SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRIENDS OF BETTER CUPERTINO, et al., Petitioners, vs. CITY OF CUPERTINO, et al., Respondents.	Case No. 18CV330190 ORDER DENYING PETITION FOR WRIT OF MANDATE
VALLCO PROPERTY OWNER, LLC, Real Party in Interest.	**ORDER ON SUBMITTED MATTER**

The verified first amended petition for writ of mandate (petition) came on for hearing before the Honorable Helen E. Williams on December 19, 2019, at 9:00 a.m. in Department 10 of the court.[1] Bern Steves and Stuart M. Flashman appeared for Petitioners Friends of Better Cupertino, Kitty Moore, Ignatius Ding, and Peggy Griffin; Heather M. Minner of Shute, Mihaly & Weinberger LLP appeared for Respondents the City of Cupertino and Grace Schmidt, in her official capacity as Cupertino City Clerk; Jonathan R. Bass, Katharine Van Dusen, and Miles H.

[1] The matter initially came on for hearing on November 1, 2019, but after the Court briefly made some initial remarks, the hearing was continued for a medical emergency.

Imwalle of Coblentz Patch Duffy & Bass LLP appeared for Real Party in Interest Vallco Property Owner LLC; Cole A. Benbow of Hanson Bridgett LLP appeared for amici curiae Bay Area Council, et al. (see list of referenced amici curiae parties with application for leave to file amicus brief) and Christopher E. Platten of Wylie, McBride, Platten & Renner appeared for amicus curiae United Association of Journeyman, Local Union 393, Plumbers, Steamfitters, and HVAC/R Service Technicians of Santa Clara and San Benito Counties (the Union) (sometimes collectively, Amici).[2] No party requested a statement of decision under Code of Civil Procedure section 632 and rule 3.1590 of the California Rules of Court in this hearing lasting less than eight hours. After the hearing, the cause was submitted; submission was later vacated by written order on a finding of good cause and the cause was then resubmitted.

After consideration of the pleadings, the briefing, the lodged administrative record, the matters of which the Court takes judicial notice and other evidence (as specified in the concurrent order re scope of the record), the arguments of counsel, and the applicable law, the Court denies the petition as follows.

I. Statement of the Case

This action is presented in traditional mandamus under Code of Civil Procedure section 1085 by Friends of Better Cupertino and its members Kitty Moore, Ignatius Ding, and Peggy Griffin (collectively, Petitioners) against the City of Cupertino (the City) and its clerk Grace Schmidt (collectively, Respondents). Petitioners oppose the redevelopment of the Vallco Fashion Mall in Cupertino (the Project) by real-estate developer Vallco Property Owner, LLC (Developer). They challenge the propriety of the City's June 22, 2018 and September 21, 2018 determinations to review and then approve the Project under new, streamlined procedures established by Senate Bill 35, codified at Government Code section 65913.4 (section 65913.4 or SB 35; further unspecified statutory references are to the Govt. Code). Petitioners contend that under section 65913.4, the City had a ministerial duty to reject the Project as ineligible for

[2] The Court by separate order filed concurrently herewith addresses the scope of the record and briefing. See Order re: Administrative Record & Scope of Briefing.

streamlined review and approval. They pray for the issuance of a writ of mandate directing Respondents to set aside that approval and issue a notice that the Project is ineligible for streamlining. The primary grounds asserted for relief are that the Project in certain respects conflicts with the "objective planning standards" set forth in section 65913.4, subdivision (a); it is therefore ineligible for streamlined approval such that the City had a ministerial duty to deny the application for streamlined review by giving timely and adequate notice to Developer under section 65913.4, subdivision (b). Respondents and Developer oppose the petition, and Amici join them.

A. Legislative and Statutory Background

In 2017, as part of legislative efforts to address the current housing crisis in California, the Legislature passed SB 35 to reform land-use and housing law, including by creating "a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment [ ] numbers."[3] (Sen. Rules Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) May 27, 2017.)

Section 65913.4, subdivision (a) states in pertinent part: "A development proponent may submit an application for a development that is subject to the streamlined, ministerial approval process provided by subdivision (b) and not subject to a conditional use permit if the development satisfies all of the [ ] objective planning standards" enumerated within that subdivision.

The objective planning standards that operate as eligibility criteria for streamlined, ministerial review are both inclusionary and exclusionary in character. In the abstract, the inclusionary and exclusionary criteria balance the primary policy of expediting housing

---

[3] As part of the housing element of a municipality's general plan, it must calculate its Regional Housing Needs Allocation or Assessment (RHNA), which is the "'existing and projected need for housing'" in the area for individuals and households of all income levels. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1186, fn. 8, quoting § 65583.) If a municipality's present and projected housing needs exceed its housing stock and land available for development, it must work to satisfy its RHNA by increasing the availability of land for housing development by, for example, changing zoning and development restrictions. (§ 65583, subd. (c)(1)(A).)

construction with the competing policy of safe, well-designed construction as embodied in existing law. To illustrate, a proposed development must be "a multifamily housing development that contains two or more residential units" in an urban area that will not displace existing rent-controlled and income-restricted housing. (§ 65913.4, subds. (a)(1)–(2), (a)(7).) A mixed-use development still qualifies if "at least two-thirds of the square footage of the development [are] designated for residential use." (§ 65913.4, subd. (a)(2)(C).) Exclusionary criteria disqualify a development proposed for construction in or on a coastal zone, fire zone, flood plain, earthquake fault zone, hazardous-waste site, wetland, or prime farmland. (§ 65913.4, subd. (a)(6).)

Unless an agency timely explains to a developer in writing the reasons why a proposed project conflicts with the eligibility criteria based on identified standards in existence when the application was submitted, "the development shall be deemed to satisfy the objective planning standards in subdivision (a)." (§ 65913.4, subds. (b)(1)–(2).) An agency's deadline for notifying a developer of ineligibility for streamlined, ministerial review is either 60 or 90 days depending on the size of the proposed development. (§ 65913.4, subds. (b)(1)(A)–(B).)

Proposed developments that qualify for streamlined, ministerial review may still be subject to design review or public oversight with the limitation that this oversight "shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction." (§ 65913.4, subd. (c)(1).) The design review must be completed, if at all, within 90 or 180 days[4] depending on the size of

[4] This means that for a smaller development, the deadline for notice of ineligibility is 60 days (§ 65913.4, subd. (b)(1)(A)) and an agency may take an additional 30 days to complete design review or public oversight for a total of 90 days (§ 65913.4, subd. (c)(1)). For a larger development, the deadline for notice of ineligibility is 90 days (§ 65913.4, subd. (b)(1)(B)) and an agency may take an additional 90 days to complete design review or public oversight for a total of 180 days (§ 65913.4, subd. (c)(2)).

the development and "shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect … ."[5] (§ 65913.4, subd. (c)(1).)

The Legislature amended section 65913.4 numerous times during the life of this action, including in July and October 2019.[6] The parties dispute whether the Court must apply relevant portions of the statute as it existed in 2018,[7] or as amended in July 2019 by Assembly Bill 101 (AB 101).

In general, statutes operate prospectively not retrospectively. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475.) As a matter of fundamental fairness and due

---

[5] Notably, while section 65913.4, subdivision (c) gives localities additional time to review objective design standards, the Legislature also enumerated compliance with "objective design review standards" as an objective planning standard—an eligibility criterion—in subdivision (a)(5). There does not appear to be a substantive distinction between these two terms. The descriptions in subdivisions (a)(5) and (c) of what design standards may be applied are so similar that they suggest the terms are equivalent. The framing of design standards as eligibility criteria and also criteria capable of review during the extended timeframe for public oversight is problematic because of the two distinct deadlines in the statute for making those distinct determinations. Treating compliance with objective design standards as an objective planning standard under subdivision (a) arguably renders as surplusage the later deadline for design review in subdivision (c)(1). Courts typically avoid interpreting statutes in such a manner. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

[6] On October 9, 2019, Governor Newsom signed Assembly Bill 1485. This most recent amendment does modify a provision implicated in this action. As amended, section 65913.4, subdivision (a)(2)(C) now specifies in its new final sentence: "The square footage of the development shall not include underground space, such as basements or underground parking garages." Given the timing of the amendment, the parties did not brief it. But the Court need not determine whether this provision applies retroactively in light of the Court's primary determination that because there is no ministerial duty to deny a noncompliant project, Petitioners may not, as a matter of law, challenge whether the criteria for streamlining were in fact satisfied. It is also not apparent from the submitted building plans, despite Petitioners' urging, that this amendment, even if applied, would affirmatively establish that the Project's residential-use ratio is less than two-thirds, the minimum required under section 65913.4, subdivision (a)(2)(C)'s unchanged objective planning standard.

[7] The Legislature amended section 65913.4, effective June 27, 2018. (Sen. Bill No. 850 (2017–2018 Reg. Sess.) § 1.) Although this particular amendment went into effect just after the City's initial eligibility determination but before its final approval of the Project, the amendment does not appear to have impacted the City's decision or bear on the outcome of this proceeding.

process, courts typically evaluate conduct in light of the law in existence at the time of the events giving rise to an action because people must know the law to act in conformity with it. (*Ibid.*) When a legislature amends an existing statute, a court must determine whether the amendment effectuates a substantive change in the law impacting existing rights that is tantamount to a new law or clarifies the law such that the amendment operates as a restatement of the law already in existence. (*Id.* at p. 472.) If the amendment clarifies existing law, a court may rely on the statute as amended to evaluate conduct predating the amendment. (*Ibid.*, citing *Western Security Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 243.) But if the amendment accomplishes a substantive modification of the law—i.e. changes the legal significance of past events—a court may not apply the statute retroactively "unless: (1) the statute contains an express retroactivity provision; or (2) extrinsic sources make it very clear that the Legislature must have intended retroactive application." (*Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 330 (*Salazar*).) And, even if the Legislature so intended, retroactive application is impermissible if it would violate fundamental principles of constitutional law. (*McClung*, *supra*, 34 Cal.4th at pp. 476–477.)

To classify an amendment, a court may consider "[a legislative] statement that a statute is declarative of existing law … ." (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 309.) "But it is not within the Legislature's bailiwick to interpret laws previously passed." (*Ibid.*) Thus, such a legislative statement does not necessarily control and is but one of many factors a court may consider. (*Ibid.*) Courts give little to no weight to a legislative statement about the significance of an amendment when made by a different group of legislators decades later. (*Apple, Inc. v. Super. Ct.* (2013) 56 Cal.4th 128, 145.) Also, "[w]here an unmistakable substantive change in the law has occurred, [ ] the court is not bound to accept a legislative statement that an amendment merely clarifies and restates the original statutory terms." (*Salazar*, *supra*, 117 Cal.App.4th at pp. 330–331.)

Developer argues here that AB 101 applies retroactively, but its analysis is too simplistic because it addresses the statute as a whole without regard for the actual substance of changes to individual provisions. Petitioners' analysis is similarly unhelpful because it is both conclusory

and based on inaccurate representations about the statutory language. While a legislative characterization of AB 101 as a "clean up" bill may be considered, as may a statement in the text of a statute that a certain amendment is declaratory of existing law, these legislative characterizations do not control. (See, e.g., § 65913.4, subd. (a)(5)(C) ["The amendments to this subdivision made by the act adding this subparagraph [AB 101] do not constitute a change in, but are declaratory of, existing law"].) While some amendments accomplished by AB 101 do seem clarifying, the same cannot be said for all of them. Thus, despite how the parties address this issue, the Court will consider the amendments to individual provisions on a case-by-case basis as needed to address the parties' substantive arguments.

B. Summary Background Within the Administrative Record

To generally describe the Project, Developer proposes redeveloping the existing Vallco Fashion Mall into the Vallco Town Center containing residential, retail, office, and public space. The construction site consists of 50.822 acres of land—a footprint of 2,212,848 square feet—spanning Wolfe Road near its intersections with Interstate 280 and Stevens Creek Boulevard. (AR0025.) The site is made up of two constituent areas connected by an above-grade pedestrian bridge, namely a larger area of 33.20 acres on the west side of Wolfe Road and a smaller area of 17.62 acres on the east. (AR0025.) In Developer's plans, it further divides these areas into 11 blocks. (AR0072, AR1025–1036.) Blocks 1–5 will be made up of mixed-use buildings with retail space on the ground floor and lower levels and residential space on the upper floors. (AR1025–1029.) Blocks 6–8 and 11 will be office buildings. (AR1030, AR1032–1033, AR1036.) Finally, Blocks 9–10 will consist solely of residences. (AR1034–1035.)

1. March 2018: Developer Applies for Streamlined Approval

On March 27, 2018, Developer applied for streamlined approval of its Project application by submitting a detailed project overview, renderings, architectural designs, landscape designs, and a tentative subdivision map. (AR1056–1580 [original application letter and supporting materials].) In its application letter, Developer explained that its Vallco Town Center proposal modified its previously submitted application to redevelop the Vallco Fashion Mall into the "Hills at Vallco," so the new proposal would meet the criteria for streamlined review under

section 65913.4.[8] (AR1056.) Developer described the proposed development as including: (1) "2,402 residential units, both for sale and for rent, serving a wide range of household types and lifestyles, 50 percent of which will be affordable to low and very low income levels"; (2) "400,000 square feet of retail and entertainment uses, including space for a new state-of-the-art AMC Theatres, bowling alley and ice rink ..."; (3) "1,810,000 square feet of office space, in order to make the project economically viable and for the City's long-term fiscal health"; and (4) "A rooftop park will provide an unprecedented community park, with accessible walking and jogging trails, turf playing fields, family picnic areas, orchards and organic gardens, children's play areas and a refuge for native species of plants and birds." (AR1061–1070.)

Developer set forth a detailed assessment of the Project's compliance with the eligibility criteria for streamlined review that are explicitly delineated in section 65913.4, subdivision (a)(1)-(10). (AR1091–1182.) It also analyzed what other zoning and design standards qualified as objective standards capable of evaluation through the streamlined review process and set forth a consistency assessment for those standards; Developer insists the Project also complies with a number of discretionary standards that are inapplicable to streamlined projects. (AR1091–1182.) This analysis is summarized in relevant part below.

First, Developer asserted that the Project—totaling 6,910,000 square feet of space—would consist of: 4,700,000 square feet or 68 percent residential space; 1,810,000 square feet or 26.2 percent office space; and 400,000 square feet or 5.8 percent retail space. (AR1096, AR1110–1111.) On this basis, Developer concluded that the Project meets the two-thirds residential use requirement in section 65913.4, subdivision (a)(2)(C). Next, Developer affirmed that the construction site is not on a listed hazardous waste site (see § 65913.4, subd. (a)(6)(E)). (AR1113.) Finally, Developer presented a tentative subdivision map and stated that its proposal

---

[8] Developer provided the City with a chart comparing its previous proposal to its new Vallco Town Center proposal. (AR1073.) A key difference between the proposals is the reduction in the square feet designated for retail and office uses, particularly a reduction from 2,400,000 to 1,810,000 for office square footage and a reduction from 640,000 to 400,000 for retail square footage. (AR1073.)

remained eligible for streamlined review even though it proposed subdividing the land because it agreed to pay prevailing wages and use a skilled and trained workforce as specified under section 65913.4, subdivision (a)(9)(B). (AR1114.)

In sum, as for the eligibility criteria at issue here, Developer asserted that its proposal complied. Developer also stated that the Project comported with other standards challenged by Petitioners in this action.

In this regard, Developer stated that the proposed Project qualified for a 35-percent density bonus as well as three concessions or incentives because Developer planned to build 1,201 affordable units with 360 units for households with very low income, and 841 units for households with low income. (AR1105.) Developer calculated that it could construct a total of 2,402 units instead of the 1,779 units authorized under the general plan in the absence of a density bonus. (AR1105.) Developer requested that the City authorize two specific concessions and asked to reserve its third concession in case the City identified an unanticipated inconsistency with objective standards. (AR1105–1106.) More specifically, Developer asked the City to waive the requirement of constructing affordable and market rate units with identical designs, which is set forth in Cupertino Municipal Code section 19.56.050. (AR1105.) Also, Developer asked the City to allow it to construct 400,000 square feet of retail space, instead of the 600,000 square feet set forth in the general plan, for financial sustainability and to offset the cost of the affordable housing units. (AR1106.) Developer acknowledged that it planned to construct bonus units in geographically separate areas in reliance on Cupertino Municipal Code section 19.56.030, subdivision(F)(7): "For purposes of calculating a density bonus, the residential units do not have to be based upon individual subdivision maps or parcels. The bonus units shall be permitted in geographic areas of the housing development other than the areas where the affordable units are located." Developer still planned to disperse the affordable units throughout the development under Cupertino Municipal Code section 19.56.050 despite characterizing the dispersal requirement as a discretionary standard inapplicable to streamlined projects. (AR1105.)

Next, Developer acknowledged the requirement of dedicating parkland or paying a fee in lieu of dedication applied as an objective standard and concluded that the Project exceeded the standard of a minimum of three acres per 1,000 residents. (AR1141, AR1146.) According to Developer, its development of 2,400 housing units with an average household size of 2.83 residents per unit would generate a need for 12.96 acres of parkland. (AR1141, AR1146.) The proposed Project will include "26 acres of publicly accessible open space, including 4 acres of at-grade park space and two plazas, and 14 to 22 acres of publicly accessible green roofs on all blocks connected by bridges (final amount depends on tenant needs)." (AR1141, AR1146.)

Finally, Developer acknowledged that the land had historically been zoned "P(Regional Shopping) and P(CG)," which are planned development zoning designations that allow standards to be "tailored to a specific program or project, which in this case is the existing mall." (AR1094.) It explained that because the general plan controls and contemplates redevelopment of the Vallco Fashion Mall, the preexisting zoning designations, like the mall itself, were now defunct due to their inconsistency with the general plan. (AR1094.) Developer also pointed out that the City could not adopt and apply a specific plan during the streamlined review process because that action would be discretionary. (AR1094–1095.) Based on this reasoning, Developer looked to the general plan for height limits—rather than to the standards for planned developments—and concluded there were none that applied. (AR1127.)

In summary, Developer pitched its Project as both one eligible for streamlined review due to consistency with the eligibility criteria and applicable objective standards as well as one that otherwise complied with traditional discretionary standards notwithstanding the inapplicability of those standards during the streamlined review process.

2. June 2018: Developer Supplements Application

On June 1, 2018, towards the end of the 90-day review window (§ 65913.4, subd. (b)(1)(B)), Developer sent the City more information, stating that it was "not new information and does not change the development submittal, but rather is provided to clarify and supplement the application materials." (AR1019.) This supplemental information included its block-by-block renderings of the buildings with area measurements for the different building

uses and a new summary table. (AR1024–1036.) The summary table still reflected that Developer planned to construct 6,910,000 square feet of space as follows: residential use (4,700,000); office use (1,810,000); and retail use (400,000). (AR1024.) The table also showed that Developer included amenity, unit, and parking space in its residential-use calculation but did not affirmatively reflect that space for amenities (if any) and parking were included in the calculation of office and retail use. (AR1024–1036.) And Developer sought to correct a table with area subtotals that had been inaccurately rendered in the building plans due to an Excel error that had caused space to be incorrectly distributed amongst three blocks of the development. (AR1055.) Developer otherwise restated its points about the Project's eligibility for a density bonus and plans for constructing the affordable and bonus market rate units; in doing so, Developer provided additional analysis of how its requested concessions would result in significant cost savings. (AR1020–1022, AR1037–1053.)

On June 19, 2018, Developer submitted yet another application supplement that primarily restated and added to the same points addressed in its June 1st letter and also provided additional information on landscaping and LEED certification not implicated here. (AR0927–0932.) As relevant here, Developer explained its methodology for calculating the areas designated for different uses and additionally discussed an alternative methodology and residential-use calculation based on more conservative assumptions. (AR0927–0928, AR0934.)

Developer offered that it had initially calculated the square footage for each use under Cupertino Municipal Code section 19.08.030:

> All rooftop spaces indicated as MEP are "exterior" roof spaces and are not counted in the area calculations. All non-residential basements and parking facilities, as defined in CMC Section 19.08.030, conform to CMC Section 19.28.070(I) and are not included in the area calculations. Interior building areas are calculated pursuant to CMC requirements and anticipate future tenant improvements, which will introduce compliant finished floor-to-ceiling heights at the time of tenant improvement building permit applications. Exhibit A provides illustrative finished ceiling locations for each floor.

(AR0927–0928.)

Developer then introduced its alternative methodology (AR0928):

> In addition to the above floor area compliance explanation, as a conservative exercise to clearly demonstrate compliance, we have also provided floor area calculations with certain areas double-counted in a separate table pursuant to CMC Section 19.08.030. In this calculation, ground floor heights higher than 20 feet are assumed not to have compliant finished floor-to-ceiling heights and thus are double-counted, and all floors above the ground floor with ceiling heights taller than 15 feet assumed not to have compliant finished floor-to-ceiling heights (i.e. floors 6 through 8 in the Block 11 office building) are double counted. Even with this conservative calculation, the Project complies with SB 35's two-thirds residential requirement.

In other words, because Developer's methodology for calculating square footage was based on the definition of "floor area" in Cupertino Municipal Code section 19.08.030—defining this term as inclusive of "interior building area above [15] feet in height between any floor level and the ceiling above"—it sought to provide two calculations in the event that the City interpreted this particular portion of the definition (especially the term ceiling) in a different manner. Developer's second calculation concluded that there was a total of 7,429,263 square feet of the development consisting of 4,961,904 square feet or 66.8 percent residential space, 1,981,447 square feet or 26.7 percent office space, and 485,912 square feet or 6.5 percent retail space. (AR0934.) Because this methodology still resulted in more than two-thirds of the development being designated for residential use, Developer maintained that the Project met this eligibility criterion even using an alternative methodology. (AR0928.)

Developer made an additional note about the pedestrian bridge across Wolfe Road:

> We understand that some in the community have asked about the uses proposed for the "bridge" area above Wolfe Road, and if that should count towards the residential areas. Although the details of the program have not been finalized, this area is planned to house various types of residential amenity uses, including primarily some combination of the fitness and wellness facilities described above. We also note that this area is not necessary in order to meet the two-thirds residential requirement. Even if the 41,000 square feet were counted as non-residential, 67.4% of the development would

still be dedicated toward residential uses.[9]
(AR0928.)

3. June 22, 2018: The City Authorizes Streamlined Review

On June 22, 2018, David Brandt (the City Manager) wrote to Developer to inform it that its proposed Project comported with the eligibility criteria in section 65913.4, subdivision (a) and qualified for streamlined review. (AR0888–AR0900.) This letter reflects that the City agreed with Developer's analysis of the eligibility criteria, including its calculation of the density bonus. It is helpful to observe how the City reached the same conclusion as Developer on three particular issues.

With respect to the residential-use requirement in particular, the City applied the definition of floor area in Cupertino Municipal Code section 19.08.030. (AR0891–0892.) In doing so, it adopted Developer's second calculation of designated-use areas as set forth in the June 22nd letter. (AR0892.) Based on the calculation of 66.8 percent residential use, the City concluded that the development met the two-thirds residential-use requirement. (AR0891–0892.)

Next, in agreeing that the Project was not planned for construction on a hazardous waste site, the City explained that it had checked several databases maintained online by divisions of the California Environmental Protection Agency (CalEPA)—the State Water Resources Control Board's Geotracker database and the Department of Toxic Substances Control's Envirostor database—because these databases are constituent sources that collectively comprise (with several others) what is known as the "Cortese list," a list of potentially contaminated sites (see § 65962.5, subd. (c)(1); *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 774 (*Parker Shattuck*)). (AR0895–0896.) The City located no cases in the Envirostor database and only two closed cases in the Geotracker database. (AR0895–0896.)

---

[9] Developer necessarily seems to assert that the area of the bridge is immaterial to the residential-use calculation when its original methodology is applied because the calculation using the second methodology is less than 67.4 percent—namely 66.8 percent—with the bridge included as a residential space. The City ultimately applied the second methodology that double counts an interior area above 15 feet when there is a ceiling, which appears to be defined based on whether the surface is finished. Consequently, the bridge does seem necessary to satisfy the residential-use requirement when using the second methodology adopted by the City.

Based on CalEPA guidance, the City determined that the cases for two leaking underground storage tanks (LUSTs) had been closed by the State Water Resources Control Board in 1994 and 1999, such that the sites were no longer considered to be on the Cortese list. (AR0895–0896.) The City thus concluded that the proposed construction site was not located on a hazardous waste site within the meaning of section 65913.4, subdivision (a)(6)(E). (AR0895–0896.) In reaching this conclusion, the City noted that the Department of Toxic Substances Control "is not responsible for monitoring or inspecting LUSTs and therefore, no clearance from [it] is necessary." (AR0896.)

Finally, the City agreed with Developer's assessment of the supremacy of the general plan vis-à-vis the inconsistent zoning designations from the previous planned development (Vallco Fashion Mall) and the inapplicability of the nascent specific plan that had yet to be completed and adopted. (AR0893.) In light of this conclusion, the City determined that there were no height limits or "architectural design standards" applicable to the Project. (AR0894.)

In summary, by the end of June 2018, the City had approved the Project application for streamlining but had yet to complete its streamlined, ministerial review. The City indicated that there were some other objective standards in existence and of general applicability that would be evaluated during the additional 90-day window for public oversight authorized by section 65913.4, subdivision (c)(1). (AR0894.)

4. July–August 2018: Developer Updates Plans and Application

In July and August 2018, Developer presented the City with updated plans and reports with a primary focus on landscaping and tree removal. (AR0367–0874.) The response letters accompanying these submissions largely reflect that Developer updated the renderings and related materials to more clearly demonstrate just what it intended to do so the City could better evaluate the Project. These voluminous materials are not summarized here.

5. September 2018: City Finally Approves Application

On September 21, 2018, Amy Chan (Interim City Manager) informed Developer of the City's final approval of the proposed Project at the end of both the streamlined, ministerial review and the 90-day extension for public oversight allowed under section 65913.4, subdivision

(c)(1). (AR0003–0330.) The City stated that its approval was "based on the Application and the additional clarifying information requested by the City [and] submitted by [Developer] on June 1 and 19, July 31, August 17 and 24, and September 7." (AR0003.) The City also explained that "[c]onsistent with the processing of all development applications, [Developer] provided a cumulative ('clean') package including a plan set dated September 15, 2018 and the additional information provided as noted above and which is referred to as the 'Project Application.' " (AR0003.) In approving Developer's application, the City also approved the following entitlements: (1) Development Permit–Major; (2) Architectural and Site Approval–Major; (3) Tentative Subdivision Map for Condominium Purposes; and (4) Tree Removal Permit.

C. Summary of Allegations and Proceedings

Petitioners filed their original petition for writ of mandate on June 25, 2018, which date they believed to be the City's deadline under section 65913.4, subdivision (b)(1) for notifying Developer that its proposed Project was ineligible for streamlined, ministerial review based on conflict with objective planning standards. They initially alleged that the City never acted in response to Developer's application and had intentionally run out the clock so the proposed Project would be deemed to satisfy the objective planning standards under section 65913.4, subdivision (b)(2). (Pet., ¶¶ 32–35.) They simultaneously filed an application asking the Court to issue the writ ex parte, which application they later withdrew upon learning that the City had, in fact, responded to Developer's application on the evening of Friday, June 22, 2018. On October 16, 2018, Petitioners filed the first amended petition in which they acknowledged that the City did respond to Developer's application. (Am. Pet., ¶¶ 4–5 & Exs. 1–2.)

According to the petition, in March 2018, Developer submitted to the City an application entitled "Vallco Town Center Project Application pursuant to SB35" proposing construction of a large mixed-use development with high-density housing as well as office and retail space. (Am. Pet., ¶ 34 & Ex. 4.) The petition alleges that the proposed Project is on a hazardous waste site, does not have sufficient residential space, exceeds height limits, lacks a sufficient setback, does not comply with requirements for below-market-rate units, and lacks dedicated parkland. (Am. Pet., ¶¶ 44–113.) The petition thus asserts that the proposed Project is ineligible for the SB 35

streamlined, ministerial approval process because it does not comply with certain objective planning standards listed at section 65913.4, subdivision (a) and, in any event, does not comport with objective design standards sufficient to qualify for final approval after the design review and public oversight contemplated by section 65913.4, subdivision (c)(1). (Am. Pet., ¶¶ 124–130.)

On these bases, Petitioners set forth two "causes of action" challenging: (1) the City's initial determination on June 22, 2018, that Developer's Project qualified for the streamlined, ministerial approval process under section 65913.4, subdivision (a); and (2) the City's decision on September 21, 2018, to approve and issue permits for the Project. (Am. Pet., ¶¶ 24–25 & Exs. 1–2.) They petition the Court to nullify or direct the City to rescind both decisions.

In February 2019, Developer filed a motion for judgment on the pleadings; it argued that the action was time-barred. The Court rejected this argument and denied the motion by written order in April 2019. Respondents and Developer then answered the petition, and the parties later submitted briefing on the merits. In the course of this briefing, Respondents filed what they called a statement of nonopposition.[10] Petitioner and Developer also requested consideration of

---

[10] Although the City purports to abstain from arguing the merits, it makes a vague statement in its filing that the Court should consider the fact that the Project may exacerbate the jobs-housing imbalance in Cupertino and cites the Legislature's policy statement in section 65913.4, subdivision (*l*) that the statute should be interpreted in a manner to promote increased housing supply. This commentary, couched as "nonopposition," is not helpful. There is a significant distinction between interpreting the law in a manner consistent with the Legislature's stated policy objective on the one hand, and deciding a case in an unprincipled manner guided by a policy consideration in the abstract on the other hand. In any event, because the City is simply tipping its hand and has not made a contribution capable of evaluation in an identifiable analytic framework or under the appropriate standard of review, the Court does not discuss its comment further. The points raised by Developer in response to the City's statement of nonopposition have merit. A true statement of nonopposition is meant to narrow the issues and to help the Court use resources efficiently, not to raise issues or sandbag by pointing to positions allegedly not being argued. And, while the City then filed a reply to Developer's response reasserting that the jobs-housing imbalance is a fact before the Court that should be considered, it failed to provide adequate support for this contention. The City had over a year to weigh in independently by actual briefing with citation to the administrative record and it chose not to do so. The Court therefore disregards the City's impromptu negative commentary on the Project disguised as nonopposition.

extra-record evidence, including matters subject to judicial notice. Finally, Amici filed their briefing with the permission of the Court.[11] Given the volume of evidentiary, record, and briefing issues—requests for judicial notice, requests for admission of extra-record evidence, objections, and amicus briefing—the Court elected to resolve these ancillary issues by separate order filed concurrently herewith.

II. Discussion

A. The Character and Standard of Review and Petitioners' Approach

Petitioners contend that Respondents' decisions to accept the Project for streamlined review and to approve it are subject to judicial review in traditional mandate under Code of Civil Procedure section 1085, not administrative mandate under Code of Civil Procedure section 1094.5. At first, they conclude that traditional mandate is available to review ministerial and adjudicatory decisions made without a hearing, and they identify the corresponding arbitrary and capricious standard of review for abuse of discretion.[12] But they do not engage in analysis of applicable legal principles to establish or honor the true character of this traditional mandate proceeding or its associated standard of review; nor do they consistently adhere to any standard of review in their arguments, which are primarily fact-based and which would thus ordinarily be subject to substantial evidence review in mandate.

At core, Petitioners treat the decisions under review—principally the first one to accept the Project for streamlining based on compliance with objective planning standards—as ministerial seemingly based on the use of the term "ministerial" in section 65913.4, subdivision (a). (See, e.g., Brief Re: Selection of Doc. at pp. 5:22–6:1.) They assume that because section 65913.4 authorizes *ministerial approval* of a project, it also imposes a corresponding *ministerial*

---

[11] For the reasons set forth in the accompanying order addressing the record, the Court has considered the Amici briefs, but they are not explicitly addressed here point by point.

[12] It is not clear whether Petitioners believe there is an actual or legally significant distinction between a ministerial decision and an informal adjudicatory decision. They cite *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, which is neither recent nor related to zoning and land-use.

duty to reject a nonconforming project. As a result of this apparent assumption, they do not offer authority or statutory analysis to support their underlying legal premise of the existence of a legal duty to reject a nonconforming project. They instead jump ahead to whether the facts that would theoretically trigger the purported ministerial duty are present in the record here. And Petitioners' discussion of the facts and their legal significance in the context of this traditional mandate proceeding is disorganized and undisciplined. They present their independent judgment on the record facts and essentially ask the Court to adopt the same. This point is illustrated by Petitioners' briefing, which reflects conjecture about the facts and contains minimal legal analysis or analogous authority establishing that similar facts have warranted the extraordinary relief Petitioners seek. Their urged points at the hearing did not substantially improve on this tendency. (RT at pp. 43–44.) While Petitioners offered that factual issues in the record should be evaluated under a substantial evidence standard and legal issues should be considered de novo, they did not adhere to these standards or account for the level of deference afforded under the law to agency decisions on development applications or conclusions rooted in an agency's interpretations of its own policies and local code. As a result, Petitioners have left the Court with the difficult task not only of evaluating the accuracy of their arguments, but of construing and framing the arguments in a manner that permits evaluation under the correct analytic approach and through a standard of review applicable to relief in mandate.

"The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other." (*Shapell Industries, Inc. v. Governing Bd.* (1991) 1 Cal.App.4th 218, 232 (*Shapell*).) The first step to selecting the standard of review is determining the proper or true nature of the writ proceeding. (*Id.* at pp. 230–231.) This first step has been the subject of substantial litigation and caselaw that has yet to yield a bright-line rule. (See, e.g., *Southern California Cement Masons Joint Apprenticeship Com. v. California Apprenticeship Council* (2013) 213 Cal.App.4th 1531, 1541 (*Cement Masons*).) When, as here, "a decision falls between the statutory cracks of writ review, the choice between Code of Civil Procedure sections 1085 and 1094.5 is not straightforward." (*Ibid.*)

Some courts faced with similar circumstances have avoided making this difficult choice when faced solely with questions of law that are reviewed independently in both traditional and administrative mandamus proceedings. (See, e.g., *Cement Masons*, *supra*, 213 Cal.App.4th at p. 1541; see also *State Bd. of Chiropractic Examiners v. Super. Ct.* (2009) 45 Cal.4th 963, 977.) But here, the Court must on its own assess the true character of the proceeding to isolate the proper standard of review. This is because while the Court must first determine the foundational legal issue of whether section 65913.4 creates a ministerial duty at all to reject a non-compliant project, after that, the Court reaches Petitioners' specific challenges to the City's approval decisions. On these questions, as noted, Petitioners primarily focus on the record facts and the manner in which the City interpreted and applied its regulations to those facts. But they do so in a vacuum untethered to any identified or analyzed standard of judicial review and without regard for the character of review in traditional mandate.

A "trial court ha[s] no obligation to undertake its own search of the record 'backwards and forwards to try to figure out how the law applies to the facts' of the case. [Citation.]" (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934.) Despite this lack of obligation, the Court must do so here in order to address the specific issues Petitioners raise and the manner in which they raise them. The expectation that a party must provide supporting analysis and legal reasoning, embodied in rule 3.1113 of the California Rules of Court, "rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide." (*Ibid.*) And so, Petitioners' dereliction of this analysis by their failure to frame their arguments through the lens of an appropriate standard of review within the context of the traditional mandate their petition invokes is burdensome. (See, e.g., *James B. v. Super. Ct.* (1995) 35 Cal.App.4th 1014, 1021.)

This problem is exacerbated here by the fact that Petitioners' challenge under section 65913.4 is novel and there is not yet guidance from appellate precedent. For this same reason, and to guide its own analysis and review, the Court sets forth below its own evaluation of the

nature of this proceeding in an attempt to pave an available path to the merits of the parties' subsidiary arguments.

"There are three general types of actions that local government agencies take in land use matters: legislative, adjudicative and ministerial." (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623 (*Calvert*); accord *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 565.) "Legislative actions involve the enactment of general laws, standards or policies, such as general plans or zoning ordinances." (*Calvert, supra*, 145 Cal.App.4th at p. 623.) "Adjudicative actions—sometimes called quasi-judicial, quasi-adjudicative or administrative actions—involve discretionary decisions in which legislative laws are applied to specific development projects; examples include approvals for zoning permits and tentative subdivision maps." (*Ibid.*) In contrast, "[m]inisterial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment; an example is the issuance of a typical, small-scale building permit." (*Ibid.*)

Of course, a ministerial act may be reviewed by traditional mandate under Code of Civil Procedure section 1085. (*Palmer v. Fox* (1953) 118 Cal.App.2d 453, 458–459.) "A ministerial act is one that a public functionary ' " 'is required to perform in a prescribed manner in obedience to the mandate of legal authority,' " ' without regard to his or her own judgment or opinion concerning the propriety of such act. [Citations.]" (*Ellena v. Dept. of Insurance* (2014) 230 Cal.App.4th 198, 205 (*Ellena*).) " 'Thus, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." ' [Citations.]" (*Ibid.*; see also *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 128–129 (*Millbrae*).) A court may issue a writ if there is: "(1) a clear, present, ministerial duty on the part of the respondent and (2) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty." (*Millbrae, supra*, 108 Cal.App.4th at p. 129.)

"Mandamus may also issue to correct the exercise of discretionary legislative power, but only where the action amounts to an abuse of discretion as a matter of law because it is so palpably unreasonable and arbitrary." (*Ellena, supra*, 230 Cal.App.4th at p. 206.) "In ordinary

mandamus proceedings courts exercise very limited review 'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.' [Citation.]" (*Shapell, supra*; 1 Cal.App.4th at p. 230.) "The court may not weigh the evidence adduced before the administrative agency or substitute its judgment for that of the agency, for to do so would frustrate legislative mandate." (*Ibid.*) "An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action [citations], and the court does not concern itself with the wisdom underlying the agency's action any more than it would were the challenge to a state or federal legislative enactment. [Citation.]" (*Ibid.*) "In sum, the court confines itself to a determination [of] whether the agency's action has been ' " 'arbitrary, capricious, or entirely lacking in evidentiary support ... .' " ' [Citations.]" (*Ibid.*)

To clarify, "a party may not invoke mandamus to force a public entity to exercise discretionary powers in any particular manner[;] if the entity refuses to act, mandate is available to compel the exercise of those discretionary powers in some way." (*Ellena, supra*, 230 Cal.App.4th at pp. 206–207.) In other words, while mandamus may lie to compel an entity to act, to make some decision, it does not lie to compel an entity to reach a particular outcome or decision. (*Ibid.*) For this reason, " ' "[m]andate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and *unmixed with discretionary power or the exercise of judgment.*" [Citations.]' (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 596.)" (*California High-Speed Rail Authority v. Super. Ct.* (2014) 228 Cal.App.4th 676, 715, original italics.) Even if a statute contains mandatory language or some limitation on the exercise of discretion, direct enforcement is not available and the action must be reviewed under the deferential standard for quasi-legislative actions if discretion necessarily must be exercised to carry out the action. (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 914–915.)

"If the administrative proceedings are quasi-judicial in character, judicial review will be stricter." (*Shapell, supra*, 1 Cal.App.4th at p. 231.) Review of the action is by administrative mandate. (*Ibid.*) "Since such a proceeding adjudicates individual rights and interests, findings are

required and the reviewing court looks to see whether the findings are supported by the evidence." (*Ibid.*) "If fundamental rights are implicated the court may be authorized to exercise its independent judgment to determine whether the findings are supported by the weight of the evidence." (*Ibid.*) "In all other cases the court examines the record for substantial evidence in support of the findings." (*Ibid.*)

Traditional mandamus "is generally an appropriate means of facially challenging a legislative or quasi-legislative enactment of a public entity [citation]; however, the appropriate remedy for a challenge to the application of an enactment to specific property—i.e., an 'as-applied challenge'—is through administrative mandamus." (*Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 259.) That said, the decision to issue a building permit may qualify as a ministerial act involving no exercise of discretion or an act that, while primarily rooted in objective criteria, involves some exercise of discretion. (See *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 572; see also *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267–272 (*Westwood*) [discussing ministerial acts in the context of the California Environmental Quality Act (Pub. Res. Code, § 21000 et seq. (CEQA)].)

The question whether a statute imposes " 'a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation.' " (*Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965 (*Weinstein*), quoting *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.) There is no mechanical test. (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1540 (*Gananian*).) Mandatory language or the characterization in a statute does not necessarily control. (*Ibid.*; accord *Weinstein*, *supra*, 237 Cal.App.4th at p. 965.) Rather "[a] reviewing court must 'examine the language, function and apparent purpose of' the statutory provision 'to determine if [it] creates a mandatory duty.' [Citation.]" (*Gananian*, *supra*, 199 Cal.App.4th at p. 1540.)

For the reasons that follow, the Court concludes that while the Legislature sought to require agencies to apply objective rather than discretionary criteria when reviewing development proposals submitted under section 65913.4, the statute does not impose a

ministerial duty to undertake the review or to reject a nonconforming application. Further, it appears that in undertaking a streamlined review, depending on the circumstances, an agency may still be required to make some decisions that involve elements of discretion.

The Legislature had the express purpose of expediting housing construction by changing how the local planning and review processes function. In evaluating this purpose along with the language of the statute, it is helpful to first consider the Legislature's observations about the existing regulatory process it sought to improve upon:

> Some housing projects can be permitted by city or county planning staff ministerially or without further approval by elected officials. Projects reviewed ministerially require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. Most large housing projects are not allowed ministerial review. Instead, these projects are vetted through both public hearings and administrative review, including design review and appeals processes. Most housing projects that require discretionary review and approval are subject to [CEQA] review, while projects permitted ministerially are not.

(See Sen. Gov. & Finance Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) April 26, 2017 at p. 2.)

The Legislature seems to have understood the ministerial-discretionary dichotomy, in part, as defined under CEQA. In that context, a land-use decision like the issuance of a permit is ministerial when the permit must be issued upon satisfaction of objective measurements that can be assessed without personal judgment. (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 300–302 (*Briones House*), citing *Westwood*, *supra*, 191 Cal.App.3d at pp. 269–70.) In contrast, " 'where the agency possesses enough authority (that is, discretion) to deny or modify the proposed project on the basis of environment [*sic*] consequences the EIR might conceivably uncover, the permit process is "discretionary" within the meaning of CEQA.' " (*Briones House*, *supra*, 190 Cal.App.4th at p. 302, quoting *Westwood*, 191 Cal.App.3d at p. 272.)

With section 65913.4, the Legislature attempted to transform a historically adjudicative or quasi-judicial process into a ministerial one. In other words, the Legislature attempted to

extend permitting by right beyond simple projects or building renovations to projects of substantial scale and complexity, like Developer's Project here. In doing so, while the Legislature purported to make the review process ministerial and nondiscretionary, it set forth detailed eligibility criteria and allowed the continued application of innumerable local design standards, including standards in an existing general plan. Based on the number, nature, and complexity of the enumerated eligibility standards and the continued applicability of unenumerated local standards, the streamlined review process afforded by section 65913.4 does not seem truly or purely ministerial. Also, section 65913.4 still allows design review by the applicable body, such as a planning commission or city council. (§ 65913.4, subd. (c).) Local practices persist so long as they do not "inhibit, chill, or preclude the ministerial approval … ." (§ 65913.4, subd. (c).) By focusing on the substance of the review and not addressing the actual procedure to be used by an agency in evaluating a project submitted for streamlined approval, the Legislature did not entirely or necessarily transform the review process into a purely ministerial one from a procedural perspective. And so, whether or not the Legislature intended to do so, section 65913.4 allows for a hybrid review process in which objective criteria are evaluated through a mechanism that, although possibly informal, is still adjudicatory in nature and involves the exercise of some agency discretion. (See, e.g., *Cement Masons*, *supra*, 213 Cal.App.4th at p. 1541.) To be sure, as shown by the record, the City took a hybrid approach here.

Although the ultimate decision to approve Developer's application was made with less formality by the City Manager, rather than by the City Council after a hearing, the decision still contains findings (AR0888–0900) similar to those that might be adopted by City Council resolution in the course of a discretionary review process. (See, e.g., *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963, 966.) Also, the City's decision involved the application of land-use regulations to a specific parcel of property. Thus, the City's decision has characteristics of an adjudicatory decision. But ultimately, the City's decision is not purely adjudicatory because it did not follow a formal hearing.

Just as the City's decision is not entirely adjudicatory, it is not wholly ministerial either. Indeed, Petitioners make statements that undercut their treatment of the decision as a purely

ministerial one. According to Petitioners, the City's determination that current zoning was inconsistent with the general plan for the purpose of deciding what standards (including height limits) to apply (AR0893) was a discretionary decision that is not permitted in the course of streamlined review. (Pet. Brief at p. 28:2–5.) As another example, Petitioners assert that the City was not permitted to interpret its own general plan requirements for parkland because interpretation is an exercise of discretion. (Pet. Brief at p. 15:19.)

At the start, Petitioners appear to conflate the concept of a discretionary standard within the meaning of section 65913.4 with the concept of an intermediate exercise of discretion more generally. From this mistaken premise, they assert that the City impermissibly applied discretionary standards in violation of section 65913.4 by making discretionary decisions. But it is unclear how this conclusion supports Petitioners' claim for relief. By this logic, the proper conclusion is that objective standards that involve any element or intermediate exercise of discretion may not be applied at all. Put differently, conflating discretionary standards with those applied as a result of an exercise of discretion does not lead to the conclusion that the City's approval here was issued in error. Rather, this premise supports the conclusion that the Project was approved notwithstanding the application of extraneous discretionary standards. Petitioners thus err in this regard, and this flaw permeates all of their arguments.

More significantly, the examples identified by Petitioners as the bases on which the Project should not have been approved for streamlining are instances in which the City *had to* exercise discretion to comport with the statute. Further, when applying the objective criteria for streamlining eligibility explicitly set forth in section 65913.4, subdivision (a) (as compared to the other objective zoning or design standards an agency may apply), the City had to exercise discretion to interpret and properly apply those criteria, many of which contain terms that are not defined in the statute. (See, e.g., § 65913.4, subd. (a)(2)(C).) Thus, while the standards applied during streamlined review are supposed to be objective and not discretionary, an agency necessarily must exercise some discretion when deciding how to conduct the streamlined review, including in deciding what standards to apply and how to interpret those standards. (See generally *Collins*, *supra*, 41 Cal.App.5th at pp. 914–915.) In sum, the City did not, and

could not, make a purely ministerial decision here that was unmixed with, or devoid of, discretion.

The mixed nature of the decision means that Petitioners have not proceeded with their challenge in accordance with an appropriate standard of review. Even if both of the City's decisions under review—initially to conduct streamlined review and then to approve the Project—do not fit neatly into an existing box, Petitioners' treatment of the Project approvals and each intermediate determination supporting those approvals as ministerial, subject to de novo review and deserving of no deference, is misplaced. At minimum, some deference must be given to intermediate decisions made by the City in the course of the review process. (See generally *Collins*, *supra*, 41 Cal.App.5th at pp. 914–915.) For example, "judicial review of consistency findings is highly deferential to the local agency." (*Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 18–19.) " '[C]ourts accord great deference to a local governmental agency's determination of consistency with its own general plan, recognizing that "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies . . . ." ' [Citations.]" (*Ibid.*)

Arguably, because the approval decision here seems to be the proper subject of traditional mandamus review but not a purely ministerial decision, the Court must limit its review to whether the acts of allowing streamlining and then issuing the permit were arbitrary and capricious. In making this determination, the Court need not engage in a granular analysis of individual reasons or findings given in support of these actions or their evidentiary foundation. Because the City's correspondence reflects that it tried to follow the substance of section 65913.4, engaged in a reasoned analysis, and considered a substantial amount of evidence, Petitioners' challenge arguably fails notwithstanding the purported presence of some irregularities or errors in the decision-making process. Incidentally, this approach comports with the purpose, spirit, and mechanics of the statute.

Alternatively, because Petitioners do not have a consistent and coherent analytic approach and present their arguments in a scattershot and conclusory fashion, it is difficult to truly engage with the points they make in a meaningful and legally permissible way, even upon

independent consideration and resolution of the character and standard of review applicable in this proceeding. For example, while there are subtle differences in the standards of review applicable to traditional and administrative mandamus actions, respectively, the standards are similar in many regards. (*Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 706–08 (*Sacramentans*). Some degree of deference is typically warranted in both and a court may not ordinarily exercise independent judgment except on pure questions of law. (*Ibid*; see also *Shapell*, *supra*, 1 Cal.App.4th at pp. 231–232.) Based on Petitioners' approach, it is difficult to reframe their arguments under any standard affording even a modicum of deference to the agency decision under review.

B. Section 65913.4 Does Not Impose a Ministerial Duty to Reject a Proposal

Moving on from the above discussion grounded in the context and character of this mandate action and the related issue of the applicable standard of judicial review, the Court proceeds to reject Petitioners' foundational legal premise that section 65913.4 imposes a ministerial duty on the part of an agency to reject a nonconforming development proposal. Petitioners' focus in briefing is on whether the facts in the record support the Project's eligibility for streamlining, and the City's application of zoning laws to the facts, as if factual non-eligibility triggers a ministerial duty to reject a project. But at the threshold, Petitioners neglect to address whether section 65913.4 on its face even imposes such a ministerial duty. Without addressing this foundational premise, they surely have not established it. In opposition, Developer argues that there is no duty for an agency to reject a project that does not meet the objective planning standards listed in section 65913.4, subdivision (a).

As the Court reads it, the statute merely modifies existing obligations and does not affirmatively impose any duty on an agency to act, instead imposing consequences for a defined failure to act. Specifically, the Court concludes as a matter of law that section 65913.4 does *not* impose a ministerial duty on an agency presented with an application for streamlined review to either undertake review or to reject the application if the agency determines that the project is ineligible because it conflicts with one or more of the enumerated objective planning standards listed in subdivision (a).

First and foremost, although section 65913.4 characterizes the eligibility determination and design review process as "ministerial"—disallowing the application of discretionary standards inherently involving subjective judgment—the statute by its terms does not impose any duty at all to reject a project. As Developer articulates, there simply is no provision in the statute that explicitly states as much. (See, e.g., *California High-Speed Rail Authority*, *supra*, 228 Cal.App.4th at pp. 706–713 [statute did not impose a ministerial duty to act in a particular manner upon receipt of a defective plan notwithstanding the mandatory, multistep process required to prepare the plan].) Nor does the statute impose a duty to even review applications or act in the first instance. Rather, it provides a carrot for developers to build housing—streamlined review—and a stick for agencies that fail to work with these developers—the limitation of their ability to weigh in on projects. In other words, the term "ministerial" as used in the statute is an adjective modifying and characterizing the review and approval process. It does not modify or characterize any stated duty or obligation on the part of agencies to evaluate project eligibility or to engage in design review, and no such language exists in the statute.

Second, the statute functions to accelerate review of development applications in the event of agency inaction. In other words, the Legislature specifically incorporated the possibility that an agency would fail to timely reject an application for streamlining and it set forth the consequences of this inaction. And so, as a matter of text or mechanics, the statute does not function to require an agency to reject an application for streamlining—even an ineligible one—in the first phase or to reject a project as a whole at the completion of the streamlined review.

More specifically, section 65913.4, subdivision (b)(2) states "[i]f the local government fails to provide the required documentation pursuant to paragraph (1), the development shall be deemed to satisfy the objective planning standards specified in subdivision (a)." There are two essential operative terms in this provision, namely: (1) "fails"—the term triggering the provision's application; and (2) "deemed"—the term establishing the result or consequence. "To fail means to leave unperformed; to omit; to neglect (Bouv. Law Dic.) … ."[13] (*A. Widemann Co.*

[13] This definition is consistent with the legislative history of section 65913.4, which reflects that the Legislature was concerned about an agency sitting on an application and

v. Digges (1913) 21 Cal.App. 342, 345; see also Garner, Dict. of Modern Legal Usage (3d ed. 2011) at p. 351 [distinguishing failure from conscious choice].) The distinction between failing to act and affirmatively taking action has long been recognized in the law. (See, e.g., *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 435, fn. 5 [discussing common law distinction between nonfeasance and misfeasance in the context of tort liability].) To deem something is "to treat [a thing] as being something that it is not, or as possessing certain qualities that it does not possess." (Garner, Dict. of Modern Legal Usage (3d ed. 2011) at p. 254.) It is frequently used "in legislation to create legal fictions . . . ." (Garner, Dict. of Modern Legal Usage (3d ed. 2011) at p. 254.) The California Supreme Court has explained that the term "deemed" creates, not an evidentiary presumption, but a rule of substantive law by establishing the legal equivalent of a particular fact or scenario. (*People v. McCall* (2004) 32 Cal.4th 175, 188.) A legal equivalent is, by definition, not equivalent in fact. Thus, section 65913.4, subdivision (b)(2) operates to establish the consequences of agency inaction irrespective of the action warranted by the true state of facts. Put differently, when no action is timely taken by an agency under section 65913.4, subdivision (b), the law treats a project as though it satisfies the objective planning standards, regardless of whether it actually does.

Because the statute by its terms contemplates that a project may proceed through streamlined review and ultimately be approved even if it is, in fact, in conflict with one or more of the objective planning standards, the Court concludes that section 65913.4 creates no affirmative duty on the part of an agency to act on an application for streamlining; nor does it create a duty to reject a nonconforming project.

It follows that Petitioners cannot establish that the City had a duty here to either deny Developer's request for streamlining or to reject the Project in its entirety, regardless of the true

---

delaying any evaluation of or decision on it, as often occurs under the Permit Streamlining Act of 1977. (See Sen. Gov. & Finance Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) April 26, 2017 [discussing similar provision triggered by "failure to act" in Permit Streamlining Act and delays in application review]; see also *Orsi v. City Council of the City of Salinas* (1990) 219 Cal.App.3d 1576, 1586 [deemed approval triggered when project is "neither approved nor denied" by deadline].)

state of facts with respect to the Project's compliance with the objective planning standards. Section 65913.4, subdivision (b)(2)(c) allows an agency some additional time to conduct public oversight or design review, but it does not mandate that the agency do so. Indeed, section 65913.4 contemplates that a project may be deemed to qualify for streamlining based on agency inaction and will not necessarily undergo any additional review thereafter irrespective of the true state of facts. Accordingly, nothing in section 65913.4 requires an agency to enforce the eligibility criteria or its own local standards by affirmatively rejecting a noncompliant project. The fact that a project may be deemed to comply with objective planning standards by operation of law (irrespective of whether the eligibility criteria are satisfied) and may be approved, without more, establishes that an agency has no ministerial duty to ensure that the criteria are met. Petitioners thus fail to establish their primary premise—that the City had a ministerial duty to reject Developer's application for streamlined review and approval based on the Project's alleged conflict with certain of the objective planning standards set out at section 65913.4, subdivision (a).

In conclusion on this issue, section 65913.4 alters the nature of local planning processes but it does not actually impose any affirmative duty on its own. Because of that, irrespective of the true state of facts here, the City was not obligated by section 65913.4 to reject Developer's application at any stage of review.[14] Thus, Petitioners are not entitled to the relief they seek compelling Respondents to set aside Project approval and to reject Developer's proposal based on the existence of a ministerial duty to do so for its asserted conflict with objective planning standards.[15]

---

[14] Petitioners proceed based on an assumption of the existence of a ministerial duty, and so they necessarily do not address whether there is any other conceivable source of a ministerial duty.

[15] In light of this conclusion, the Court need not and does not decide whether an agency's affirmative approval of an application for streamlined review or actual approval of the Project result in or are the same as "deemed" approval under section 65913.4, subdivision (b) flowing from an agency's failure to act.

C. *Petitioners Have Not Established That the Project Conflicts*

Alternatively, and in addition to the conclusion that section 65913.4 does not, as a matter of law, impose a ministerial duty on the part of an agency to reject a streamlining application or project, the Court likewise concludes that Petitioners have failed to establish, on the evidence in the record and based on appropriate standard of judicial review in mandate, that any purported duty to reject was triggered here on the basis that the Project in fact conflicts with objective planning standards.[16]

1. Streamlining Eligibility Criteria

Petitioners initially raise three of the eligibility criteria enumerated in section 65913.4, subdivision (a). They assert that the Project does not meet the two-thirds residential use requirement (§ 65913.4, subd. (a)(2)(C)) and is on a hazardous waste site (*id.* at subd. (a)(6)(E)). They also take issue with the Project's subdivision map and contend that project approval violates the Subdivision Map Act (§ 66410 et seq.).

i. Minimum Residential Usage

To be eligible for streamlined review, a project must satisfy the criterion for minimum residential use in section 65913.4, subdivision (a)(2)(C), which in 2018 stated: "A site that is zoned for residential use or residential mixed-use development, or has a general plan designation that allows residential use or a mix of residential and nonresidential uses, with at least two-thirds of the square footage of the development designated for residential use."

The statute as amended by AB 101 in July 2019 added that: "Additional density, floor area, and units, and any other concession, incentive, or waiver of development standards granted pursuant to the Density Bonus Law in Section 65915 shall be included in the square footage calculation." (§ 65913.4, subd. (a)(2)(C).)

The parties have two primary legal disputes on this issue: (1) whether the residential-use calculation may include additional units authorized for construction under the Density Bonus

---

[16] The Court attempts to address Petitioners' arguments in this regard, but, as noted, it is challenging to do so as their arguments are not clearly and consistently framed by any appropriate standard of review, and their points are advanced in a disorganized manner.

Law; and (2) whether the California Building Standards Code (see generally, Cal. Code Regs., tit. 24) or the Cupertino Municipal Code dictate the different areas, such as hallways or parking garages, that are accounted for in the calculation.

Petitioners first argue that "development," as this term is used in section 65913.4, subdivision (a)(2)(C), excludes areas of the Project authorized for construction under the Density Bonus Law. But they fail to provide a reasoned explanation to support their position that the square-footage calculation must exclude bonus areas. In their opening brief, they rely on a different subdivision of section 65913.4 relating to another topic before proceeding—without any explanation—directly to their conclusion about subdivision (a)(2)(C). And in their reply, while they do cite the guidelines prepared by the Department of Housing and Community Development under the delegation of authority in subdivision (j) of section 65913.4 ("Streamlined Ministerial Approval Process Guidelines," <https://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf> [as of May 6, 2020]), their presentation is just as conclusory.

In contrast, Developer presents a number of compelling reasons for reaching a contrary conclusion, which Petitioners do not address.

As explained below, the Court concludes that the proper interpretation of the version of section 65913.4, subdivision (a)(2)(C) in existence when Developer submitted its application is that the "square footage of the development" *includes* areas authorized for construction under the Density Bonus Law. Incidentally, this interpretation is consistent with the Legislature's express directive in the statute as amended.

First and foremost, the Legislature did not provide in its enactment of section 65913.4 that areas authorized for construction under the Density Bonus Law must be excluded from the square-footage calculation for the residential-usage ratio. Ordinarily, "when a statute announces a general rule and makes no exception thereto, the court can make none." (*City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1339.) "It is equally recognized that the court may not insert into a statute qualifying provisions not intended by the Legislature." (*Ibid.*) Thus, it is error

to either read the statute in existence in 2018 as containing an exclusion, or to rewrite the statute to exclude certain areas from the square-footage calculation.

Next, there is no justification for reading the exception quoted by Petitioners from an entirely different subdivision of the statute as applying to the one setting forth the residential-use requirement. The general rule of construction is that exceptions are strictly construed and not interpreted as encompassing subjects beyond their terms. (*In re Goddard* (1937) 24 Cal.App.2d 132, 139–140.) The criterion provided in section 65913.4, subdivision (a)(5) as relied on by Petitioners is: "The development, *excluding any additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915*, is consistent with objective zoning standards, objective subdivision standards, and objective design review standards in effect at the time that the development is submitted to the local government pursuant to this section." (Italics added.) Under the general rule of construction cited above, this express exclusion located in subdivision (a)(5) may not be extended to another distinct subdivision—subdivision (a)(2)(C)—by implication.

Moreover, as Developer articulates, the cited exclusion appears in subdivision (a)(5) as a practical necessity because a concession or waiver under the Density Bonus Law is, by definition, an authorization to deviate from zoning or design review standards. And so, the exclusion is contextually necessary in subdivision (a)(5) so that projects that permissibly deviate from standards based on a waiver under the Density Bonus Law are not held to be inconsistent with those standards for the purpose of streamlined review. No such issue is presented by the residential-use requirement; the exclusion is not a practical necessity for that particular provision.

For these reasons, the Court rejects Petitioners' contention that the square footage calculation for the residential-use requirement in section 65913.4, subdivision (a)(2)(C) excludes bonus areas. As the Legislature has now expressly made clear, those areas are to be *included* in the calculation.

Next, Petitioners proceed as though "the square footage of the development" as used in section 65913.4, subdivision (a)(2)(C) means the total floor area as defined by the California

Building Standards Code. The parties appear to agree that the term "square footage" here means "floor area," but they dispute what source of law should supply the definition of, and methodology for, calculating floor area.

The term "square footage" is not explicitly defined in section 65913.4. In other contexts, courts have used this term in a manner that is not necessarily technical. (See, e.g., *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1075–1077 [discussing comparison of adjusted and unadjusted square footage in evaluating whether EIR warranted].) A separate streamlining statute for "transit priority projects" contains a similar residential-use requirement with the term "square footage," but courts have yet to weigh in on the meaning of that statutory language and usage. (See *Sacramentans*, *supra*, 37 Cal.App.5th at p. 719 [discussing Pub. Res. Code, § 21155].) Certainly, the use of square feet as a unit of measurement establishes that area is being calculated. But the residential-use requirement is not necessarily the same, in concept or in purpose, as a floor-area ratio.

A floor-area ratio is used to measure the intensity of a development. (*Sacramentans*, *supra*, 37 Cal.App.5th at p. 705.) It compares building area to lot size. (*Ibid.*) It signifies how heavily a given area of developable land will be built up. But nothing in section 65913.4 or its history suggests that the residential-use ratio as an objective planning standard was intended to measure building intensity. Rather, the requirement furthers the stated purpose of the statute, namely expediting housing development. Thus, contrary to what Petitioners at times suggest, and what Developer seems to accept, the calculation of square footage designated for residential use is not necessarily a calculation of the floor-area ratio. An argument could be made that the term "square footage," as used in section 65913.4, subdivision (a)(2)(C), thus, should not borrow the definition of floor area.

But even accepting that square footage should be defined as floor area, Petitioners' argument for application of the California Building Standards Code as a measurement standard is not convincing. For context, Developer and the City used the definition of floor area in Cupertino Municipal Code section 19.08.030[17]:

> "Floor area" means the total area of all floors of a building measured to the outside surfaces of exterior walls, and including the following: [¶] 1. Halls; [¶] 2. Base of stairwells; [¶] 3. Base of elevator shafts; [¶] 4. Services and mechanical equipment rooms; [¶] 5. Interior building area above fifteen feet in height between any floor level and the ceiling above; [¶] 6. Basements with lightwells that do not conform to Section 19.28.070(I); [¶] 7. Residential garages; [¶] 8. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts, and similar features substantially enclosed by exterior walls; [¶] 9. Sheds and accessory structures.
>
> "Floor area" shall not include the following: [¶] 1. Basements with lightwells that conform to Section 19.28.070(I); [¶] 2. Lightwells; [¶] 3. Attic areas; [¶] 4. Parking facilities, other than residential garages, accessory to a permitted conditional use and located on the same site; [¶] 5. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts and similar features not substantially enclosed by exterior walls.

[17] Petitioners do not offer any critique of the definition of floor area in the Cupertino Municipal Code or identify a legal basis for discounting the City's decision to rely on it.

Using this definition, Developer and the City calculated the residential-use ratio as:

	March 27, 2018 Initial Application (AR1096)	June 22, 2018 Streamlining Approval[18] (AR0892)	September 21, 2018 Final Approval of Project (AR0025)
Residential	4,700,000[19] **68%**	4,961,904 **66.8%**	4,961,904 **66.8%**
Office	1,810,000 26.2%	1,981,447 26.7%	1,981,447 26.7%
Retail	400,000 5.8%	485,912 6.5%	485,912 6.5%
Total	6,910,000 100%	7,429,263 100%	7,429,263 100%

Petitioners contend that the definitions of floor area from the California Building Standards Code instead apply. According to Petitioners, gross floor area and net floor area are, respectively:

> The floor area within the inside perimeter of the exterior walls of the building under consideration, exclusive of vent shafts and courts, without deduction for corridors, stairways, ramps, closets, the thickness of interior walls, columns or other features. The floor area of the building, or portion thereof, not provided with surrounding exterior walls shall be the usable area under the horizontal projection of the roof or floor above. The gross floor area shall not include shafts with no openings or interior courts.
>
> The actual occupied area not including unoccupied accessory areas such as corridors, stairways, ramps, toilet rooms, mechanical rooms and closets.

(Pet. Brief at p. 15:4–10.)

It seems that Petitioners may not understand the nature of the California Building Standards Code within the appropriate regulatory framework. "By way of background, until the 1970's, every city and county in California adopted its own building code, unfettered by

---

[18] As discussed in the summary of the administrative record, the change in these calculations appears to result from the City's adoption of the alternative methodology presented by Developer with its supplemental information. (See Statement of the Case, *supra*, at pp. 11–12.)

[19] Inclusive of units, amenities, and parking (2,714,340+550,055+1,435,605=4,700,000). (AR1024.)

mandated state standards or state control." (*Cal. Apartment Assn. v. City of Fremont* (2002) 97 Cal.App.4th 693, 696–697 (*CAA*).) "In 1970, the Legislature put an end to this practice by declaring a statewide interest in uniform building codes and by otherwise expressing an intent to preempt the field of setting building code standards." (*Id.* at p. 697.) "Since then uniform statewide building standards have been generally specified by the Legislature." (*Ibid.*) "The State Code is a compilation of these building standards … ." (*Ibid.*) But "local entities, such as the City, are not absolutely precluded from enacting standards different from the standards set out in the State Code." (*Ibid.*) " 'There is a statewide interest in uniform building codes and the field has therefore been preempted by state law, subject to a statutory exception which permits a local entity to modify the provisions of the California Building Standards Code when it determines, and expressly finds, that such changes are reasonably necessary because of local climatic, geological or topographical conditions. [Citations.]' " (*Ibid.*, quoting *ABS Institute v. City of Lancaster* (1994) 24 Cal.App.4th 285, 293.) A planning decision may require the application of both local zoning law as well as the California Building Standards Code, which decision is entitled to deference. (See, e.g., *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 438–440.)

Petitioners' invocation of these definitions out-of-context—without deference to the City's decision or regard for the nature and function of the California Building Standards Code—is inapt.

Their supporting argument further fails to persuade. They urge that section 65913.4 requires the application of uniform, statewide standards. (Pet. Brief at pp. 14–15 ["As a statewide statute, SB35 must be interpreted by reference to uniform, statewide standards …"].) But section 65913.4 does not, on its face, provide that the California Building Standards Code or other statewide standards must apply. And, as Petitioners argue elsewhere in their papers, section 65913.4 does not displace all local zoning laws, instead expressly incorporating them. Although eligibility criteria for streamlined review are set forth in the statute and, thus, apply throughout the state, section 65913.4 is an overlay upon local zoning schemes.

In presenting this argument, Petitioners also posit that a holding to the contrary would "defeat SB35's purpose of effecting statewide regulation and would encourage local game-playing through manipulation of municipal regulations by development opponents or proponents." (Pet. Brief at p. 14:24–26.) Petitioners misstate the purpose of the statute, namely expediting housing development to ameliorate the housing crisis. And their urging of this point sits in tension with, and indeed calls into question, the very fact of this litigation and the specific challenges Petitioners are making; their argument here is at odds with their other claims.

Petitioners also emphasize repeatedly that the residential-use ratio must compare gross residential area to gross development area or net residential area to net development area—apples to apples. They neither cite authority, nor provide any explanation based on how the California Building Standards Code definitions are to be used, to make this point. Petitioners primarily use the terms "gross" and "net" to denominate whether parking is included in their calculations. But the California Building Standards Code says nothing about parking. And, here, Developer plans to provide parking in subsurface and above-grade structures, including wrap-around buildings of residential units with some parking located in the middle of the structures. (AR1100.) Accordingly, it makes sense under the Cupertino Municipal Code (requiring inclusion of residential garages),[20] and arguably even under the California Building Standards Code, that such parking would be included in an area calculation.

Further, while Petitioners treat the necessary calculation as one of floor-area ratio at times, when calculating a floor-area ratio, gross and net figures *are* properly compared, namely the gross building area to net developable land area. Petitioners do not consistently define and use the terms "net" and "gross" or use these terms in a manner consistent with the California

---

[20] It is also worth noting that a residential garage, although used for parking, lends itself to other uses (including storage) not available with surface-level parking areas. Petitioners do not address this distinction or the function of different types of spaces used for parking in their explanation of what should be either included or excluded from the square-footage calculation, in the context of section 65913.4's residential-use requirement.

Building Standards Code or a true floor-area calculation. And so, their points, as presented, fall flat.

No matter what methodology is used, Petitioners do not substantiate their ultimate position that the Project's residential-use ratio is insufficient or in conflict with the required two-thirds. Despite asking the Court to essentially recalculate the residential-use ratio to affirmatively conclude that the Project is short, Petitioners do not put forth with sufficient detail their own calculation applying the methodology they espouse. They present tables summarizing the residential-use ratio with various categories of space (e.g., parking and amenities for residents) included or excluded. But these summary tables don't add or explain much because the areas included and excluded do not clearly correlate with the methodology in the California Building Standards Code, and the exact sources of all of Petitioners' data are unclear. They seem to rely in part on averages rather than actual measurements. As Developer articulates, it is not apparent what other assumptions Petitioners make in their calculations. They do not show their work.

Furthermore, the new arguments about under and over counting advanced by Petitioners for the first time in their reply are problematic for the same reasons. They assert that Developer double counted 64,804 square feet of residential parking space; failed to double count 1,198,904 of office space; and failed to include 3,384,000 square feet of office parking. As for Petitioners' double-counting argument, they contend that Developer did not properly calculate one parameter of floor area, particularly interior building areas above 15 feet in height. (Cupertino Mun. Code, § 19.08.030.) They argue that Developer included some interior building areas above 14 feet in height and excluded other interior areas above 15 feet in height that should have been included. In advancing these new arguments, Petitioners seemingly do not rely on the most up-to-date, operative documents used by the City in making either its June 2018 or September 2018 decisions. Also, Developer counters that Petitioners are misreading the plans and provides a credible explanation for this assertion. Overall, these new arguments are not analytically clear, supported by a reasoned explanation, or obviously based on a proper reading of the law and the Project's building plans.

Finally, for the first time in Petitioners' reply, they argue that an above-grade pedestrian bridge may be designated only for retail and not residential use in the calculation of the residential-usage ratio. Their argument is based on the scope of the easement for a pedestrian bridge that historically connected different parts of the Vallco Fashion Mall.[21] From this premise, they argue that the exclusion of the bridge area makes the residential-use ratio too low. As a threshold matter, and as Developer points out, Petitioners' arguments about the bridge are not consistently raised throughout the briefing and should have been better articulated in the opening brief given that Petitioners raised this issue during the course of the City's original decision-making process.

In any event, Petitioners do not substantiate their argument. It was not until Petitioners' response to Developer's sur-reply—a sur-reply only authorized because of Petitioners' multitude of new arguments on reply—that they even cited legal authority on easements. Their argument as first presented in their reply is pure conjecture. And, while Petitioners do quote a basic legal definition of an easement as a right to use another's land in their response to Developer's sur-reply, this definition is wholly insufficient to establish their point. What is the significance of the development agreement and the regulatory framework for such agreements to the creation, scope, transfer, and continued existence of the easement? How does the City's approval of the Project impact the analysis or affect the argument? Petitioners also neglect to present a legally and factually substantiated interpretation of the instrument granting the easement to support their conclusion that the use proposed by Developer is not one that might be " 'found in regional shopping centers … .' " (Pet. Response at p. 3:15–19, quoting PR2223.) The concept of a mixed-use development may have evolved after the City and the previous developer originally agreed to develop the Vallco Fashion Mall. On the other hand, the concept is not entirely novel. In either case, Petitioners do not present sufficient analysis to establish the intent of the parties to the

---

[21] In Petitioners' opening brief, they contended that the bridge should be allocated to residential and nonresidential uses because it connects a residential building to a commercial one. In essence, this initial position is that the allocation of space as between residential and non-residential should be modified.

original development agreement and the scope of the easement, or show how either would defeat the Project. Given the complexity of the law applicable to the proposed Project, Petitioners' analysis fails to establish that the scope of the easement undermines the decision under review.[22]

In sum on this issue, Petitioners do not provide a persuasive, logically-sound, and legally-substantiated argument establishing that, for purposes of calculating the Project's residential-use ratio, the square footage should have been calculated based on the California Building Standards Code and exclusive of areas authorized for construction under the Density Bonus Law. And, by cherry-picking data points to dispute and advancing different calculations without a clear and legally-sound methodology, they do not show that the residential-use ratio falls below the required two-thirds. Furthermore, Petitioners do not tailor their arguments to the City's decision vis-à-vis an appropriate standard of review in mandate.

ii. Hazardous Waste Site

The parties dispute whether the project is located on a disqualifying hazardous waste site within the meaning of section 65913.4, subdivision (a)(6)(E). The Court concludes that the Project is not planned for construction on a hazardous waste site and that no conflict in the record with this objective planning standard is shown by any standard of review.

As codified in 2018, a project is disqualified from streamlined approval if it will be constructed on "[a] hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses." (§ 65913.4, subd. (a)(6)(E).) As amended in July 2019, section 65913.4, subdivision (a)(6)(E) defines a disqualifying site as a "hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the

---

[22] It is unclear whether Developer intends to reuse the existing pedestrian bridge and renovate portions of those existing buildings or if it intends to demolish the existing bridge and build a new one in its place in reliance on the easement for the original bridge. Petitioners do not clearly explain how the current plans, existing structures, and predecessor development agreement fit together to defeat the two-thirds residential-use ratio requirement.

Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, *unless the State Department of Public Health, State Water Resources Control Board, or* Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses." (Italics added.)

Section 65962.5 requires a number of divisions of the California Environmental Protection Agency (CalEPA)—including the Department of Toxic Substances Control (DTSC) and the State Water Resources Control Board (the Water Board)—to compile lists of land with hazardous waste and other contaminants as specified in that statute. As noted, this list is sometimes known as the Cortese list after legislator Dominic Cortese. DTSC in particular must list: "(1) All hazardous waste facilities subject to corrective action pursuant to Section 25187.5 of the Health and Safety Code. [¶] (2) All land designated as hazardous waste property or border zone property pursuant to former Article 11 (commencing with Section 25220) of Chapter 6.5 of Division 20 of the Health and Safety Code. [¶] (3) All information received by the Department of Toxic Substances Control pursuant to Section 25242 of the Health and Safety Code on hazardous waste disposals on public land. [¶] (4) All sites listed pursuant to Section 25356 of the Health and Safety Code." (§ 65962.5, subd. (a).) The constituent list prepared under Health and Safety Code section 25356—which is, in turn, incorporated into DTSC's contribution to the Cortese list—is a prioritized list of sites meeting the regulatory criteria for "hazardous substance release sites for a response action." (Health & Saf. Code, § 25356, subd. (a)(1).) In other words, DTSC must include in its contribution to the Cortese list a prioritized list of sites needing environmental remediation. The Water Board must also provide information about hazardous waste including by listing "[a]ll underground storage tanks for which an unauthorized release report is filed pursuant to Section 25295 of the Health and Safety Code." (§ 65962.5, subd. (c)(1).)

In summary, section 65913.4 disqualifies projects planned for construction on Cortese-listed sites or sites included on the constituent list prepared by DTSC under Health and Safety Code section 25356 unless the site has been cleared. While section 65913.4 defines a hazardous waste site as one included on either the Cortese list as a whole or on the constituent list prepared by DTSC, the separate reference to the constituent list of remediable sites compiled under

section 25356 is arguably redundant because such remediable sites must necessarily be included on the Cortese list based on the mandate in section 65962.5, subdivision (a)(4).

Applying this regulatory framework to the facts here, it is undisputed that the contemplated construction site was previously on the Cortese list. Former anchor tenants Sears and J.C. Penney maintained underground storage tanks on the site for their automotive repair shops. (AR1581–1613.) The tanks were designated as leaking underground storage tanks by the Water Board (see, § 65962.5, subd. (c)(1)), but remediation of both was completed and the Water Board closed the cases in 1994 and 1999 (AR1581–1613). Thus, the critical issue is whether these remediation sites remain "listed" or have been adequately cleared for purposes of section 65913.4.

Petitioners argue that case closure by an administrative agency does not effectively delist a site and clear it for residential or mixed uses, and that this status solely establishes that the site is not subject to ongoing remediation. Petitioners do not cite any legal authority or provide a reasoned explanation for their position.[23] And they don't provide any suggestion as to what is legally sufficient to either delist or affirmatively clear a remediation site, in the alternative to closing the case, for that site. And so, Petitioners' argument fails.

Petitioners also emphasize that only DTSC can clear a site for use. It is true that section 65913.4 as enacted at the time of Developer's application identified only DTSC as an agency capable of clearing a previously listed site. (§ 65913.4, subd. (a)(6)(E).) Still, Petitioners' interpretation is problematic.

---

[23] To be fair, there is little caselaw on the point. Although the Court easily and independently located a CEQA case in which a court was presented with a similar dispute over the listing of a site with a leaking underground storage tank. The court there commented that it seemed "a site may stay on the Cortese list even after a determination is made that no further remediation is required … ." (*Parker Shattuck, supra,* 222 Cal.App.4th at p. 781.) Ultimately, in addition to Petitioners not citing this case, it does not otherwise support their position as a practical matter because the court there did not directly rule on the issue presented here and it rejected the argument that historic inclusion on the Cortese list establishes, even after case closure, that there is a significant effect on the environment under CEQA. (*Id.* at pp. 774, 781.)

A court's essential task when interpreting a statute is to effectuate the law's purpose as intended by the Legislature. (*Sierra Club v. Super. Ct.* (2013) 57 Cal.4th 157, 165 (*Sierra Club*).) First, a court must " 'examine the statutory language, giving it a plain and commonsense meaning.' [Citation.]" (*Ibid.*) A court does " 'not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.' [Citation.]" (*Ibid.*) " 'If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.' [Citation.]" (*Sierra Club*, *supra*, 57 Cal.4th at pp. 165–166.) " 'Furthermore, [courts] consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' [Citation.]" (*Id.* at p. 166.)

The statutory definition of hazardous waste sites in section 65913.4, subdivision (a)(6)(E) encompasses sites listed by DTSC as well as sites included on the Cortese list by other departments or units of CalEPA, namely the Water Board. Thus, the reference to DTSC alone as a clearing agency does not comport with the mechanics of how CalEPA operates and how the Cortese list is administered. Adopting Petitioners' interpretation would lead to absurd results. In codifying the eligibility criteria for streamlining, the Legislature sought to preserve, to a limited extent, the ability of an agency to protect future residents from harms like hazardous waste provided that the agency acts swiftly to expedite review of proposed housing developments. Reading section 65913.4, subdivision (a)(6)(E) literally would result in disqualification of sites cleared by a CalEPA department other than DTSC even when the site was properly administered by a different department, like the Water Board. Put differently, this literal reading could result in the rejection of streamlining applications based on an erroneous application of the very environmental regulations the Legislature incorporated by reference. That would be directly contra to the policy and legislative directive to interpret and implement section 65913.4 "in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply." (§ 65913.4, subd. (*l*).) Because Petitioners' proposed reading of the

statute in this respect does violence to both section 65913.4 and the mechanics of the Cortese list, the Court will not adopt their interpretation.

For the same reasons, it is not surprising that the Legislature has amended section 65913.4, subdivision (a)(6)(E) to include other contributors to the Cortese list, including the Water Board, as agencies that may clear a property for use. This amendment operates to conform section 65913.4, subdivision (a)(6)(E) to the law governing the administration of the Cortese list. Accordingly, the Court gives retroactive application to this particular amendment effectuated by AB 101. The amendment codifies the interpretation of section 65913.4, subdivision (a)(6)(E) as enacted in 2018 that necessarily must be adopted to read the statute in accordance with the principles of interpretation summarized above.

Here, because the Water Board listed the site to begin with, particularly the locations of the leaking underground storage tanks, the Water Board necessarily was the agency that closed the case files. The City understood this fact. (See AR0895–0896.) Petitioners' argument that the site remains listed notwithstanding the Water Board's actions is inconsistent with the law governing the Cortese list as well as the purpose and mechanics of section 65913.4.

In opposition, Developer presents compelling reasoning, evidence, and authority to support the conclusion that the site has been delisted and cleared. Developer presents a number of printouts from CalEPA's website in which it discusses the history of the Cortese list—including the changes in information technology since the 1990's impacting the way the list is maintained and accessed—as well as the significance of terminology in its databases as it relates to whether a site is considered to be on or off the list. (Opp. at pp. 35:16–39:18.) For some time, including at the time of Developer's application, CalEPA did not maintain the Cortese list in a unified document; the list is neither a scroll nor a continuously paginated PDF. Rather, CalEPA maintained and continues to maintain the information it is required to compile and publish under section 65962.5 in a number of electronic databases, including the Water Board's GeoTracker database. "Sites that are no longer considered 'active' because the Water Board, a regional board, or the County has determined that no further action is required because actions were taken to adequately remediate the release, or because the release was minor, presents no environmental

risk, and no remedial action is necessary, are listed as 'closed' and deleted from the list." (AR1613.) While Developer only recently printed out this clarification from CalEPA's website, the Court considers this information for several reasons.

First, the printouts consist of clarifying information. They do not reflect a change in policy or database maintenance occurring after the City's decision to approve Developer's application. Rather, the website printouts provide insight into CalEPA's historic practices for compiling, maintaining, publishing, and interpreting the Cortese list. Petitioners' conclusory retort that the information from the CalEPA website is a "change of [its] listing policy, apparently at the instance of [Developer], to delete certain listings" is without foundation. Second, the clarifications are consistent with the mechanics of the Cortese list and database administration. It makes sense given the number of different units and departments of CalEPA contributing to the list that each contributor would maintain its own constituent database or "list" in lieu of engaging in the administratively burdensome task of compiling the different databases (with different units of measurement and data points) into a unified database or list. Finally, and most significantly, the City considered this clarifying information in making its decision as reflected in the approval correspondence it sent to Developer. While it is conceivable that the CalEPA website could have changed between the time the City viewed the website and the time Developer printed it out, the City's comments reflect that the website remains, in all material respects, unchanged. In other words, there is no basis for discounting Developer's contemporaneous printouts as unrepresentative of the information the City reviewed in the course of reaching its decisions under review. The City understood the administration of the Cortese list described above and the responsibilities of different units of CalEPA. And so, the Court may consider the same information cited and relied on by the City.

Accordingly, Developer persuasively argues that case closure is tantamount to the clearance or delisting of a site, at least for purposes of section 65913.4, subdivision (a)(6)(E). Because the Water Board closed the cases for the leaking underground storage tanks at the Project site in the 1990's, the Project site is no longer listed.

Petitioners also argue that the site has other outstanding instances of environmental contamination and pollution, which Developer disputes. Petitioners' brief discussion of these other purported hazards is not material to the issue before the Court due to the statutory definition of a hazardous waste site. (See Pet. Brief at pp. 10:13–11:12.) And, as Developer points out, Petitioners appear to overstate the significance of the environmental impact reports on which they rely to raise the specter of additional impediments. (Opp. at pp. 41:11–42:6.)

In conclusion on this issue, Petitioners' assertion that the City incorrectly determined that the Project site was no longer on the Cortese list lacks merit. The other environmental issues they attempt to raise are beyond the scope of the issues before the Court.

iii. Subdivision Map

Petitioners contend that Developer and the City failed to comply with the requirements of the Subdivision Map Act and related requirements in the Cupertino Municipal Code. Contrary to what Petitioners assert in their reply, this theory of noncompliance is neither set forth nor fairly encompassed in the petition. The assertion that this issue is "squarely" raised in the pleading is unreasonable. (Pet. Reply at p. 34:11.) While Petitioners urge that they could seek leave to file a second amended petition and that the amendment would relate back, they have not done so. And given the service requirement in the applicable statute of limitations, it is not apparent that they could timely file *and* serve an amended petition at this juncture. (See, § 65009.)

In any event, although Petitioners make clear their belief that the City and Developer erred in this respect, it is fundamentally foggy how the points they advance relate to their overarching position that the Project is ineligible for streamlined review and approval under section 65913.4, or how this argument furthers Petitioners' claim for extraordinary relief through the lens of an appropriate standard of review.

At the time of Developer's application, the objective planning standard in section 65913.4, subdivision (a)(9) stated:

> The development did not or does not involve a subdivision of a parcel that is, or, notwithstanding this section, would otherwise be, subject to the Subdivision Map Act (Division 2 (commencing with Section 66410)) or any other applicable law authorizing the subdivision of land, unless either of the following apply:
>
> (A) The development has received or will receive financing or funding by means of a low-income housing tax credit and is subject to the requirement that prevailing wages be paid pursuant to subparagraph (A) of paragraph (8).
>
> (B) The development is subject to the requirement that prevailing wages be paid, and a skilled and trained workforce used, pursuant to paragraph (8).

Here, Developer agreed to pay prevailing wages and use a skilled and trained workforce. (AR1114.) Thus, it still qualified for streamlined review notwithstanding the subdivision of the property. And, in any event, Petitioners do not actually argue that the Project is ineligible because it conflicts with this objective planning standard. Instead, they present a more traditional challenge to whether Developer complied with the Subdivision Map Act notwithstanding section 65913.4. They use that act as a hook for introducing a wide array of new arguments about consistency with the general plan. They attempt to raise technical nonconformities with the general plan based on their own interpretation of the City's land-use laws and policies. But Petitioners do not explain how the requirements of the Subdivision Map Act should be reconciled with section 65913.4. And, irrespective of this deficiency, they do not otherwise proceed in a legally permissible manner.

"The Subdivision Map Act, [] section 66410 et seq., is ' "the primary regulatory control" governing the subdivision of real property in California. [Citation.] The Act vests the "[r]egulation and control of the design and improvement of subdivisions" in the legislative bodies of local agencies, which must promulgate ordinances on the subject. (§ 66411.)' " (*Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 269 (*Tower Lane*), quoting *Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996–997 (*Gardner*).) " 'The Act generally

requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances.' " (*Tower Lane*, *supra*, 224 Cal.App.4th at p. 269, quoting *Gardner*, *supra*, 29 Cal.4th at pp. 996–997.) "The Subdivision Map Act delegates '[r]egulation and control of the design and improvement of subdivisions' to local agencies, 'which must promulgate ordinances on the subject.' " (*Tower Lane*, *supra*, 224 Cal.App.4th at p. 270, quoting § 66411.) The City's local regulations are set forth in chapter 18.04 of the Cupertino Municipal Code.

Although somewhat unclear, Petitioners initially seemed to argue that the Project does not comply with the Subdivision Map Act because the City did not properly proceed on this topic and Developer did not designate parkland. Petitioners later raised a number of other issues, such as whether there are proper roadway easements and the propriety of residential uses on ground floors that must have retail and "active" uses. At the threshold, many of Petitioners' arguments are misdirected because they focus on building design as compared to whether the subdivision of property Developer proposes complies with relevant provisions of the general plan.

Moreover, Petitioners' arguments are inapt because they misstate the level of consistency required. "State law does not require an exact match between a proposed subdivision and the applicable general plan." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717 (*Sequoyah*).) "Rather, to be 'consistent,' the subdivision map must be 'compatible with the objectives, policies, general land uses, and programs specified in' the applicable plan." (*Id.* at pp. 717–718, quoting § 66473.5.) "As interpreted, this provision means that a subdivision map must be 'in agreement or harmony with' the applicable plan." (*Sequoyah*, *supra*, 23 Cal.App.4th at p. 718, quoting *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406.) Petitioners do not argue that there is a lack of harmony. Instead, they attempt to raise technical defects. And, in doing so, they do not afford the appropriate level of deference to the City's decision, which would ordinarily be reviewed for an abuse of discretion under Code of Civil Procedure section 1094.5. (*Sequoyah*, *supra*, 23 Cal.App.4th at p. 717.) And so, Petitioners' arguments fail.

Petitioners' analysis of the local regulations and related state law also suffers. For example, it is true that: "As a condition of approval of a final subdivision map or parcel map, the subdivider shall dedicate land, pay a fee in lieu thereof, or both, *at the option of the City*, for park or recreational purposes at the time and according to the standards and formula contained in this chapter." (Cupertino Mun. Code, § 18.24.030, italics added.) Given the discretion afforded the City to decide on the dedication of parkland or payment of fees in lieu (addressed in more detail below), Petitioners' suggestion that there is necessarily only one conclusion as to this requirement is questionable. And the local regulations are detailed, subject to exceptions, and limited by state requirements in the Subdivision Map Act. Petitioners do not adequately explain why or how certain requirements apply based on the particular subdivision map presented here. This deficiency extends to their procedural argument about who bears responsibility for reviewing and approving subdivision maps (see Cupertino Mun. Code, §§ 18.08.020–.060), an issue they do not sufficiently reconcile with the directives in section 65913.4.

As another example of the problematic approach, Petitioners' discussion of the issue of roadway easements is inadequate. Developer proposed modifying an existing roadway easement to comply with the general plan. (AR 1401.) An offer to dedicate a roadway easement may be made by presenting a subdivision map. (*Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, 1009.) And so, as a general matter, it is not clear how Developer's proposed modification of a roadway easement by way of the map it presented is improper, especially given that it asserted the modification was proposed for conformity with the general plan.

Petitioners also take issue with whether formal proceedings to vacate easements occurred in accordance with Streets and Highway Code section 8300, et seq. But they don't establish that this statutory scheme even applies. Petitioners merely assume that Developer proposes vacating an easement covered by the scheme. But vacation in that context "means the complete or partial abandonment or termination of the public right to use a street, highway, or public service easement." (§ 8309.) Thus, it is not apparent that this statute is implicated here based on the nature of the existing easements or the proposed changes. And Petitioners' theory that the Streets and Highways Code is the only statutory means for managing certain easements is incorrect.

(§ 8311, subd. (a) ["The procedures provided in this part are alternative procedures for vacating streets, highways, and public service easements. The authority granted in this part is an alternative to any other authority provided by law to public entities"]; accord *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1044.)

In sum, Petitioners belatedly raise a claim—not alleged in their petition—based on the Subdivision Map Act in an attempt to broaden the inquiry before the Court and transform it into a more traditional consistency challenge. Their pitch to challenge consistency in this manner lacks credence given the procedures, standards, and level of deference applicable to such challenges. And, also, Petitioners do not substantiate their supporting arguments with legal analysis and a reasoned discussion of Developer's plans and the City's decision. While Petitioners also raise issues of procedure, they do not explain how municipal procedures for managing easements or approving subdivision maps should be reconciled with either the statewide requirements for those local regulations or section 65913.4. Ultimately, although section 65913.4 mentions the Subdivision Map Act, it is otherwise unclear how Petitioners' overarching theory and subsidiary points on this issue relate to section 65913.4. For all of these reasons, even on consideration of the belated claim, Petitioners' arguments are insufficient to establish that they are entitled to the relief they seek.

2. Objective Standards Beyond Initial Eligibility Requirements

Petitioners allege that, even accepting that the Project is eligible for streamlined review because it is compliant with objective planning standards, it still conflicts with objective design and zoning standards and so should not ultimately have been approved. In particular, they challenge the Project's conformity with standards for building height, parkland, below-market-rate units, and set-backs.[24] This aspect of Petitioners' action is essentially the same type of challenge traditionally brought under Code of Civil Procedure section 1094.5 to test whether a project in the regular design-review track is consistent with a locality's general plan, specific

[24] Petitioners appear to have abandoned in briefing their claim about set-backs.

plan, or design standards. Thus, the Court's discussion at the outset of the nature of the decision under review and the applicable standard of review is essential to evaluating the arguments below. But again, because Petitioners afford no deference to the City's decisions and argue in a manner that is not framed through any standard of review, it is difficult to assess their arguments. That said, the Court attempts below to address these points.

i. Height Limits

Petitioners contend that some buildings of the Project exceed the 30-foot height limit in a planned, general commercial zone (sometimes denominated as "P(CG)") and that other buildings exceed the 85-foot limit in a planned, regional shopping zone (sometimes denominated as "P(Regional Shopping)"). But Petitioners' supporting analysis is disjointed and, thus, difficult to parse for the purpose of evaluating each of their subsidiary points.

Land-use regulations exist in a hierarchy that descends from general to specific. (*Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 784 (*Gonzalez*).) At the top level of this hierarchy is the general plan. (*Ibid.*) "To promote public deliberation and reasoned decisions about land use, state law requires cities and counties to develop general land use plans that function as charters for all future land use in that county or city." (*City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1075 (*Morgan Hill*).) A city may also adopt a specific plan to "implement its general plan in a particular geographical area." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259–1260.) A specific plan "is usually more detailed than a general plan, and covers specific parts of the community." (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1310–1311 (*Foothill*); see, e.g., *Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 200.) A zoning ordinance and its constituent regulations sit at the bottom of this hierarchy—below a specific plan (if any) or directly below the general plan (in the absence of a specific plan)—and regulate how individual parcels of land are used. (See *Gonzalez*, *supra*, 65 Cal.App.4th at p. 784.)

Because a general plan is like a constitution, all subordinate land-use regulations, including specific plans and zoning ordinances, must be consistent with it. (*Fonseca*, *supra*, 148 Cal.App.4th at p. 1182, citing *Lesher Communications, Inc. v. City of Walnut Creek* (1990)

52 Cal.3d 531, 544 (*Lesher*); §§ 65454, 65860, subd. (a).) And, when a specific plan exists, a zoning ordinance must be consistent with that superior regulation as well. (*Foothill*, *supra*, 22 Cal.App.4th at p. 1314; § 65455.) A zoning ordinance that is inconsistent with a general plan when the ordinance is passed is invalid from the start. (*Morgan Hill*, *supra*, 5 Cal.5th at p. 1079, citing *Lesher*, *supra*, 52 Cal.3d at p. 544.) Alternatively, when a zoning ordinance becomes inconsistent with a general plan as a result of an amendment to the general plan itself, the zoning ordinance must be conformed within a reasonable amount of time. (*Morgan Hill*, *supra*, 5 Cal.5th at p. 1080, citing § 65860, subd. (c).)

While Petitioners give a nod to these consistency principles, they do not methodically drill down through the hierarchical layers of regulations to identify or establish the most precise standard that is applicable to the Project here, and then proceed to apply that standard in framing their argument.

The Cupertino General Plan (for 2015–2040) in existence at the time of Developer's application (and as presently amended) identifies the Vallco Shopping District as a special area within the meaning of the City's zoning scheme. Although near another special area—the Heart of the City Special Area, which is subject to the Heart of the City Specific Plan—the Vallco Shopping District is separate and distinct. It is not subject to the Heart of the City Specific Plan. (See generally Cupertino Mun. Code, §§ 20.04.020–.040.) As reflected in the general plan at the time, the City envisioned redeveloping the area into a town center and enacting a Vallco Shopping District Specific Plan, but it had not yet enacted a specific plan like those applicable to other designated special areas listed in the general plan. (General Plan at pp. 69, 141 [building heights to be set forth in specific plan].)

Petitioners acknowledge the absence of the intended specific plan at the time, but do not provide a clear explanation, rooted in analysis of applicable law, to establish from their perspective what regulation or plan fills that gap, if any. While they purport to apply the height limits for P(CG) and P(Regional Shopping) zones, Petitioners do not discuss or appear to comprehend the nature of a planned development designation or demonstrate why these height limits are applicable.

Petitioners rely on a January 2019 printout from a GIS database, which is provided for informational purposes only, to establish that several parcels within the Project site are zoned P(CG). They also rely on a draft environmental impact report for the proposition that other areas of the site are zoned P(Regional Shopping). But the City's zoning map is the official record of land-use designations. (Cupertino Mun. Code, §§ 19.16.030–19.16.050.) Petitioners' use of different sources of information that is out-of-context and without regard for the zoning map is incorrect.

In any event, the historic zoning from the previous planned development, the Vallco Fashion Mall, is undisputed. Even so, Petitioners do not establish their premise that the Project is subject to height limits ranging from 30 feet to 85 feet, which they derive from the P(CG) (general commercial) and P(Regional Shopping) (regional shopping) planning zones, respectively. "The planned development (P) zoning district is intended to provide a means of guiding land development or redevelopment of the City that is uniquely suited for planned coordination of land uses and to provide for a greater flexibility of land use intensity and design because of accessibility, ownership patterns, topographical considerations, and community design objectives." (Cupertino Mun. Code, § 19.80.010.) Unlike other zoning districts, planned-development districts do not have fixed design standards; rather, the standards applicable to a planned development are borrowed from other sources. (Cupertino Mun. Code, § 19.80.030.) "Permitted uses in a P zoning district shall consist of all uses which are permitted in the zoning district which constitutes the designation following the letter coding 'P.' " (*Ibid.*) "For example, the permitted uses in a P(CG) zoning district are the same uses which are permitted in a CG zoning district … ." (*Ibid.*) General commercial properties are subject to a height limit of "30 feet unless otherwise permitted by the General Plan or applicable Specific Plan." (Cupertino Mun. Code, § 19.60.060.) A planned development district may also borrow standards from a specific plan: "[f]or sites which require a specific plan prior to development approval, the permitted and conditional uses and all development regulations shall be as shown in the specific plan." (Cupertino Mun. Code, § 19.80.030.)

Here, the general plan states that the City intended to enact a specific plan. Thus, under section 19.80.030 (addressing planned developments generally) or section 19.60.060 (addressing general commercial standards) of the Cupertino Municipal Code, the specific plan is the source of the applicable standards. Because the City had yet to enact a specific plan, the fallback provision in the chain of authority, even as reflected in the regulation Petitioners rely on (Cupertino Municipal Code section 19.60.060), is the general plan. This comports with the very nature of a general plan as a constitution-type document as well as section 65913.4, subdivision (a)(5)(B), which states: "In the event that objective zoning, general plan, or design review standards are mutually inconsistent, a development shall be deemed consistent with the objective zoning standards pursuant to this subdivision if the development is consistent with the standards set forth in the general plan."

To summarize, no matter what body of law one looks to (caselaw, statutes governing consistency, section 65913.4, or the Cupertino Municipal Code), the general plan sets the standard. And that document does not impose the height limits espoused by Petitioners. It specifically states that the applicable limits have yet to be formulated and will be set forth in an upcoming specific plan uniquely tailored to the Vallco Project site. And so, applying height limits for a prior planned development in the location does not comport with the general plan.

Ultimately, apart from this conclusion, Petitioners' approach is otherwise impermissible. The City is in the best position to interpret its general plan and zoning ordinance and to make a consistency determination. Petitioners do not show that the City's decision in this regard was arbitrary and capricious or constituted a prejudicial abuse of discretion for the purpose of relief in mandate.

For all of these reasons, Petitioners' theory that the Project exceeds applicable height limits fails.

ii. Parkland

Petitioners argue that Developer failed to dedicate parkland as required because the green roof and other public spaces it plans to develop do not qualify as parkland. From the start, as with Petitioners' argument about building height, the manner in which they pursue this argument

is faulty because it affords insufficient deference to the City's interpretation of the parkland requirement in its own general plan. Petitioners effectively ask the Court to impermissibly supplant the City's interpretation with their own.

The City has a policy goal of distributing "parks and open space throughout the community and provid[ing] services, and safe and easy access, to all residents and workers." (PR0983.) The general plan states that its strategy for meeting this goal "should be based upon three broad objectives … ." (PR0983.) Petitioners treat these broad objectives, such as obtaining and restoring creek lands, as though they are separate, technical requirements that apply to each and every proposed park as compared to overarching aims that may be achieved through the acquisition of different open spaces that collectively meet the objectives and the policy goals set forth in the general plan. Petitioners' approach is inapt, particularly given the non-deferential manner in which it is presented. (See, e.g., *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 523–524 (*SF Tomorrow*) [rejecting consistency challenge to open-space policy as too rigid and non-deferential].)

Petitioners also use emphatic typography to make a circular argument that Developer's proposed public spaces are not parkland because they are not parkland. The manner in which this argument is presented makes it difficult to isolate any premise capable of verification as a matter of law or fact. For example, Petitioners take issue with whether the park consists of land at grade—*terra firma*—as compared to dedicated space above grade, as though the latter can never be parkland. They do not substantiate their view. And the validity of this view is not self-evident. (See, e.g., *SF Tomorrow*, *supra*, 229 Cal.App.4th at pp. 523–524; see also *Mun. Art Society of N.Y. v. New York State Convention Center Development Corp.* (2014) 15 Misc.3d 1138(A) [841 N.Y.S.2d 821], *13–14.) From the Coulée Verte René-Dumont in Paris to the Chelsea High Line in New York City, cities have turned derelict infrastructure and railways into above-grade parks in densely developed and populated urban areas. Indeed, Congress laid a legal path for such reuse when it amended the National Trails System Act in 1983. All of this is to say that Petitioners err in presenting their limited definition of parkland as a foregone conclusion. Section 65913.4 applies to infill developments, and so it is not beyond the bounds of reason that an

agency could permissibly approve a novel and creative solution to providing parkland in urban areas, just as the Legislature has tried to enact novel solutions to California's housing crisis.

For all of these reasons, the Court rejects Petitioners' unsubstantiated argument about parkland as problematically presented and without regard for the standard of review.

iii. Density Bonus Concessions

"In 1979, the Legislature enacted the density bonus law, section 65915, which aims to address the shortage of affordable housing in California." (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164 (*Latinos Unidos*).) "Although application of the statute can be complicated, its aim is fairly simple: When a developer agrees to construct a certain percentage of the units in a housing development for low or very low income households, or to construct a senior citizen housing development, the city or county must grant the developer one or more itemized concessions and a 'density bonus,' which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limit under local zoning law." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 824 (*Lagoon Valley*), citing § 65915, subds. (a), (b).) "In other words, the Density Bonus Law 'reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations.' [Citation.]" (*Lagoon Valley, supra*, 154 Cal.App.4th at p. 824.) "To ensure compliance with section 65915, local governments are required to adopt an ordinance establishing procedures for implementing the directives of the statute." (*Latinos Unidos, supra*, 217 Cal.App.4th at p. 1164, citing § 65915, subd. (a).)

The City's density bonus ordinance is codified as chapter 19.56 of the Cupertino Municipal Code and sets forth a number of bonuses, incentives or concessions, and waivers to reward developers that meet the specified criteria. For example, a developer may be rewarded with a "reduction of development standards or a modification of zoning code requirements or architectural design requirements …, including but not limited to, a reduction in setback requirements, square footage or parking requirements, such that the reduction or modification results in identifiable, financially sufficient, and actual cost reductions." (Cupertino Mun. Code,

§ 19.56.040.) Alternatively, a developer may obtain "[a]pproval of mixed-use zoning in conjunction with the housing development if commercial, office, industrial or other land uses will reduce the cost of the housing development, and if the commercial, office, industrial or other land uses are compatible with the housing development and the existing or planned development in the area where the proposed housing development will be located." (*Ibid.*) A developer may also obtain: "Other regulatory incentives or concessions proposed by the developer or the City, which result in identifiable, financially sufficient, and actual cost reductions." (*Ibid.*) The number of incentives or concessions awarded to a developer depends on the percentage of very-low, low, and moderate-income units it constructs. (*Ibid.*)

There are a number of requirements for obtaining a density bonus, including requirements for the construction of the affordable housing units: "Affordable units shall be dispersed throughout the project; [¶] Affordable units shall be identical with the design of any market rate rental units in the project with the exception that a reduction of interior amenities for affordable units will be permitted upon prior approval by the City Council as necessary to retain project affordability." (Cupertino Mun. Code, § 19.56.050.) Although Petitioners raised a number of issues about the plans for construction of affordable units in their petition (Am. Pet., ¶¶ 98–110), they focus on the issue of dispersal and comparability of the affordable units in their briefing.

Petitioners' dispersal argument is not persuasive, as they appear to tacitly concede in their reply. Developer's application does not admit that the affordable units are not dispersed; rather, the page cited by Petitioners shows that the City found the *below*-market-rate units—the affordable units—were properly dispersed throughout the development. (AR0334.) The *bonus*-market-rate units, meaning additional market-rate units authorized for construction as a reward for including the affordable units, will not be dispersed. Developer stated in its application, and Petitioners do not effectively dispute, that these additional bonus units need not be dispersed.

As for the comparability of the affordable units, Petitioners state in a conclusory manner that the City could not waive the requirement of comparable size and design as a reward for building the below-market-rate units. Petitioners provide neither legal authority nor a reasoned

discussion of the text of the applicable regulation to support their position. And so, this point requires no further discussion.

In conclusion, Petitioners do not establish that the Project fails to comply with state or local regulations governing density bonuses. And, as with all of their other arguments, Petitioners' approach is problematic because it is unclear how it can be reconciled with the dictates of section 65913.4 and an appropriate standard of review.

D. Ultra Vires

Petitioners make numerous assertions about whether a public hearing was required and whether the planning commission, as compared to city staff, should have decided whether to approve the Project application. They describe the conduct of city staff as "ultra vires." Section 65913.4 neither mandates a public hearing nor requires a decision to be made by a local planning commission. Rather, it limits the oversight otherwise authorized under an agency's zoning ordinance. And, as noted, the legislative history of section 65913.4 reflects that the Legislature wanted to eliminate the involvement of elected officials in the process to make review ministerial rather than discretionary. Petitioners' statement that the statute "must be taken to have envisaged an open, public process" is erroneous because it is based on a misrepresentation about what the statute provides and it is not otherwise supported by citation to authority or legislative history materials. (Pet. Brief at p. 31:3–4.) While section 65913.4 does not go so far as to prohibit all public oversight, the Legislature clearly intended—as reflected in the language and mechanics of the statute and legislative history—to drastically reduce the politicization of the planning process and the use of tactics like those Petitioners resort to here. Thus, Petitioners misinterpret section 65913.4 in this respect. They do not otherwise identify authority to support their ultra-vires argument or explain why local procedures for project approval should control if in conflict with section 65913.4.

What's more, Petitioners misuse the term ultra vires. Ultra vires is commonly used to describe conduct giving rise to a defense to a breach-of-contract claim. It rests on the rationale that the contract is void and unenforceable if the other party was entirely without power or

capacity to enter into the contract.[25] (See generally *McDermott v. Bear Film Co.* (1963) 219 Cal.App.2d 607, 610.) But an act that is merely performed in an unauthorized manner is not the same as an ultra vires act. (*Ibid.*) Concerning municipalities, a municipal contract or ordinance must be beyond the authority of the municipality under state law to be described as ultra vires. (*Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 310.) Put differently, ultra vires in this context describes the conduct of the municipality in relation to state law. It is not a matter of whether individual agents of the municipality complied with municipal law. Petitioners do not contend that a municipality like the City here lacks authority to act on development applications. And so, ultra vires is not a proper descriptive term given the substance of their argument.

The Court accordingly rejects Petitioners' miscast ultra-vires claim.

III. Conclusion and Disposition

The petition for writ of mandate is denied. Fundamentally, the Court finds as a matter of law that there is no ministerial duty on the part of an agency to deny or reject an application submitted for streamlined review under SB 35 if the project conflicts with objective planning standards enumerated at section 65913.4, subdivision (a). The existence of such a duty undergirds all of Petitioners' subsidiary claims, by which they attempt to show that the Project, in fact, is ineligible for streamlined review and approval because it conflicts with several of those standards. Further, Petitioners' presentation of their claims for relief in mandate is flawed and many of their arguments lack merit even proceeding, as they do, by treating the City's decision

---

[25] The term generally refers to acts taken beyond corporate powers. " 'An act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose. An act is also, sometimes, said to be ultra vires with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose.' " (*Colley v. Chowchilla Nat. Bank* (1927) 200 Cal. 760, 767; see also *Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 281 [ultra vires conduct is conduct that is beyond the power of the corporation, not an individual director; if the director's act was within the corporate powers but was performed without authority or in an unauthorized manner, the act is not ultra vires].)

to approve the Project as a purely ministerial one. Because Petitioners do not substantiate their arguments invoking de novo, non-deferential review or otherwise present arguments capable of review under a recognized, deferential standard in mandate—such as abuse of discretion by an arbitrary and capricious decision or one not supported by substantial evidence in the record—they fail to show their entitlement to writ relief.[26]

As related to these fundamental flaws, the Court observes that the majority of the parties' legal arguments are contained in supplemental briefing that goes far beyond the points raised in Petitioners' opening brief. Their pivot on reply is so significant as to raise the question whether supplemental briefing, which Developer had the opportunity to submit, can possibly mitigate the delay and disorganization of Petitioners' arguments. Ultimately, the fundamental problem with Petitioners' supplemental points challenging the City's decision to approve streamlined review and ultimately approve of the Project is that such claims are typically evaluated through administrative mandate under substantial evidence review in determining whether the City abused its discretion. Yet Petitioners charge ahead, advancing arguments as though the City's decision is entitled to no deference at all. In doing so, Petitioners do not reconcile their claims with section 65913.4 or, to the extent necessary, reconcile the dictates of section 65913.4 with other state laws they invoke. And so, Petitioners' belated arguments raise more questions than they answer.

Judgment will be entered consistently with this Order against Petitioners and in favor of Respondents and Developer. Developer and Respondents are prevailing parties entitled to costs of suit under Code of Civil Procedure section 1032, which costs are to be claimed by timely-filed memoranda and which are subject to striking or taxing according to law. Counsel for Developer is directed to prepare a proposed form of judgment, submit it to counsel for Respondents and

---

[26] Developer renews its statute-of-limitations argument previously advanced in support of its motion for judgment on the pleadings. For the reasons the Court already articulated in its order denying that motion, this action is subject to the 90-day limitations period set forth in section 65009 and was timely brought. To the extent Developer further challenges the action on this ground in merits briefing, in light of the result, it is unnecessary for the Court to reach these challenges or deny the petition on that procedural ground.

Petitioners for approval as to form, and then submit the same to the Court in a Word document to Department10@scscourt.org within 15 days of service of this Order. If no agreement can be reached as to the form of the proposed judgment, then each side may submit their own version in the same Word format to the same email address within the same 15 days.

IT IS SO ORDERED.

Date: May 6, 2020

HON. HELEN E. WILLIAMS
Judge of the Superior Court