or reject projects during discretionary review processes These types
of responses have been a major factor in the undersupply of housing in California's
coastal communities.

9 (Rheinheimer Decl., Ex. 6 at 6-7 [Mac Taylor, *The 2016-17 Budget: Considering Changes to*
10 *Streamline Local Housing Approvals*, Legislative Analyst's Office (May 18, 2016)].) Accordingly,
11 the LAO concluded that "[i]f the state's housing shortage is to be addressed, discretionary review
12 likely will need to be scaled back for all types of housing development." (*Id.* at 10.) By passing SB
13 35, the Legislature took a small step forward on this front for projects containing significant
14 affordable housing elements.

15 While SB 35 streamlines the approval process, it does not remove local control over
16 development. Pursuant to Government Code § 65913.4(b)(5), a local government can disapprove
17 of an application if the proposed project is not "consistent with objective zoning standards,
18 objective subdivision standards, and objective design review standards in effect at the time that the
19 development is submitted." The standards to which this provision refers are, of course, those that
20 the relevant local government has established, invariably with substantial public input. Thus, SB
21 35's main impact is to require cities to shorten the period during which they evaluate a project and
22 determine its consistency with their own established, objective standards. The statute specifically
23 allows design review and public oversight, so long as the criteria are objective and, for a project of
24 more than 150 units, the process is completed within 180 days. (Gov. Code § 65913.4(c)(1)(B).)
25 That process "shall not in any way inhibit, chill, or preclude the ministerial approval" procedure
26 created by SB 35. (Gov. Code § 65913.4(c)(1).)

27 In sum, the actual function and effect of SB 35 is not a supposed dismantling of local
28 control, but a requirement that local control be fairly, evenly, and objectively applied. Because it

1 requires compliance with local standards, SB 35's streamlined process is really only objectionable
2 to jurisdictions and local groups that prefer to stymie development of affordable housing in their
3 communities, and do so hiding behind the vagaries of discretionary review.

4 **2. The Project Is Consistent with the Purposes of SB 35 and All**
5 **Applicable Objective Planning Criteria.**

6 As the City rightly concluded in 2018, the Project complied with all applicable objective
7 planning standards. Moreover, the Project admirably serves the goals of SB 35, providing 1,201
8 affordable units (360 very low income and 841 low income) in a jurisdiction that has refused to
9 permit the development of almost any affordable housing in recent years—only 19 of the target
10 356 low or very low income units for the current RHNA cycle. (Rheinheimer Decl., Ex. 23
11 [*Cupertino data, SV@home.com*].) In addition to its sizable contribution to Cupertino's currently
12 non-existent affordable housing stock, the Project provides immense public benefits in the form of
13 publicly accessible open space and commercial amenities such as retail and restaurants. When
14 contrasted with the dilapidated shopping mall currently occupying the space, the Project serves as
15 an excellent illustration of the law's potential to streamline the creation of vibrant living spaces
16 where they are most needed. As SB 35 lead author Senator Scott Wiener stated in reference to the
17 Project, "[t]his type of project is exactly why [the Legislature] passed SB 35: to streamline and
18 expedite housing approvals in cities that fall short of their housing goals." (Rheinheimer Decl., Ex.
19 19 [*Vallco Town Center – California's First Major SB 35 Project Application – Receives Approval*
20 *From City of Cupertino, The Registry* (Sept. 24, 2018)].) If this Project does not qualify for
21 streamlining under SB 35, it raises a genuine question as to whether *any* project can qualify—
22 which is precisely the outcome that Petitioners would prefer.

23 It is clear to *Amici* that the alternative to this Project's approval is an unsustainable status
24 quo. (Rheinheimer Decl., Ex. 18 [*Department of Housing and Community Development Letter to*
25 *City of Cupertino* (August 2, 2019)].) As described above, SB 35 was enacted because
26 discretionary review processes have made affordable housing development unduly time-
27 consuming and expensive, leading to the state's severe crisis. SB 35's sole mechanism for
28 improving this situation is expediting the approval process by removing discretionary review for

1 certain affordable housing projects. Construing SB 35 so narrowly that this Project cannot even fit
2 within the scope of the expedited process would discourage would-be developers of affordable
3 housing from utilizing the statute—contrary to public policy and the express language of the
4 statute. (*See* Gov. Code § 65913.4(1) ["It is the policy of the state that this section be interpreted
5 and implemented in a manner to afford the fullest possible weight to the interest of, and the
6 approval and provision of, increased housing supply."].)

7 **B. The City's Argument Regarding the Project's Purported Impact on the**
8 **Jobs/Housing Imbalance Is Substantively Irrelevant and an Example of Local**
9 **Attitudes Rejected by SB 35.**

10 In an apparent about-face, after originally approving the Project under SB 35, the City now
11 suggests that its approval of the Project may have been in error due to a nebulous reference to the
12 "jobs housing imbalance."² (*See* City's "Notice of Non-Opposition" at 2; City's Reply to Vallco's
13 Response to City's Statement of Non-Opposition at 2.) The entire premise of the City's suggestion
14 is off base.

15 The policy of SB 35, as clearly set forth in the very section quoted by the City in its "Non-
16 Opposition," is that SB 35 "be interpreted and implemented in a manner to afford the fullest
17 possible weight to the interest of, and the approval and provision of, *increased housing supply*."
18 (Gov. Code § 65913.4(1) [emphasis added].) Although the jobs/housing balance may also be a
19 problem, and although SB 35 may ameliorate some of that problem, SB 35 was only focused on
20 half of that equation: increasing the housing, and particularly affordable housing, supply. (*See also*
21 Gov. Code § 65913 ["The Legislature finds and declares that there exists a severe shortage of
22 affordable housing, especially for persons and families of low and moderate income, and that there
23 is an immediate need to encourage the development of new housing . . ."].) The City's desire to
24 point to a purported jobs/housing imbalance as a rationale for preventing the development of low
25 income housing would turn SB 35 on its head—the suggestion that Vallco's 1,201 affordable
26 housing units would worsen the jobs/housing imbalance for low income households is particularly

27
28 ² This about-face is likely the result of the City's change in administration. (*See* Pet. Br. at 1:10-12
["Each of these inconsistencies should have disqualified the Project but all were ignored by the
City administration under the former City Manager and former Assistant City Manager."].)

1 preposterous, especially in light of the fact that only 31 low and 57 very low income units have
2 been permitted in the City over the last 12 years. (Rheinheimer Decl., Ex. 10 at 4 [Metropolitan
3 Transportation Commission, *Memo – Proposal for Second Round of One Bay Area Grant*
4 *Program* (Nov. 12, 2015)]; Rheinheimer Decl., Ex. 23 [Cupertino data, SV@home.com].)³

5 In fact, the City's position in this case further demonstrates why the Legislature deemed SB
6 35 necessary in the first place. Even without the ability to apply discretionary review to this
7 project, the City is still searching for a way—any possible justification—to avoid permitting the
8 development of affordable housing on this site. The City now purports to be deeply concerned
9 about the jobs/housing imbalance, and that is why the City would apparently prefer that the
10 Project not be built—another in the long line of discretionary rationales the City has relied on over
11 time, all of which seem to have one outcome: almost no affordable housing is actually built.⁴
12 Indeed, in conjunction with the City's new position, the City is also undertaking an effort to re-
13 zone the Property so that, if the Petition is granted by this Court, the Project will be prohibited
14 under the new zoning provisions. (Rheinheimer Decl., Ex. 17 [Thy Vo, *Vallco project: Cupertino*
15 *accused of trying to sink housing plan*, Mercury News (June 18, 2019)].)

16 The authors of SB 35⁵ knew that, for years, cities like Cupertino, based on the pressure
17 from groups and residents like Petitioners, had utilized every available method to avoid permitting
18 the development of sufficient affordable housing. (Rheinheimer Decl., Ex. 16 [Scott Wiener,
19 *Statement on the Release of List of SB 35 Streamlined Cities* (Feb. 1, 2018)].) Whatever the basis
20 for such opposition, the result has been a massive affordable housing shortage that threatens
21 California's economic well-being and causes significant harm to the residents of this state.
22 (Rheinheimer Decl., Ex. 4 [Elijah Chiland, *Here's How Serious California's Housing Shortage*

23 _____
24 ³ That is less than 8 units per year in the City, which has a population of approximately 60,000.

25 ⁴ The City's purported concern about the jobs/housing balance appears to be a newfound (and
26 convenient) one. (See Rheinheimer Decl., Ex. 3 [Chris O'Brien, *Cupertino gives final approval to*
Apple Campus 2, Los Angeles Times (Nov. 20, 2013)]; Rheinheimer Decl., Ex. 20 [Cupertino
Union cancels teacher housing project, Mercury News (June 9, 2016)].)

27 ⁵ In addition to lead author Senator Scott Wiener, the bill's co-authors were Senators Toni Atkins
28 (Principal), Ben Allen, and Andy Vidak, and Assemblymembers Joaquin Arambula, Raul
Bocanegra, Rob Bonta, Anna Caballero, Mike Gipson, Todd Gloria, Timothy Grayson, and
Miguel Santiago.

1 *Has Gotten*, Curbed Los Angeles (Mar. 4, 2016)].) SB 35, if implemented in a manner consistent
2 with the Legislature's intentions, is the first step on the path to rectifying the severe affordable
3 housing shortage—but only if its provisions are given the intended effect.

4 **III. CONCLUSION**

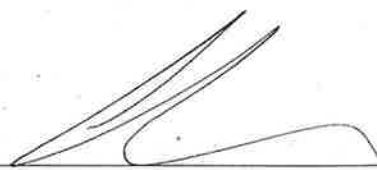
5 Ultimately, SB 35's effectiveness—and its ability to function as intended by the
6 Legislature—will largely depend on its treatment by the courts of this state.⁶ While the Real Party
7 in Interest asks the Court to simply follow the plain language of the statute, Petitioners (and,
8 apparently, the City) request that the Court graft additional limitations on the scope of SB 35 that
9 have no basis in the law as written.

10 It is clear that Petitioners and the City take issue not only with the Project, but with the
11 basic provisions of SB 35 itself and the statewide policy encouraging the development of
12 affordable housing (at least insofar as that housing is near their neighborhoods). But that policy
13 decision was made in the Legislature and their recourse is in the Legislature through the political
14 process. Disagreement with the substance of, or the policy behind, a particular law does not
15 amount to a showing that the law was violated, and Petitioners fail to demonstrate that the Project
16 approval did not comply with SB 35. Accordingly, the Petition should be denied.

17
18 DATED: August 15, 2019

HANSON BRIDGETT LLP

19
20
21 By:


22 Kristina D. Lawson
23 Christopher A. Rheinheimer
24 Cole A. Benbow
25 Attorneys for Amicus Curiae BAY AREA
26 COUNCIL, ET AL.
27

28 ⁶ Lawsuits over SB 35 and its implementation are currently also being litigated in cases involving
the cities of Berkeley and Huntington Beach.

1 PROOF OF SERVICE

2 Case No. 18CV330190

3 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

4 At the time of service, I was over 18 years of age and not a party to this action. I am
5 employed in the County of San Francisco, State of California. My business address is 425 Market
6 Street, 26th Floor, San Francisco, CA 94105.

6 On August 15, 2019, I served true copies of the following document(s) described as

7 **BAY AREA COUNCIL, ET AL.'S NOTICE OF APPLICATION AND**
8 **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF REAL PARTY**
9 **IN INTEREST; BRIEF OF AMICUS CURIAE**

9 on the interested parties in this action as follows:

10 **SEE ATTACHED SERVICE LIST**

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

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

19 Executed on August 15, 2019, at San Francisco, California.

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Kate A. Bendick

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