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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **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, a General Law
City; GRACE SCHMIDT, in her official
16 capacity as Cupertino City Clerk, and
DOES 1-20 inclusive,

17 Respondents.

19 VALLCO PROPERTY OWNER LLC,

20 Real Party in Interest.

Case No. 18CV330190

**RESPONDENT CITY OF
CUPERTINO'S RESPONSE TO BAY
AREA COUNCIL ET AL.'S AND UA
LOCAL 393'S AMICUS CURIAE
BRIEFS**

Date: November 1, 2019
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Helen E. Williams

Action Filed: June 25, 2018
Trial Date: None set

Filed Concurrently with Declaration of
Benjamin Fu and Request for Judicial
Notice

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1 **INTRODUCTION**

2 The City of Cupertino has taken no position for or against Petitioners’ challenge to the
3 Vallco SB 35 Project, and it remains neutral in this litigation. However, because Amici Bay
4 Area Council et al. (“BAC”) and UA Local Union 393 (“Local 393”) repeatedly make factual
5 errors and misleading statements in their amicus curiae briefs submitted in support of Real Party
6 in Interest Vallco Property Owner LLC, the City files this response to correct and clarify the
7 record before the Court.

8 California’s affordable housing crisis is real, undisputed, and the result of a complex
9 array of longstanding factors. But, according to BAC, affordable housing shortages have almost
10 nothing to do with the major cutbacks in federal funding, the state’s elimination of
11 redevelopment agencies and the affordable housing they generated, construction cost increases,
12 labor shortages, developer proposals and campaigns designed to maximize profit, or the
13 numerous other factors identified by those who have studied the problem closely. Instead, BAC
14 contends, the State’s affordable housing shortages are caused almost entirely by local
15 government “opposition” to affordable housing and decisions to “restrict housing production”
16 by “declining to approve and promote the development of new housing.” BAC Br. at 2. The
17 City will not further address what the Court’s order permitting the Amici briefs correctly
18 characterized as “broad policy issues that are outside the direct challenge to the approval of the
19 project” at issue here. Court Order (Sept. 6, 2019). But in an attempt to support its narrative,
20 BAC misleadingly suggests that the City has denied housing applications and completely
21 overlooks the City’s long track-record of approving and facilitating affordable housing
22 development in Cupertino. See BAC Br. at 7:6-9:21.

23 In fact, the City has *approved* every development project application submitted in the last
24 12 years that would produce affordable housing. Fu Decl. ¶ 17, Exh. 1. Not a single affordable
25 housing development application has been denied by the City during that time. *Id.* Far from
26 restricting opportunities for affordable housing development, the City’s 2015-2023 Housing
27 Element designates high-density, priority housing sites suitable to accommodate 1,400
28 affordable housing units, greatly exceeding the City’s 1,064 unit regional housing needs

1 allocation (“RHNA”)¹ for all income levels. RJN, Exh. A at H-14 to H-17.

2 Moreover, independent of the Vallco SB 35 Project, the City Council approved 807 new
3 units on those sites within the first 2 years of the Housing Element’s 8-year planning period. Fu
4 Decl. Exh. 3. And the City is currently processing applications for an additional 242 units. *Id.*
5 In total the City has approved 1,057 new housing units since 2014, including 133 affordable
6 units—not including the Vallco SB 35 Project. Fu Decl. Exh. 2. The City also continues to
7 facilitate the development of affordable housing through its regulatory and incentive programs,
8 and by contributing millions of dollars to help build affordable housing projects. Fu Decl. ¶¶ 7,
9 11-16; RJN, Exh. B.

10 Given this track-record, it is not surprising that the California Department of Housing
11 and Community Development (“HCD”) has found that the City’s Housing Element complies
12 with state housing laws for at least the past three planning cycles. See Fu Decl. ¶ 21. HCD
13 recently affirmed that the City remains in compliance with state housing element law for this
14 2015-2023 planning cycle. RJN, Exh. C. Contrary to Local 393’s statements, HCD
15 acknowledged that the City can continue to remain in compliance even without the Vallco SB
16 35 project. Local 393 Br. at 10:1-7, 15-18; RJN, Exh. C.

17
18 **DISCUSSION**

19 **I. BAC’s Brief Relies on Broad Policy Assertions, Newspaper Reports, and Other**
20 **Similarly Inadmissible and Unreliable Sources.**

21 As an initial matter, the City objects to BAC’s failure to properly support its arguments.
22 The City has urged the Court to carefully consider the arguments from all parties and the
23 evidence in the record in determining whether the Project complies with the requirements of SB
24 35. City of Cupertino’s Statement of Non-Opposition (May 24, 2019) at 1:7-10 (“City
25 Statement”). The articles and websites relied on in BAC’s brief, however, are not reliable
26 sources of evidence for the Court to consider. Indeed, BAC has not even attempted to request

27 ¹ The RHNA is Cupertino’s share of regional housing needs within the Bay Area as determined
28 by the Association of Bay Area Governments pursuant to state law, Government Code section
65584. RJN, Exh. A at H-14.

1 that the Court take judicial notice of the documents it relies on for its sweeping assertions. This
2 is a clear error and BAC's unsupported arguments should be disregarded as a result. See *Matuz*
3 *v. Gerardin Corp.* (1989) 207 Cal.App.3d 203, 206-07 (court may choose to ignore improper
4 material in briefing); *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn.14 (courts will
5 not accept facts submitted by amici unless they are properly subject to judicial notice).

6 With the exception of HCD's letter affirming that the City's Housing Element complies
7 with State law (BAC Exhibit 18) none of the exhibits attached to the declaration of BAC's
8 attorney are properly subject to judicial notice here. Moreover, the majority of exhibits are
9 newspaper and blog articles and websites. See, e.g., Exhibits 1, 3, 4, 5, 8, 13, 17, 19, 20, 23
10 (newspaper and blog articles), Exhibits 14, 15, 21, 23, 24 (information from various websites).
11 Courts have repeatedly held that the truth of the facts asserted in newspaper articles is not
12 judicially noticeable. *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote*
13 *Investors, LLC* (2015) 234 Cal.App.4th 166, 186. It is likewise improper to take judicial notice
14 of the factual content of websites. *Searles Valley Minerals Operations, Inc. v. State Bd. of*
15 *Equalization* (2008) 160 Cal.App.4th 514, 519. Accordingly, the court should disregard BAC
16 exhibits other than the HCD letter, which is also attached to the City's accompanying request for
17 judicial notice.

18 **II. The City Has Consistently Approved and Facilitated Affordable Housing** 19 **Developments.**

20 BAC implies that housing shortages in the City of Cupertino are the result of the City
21 denying affordable housing projects. Nothing can be further from the truth. To correct BAC's
22 blatant misrepresentation of the facts, the City provides a brief overview of the City's role under
23 state housing law and the City's record approving projects with affordable housing.

24 **A. The City Has Already Approved Projects on Four out of the Five Priority** 25 **Housing Sites in its 2015-2023 Housing Element.**

26 State law requires every city to adopt a housing element as part of its general plan
27 guiding future development. Housing elements are comprehensive eight-year plans intended to
28 identify local housing needs, adopt programs to help meet housing needs, and identify adequate
sites to accommodate the Regional Housing Needs Allocation. See Gov. Code §§ 65580 et seq;

1 *supra*, fn. 1. A housing element must include a site inventory that demonstrates a city has
2 enough land zoned for housing at appropriate densities to accommodate its RHNA. Gov. Code
3 § 65583(c)(1).

4 For the 2015-2023 Housing Element, the City’s total RHNA allocation was 1,064 units,
5 broken down by the following income levels: 356 units for extremely low/very low income
6 households, 207 units for low income households, 231 units for moderate income households,
7 and 270 units for above moderate income households. RJN, Exh. A at H-14. In Cupertino, sites
8 zoned for at least 20 units per acre are deemed appropriate to accommodate very low- and low-
9 income housing. Gov. Code § 65583.2(c)(3)(B). The City’s Housing Element identified five
10 “Priority Housing Sites” that could accommodate its RHNA: the Hamptons (600 units); Vallco
11 (389 units); the Oaks (200 units); Marina Plaza (200 units); and the Veranda (11 units). RJN,
12 Exh. A at H-17. In total, the Priority Housing Sites could accommodate at least 1,400 units of
13 affordable housing, far exceeding the City’s 1,064 unit RHNA allocation. *Id.*

14 Within four years of the Housing Element’s adoption in May 2015, the City has already
15 approved development on four out of the five Priority Housing Sites: the Hamptons, Marina,
16 Veranda, and Vallco (currently entitled for 2,402 units, far above the 389-unit RHNA allocation
17 for the site).² Fu Decl. ¶ 19, Exh. 3. In total, the City has approved 3,209 units on these priority
18 sites alone, including 1,275 affordable housing units (396 units for extremely low/very low
19 income, 847 for low income, and 32 for moderate income). Fu Decl. ¶¶ 17, 19, Exhs. 1, 3.
20 Even without the Vallco project, the City has approved applications for 807 new units on the
21 other priority sites, including 74 affordable housing units (35 units for extremely low/very low
22 income, 7 for low income, and 32 for moderate income). Fu Decl. ¶¶ 17, 19, Exhs. 1, 3.
23 Finally, the City is currently processing an application at the fifth priority housing site (the
24 Oaks/Westport), for 242 total units, including 39 units reserved for very-low income
25

26 ² Two days before it approved the Vallco SB 35 Project, the City approved a Vallco Town
27 Center Specific Plan that would have allowed a separate development project for the same site.
28 AR0003; RJN, Exh. D. After City voters exercised their constitutional power to referend that
Specific Plan, the City Council rescinded the approval pursuant to Elections Code section 9241.
RJN, Exh. E.

1 households. Fu Decl. ¶ 15, Exhs. 1, 3. The City has also issued building permits for 59
2 moderate income Accessory Dwelling Units during this RHNA cycle pursuant to City Code
3 provisions facilitating construction of ADUs. Fu Decl. ¶¶ 7, 18, Exh. 2. While ignored by BAC
4 in its brief, moderate income housing is an important affordable housing stock for teachers,
5 nurses, and middle-income families in Cupertino. Fu Decl. ¶ 7.

6 It is therefore incorrect for BAC to contend that the City has “refused to permit the
7 development of almost any affordable housing in recent years.” BAC Br. at 7:8-9. The City
8 acknowledges that the Hamptons and Marina projects have not yet been built, but that is the
9 result of developers failing to build approved projects, not the City refusing to permit them. Fu
10 Decl. ¶ 6, Exh.3.

11 **B. The City Has *Approved* Every Multi-Family Housing Development**
12 **Application Submitted in the Last Twelve Years.**

13 BAC suggests that the City has failed to permit sufficient affordable housing over the last
14 12 years. BAC Br. at 9:1-2 (“only 31 low and 57 very low income units have been permitted in
15 the City over the last 12 years”); 9:16-18. In fact, over the past 12 years the City has approved
16 every single multi-family project application that developers have proposed. Fu Decl. Exh. 1
17 (chart showing every multi-family development application heard by the City since 2007 or
18 currently pending, including the number of units in the project, broken down by income
19 category, the City’s action on the application, and the status of each project’s building permit
20 application). Not a single application to develop affordable housing has been denied during this
21 period. *Id.* And BAC once again ignores the approval of moderate income affordable housing
22 developments over the past 12 years. Fu Decl. ¶ 10, Exh. 1 (multi-family), 2 (ADUs since
23 2014).

24 **C. The City Is Actively Facilitating the Development of Affordable Housing.**

25 As discussed above, the City has designated more than sufficient lands to accommodate
26 its RHNA allocations for at least the last three housing cycles in a row and it has approved every
27 development application including affordable, multi-family units that it has received at least
28 since 2007. Moreover, the City is actively facilitating the development of affordable housing on

1 a number of fronts. Fu Decl. ¶¶ 7, 11-15.

2 The most recent example is the City’s support for the Veranda project—which provides
3 18 extremely-low and very-low income senior units, as well as a property manager’s unit with
4 an affordability level of extremely-low income—on one of the Priority Housing Sites, exceeding
5 the 11 lower-income units that the Housing Element had projected. Fu Decl. ¶ 11, Exhs. 1, 3;
6 RJN, Exh. B at 2. This project was developed using the City’s density bonus program and
7 flexible development standards in City plans and ordinances to facilitate the development of
8 affordable housing, such as exceptions for required retail components and reduced parking
9 requirements. Fu Decl. ¶ 12. The City contributed approximately 43 percent of the total
10 development costs, including site acquisition, for a total contribution of \$5,172,000. Fu Decl. ¶
11 13; RJN, Exh. B at 2. The project was approved within a year of the application being
12 submitted with strong support from the community, and unanimous approvals from the Planning
13 Commission and City Council. Fu Decl. ¶ 14; RJN, Exh. B at 2. Additional examples of the
14 City’s efforts to facilitate development of affordable housing are discussed in the City’s recent
15 letter to HCD detailing steps the City is taking to implement its Housing Element policies to
16 encourage and support affordable housing projects. RJN, Exh. B at 2; Fu Decl. ¶¶ 7, 15-16.

17 At the same time, and as discussed next, the City Council has also sought to address the
18 City’s existing jobs/housing imbalance, which can be exacerbated by commercial or mixed-use
19 developments that attract large numbers of new employees to the City without providing a
20 sufficient amount of new housing units to house those employees.

21 **III. The City Believes the Court Should Have Accurate Information About the Vallco**
22 **SB 35 Project’s Impacts on the Jobs/Housing Balance.**

23 The City’s Statement of Non-Opposition noted that the Vallco project may actually
24 exacerbate housing shortages in the City because of its impact on the City’s jobs/housing
25 imbalance. See City Statement at 2:12-14. In its brief, BAC mischaracterizes the City’s
26 explanation of the Vallco SB 35 Project’s jobs/housing imbalance. BAC Br. at 10:10-15.

27 While BAC acknowledges that jobs/housing imbalances are problematic, it claims that it
28 is “preposterous” to suggest that “Vallco’s 1,200 affordable housing units would worsen the

1 jobs/housing imbalance for low income households.” BAC Br. at 8:24-9:1. However, the City
2 did not suggest that the Project’s *housing* component would worsen the jobs/housing imbalance.
3 Rather, it is the jobs-rich *office*, and to a lesser extent retail, component of the Project that
4 contributes to this problem. As the City has previously explained, Vallco’s own estimates
5 forecast that “the Project would bring 8,719 *new* jobs to the City of Cupertino” while providing
6 only 2,402 new housing units. As a result, the Project actually results in the need for 3,410
7 more housing units than it provides. City of Cupertino’s Reply re Statement of Non-Opposition
8 (July 1, 2019) at 2:9-12.

9 In the context of this case, SB 35 does not “ameliorate” housing shortages as BAC
10 suggests. BAC Br. at 8:18. Instead, the application of SB 35 actually exacerbates the City’s
11 housing shortage. Local 393’s unsupported statement that “the Vallco Project will help reduce
12 Bay Area housing costs for the working men and women of Local 393” is thus questionable at
13 best. Local 393 Br. at 2:9-10. Given the unmet housing demands of the Project, it is just as
14 likely to result in increased housing costs for local workers. As the City’s Housing Element
15 explains, well-paid area professionals competing with lower-earning residences is a factor that
16 contributes to high-housing costs. RJN, Exh. A at H-8. Moreover, 67 percent of the Project’s
17 housing units (and all of its affordable units) are either studios or one bedroom units, likely too
18 small for working families. AR0339, 0341.

19 BAC’s speculation that the City has raised the issue of the Project’s jobs/housing
20 imbalance and is undergoing further planning for the Vallco site to avoid permitting the
21 development of affordable housing is likewise incorrect. BAC Br. at 9:5-15. The City is
22 concerned with excessive non-residential components of mixed-use projects, and has made a
23 policy determination that building 2 million square feet of office space on the Vallco site is not
24 the best way to address the City’s housing needs for any future project that is proposed there.³
25

26 ³ To address this concern, the City Council recently approved General Plan and Zoning
27 amendments removing the office allocation for the Vallco site. RJN, Exh. F. These
28 amendments do not apply to the Vallco SB 35 Project at issue in this case. However, they
would apply in the event that the Court overturns the City’s approval of Vallco’s SB 35
Project—or that the property owner decides in the future to submit another application to
(footnote continued on next page)

1 **IV. HCD Found that the City Is in Compliance with Housing Laws and Can Remain In**
2 **Compliance Even if the Vallco SB 35 Project Is Overturned.**

3 Finally, Local 393 contends that HCD “sent a letter to the City threatening a lawsuit if the
4 City does not meet its obligations under state housing element law.” Local 393 Brief at 10:1-4.
5 But this summary grossly mischaracterizes the letter. When HCD is contemplating filing a
6 lawsuit against a city for non-compliance with state housing laws, it follows a multi-step
7 statutory process that HCD has not even begun here. First, if HCD determines that any action or
8 inaction by a city is inconsistent with an adopted housing element or the State’s housing element
9 law, HCD will issue written findings and provide the city 30 days to respond to the findings.
10 Gov. Code § 65585(i)(1)(A). Any potential lawsuit could only occur *after* (1) a city has
11 responded to this determination, (2) HCD has revoked its findings of compliance, and (3) HCD
12 has decided to notify the Attorney General of its revocation. Gov. Code § 65585(i), (j). In this
13 case, HCD has not even issued an initial determination of noncompliance.

14 To the contrary, HCD’s letter found that *the City is currently in full compliance* with the
15 City’s Housing Element and State housing law. In the letter, HCD notes that its “May 29, 2015
16 review found the City’s adopted [Housing] element in full compliance with State housing
17 element law.” RJN, Exh. C at 1. It further notes that the Vallco site is one of the areas
18 identified to accommodate the City’s RHNA under Strategy 1 of the Housing Element, and finds
19 that the City’s approval of the Vallco SB 35 project “meets the City’s remaining RHNA
20 obligation as put forth by Strategy 1.” *Id.* Acknowledging that the Vallco SB 35 project could
21 be overturned by the Court, however, HCD also states that, in such an event, the City would
22 need to take additional steps to ensure that the Housing Element “demonstrate[s] adequate sites
23 to accommodate the RHNA.” *Id.* at 2.

24
25
26
27 develop the site. The Real Party in this action, Vallco Property Owner LLC has filed suit in this
28 Court challenging the City’s recent approval of General Plan and Zoning amendments for the
Vallco site. *Vallco Property Owner LLC v. City of Cupertino* (Case No. 19CV355457 Santa
Clara County Superior Court).

1 Local 393’s statement that the “City is *required to permit*” the Vallco development or
2 face litigation by HCD is thus directly contradicted by HCD’s letter, which outlines paths to
3 compliance even if the Vallco SB 35 project is overturned. Local 393 Br. at 10:15-18 (emphasis
4 in original). In fact, the City Council recently adopted General Plan and Zoning amendments
5 for the Vallco site that the City believes provide one such path. RJN, Exh. F. The City
6 recognizes that Vallco disagrees with the City on this issue (and has filed a lawsuit challenging
7 it). See supra, fn. 3. But that disagreement is not before the Court in the instant matter.

8 **CONCLUSION**

9 The City requests that the Court consider these factual corrections and clarifications and
10 that it give no weight to Amici’s arguments based on inadmissible, inaccurate, and misleading
11 statements regarding the City’s actions and motivations. Amici would paint the City as anti-
12 housing in an attempt to justify the preemption of long-standing local control over land use
13 decisions, and they do so in support of a project with such a large non-residential component
14 that it will actually deepen housing shortages within the City. Cupertino is committed to doing
15 its part to facilitate increased housing supplies and affordability. It simply asks that this case be
16 evaluated based on an application of SB 35 to the accurate and relevant facts.

17
18 DATED: October 7, 2019

SHUTE, MIHALY & WEINBERGER LLP

19
20 

21 By: _____

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