
Katharine Van Dusen
D (415) 772-5712
kvandusen@coblentzlaw.com

May 4, 2021

VIA E-MAIL

Sunny K. Soltani
Aleshire & Wynder LLP
1881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
ssoltani@awattorneys.com

Re: Vallco Town Center SB 35 Project

Dear Ms. Soltani:

This responds to your letter dated April 13, 2021. As we discussed in our follow-up call with you on April 16, we were surprised at the direction and detail of your letter, particularly to the extent it raises many new issues and ideas that the City has not discussed with us previously. During our introductory call with you and your colleague Dave Aleshire on April 12, you said that your goal is to find an efficient path to getting the Project built. We of course agree that is the goal. Indeed, it is the City's legal obligation to find and follow that path. As the City itself has recently admitted, the City's permitting process to date has been circuitous and has resulted in considerable delay.¹ Unfortunately, your letter has had the effect of further contributing to those delays by (i) ignoring or reversing course on prior discussions; (ii) imposing new requirements that have no basis in law; and (iii) mischaracterizing issues that have been long since addressed, as explained below. We hope that each of these issues was based on misunderstandings and miscommunications as former counsel and staff have brought you up to speed. To achieve our mutual goal of implementing the Project, we remain focused at this point on setting up a process for clear communication and cooperation with the City and, most importantly, to work with the City to identify a path to expeditious approval of Vallco's permits.

The primary focus of your letter is the City's concerns about the small areas of soil contamination on the Project site. Those areas comprise only 1,250 square feet of the site, which is over 1.3 million square feet in size. I want to assure you at the outset that Vallco will comply with all applicable laws and regulations in removing the soil contamination, as we have endeavored to communicate to the City for years. As you know, we are working with some of the most reputed environmental professionals in the Bay Area—several of whom have worked on other major

¹ During the "Food for Thought: A Lunchtime Chat with City Manager Deb Feng and Councilmember Hung Wei" public forum on April 23, 2021, the City Manager acknowledged that approval of Vallco's permits has been delayed due to various factors, including inadequate City staffing and the "long transition" to the City's new land-use counsel.

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projects within the City—to ensure that all proper procedures are followed for the protection of workers and residents. The isolated soil contamination on the site is neither unusual for previously developed sites, nor extensive. Vallco’s team and its contractors have safely addressed similar sites on many occasions. Moreover, regulatory agencies have reviewed the process we intend to use and have confirmed that it is correct. We are not cutting corners and to suggest otherwise misleads the public. Critically, the City is not itself an environmental regulator and cannot direct us to do more than is required under existing laws.

Lastly, you have stated to us that your team, which has been recently engaged by the City, needs time to get up to speed, and noted that your team may see things differently than the City’s former counsel. We understand that there is much history for you to become familiar with, but we cannot lose more time on implementing the Project while you or any other new consultants get up to speed. And it should go without saying that the City cannot change positions or impose new requirements at this late date, nearly three years after the Project was approved. Because the City has an obligation to expeditiously process our permits, it should not revisit prior decisions or reopen prior discussions. Again, our goal and the City’s statutory obligation is to implement this Project and that is where all discussions should focus.

1. Your April 13 Letter Ignores Recent Discussions and Proposals, and Ignores the Legal Constraints Imposed Under SB 35

The most surprising and problematic aspect of your letter is that it ignores our proposal to engage the Santa Clara County Department of Environmental Health (DEH), and asserts that we must prepare a Human Health Risk Assessment (HHRA) to submit to the City for it to process through a different agency, CalEPA’s Office of Environmental Health Hazard Assessment (OEHHA). The OEHHA process is not a process that the City has any legal basis to require under SB 35, as explained below. Moreover, the City has never raised this process with us previously, nor is it one that any of our environmental professionals have used in their decades of experience in the field.

Furthermore, there is no need for it. In a March 26 meeting with the City Manager Deb Feng and the City Attorney Heather Minner, Vallco proposed to the City that we would attempt to re-engage DEH—even though DEH previously told us no oversight was needed—to enroll in its voluntary Site Cleanup Program and, if DEH again declined formal oversight, we would ask for its informal direction and review. That is, we would follow DEH’s direction, including whether excavation could occur on the balance of the site outside of the contaminated areas. The City Manager was appreciative of that proposal and said the City would consider it. In an April 19 conversation between the City Manager and our client, Ms. Feng also said the “City is agnostic to oversight and who provides it.” My colleague Miles Imwalle followed up with a phone call to the City Attorney on March 29 to reiterate Vallco’s proposal and was told that the City Attorney would discuss with staff. Not having heard anything, a week later Mr. Imwalle reached out to the City

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Attorney and then to her colleague Ellen Garber,² the City's long-time environmental counsel, who directed Mr. Imwalle to you. Mr. Imwalle's goal was to make sure you were apprised of these discussions and understood the urgency. After you and Mr. Imwalle spoke on April 5, his impression was that you understood the proposal and would look into it.

Having raised our proposal to City representatives on four separate occasions, we naturally believed that the City would respond to it. Instead, we received your letter on April 13 that fails to acknowledge these discussions and instead proposes a brand new process with OEHHA that is not used in this region. Your proposal and the remainder of your letter is a major shift from the City's prior representations and interactions with Vallco. We sincerely hope that your decision to propose this new process was based on misunderstandings and miscommunications as the City's former counsel and staff have tried to bring you up to speed. Before you cause further delays, we encourage you to reverse course and work with us to remove obstacles, rather than construct them.

2. The City Has a Legal Obligation to Issue the Permit Without Delay and Without Imposing Additional Requirements that Have No Basis in Law

More generally, your letter is problematic because it makes clear that the City still does not understand SB 35 and, specifically, does not appreciate that its authority to process our subsequent permit applications is legally constrained. SB 35 and the approval documents limit what the City can require. SB 35 directs the City to issue subsequent permits, such as the Shoring & Excavation Permit that the City has been processing for the past 2.5 years, "without unreasonable delay." (Gov. Code § 65913.4(h)(2).) The statute describes the issuance of subsequent permits as a way to "implement the approved development" and mandates that a city's "review of the permit application shall not inhibit, chill, or preclude the development." (*Id.*)

Here, the City's delay in issuing the Shoring & Excavation Permit is unreasonable, has inhibited the development by preventing Vallco from beginning excavation, and is extremely expensive for Vallco. According to the HCD Guidelines, delay is unreasonable if "permit processing times . . . are longer than other similar permit requests for projects not approved using the Streamlined Ministerial Approval Process." (HCD Guidelines § 301(e).) It does not appear that the City has ever taken 2.5 years to issue a Shoring & Excavation Permit. The delays are also illegitimate because they are caused by the City's imposition of extralegal processes on us that it has no authority to require, and by the City's redundant and inefficient review-and-comment process that has required us to make seven separate submittals, in addition to our permit application. Moreover, SB 35 requires the City to issue a permit if the application "substantially complies with

² We had been told that the City was bringing in special counsel for Vallco to assist with the City Attorney transition, but had also been told that some specialists, such as Ms. Garber, may remain on the project. We understand the need to bring in new counsel for new issues, but not to replace someone who is still available and has advised the City for years.

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the development as approved.” (Gov. Code § 65913.4(h)(2).) The permit application submitted 2.5 years ago in December 2018 substantially complies with the approved Project.

Not only are these delays illegitimate, they appear to be motivated by the animus that certain City officials harbor toward the Project. For example, Councilmember Kitty Moore—a former petitioner in litigation seeking to set aside the Vallco Project SB 35 approval—directed on February 16 that City Staff provide her and the other Councilmembers with formal updates on various permits, including the Shoring & Excavation Permit required for site preparation and the final subdivision map. This highly unusual direct involvement and heightened scrutiny by a longstanding Project opponent has unlawfully “inhibit[ed]” and “chill[ed]” Staff’s processing of these ministerial approvals, as demonstrated by the fact that Staff was prepared to issue the Shoring & Excavation Permit on January 27,³ but backtracked after receiving Moore’s instruction. (See Gov. Code § 65913.4(h)(2).)

a. Vallco Has Satisfied All Environmental Requirements

On the issue of “Environmental Health,” the only requirement that the City can enforce is the following condition of approval: “If a Phase 2 report identifies potential for soil contamination, the Applicant shall obtain all necessary clearances from the Santa Clara County Department of Environmental Health and/or other applicable regulatory agencies.” The City has never identified any legal basis to assert that clearances from OEHHA, DEH, U.S. EPA, or another regulatory agency are necessary—and there is none. This has been confirmed by the very agencies to which the City has directed us. When the County Fire Department’s Closure Letter referred us to DEH, we immediately met with them and were told that regulatory oversight is not required and their preference was instead to play an informal role. DEH informed the City of its position in a phone call on November 1, 2020. The City then suggested that the U.S. EPA must provide oversight under 40 CFR § 761.61(a). We had previously described to the City how subpart (b) of that regulation prescribes an alternative path for removal (rather than remediation) of PCBs in soil that does not require agency oversight or approval. Without providing a legal basis, the City insisted on the subpart (a) process and only relented when the U.S. EPA confirmed in writing that its oversight is not required, provided we follow the process under 40 CFR § 761.61(b). If the regulators are satisfied, the City must also be.

Now, over two years into the process, your letter directs us to yet another agency—OEHHA—and purports to require us to prepare a HHRA, a document never before mentioned to us. The City again fails to explain under what authority it is requiring such a process. Neither U.S. EPA nor the County requires it. The City is not free to invent requirements it deems desirable, and it certainly cannot identify a new process involving a never-before-mentioned agency requiring

³ On January 27, 2021, a representative of the City told Vallco that “the only outstanding item prior to permit issuance” was payment of “the fees and bond.”

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preparation of a never-before-mentioned plan over two years into the process.⁴ SB 35 removes any discretion the City might have had to require a process beyond that set forth in the standard conditions of approval. The Shoring & Excavation Permit, like all “further approvals” following an SB-35 approval, is ministerial. (See HCD Guidelines § 301(a)(4).) The City may only impose “objective standards”—meaning standards that “involve no personal or substantive judgment” and that are “available and knowable by both the applicant . . . and the public officer prior to submittal”—as preconditions to permit issuance. (*Id.* §§ 102(q)-(r) & 301(a)(4).) The OEHHA process outlined in your letter fails this test. SB 35 also prohibits the City from imposing “any procedure or requirement that is not imposed on projects that are not approved” using the Streamlined Ministerial Approval Process. (Gov. Code § 65913.4(h)(2); HCD Guidelines § 301(e).) Your OEHHA process, which no other project in Cupertino has been subjected to, cannot be required for that additional reason.

Despite its narrow role under SB 35, the City seems to mistakenly believe that it has broad authority to impose measures that purport to enforce state and federal laws that are beyond its jurisdiction. For example, your letter claims that the City will not issue the permit until Vallco obtains a “USEPA waste generator ID,” provides a “Bay Area Air Quality Management District (‘BAAQMD’) Regulation 8 Rule 40 Compliance Plan,” and provides a “Proposition 65 notice.” Of course, to the extent any of this is required by state and federal law, we will comply with those laws at the appropriate time, but the City does not regulate compliance with these laws and cannot use them as pretext for refusing to issue a permit. The letter also suggests that the City will require us to provide it with “confirmation” that we completed an asbestos-containing materials (“ACM”) assessment. The first problem with this demand is that it is yet another redundancy in the City’s process, as we already provided the City with a copy of BAAQMD’s acknowledgment of having received the ACM, before the demolition permit issued. The second problem with this purported requirement is, again, that the City does not regulate asbestos—it is the jurisdiction of BAAQMD and the County Fire Department as part of its approval of the Closure Plan—and therefore the City has no authority to make such a demand. Indeed, we have provided the ACM assessments directly to BAAQMD and the County Fire Department as required.

Likewise, obtaining the HHRA identified in your letter is far beyond what the City is permitted to impose as a condition for issuing the Shoring & Excavation Permit. We will excavate the small

⁴ To make matters worse, the April 13 letter is inconsistent in its direction. While the City’s new consultant Dr. Mearns and the cover letter direct us to OEHHA, the comments from Planning Staff require that we submit to DEH. Further, for the first time, the City’s consultant Baseline directs that if DEH determines that their oversight is not needed, that we “please provide a regulatory agency that will assume this function to the City for concurrence.” Yet again, there is no explanation why oversight from some other agency is necessary. Apparently following Dr. Mearns’ new approach, Baseline also suggests for the first time that we prepare a HHRA.

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amount of PCB-contaminated soil⁵ in a manner that complies with all federal and state laws and that is consistent with the conditions of approval. And, as mentioned, we offered to pursue oversight from DEH, which has the experience to determine whether any supervision would benefit this project. Yet, the City chose to ignore that offer and has instead pointed to a new process and new agency that has no familiarity with the Project or prior engagement with the City.

b. The City Has No Reasonable Basis to Delay the Construction on the Balance of the Site

We have proposed a reasonable path forward that would have both addressed the City's alleged concerns while allowing construction to progress: Vallco would voluntarily seek oversight from DEH and, if DEH refuses to take on formal oversight, Vallco would follow DEH's informal direction, including on whether we may proceed with construction on the balance of the site while soils are being removed from the small areas that have some contamination, and otherwise continue to comply with applicable laws. Your letter fails to address the first portion of the proposal, but then goes on to reject the approach of allowing simultaneous work on the uncontaminated portions of the site.

That is unreasonable. The portions of the site that have contamination are extremely small and shallow relative to the portions of the site that are not contaminated. The contaminated area covers only approximately 1,250 square feet, which is less than 0.001% of the 30-acre site, and does not extend below a depth of 10 feet. There is no reason that excavation on uncontaminated areas cannot be done safely while contaminated soil is removed.

Your letter purports to provide five reasons for refusing to allow us to begin work on the balance of the site, none of which are legitimate and all of which contradict your representations that the City is trying to work with us in good faith to get the Project built. Below are each of your reasons for rejecting our proposal, with our point-by-point responses:

⁵ The insinuation in your letter that Vallco intentionally mischaracterized or hid information about the PCB levels on the site until 2019 is false. The 2016 Geosphere report referred to in your letter was completed in connection with the proposed Hills at Vallco project, to qualify the soil to be excavated for use as fill at the Treasure Island project. During soil sampling, Geosphere found a single hit of PCBs at 0.523 mg/kg. While it is true that this one reading exceeded the state screening level of 0.23 mg/kg, it is well below the federal screening level under the federal Toxic Substances Control Act, which is 1 mg/kg. When the Hills at Vallco project did not proceed after the 2016 election, the investigation related to the fill issue stopped entirely, so there was no reason to provide the report to the City or anyone else at that time. We then openly provided the report and sampling results (including the single boring finding PCBs) to the City in 2019, in support of WSP's Site Characterization Report.

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(i) Your assertion: The Final EMP (ver. 3-5-21A) is deficient;

Response: We disagree that the EMP is deficient, but regardless, the City has no legal basis to make that determination because it has no authority to impose further regulatory requirements. The opinion of the City's new consultant is not relevant.

(ii) Your assertion: Vallco's consultant EKI stated to U.S. EPA (February 9, 2021) that its intent was to excavate and dispose of the contaminated soils first;

Response: This statement by EKI was made in connection with a prior process that the City previously rejected and is irrelevant at this point. Further, it did not in any way color U.S. EPA's response. This is a clear example of the City searching for excuses to hold things up rather than finding solutions to move them forward.

(iii) Your assertion: The Final EMP (ver. 3-5-21A) advocates for excavation of the parking garages without proper delineation and disposal of the PCB-contaminated soils adjacent to the proposed parking garages;

Response: This reason is unconnected with the issue and does not make sense. The question is whether excavation on the balance of the site can move forward now, and this response just states that the EMP suggests this very idea, so the rationale does not support the rejection of the proposal. We also disagree that delineation is deficient. The PCB-contaminated soils have been carefully delineated as peer reviewed by Baseline, and the proposal includes a wide buffer around all potentially impacted areas, which would not be excavated at this time.

(iv) Your assertion: If the HHRA process were extended or the actual remediation delayed, or if the removal area were to be expanded after the excavation for the parking garages, there would be large open excavations present onsite;

Response: The concern raised is unrealistic: this removal action is straightforward and there is no risk that it will be materially delayed. There are months of excavation work that can be done first, giving ample time to resolve the PCB removal. Further, the City imposes grading bonds requirements in the highly unlikely event that the Project cannot proceed and an open excavation remains. In fact, Vallco submitted a signed bond to the City for this work on January 29, 2021, after receiving direction from the City to do so. Finally, the City already agreed that it could allow the northern half of the Site to proceed now, which would suffer from this same issue. While proceeding with the approach does not work for the construction phasing, it highlights that the City is not consistent and its positions are evolving. This concern also indicates that the City is entertaining the

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notion that it may permanently stop construction, rather than focusing on moving the Project forward as required by State law.

(v) Your assertion: The consultant's experience is that review agencies prefer that remediation work be completed before other site grading and construction begins, and proposing concurrent activity could delay the approval of the HHRA.

Response: The U.S. EPA and DEH's view, not the consultant's opinion, should control. Both agencies have reviewed our proposed approach and provided feedback to the City that no further regulatory oversight is required.

c. Your Letter Raises New Issues That Could Have Been Raised Long Ago

Your letter provides additional evidence that the City's delays are unreasonable in violation of SB 35. For example, your letter attaches "new" City comments on documents that have been in the City's possession for almost two years, including comments from Planning Staff on the Construction Management Plan (CMP), a document that Vallco submitted to the City on June 28, 2019. Since then, City Staff (including the Planning Department) has provided at least eight sets of comments on the CMP, including on October 3, 2019, May 5, 2019, August 31, 2020, October 14, 2020, November 5, 2020, February 4, 2021, and March 4 and 5, 2021. The comments raised recently on April 13 do not relate to any intervening changes in the CMP, and thus could have and should have been raised soon after the CMP was submitted in 2019. Baseline similarly identified new issues that could have been raised long ago.

3. Project Management Going Forward

We appreciate that your letter recognizes there are issues to be resolved and suggests that we "get organized" and "work collaboratively" to resolve them. We would also like to work collaboratively, but should be specific about what that means. In particular, we want to avoid another letter that is not fully informed of prior discussions or all the facts, so to us, working collaboratively means that we will meet to discuss issues and seek resolution before positions are taken. This is how our relationship with the City has worked previously both on this Project and others. Collaboration requires mutual discussion and the City's consideration of Vallco's point of view before any decisions are made. Getting organized should not be an exercise in identifying purported concerns that could have been raised long ago.

The City has told us that it intends to engage a project coordinator to help move the Project forward, although we have not been given any other information on the subject. We were recently in touch with the County Fire Department, however, and understand that a new City consultant has raised questions about the Project, including whether it includes a fire station. We have not been told who this person is or the purpose behind the questions or, most importantly, why this person did not come to us if there are questions about the Project program. We do not know if

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this person making inquiries is the City's project coordinator, or someone else, but if the City has engaged a consultant to work on our Project, and the City truly intends to work collaboratively with us, then needless to say, the City should be transparent with us and the public about who it has engaged and what their intentions are.

4. **Conclusion**

Ever since the Project was approved in September 2018, we have worked diligently and professionally to implement it. We are extraordinarily excited to do so, as it will provide Cupertino with much-needed housing, and will create a thriving retail and commercial destination by establishing a Town Center that the City has long envisioned. We are committed to this Project, and it is our sole focus.

Over the course of the past 2.5 years, we have followed the City's proposed processes related to investigation of and treatment of environmental issues in good faith. We have done so even though neither SB 35 nor the Project conditions of approval authorize imposition of any of those processes. It is now our suspicion, however, that the City's objective may be to delay until our approval expires, which members of the City Council, including Councilmember Moore, inaccurately believe will occur in September 2021. The law, as confirmed by the HCD Guidelines, is that the term of the approval lasts until May 2023, which is 3 years after judgment was entered in the litigation brought by Councilmember Moore. Yet, even assuming September 2021 were the deadline, the City, if it were truly acting in good faith and without intending to manufacture delays so that the approval would expire, would readily agree to extend our approval by one year as authorized under SB 35 and as we have requested. Tellingly, the City has not responded to our requests for an extension.

Unfortunately, our suspicions are validated by a long history of opposition from the City. City leaders frequently claim that the City has a strong track record of approving housing, and it is developers who do not move projects forward. Yet here, as we have diligently tried to move forward with this Project, one that will produce more housing than the City has seen in decades, we have encountered endless roadblocks and delays, some of which we have already described. To provide more examples, in 2019, the City refused to defend—and actively argued against—the Project approval in litigation brought by Friends of Better Cupertino. The City Council now contains not just members of Friends of Better Cupertino, but also an individual who personally sued the City to stop the Project and who appears to be using her position of authority to meddle in permitting processes that are required to be handled at the staff level. While it is clear that City officials oppose this Project, their personal opposition should be irrelevant—the ministerial approval under SB 35 happened years ago, and the only remaining steps involve ministerial permits, which must be processed at the staff level. The City Council should not be providing direction on whether particular permits should be issued. It has no authority to defeat this Project.

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The City can no longer continue to inject endless and costly delays into the permitting process. The law simply does not allow it.

We appreciate that you are new to this Project and hope that the purported requirements that you identify in your letter as preconditions to issuing the Shoring & Excavation Permit are all based on misunderstandings and miscommunications about the Project and SB 35. We urge the City to comply with the law and take the next step toward implementing the Project: approving the Shoring & Excavation Permit. Doing so—and allowing expeditious and safe removal and disposal of all contaminants—is not only required by law, it is also in the best interest of the general public. The City's unlawful stonewalling of our Shoring & Excavation Permit prolongs the public's exposure to the contaminants, undermining public health objectives, and exacerbates the City's housing supply problem.

Finally, we are well aware that the City has the ability to move projects forward when it has the will to do so. The City is rightly proud that Apple Park, one of the most iconic structures in the Bay Area, sits within its borders. That project exists today because City Staff worked tirelessly, collaboratively, and expeditiously to implement it. Vallco itself has seen firsthand how quickly the City can act when there is the political will and support of City Council. When the City was preparing the 2018 Vallco Town Center Specific Plan, City Staff worked exceptionally hard to prepare a highly complex planning document and negotiate a lengthy Development Agreement in a very short timeframe. Vallco's team spent hundreds of hours, both across the table from and shoulder-to-shoulder with City Staff as we moved that project forward. In parallel, City Staff successfully processed the SB 35 application in 180 days.

The City knows how to implement this Project. We strongly urge the City to regain the will and work with us to move the Project forward.

Sincerely,

COBLENTZ PATCH DUFFY & BASS LLP



Katharine Van Dusen

KTV:kks

cc: (via email):
Deb Feng; Heather Minner; Reed Moulds; Miles Imwalle; Dave Aleshire