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January 6, 2019

VIA E-MAIL

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

Re: Letter from Better Cupertino Opposing the Recusal of Liang Chao, John Willey, and Steven Scharf from the *Friends of Better Cupertino* Litigation

Dear Ms. Fierro:

I write on behalf of my client Vallco Property Owner LLC (“Vallco”) regarding the December 21 letter by the Better Cupertino Action Committee (“Better Cupertino”) opposing our notice that Mayor Steven Scharf and Councilmembers Liang Chao and John Willey must recuse themselves from supervising or directing the City’s conduct in the litigation brought by Friends of Better Cupertino against the City and Vallco.

Better Cupertino apparently wishes to provide “cover” for Mr. Scharf, Ms. Chao, and Mr. Willey *not* to recuse themselves. But its opposition to the required recusals lays bare the organization’s desire to undermine the adversarial process, by controlling both sides in the litigation. Indeed, the letter confirms that the organization is already considering how it can manipulate the City to settle the litigation and make the City “pay dearly in attorneys’ fees” – to the betterment of Better Cupertino, and to the detriment of Cupertino taxpayers and residents.

The positions taken by Better Cupertino in the letter are unsupported and meritless. There is no difference between a conflict of interest and “conflict of position.” There is no rule that “conflict of position” only occurs when a decision-maker is a current “board member” or “officer” in an adverse organization. Better Cupertino did not provide a single relevant legal authority.¹ As explained in my December 12 letter, a conflict of interest arises (separate and

¹ The only case cited by Better Cupertino, *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, is irrelevant. That case has nothing to do with conflicts of interest, and it certainly does not support the outrageous position that conflicted city council members may interfere with a city clerk’s ministerial duty to reject a referendum petition that fails to comply with the mandatory form and format requirements of the California Elections Code. (See Letter

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apart from any personal financial conflict under the California Political Reform Act) if an official has a personal interest in a matter. The source of the interest can be “an organizational responsibility to or personal commitment to others” that creates a conflict or the “appearance” of a conflict, or “a strong personal bias as to one party or position.” (Cupertino City Council Resolution No. 18-115 (emphasis added); see also *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1173 (“animosity” or “bias” toward one of the participants in the matter creates a conflict); *Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351 (conflict of interest exists if an official is personally “embroiled” in a dispute with a participant in the matter).) There is no “board member” limitation.

Indeed, Better Cupertino concedes that where a city council member is a “decision maker” in an organization adverse to the city, that councilmember must recuse herself. Better Cupertino then contends – in the teeth of the evidence – that Mr. Scharf, Mr. Willey, and Ms. Chao are not decision makers for that organization. In fact, the evidence described in my earlier letters, and in the pending investigation of Ms. Chao, Liang Chao for City Council 2018, Ignatius Ding, and the Better Cupertino Action Committee by the California Fair Political Practices Commission, demonstrates an ongoing pattern by Ms. Chao, for one, to actively direct and control Better Cupertino. (See FPPC Enforcement, COM-10222018-02345.) In other words, even under Better Cupertino’s own analysis, Ms. Chao must be prohibited from participating in any governmental decision involving the pending litigation.

Better Cupertino’s claims that “[i]mpartiality is not an issue” in “[i]litigation defense” decisions, and that conflict-of-interest rules do not apply in that context, are refuted by *Hamilton v. Town of Los Gatos* (1989) 213 Cal. App. 3d 1050. The Court in *Hamilton* applied conflict-of-interest rules to exclude a city councilperson who was not impartial from participating in litigation. Better Cupertino does not address *Hamilton*, and its position also makes no sense. Under Better Cupertino’s view, an official with a conflict of interest could control the City’s positions in litigation, in order to advance his or her personal interests, and to harm the interest of other citizens. That position does not comport with common sense notions of fair governance and appropriate judicial process. In litigation against a city, a city council member must be loyal to the city, not to the opponent. If the member’s loyalty is divided, he or she must be recused. (*Breakzone Billiards v. City of Torrance* 2000) 81 Cal.App.4th 1205, 1234.)

The fact that Better Cupertino *insists* that its members be able to direct the City’s conduct in the litigation illustrates the need for recusal. The December 21 letter *itself* demonstrates Ms. Chao’s, Mr. Willey’s, and Mr. Scharf’s association with Better Cupertino, and confirms the impropriety of allowing them to have any involvement with the *Friends of Better Cupertino* litigation. We ask that you consider the materials and legal arguments presented in

from Nielsen Merksamer, dated December 6, 2018 [citing unbroken line of California cases holding that elections officials must reject facially defective petitions.]

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my earlier letters, and determine that conflicts of interest disqualify Ms. Chao, Mr. Willey, and Mr. Scharf from all decisionmaking that concerns the SB 35 Project or the Specific Plan Project.

Very truly yours,



Katharine Van Dusen

ktv:sep

cc: Patricia Curtin
Todd Williams