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9 UA LOCAL 393

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

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

15 Petitioners,

16 vs.

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

19 Respondents.

Case No. 18CV330190

**UA LOCAL 393'S AMICUS CURIAE
BRIEF IN OPPOSITION TO
PETITIONER FRIENDS OF BETTER
CUPERTINO'S PETITION FOR
WRIT OF MANDATE**

DATE: October 4, 2019
TIME: 9:00 A.M.
DEPT.: 10
JUDGE: Hon. Helen E. Williams

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

22 Real Party in Interest

23 UA Local Union 393, Plumbers, Steamfitters, and HVAC/R Service Technicians of Santa
24 Clara and San Benito Counties ("Local 393") respectfully submits the following amicus curiae
25 brief in the above case. This brief is submitted pursuant to California Rules of Court 8.882(d).

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28 **UA LOCAL 393'S AMICUS CURIAE BRIEF IN OPPOSITION TO PETITIONER FRIENDS OF BETTER
CUPERTINO'S PETITION FOR WRIT OF MANDATE - 1**

1 **I. Interest of Amicus Curiae**

2 Local 393 is a trade union representing craftsmen and craftswomen involved in the trades
3 of plumbers, steamfitters & refrigeration fitters in Santa Clara and San Benito Counties. Local
4 393 has been in existence for over a century and has over 2,500 members who work on building
5 and maintenance of both commercial and residential properties. The Vallco Town Center Project
6 (“the Vallco Project”) being contested by the Friends of Better Cupertino (“Petitioner”) in this
7 case will employ several Local 393 members and generate millions of dollars in wages for our
8 members. Additionally, large housing projects such as the Vallco Project will help reduce Bay
9 Area housing costs for the working men and women of Local 393.
10

11 Local 393 is specifically submitting this Amicus brief because it is concerned with
12 Petitioner’s interpretation of the exclusion of “hazardous waste sites” from SB 35’s streamlined
13 approval process for development applications. Petitioner’s overbroad interpretation
14 misconstrues SB 35 and would needlessly halt the efficient production of the affordable housing
15 that will provide jobs and shelter for our members. Moreover, the recent amendments to SB 35
16 via AB 101 clarifies that the City has several options for determining whether a hazardous waste
17 site is cleared for development, further undermining Petitioner’s position. For the reasons laid
18 out in this amicus, Petitioner’s request for a writ of mandate should be denied.
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20

21 **II. Discussion**

22 **A. The Exclusion of “Hazardous Waste Sites” From the Streamlined**
23 **Development Application Process Should be Read in the Context of SB 35’s**
24 **Overriding Purpose to Increase Availability of Affordable Housing.**

25 The dispute between Petitioner and Respondent Vallco Property Owner LLC (“Vallco”)
26 arises from Petitioner’s contention that the City of Cupertino (“the City”) incorrectly determined
27 that the Vallco Project met SB 35’s “objective planning standards”. As a result, Petitioner

1 contends that the Vallco Project is not entitled to SB 35’s streamlined approval process for the
2 project’s development application. Given the recency of the statute’s enactment, there is little
3 judicial guidance on the meaning of SB 35, therefore requiring the Court to engage in statutory
4 construction.
5

6 As a general principle, when interpreting a statute “the intention of the Legislature [...] is
7 to be pursued, if possible[.]” (Cal. Civ. Proc. §1859.) A court’s interpretation of the statute
8 should effectuate the purpose of the law rather than rewrite it. (*Moyer v. Workmen's Comp.*
9 *Appeals Bd.* (1973) 10 Cal.3d 222, 230.) In fact, the statute’s intent should prevail over the letter
10 of the statute, with the letter of the statute being interpreted to conform with the spirit of the act.
11 (*Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1336.) Furthermore, “if the courts have not yet
12 finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a
13 later Legislature as to what an earlier Legislature intended is entitled to consideration.”
14 (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473.)
15

16 SB 35’s provides “objective planning standards” that determine whether a project is
17 entitled to a streamlined approval process. (Government Code §65913.4.) The Legislature
18 elaborated on the meaning on the purpose behind this process in 2017, when it amended SB 35
19 via SB 765. The California Bill Analysis of SB 765 stated that one purpose of the SB 35
20 amendment was to reaffirm the State Legislature’s “intent that it is the policy of the state that SB
21 35 be interpreted and implemented in a manner to afford the fullest possible weight to the
22 interest of, and approval and provision of, increased housing supply.” (California Bill Analysis,
23 S.B. 765 Sen., 8/31/2018.)
24

25 The State Legislature enshrined this intent by substantially expanding the Legislative
26 Findings and Declarations section of SB 35 found in Gov. Code §65582.1. This section states
27
28 **UA LOCAL 393’S AMICUS CURIAE BRIEF IN OPPOSITION TO PETITIONER FRIENDS OF BETTER
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1 that the Legislature enacted SB 35 to provide “reforms and incentives to facilitate and expedite
2 the approval and construction of affordable housing.” (Gov. Code §65582.1.) The code
3 specifically singles out the “objective planning standards” process of Government Code
4 §65913.4 as being designed for “[s]treamlining housing approvals during a housing shortage.”
5 (Gov. Code §65582.1(p).) This point is reinforced in Government Code §65913.4’s description
6 of the “objective planning standards” process which states that “the design review or public
7 oversight [of the “objective planning standards” process]... shall not in any way inhibit, chill, or
8 preclude the ministerial approval provided by this section.” (Gov. Code, § 65913.4(c)(1).) The
9 Section also states that “[i]t is the policy of the state that [the “objective planning standards”
10 process] be interpreted and implemented in a manner to afford the fullest possible weight to the
11 interest of, and the approval and provision of, increased housing supply.” (Gov. Code, §
12 65913.4(l).) Given the relatively small amount of judicial interpretation of SB 35, the language
13 contained in Government Code §65913.4, as well as the State Legislature’s elaboration regarding
14 SB 35’s intent should be considered in construing the meaning of the “objective planning
15 standards”, especially given that this intent was enshrined in statutory language. (*See McClung*,
16 34 Cal.4th at 473; *Estate of Rossi*, 138 Cal.App.4th at 1336.)

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20 Petitioner’s interpretations of the “objective planning standards” requirements fly in the
21 face of SB 35’s objectives of “facilitat[ing] and expedit[ing] the construction of affordable
22 housing” and “[s]treamlining housing approval”. (*See* Gov. Code §65582.1(p).) Rather,
23 Petitioner’s standard would “inhibit, chill, or preclude the ministerial approval provided” by SB
24 35. (*See* Gov. Code, § 65913.4(c)(1).) This is apparent in Petitioner’s discussion the exclusion of
25 development applications for projects located on “a hazardous waste site that is listed pursuant to
26 65962.5” (hereinafter “Cortese List Sites”) or “hazardous waste site designated by the
27

1 Department of Toxic Substance Control pursuant to Section 25356 of the Health and Safety
2 Code” (hereinafter “Department Sites”). (Gov. Code §65913.4(a)(6)(E).)

3 Petitioner’s brief justifying its request for writ of mandate inaccurately asserts that the
4 County “admits that the [Vallco Town Center] Project site is listed as a [Cortese List] site.”
5 (Petitioner’s Brief at 9.) But as Vallco notes, the last investigation the Vallco Project site ended
6 two decades ago. Therefore, the site of the Vallco Project is no longer on the Cortese List.
7 (Vallco Opposition at 35-36.) Since the site has already been taken off the Cortese List,
8 Petitioner’s position amounts to an assertion that SB 35 bars expedited development for any site
9 that has ever been on the Cortese List at any time in the List’s history.
10

11 Petitioner also argues for an expansive reading of exclusions for being found to be
12 Department Sites contrary to the intent and purpose of SB 35. Petitioner specifically points to an
13 investigation done for “Leaking Underground Storage Tanks” at the Vallco Project site.
14 (Petitioner’s Brief at 11.) Petitioner concedes that the investigations related to Tank
15 contamination are closed, but then goes on to assert that closing the investigation does not mean
16 that the site is has been cleared by the Department. (Petitioner’s Brief at 11.) Once again,
17 Petitioner misreads SB 35 to bar development in any area that has ever been the subject of any
18 investigation, even when that investigation is closed. Petitioner’s interpretation simply does not
19 grant “the fullest possible weight to the interest of, and approval and provision of, increased
20 housing supply”. (See California Bill Analysis, S.B. 765 Sen., 8/31/2018.)
21

22 Petitioner’s position is incorrect. The “hazardous waste site” exemption found in
23 Government Code §65913.4(a)(6)(E) must be read in the context of SB 35’s goal of more
24 efficiently beginning housing construction projects. (See Gov. Code §65582.1(p); California Bill
25 Analysis, S.B. 765 Sen., 8/31/2018.) It also should be read in light of the Legislature’s
26
27
28 **UA LOCAL 393’S AMICUS CURIAE BRIEF IN OPPOSITION TO PETITIONER FRIENDS OF BETTER
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1 instruction that the “objective planning standards” of §65913.4 “be interpreted and implemented
2 in a manner to afford the fullest possible weight to the interest of, and the approval and provision
3 of, increased housing supply.” (See Gov. Code, §65913.4(l).) The purpose of the “hazardous
4 waste sites” exemption in Government Code §65913.4(a)(6)(E) is obvious: to make sure that
5 housing developers are not building homes in locations that have toxic chemicals that would be
6 harmful to future residents. Petitioner’s interpretation expands the exemption beyond its obvious
7 purpose, seeking to halt development because, at some point in the past, the site was
8 contaminated. This standard would place an unnecessary procedural burden on vast swaths of
9 land development for housing, making a farce of SB 35’s promise “to facilitate and expedite the
10 approval and construction of affordable housing” and “[s]treamlin[e] housing approvals during a
11 housing shortage.” (See Gov. Code §65582.1(p).) The “hazardous waste sites” exemption should
12 be construed as applying sites under active investigation.
13
14

15 Petitioner’s position is further undermined by Governor Newsom’s recent signing of AB
16 101, which clarifies the meaning of SB 35 as part of package of housing reforms. Previously SB
17 35 stated Department Sites could be cleared for residential use by the Department of Toxic
18 Substances Control. (Gov. Code §65913.4(a)(6)(E).) Under the clarifications laid out in AB 101,
19 sites can be cleared for building by the “State Department of Public Health, State Water
20 Resources Control Board, *or* Department of Toxic Substances Control” (collectively “the
21 Clearing Departments”). (Gov. Code §65913.4(a)(6)(E), emphasis added.) The “or” in this
22 expanded list of Clearing Departments means that *any one of these Clearing Departments* can
23 provide a basis for the streamlined approval process laid out in SB 35. By expanding the number
24 of Clearing Departments, AB 101 increases the number of locations that can be subject to SB
25 35’s streamlined approval process.
26
27

1 Petitioner’s position, if taken seriously, would amount to asserting “once a hazardous
2 waste site, forever a hazardous waste site”. It would undermine SB 35’s streamlined
3 development application process, turning a procedural standard into a historical scavenger hunt
4 for evidence that a proposed project site was at any moment in the history of the Cortese or
5 Department Lists without any consideration of whether the investigation is active or closed. The
6 language of the statute does not mandate excluding a development project from SB 35’s
7 streamlined process because of closed investigations of former “hazardous waste sites”.

8
9 Petitioner’s interpretation of the legislation is onerous given SB 35’s stated purpose of increasing
10 the efficiency of housing creation. (*See* Gov. Code §65582.1(p); California Bill Analysis, S.B.
11 765 Sen., 8/31/2018.) This is especially the case when interpreting the “hazardous waste site
12 exemption” contained in §65913.4 which must “be interpreted and implemented in a manner to
13 afford the fullest possible weight to the interest of, and the approval and provision of, increased
14 housing supply.” (*See* Gov. Code, §65913.4(l).) This Court should defer the State Legislature’s
15 clear statutory preference for housing development and refuse to impose Petitioner’s burdensome
16 interpretation of the statute.
17
18

19 **B. Petitioners Cannot Compel the City to Take Actions it is Not Obligated to**
20 **Perform.**

21 “A writ of mandate may be issued by any court to any inferior tribunal, corporation,
22 board, or person, to compel the performance of an act which the law *especially* enjoins, as a duty
23 resulting from an office, trust, or station....” (Cal. Civ. Proc. Code § 1085 (emphasis added).) A
24 writ of mandate “can be granted only where the administrative agency has a clear, present, and
25 usually ministerial duty to perform, and the petitioner has a clear, present, and beneficial right to
26 the performance of that duty.” (*Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal. App. 4th 700,
27

1 713 (citations omitted).) “A ministerial duty is an act that a public officer is obligated to perform
2 in a prescribed manner required by law when a given state of facts exists.” (*Alliance for a Better*
3 *Downtown Millbrae v. Wade* (2003) 108 Cal. App. 4th 123, 129 [hereinafter “*Wade*”].)
4

5 When determining the scope of a ministerial duty, courts look to the stated purpose of the
6 statute mandating government action. (*Wade*, 108 Cal. App. 4th at 133.) For example, in *Wade*,
7 Plaintiffs sought to compel the Millbrae City Clerk to certify a local initiative to appear on the
8 ballot. (*Id.* at 127.) The Clerk refused to certify the initiative because the its title and text did not
9 appear on every signature page, but only one side of a double-sided signature page. (*Id.*) Both the
10 trial court and Court of Appeal rejected the Clerks’ argument looking to the practical
11 implications of their reading of the Government Code section relied on by the City Clerk, stating
12 that the definition of the word “page” in the statute “can only be gleaned from the context”. (*Id.*)
13 Because of the length of Initiative summaries as well as the requirement of a declaration from the
14 person collecting the signatures attesting to the veracity of the signers, the Clerk’s reading of the
15 statute would leave virtually no room for collecting signatures. (*Id.* at 130.) The Court described
16 the Clerk’s interpretation of the statutory requirement as “strained and impractical” and stated
17 that it did not further the statutory purpose of the Government Code section: to avoid deception
18 of voters by providing them with a neutral explanation of the statute and to give government
19 clerk reviewing the initiative petition assurance that voters received a neutral description of the
20 proposed initiative. (*Id.*)
21
22
23

24 Petitioner’s reading of the exemption from the SB 35 expedited building approval process
25 for “hazardous waste sites” places burdens on the City not found in the text of the statute. The
26 provision of Government Code §65913.4(a)(6)(E) does not mandate the City to *specifically*
27 investigate whether sites investigations designated by the Clearing Departments as closed are, in
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1 fact, *really, truly, actually* closed. (See Cal. Civ. Proc. Code § 1085.) The meaning of the
2 “hazardous waste site” exemption must be “gleaned from the context” of SB 35’s goal of
3 expediting the development of affordable housing. (See *Wade*, 108 Cal. App. 4th at 127; *see also*
4 Gov. Code §65582.1; California Bill Analysis, S.B. 765 Sen., 8/31/2018.) Since nothing in the
5 language of Government Code §65913.4(a)(6)(E) mandates to investigated closed investigations
6 of potentially hazardous waste sites, a writ of mandate is improper as there is no government
7 action to compel.
8

9 A comparison with the *Wade* decision illustrates this point. Like the City Clerk in *Wade*,
10 Petitioners are seeking to add an additional procedural hurdle to the City’s approval of the Vallco
11 Project under SB 35’s expedited development application process. (See Government Code
12 §§65582.1(p), 65913.4(a)(6)(E), (c)(1), (l).) Also like the City Clerk in *Wade*, Petitioner’s
13 additional procedural requirement is “strained and impractical”, not only requiring the City to
14 evaluate whether the building site has an current hazardous waste issues, but also evaluate
15 whether the hazardous waste issues in the past are really, truly, resolved even though the
16 Clearing Departments and CalEPA closed the investigations long ago.¹ Finally, also like the City
17 Clerk in *Wade*, Petitioners interpret the statute in a way that is disconnected from SB 35’s goal of
18 expediting the approval process for the building of new housing. Petitioner’s arguments, like the
19 City Clerk’s arguments in *Wade*, should be rejected.
20
21

22 Finally, recent developments surrounding the Vallco project show that, contrary to
23 Petitioner’s position, the City has an obligation to *further* housing development rather than stifle
24
25

26
27 ¹ See Vallco’s Opposition, pg. 35-43 for a complete summary of the status of the various investigations conducted
28 on the site of the Vallco Project.

1 it. As Local 393 was preparing to file its amicus, the California Department of Housing and
2 Community Development (“HCD”) sent a letter to the City threatening a lawsuit if the City does
3 not meet its obligations under state housing element law.² In the letter HCD informed the City
4 that if the Vallco Project does not come to fruition, and the City does nothing else to develop
5 housing, then the City would be out of compliance with California state law and subject to a
6 lawsuit. This warning from HCD underlines what Local 393 argues in this amicus, the State
7 enacted housing legislation like SB 35 to expedite and increase housing development in
8 California. Furthermore, it indicates that the Superior Court of Santa Clara County may be facing
9 further litigation by the State over the City’s compliance with state housing element
10 requirements and the Vallco project if the Court grants Petitioner’s writ of mandate. SB 35 was
11 designed to bypass just the sort of ongoing litigation quagmire that Petitioner’s argument will
12 create.
13
14

15 Put simply, SB 35 does not mandate that the City halt the Vallco project. In fact, recent
16 actions by the State of California indicate that the City is *required to permit* such development or
17 face potential litigation liability. Petitioner’s request for a writ of mandate is out step with the
18 City’s obligations under SB 35 and State housing law. It is also contrary to the State’s aggressive
19 promotion of housing development, Petitioner’s request must be denied.
20

21 **III. Conclusion**

22 For the foregoing reasons, Local 393 submits that Petitioner’s interpretation of
23 “hazardous waste sites” produces unnecessary procedural burdens which frustrate SB 35’s stated
24

25
26
27 ². A copy of HCD’s letter to the City is attached as Exhibit 1 to the Request for Judicial Notice included with this
28 amicus brief.

1 goal of streamlining housing approval processes. As such, their interpretation should be rejected
2 and Petitioner's request for a writ of mandate must be denied.
3

4 Dated: August 15, 2019

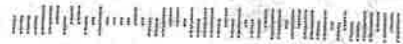
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