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December 6, 2018

VIA E-MAIL

Ms. Rocio Fierro
Cupertino City Attorney
20410 Town Center Lane
Suite 210
Cupertino, CA 95014-3230

Re: Cupertino City Council Conflicts of Interest

Dear Ms. Fierro:

We represent Vallco Property Owner ("Vallco") in connection with its efforts to redevelop and revitalize the Vallco Shopping Center in Cupertino. On September 21, 2018, the City of Cupertino (the "City") notified Vallco that it had ministerially approved the Vallco Town Center SB 35 Project under Government Code section 65913.4 (the "SB 35 Project"). The City also approved the Vallco Town Center Specific Plan project (the "Specific Plan Project"). Both the SB 35 Project and the Specific Plan Project are now the target of litigation brought by Friends of Better Cupertino against the City and Vallco.

We write now because two recently elected City Council members are objectively, and indisputably, biased with regard to the Specific Plan Project and the SB 35 Project. Both Liang Chao and Jon Willey have, for years, participated as high-level members of Better Cupertino, the political arm of the Friends of Better Cupertino organization. Mr. Willey and Ms. Chao campaigned, with financial and material support from Better Cupertino, on a platform opposing both the SB 35 Project and the Specific Plan Project. In addition, Steven Scharf, a Council member since 2016, has worked with and coordinated with Better Cupertino both before his election and during his tenure on the City Council.

Liang Chao has publicly identified herself as a "founder" of Better Cupertino for years, including in her recently posted biography on the City Council website. Her 2018 campaign focused extensively, and almost exclusively, on defeating the SB 35 Project and the Specific Plan Project as a part of Better Cupertino.

In 2017, Mr. Willey was publicly listed as the Chief Executive Officer of Better Cupertino. Mr. Willey's listing as Chief Executive Office of the organization was changed in July 2018, after Friends of Better Cupertino initiated litigation to challenge the SB 35 project. As of 2017, Mr. Willey was also the "president" of Friends of Better Cupertino, the very entity that has sued both the City, as well as real party Vallco Property Owner, to challenge the SB 35 project and the specific plan project.

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Mr. Scharf is repeatedly identified by Better Cupertino as the "Better Cupertino" City Council member. In a speech to the state legislature, while a City Council member, Mr. Scharf identified himself as representing "Better Cupertino."

The connections between Ms. Chao, Mr. Willey, Mr. Scharf and Better Cupertino are as numerous as they are obvious. Ms. Chao, Mr. Scharf, and Mr. Willey have worked with Better Cupertino, and Friends of Better Cupertino, over the years to develop strategies to defeat the SB 35 Project and the Specific Plan Project, including the litigation now actively being pursued against the City and Vallco. Now that Mr. Willey and Ms. Chao have taken positions on the City Council, alongside Mr. Scharf, they are presumptively in a position to make strategy decisions concerning the City's defense of the litigation, despite their direct and meaningful connections to the organization that has brought the lawsuit.

From the filing of the litigation to present, the City – as defendant and respondent in the litigation – has defended its actions. Vallco's due process rights are violated when the City comes under the control of the petitioner that is attacking those actions. Due process requires a level playing field, with parties that are in *opposition* to one another. It is plainly unfair, and a violation of Vallco's due process rights, to allow Ms. Chao, Mr. Scharf, and Mr. Willey to control the defense of the litigation that they were instrumental in filing. The fox is guarding the henhouse.

The control of litigation requires discretion – assessment of facts and arguments developed during the litigation, and determining whether to pursue certain avenues of attack and defense, and what resources to devote to those efforts. It is analogous to Council actions in adjudicatory decisions, and in that context, municipal officials who have advocated for particular positions are prohibited from participating in those decisions. For example, in *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484, a planning commission member who had publicly advocated against a project had demonstrated actual bias, and was prohibited from voting on the proposed development. Just as in *Nasha*, Mr. Willey, Mr. Scharf, and Ms. Chao have affirmatively advocated against the SB 35 Project and the Specific Plan Project. One of the *primary organizing principles* of the organization that Ms. Chao founded, that Mr. Willey led, and that Mr. Scharf claimed to represent, was opposition to the development of the SB35 Project and the Specific Plan Project. The evidence of their actual bias against the two Projects is overwhelming.

Consideration of privileged materials and strategic decisions should remain the province of the City, not the party that has sued the City. The City is now in a position to determine its defense of the litigation brought by Friends of Better Cupertino, and it is ethically and procedurally improper for that defense to be determined and controlled by the very individuals whose organization initiated the lawsuits against the City.

These city council members are presumptively not acting solely in the interest of the City, but also acting on behalf of Better Cupertino. Because of their documented bias, information they receive as City Council members could immediately be attributed to Better Cupertino, including

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confidential and privileged litigation information. Ethics rules require that they recuse themselves from decisions involving the City's legal strategy and decision making regarding the SB 35 Project and the Specific Plan Project, and that they be "walled off" from receiving any non-public information about the litigation.

We appreciate your prompt consideration of and attention to this matter.

Very truly yours,



Katharine Van Dusen

ktv:KTV

cc: Todd Williams; Wendel Rosen (via email
toddwilliams@wendel.com)