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LATHAM & WATKINS LLP

May 10, 2018

VIA EMAIL

William Witt, Esq., Sr. Deputy County Counsel
Office of County Counsel
County of San Diego
County Administration Center
1600 Pacific Highway, Room 355
San Diego, CA 92101
Email: william.witt@sdcounty.ca.gov

Re: Enforcement of Affordable Housing Requirements for Newland Sierra Project

Dear Mr. Witt:

We understand that you may be handling legal matters regarding the County staff's processing of the developer's application for the Newland project. We write to ask you to ensure that the staff include a required "affordable housing component" that enforces County General Plan Housing Element Policy H-1.9 in their recommendations on the project, which the developer appears to have violated in its proposed project. We already have raised this issue before with the County in our April 17th letter to the Board of Supervisors (enclosed hereto as Attachment B to **Enclosure 1**), but we are writing to you directly to provide you with relevant legal authority and suggestions about how the staff could address the issue.

As you know we prefer to raise our client's concerns as early as possible in the process, rather than waiting for the public hearings. It is possible that our concerns are unnecessary, since it is possible that the County staff will include a required "affordable housing component" that enforces County General Plan Housing Element Policy H-1.9 in their recommendations on the project. Furthermore, we expect that our comments may be met with the response that the County must adopt an "ordinance" before imposing a Housing Element Policy H-1.9 affordable housing condition. This is not correct, but we believe that raising the issue directly with you now in this letter gives County Counsel sufficient time to draft any affordable housing ordinance, which could be included along with any ordinance that may be drafted by your office to exempt Newland from the Resource Protection Overlay Ordinance.

In particular, we wanted to alert you to a decision of the Superior Court of the County of Monterey in *Carmel Valley Assocation v. County of Monterey*, No. 17CV000131 (Apr. 24, 2018).

In *CVA v. Monterey*, the court held that the county's 7+ year delay in adopting revisions to its zoning ordinance to conform to the clear requirements of its general plan constituted an arbitrary and capricious abuse of discretion, based on the requirements of Government Code section 65860(c). (See pp. 15-17 of attached **Enclosure 2**.) Section 65860(c) states: "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."

As we have previously noted to the County (see Attachment B to **Enclosure 1**: April 17, 2018 Letter to County), General Plan Housing Element Policy H-1.9 is a clearly expressed, mandatory requirement that there be "an affordable housing component" provided as part of any "General Plan amendment for a large-scale residential project when this is legally permissible." The language of the General Plan Housing Element is sufficiently clear and mandatory such that no implementing ordinance is required in order for the policy to be enforced – in particular, with regards to the Newland Sierra project, which does not include any affordable housing component. Without such a component, the County cannot make the required findings of general plan consistency for the proposed Newland Specific Plan or the proposed Newland vesting tentative maps.

We note that Housing Element Policy H-1.9 has been part of the General Plan since at least the General Plan Update adopted in 2011. In 2012, the County stated that the policy would be implemented within "0-3 years."[1] So when initially adopted, it was intended that an implementing ordinance would be enacted by 2015. In 2013, the County changed this timeline to "2-7 years," delaying the implementing ordinance for this policy past 2015.[2] Notably, in 2017, the County disclosed that no additional resources were required to implement Housing Element Policy H-1.9.[3] This means that as of last year, either the County determined that it did not need an implementing ordinance to enforce the requirements of General Plan Housing Element Policy H-1.9, or that there was no reason for why an implementing ordinance should be further delayed. Thus, if an implementing ordinance were required, it seems likely that a court would find the County's now 7-year delay in conforming its zoning ordinance to the clear requirement of the

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[1] *See* County of San Diego, 2012 General Plan Progress Report, *available at* https://www.sandiegocounty.gov/content/dam/sdc/pds/advance/2012_GP_Progress_Report.pdf, at A-4.

[2] *See* County of San Diego, 2013 General Plan Progress Report, *available at* https://www.sandiegocounty.gov/content/dam/sdc/pds/gpupdate/docs/GP-APRs/GP-APR2013.pdf, at A-4

[3] *See* County of San Diego, 2017 General Plan Implementation Plan, *available at* https://www.sandiegocounty.gov/content/dam/sdc/pds/gpupdate/docs/GP/Implementation%20Plan_v2017.pdf.

General Plan Housing Element Policy H-1.9 to be unreasonable and in violation of Government Code section 65860.

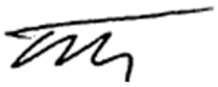
Accordingly, we again urge the County to enforce General Plan Housing Element Policy H-1.9 as we requested (both in writing and in person) several weeks ago at the April 17, 2018 meeting of the Board of Supervisors, through conditions attached to the Newland project. Further, if the County contends that it requires an implementing ordinance, even though that appears to contradict the statement in the 2017 Implementation Plan that no additional resources are required, then the County should start immediately in devising and adopting that ordinance.

This should not be difficult or complicated considering the clearly expressed requirement for affordable housing as part of General Plan amendment projects in Housing Element Policy H-1.9. (See, e.g., **Enclosure 3**: Excerpt from City of San Diego North City Future Urbanizing Area Framework Plan.)[4] The County should start immediately and pursue the matter with due diligence. The proposed ordinance could be heard by the Planning Commission this summer, either along with or before its consideration of the Newland project.

I also wanted to note that our concerns on this issue do not mean that our client approves of the Newland project if it contains a Housing Element Policy H-1.9 condition. This issue is important to our client the Golden Door because, if this and other projects are to be approved, many of the hospitality and agricultural workers on our client's property could benefit from the availability of affordable housing. The Golden Door draws many of its employees from the local community. My client believes the Newland project has been proposed for the wrong site, with the wrong design, but if it is going to be recommended for approval by County staff despite these objections, it should actually include an affordable housing component as required by the County General Plan. The fact that the Newland project does not contain any affordable housing as defined by the County's Housing Element underscores that the project – though it will add a new population the size of the City of Del Mar in a currently mostly undeveloped and uninhabited area – is not intended by Newland to provide any affordable housing to the community.

Please include this comment letter in the administrative record for the project. Thank you for your time and attention to this matter.

Very truly yours,



Taiga Takahashi
of LATHAM & WATKINS LLP

cc: Mark Wardlaw, County of San Diego PDS

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[4] *Available at* https://www.sandiego.gov/sites/default/files/legacy/planning/community/profiles/ncfua/pdf/nfcu_final_102314.pdf.

Darin Neufeld, County of San Diego PDS
Ashley Smith, County of San Diego PDS
Claudia Silva, Assistant County Counsel
Stephanie Saathoff, Clay Co.
Denise Price, Clay Co.
Clif Williams, Latham & Watkins
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Kathy Van Ness, Golden Door

ENCLOSURE 1

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May 8, 2018

Jennifer Seeger
Assistant Deputy Director
California Dept. of Housing and Community Development
Division of Housing Development
2020 W. El Camino Avenue, Suite 500
Sacramento, California 95833

Re: San Diego County Housing Element

Dear Ms. Seeger:

We represent Golden Door Properties LLC (the "Golden Door"), which owns and operates an award-winning spa and resort that opened in 1958, along with sustainable agricultural operations. Adjacent to the Golden Door, the Newland Sierra, LLC ("Newland") has proposed a revised Merriam Mountains project, known as the "Sierra" project (the "Newland Sierra Project" or "Project") on property located near Deer Springs Road. Newland's proposal includes 2,135 residential units but fails to include a necessary affordable housing component. Further, the County of San Diego is failing to implement the Housing Element which the County adopted in August of 2011, updated in April of 2017, and which your Department approved in the letter attached hereto as **Attachment A**. In particular, the County is failing to comply with General Plan Policy H-1.9 regarding the provision of affordable housing. This policy states that:

> **Affordable Housing through General Plan Amendments.** Require developers to provide an affordable housing component when requesting a General Plan amendment for a large-scale residential project when this is legally permissible.

Unfortunately, the County staff is failing to propose conditions that will require an affordable component in the Newland Sierra Project, and Newland contends that it is not required to provide any affordable housing. The Newland Sierra Project requires a General Plan amendment that the County has been processing since May 7, 2015. The County has the legal authority to impose conditions requiring an affordable housing component as set forth in General Plan Policy H-1.9, but as of yet, neither County staff nor the County Counsel have proposed those conditions for this project.

The Golden Door is opposed to any project on the Newland property that requires an amendment to the General Plan land use element or an exemption from the County's Resource Protection Ordinance. Nonetheless, if the County intends to amend its General Plan and convert

this rural land, and completely exempt the project from the County's Resource Protection Ordinance, the County must nonetheless comply with Policy H-1.9.

We ask that your office take steps to investigate and remedy the County's failure to implement this key portion of its General Plan. The County's failure to comply with this mandatory policy can only delay or disrupt the County's overall planning for new housing in the County and its ability to provide affordable housing.

We have raised these issues with the Board of Supervisors and County staff at the Board's meeting of April 18, 2018, as set forth in the attached letter (**Attachment B**). However, the Board has so far decided to take no action on this matter. We therefore look to the Department for assistance in this matter.

Best regards,

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Kathy Van Ness, Golden Door
Darin Neufeld, County Planning and Development Services
Mark Slovick, County Planning and Development Services
Ashley Smith, County Planning and Development Services
Stephanie Saathoff, Clay Co.
Denise Price, Clay Co.
Taiga Takahashi, Latham & Watkins

ATTACHMENT A

STATE OF CALIFORNIA - BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY EDMUND G. BROWN JR., Governor
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

June 15, 2017

Ms. Helen N. Robbins-Meyer, Chief Administrative Officer
County of San Diego
1600 Pacific Highway, Room 209
San Diego, CA 92101

Dear Ms. Robbins-Meyer:

RE: County of San Diego's 5th Cycle (2013-2021) Four-Year Update, Adopted Housing Element

Thank you for submitting San Diego County's housing element adopted March 15, 2017 and initially received for review on May 1, 2017 with a corrected version received for review on May 22, 2017. Pursuant to Government Code (GC) Section 65585(h), the Department is reporting the results of its review.

The Department is pleased to find the adopted housing element in full compliance with State housing element law (Article 10.6 of the Government Code). The adopted element was found to be substantially the same as the revised draft element the Department's October 26, 2016 review determined met statutory requirements.

Pursuant to GC Section 65588(e)(2)(B) a local government in the SANDAG region that did not adopt a fourth planning period housing element by January 1, 2009 shall revise its housing element every four years, unless the local government met both of the following conditions: 1) adopted the fourth revision no later than March 31, 2010; and 2) completes any rezoning identified in the fourth revision by June 30, 2010. The County did not meet the requirements of GC 65588(e)(2)(B); therefore, it is subject to the four-year revision requirement until the County has adopted at least two consecutive revisions by the applicable due dates. Adoption of this housing element meets the requirements of the first four-year update. Provided the County adopts a housing element pursuant to the requirements of GC 65585 on or before the due date for 6th cycle housing elements, it will meet the second four-year update requirement and return to an eight-year update schedule.

Please note the County now meets specific requirements for State funding programs designed to reward local governments for compliance with State housing element law. Please see the Department's website for specific information about State funding programs at http://www.hcd.ca.gov/grants-funding/active-funding/index.shtml.

For your information, on January 6, 2016, HCD released a Notice of Funding Availability (NOFA) for the Mobilehome Park Rehabilitation and Resident Ownership Program (MPRROP). This program replaces the former Mobilehome Park Resident Ownership Program (MPROP) and allows expanded uses of funds. The purposes of this new

program are to loan funds to facilitate converting mobilehome park ownership to park residents or a qualified nonprofit corporation, and assist with repairs or accessibility upgrades meeting specified criteria. This program supports housing element goals such as encouraging a variety of housing types, preserving affordable housing, and assisting mobilehome owners, particularly those with lower-incomes. Applications are accepted over the counter beginning March 2, 2016 through June 30, 2017. Further information is available on the Department's website at: http://www.hcd.ca.gov/grants-funding/active-funding/mprrop.shtml .

The Department appreciates the assistance and cooperation Mr. Noah Alvey, Planning Manager, and Mr. Timothy Vertino, Lan Use/Environmental Planner, provided throughout the course of the housing element review. The Department wishes the San Diego County success in implementing its housing element and looks forward to following its progress through the General Plan annual progress reports pursuant to GC Section 65400. If the Department can provide assistance in implementing the housing element, please contact Robin Huntley, of our staff, at (916) 263-7422.

Sincerely,

Jennifer Seeger
Assistant Deputy Director

ATTACHMENT B

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April 17, 2018

VIA HAND DELIVERY

San Diego County Board of Supervisors
County Board of Supervisors
1600 Pacific Highway, Room 402
San Diego, CA 92101
Attn: Clerk of the Board of Operations

Re: Housing Affordability within San Diego County; Agenda Item 5

Dear Supervisors Cox, Jacob, Gaspar, Roberts, and Horn:

As you know, we represent the Golden Door Properties LLC (the "Golden Door"), which owns and operates an award-winning spa and resort that opened in 1958, along with sustainable agricultural operations. Adjacent to the Golden Door, the Newland Real Estate Group, LLC ("Newland") has proposed a revised Merriam Mountains project, known as the "Sierra" project (the "Newland Sierra Project" or "Project") on property located near Deer Springs Road. Newland's proposal includes 2,135 residential units but fails to include a necessary affordable housing component.

We understand the Board is considering requesting the Chief Administrative Officer to investigate options to promote construction of homes in the unincorporated region and to close the housing gap. The Golden Door has employees of all income levels who need access to more affordable housing within North County. However, the proposed Newland Sierra Project is not located on a site that the County has identified for new housing construction in the North County metro area (see, e.g., Smart Growth Opportunity Areas, Figure H-2, General Plan Housing Element), it does not provide any affordable housing, and its market analyses are outdated and are inaccurate. Newland Sierra defines "affordable" as "assuming 4.0 percent interest rate, 10 percent down payment and a 35 percent of household income for housing." However, interest rates today are higher (4.625%) and rising, and federal standards define "affordable" as costing "no more than 30% of the monthly household income for rent *and* utilities."[1] And Newland

[1] See Enclosure 1; see also U.S. Dept. of Housing and Urban Development, *Affordable Housing*, https://www.hud.gov/program_offices/comm_planning/affordablehousing/ (last visited Apr. 17, 2018); San Diego Housing Federation, *Frequently Asked Questions*, https://www.housingsandiego.org/find-housing-faq (last visited Apr. 17, 2018).

Sierra has refused to commit to legally commit to providing affordable housing, incorrectly claiming on its website that the County has no such requirements.[2]

Accordingly, if the County were to approve the Newland Sierra Project, it would violate the County's General Plan because the Project lacks the required affordable housing which is expressly specified as necessary in the County's General Plan. (See General Plan Policy H-1.9; see also Government Code § 65300.5, *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 635-636 [project must comply with specific and mandatory general plan policies].)

Existing County Policies Require an Affordable Housing Component for General Plan Amendment Projects. The County's General Plan already contains a policy requiring that **"developers [ ] provide an affordable housing component when requesting a General Plan amendment for large-scale residential project[s] when this is legally permissible.** (General Plan, Policy H-1.9)(emphasis supplied). Current California law does make a mandatory "affordable housing component" legally permissible. Thus, the Board of Supervisors has the existing legal authority under California law to require an affordable housing component in every project that requires a General Plan amendment, as specified in Policy H-1.0. Thus, the Chief Administrative Officer and County Counsel, and the Board of Supervisors, have a mandatory duty under the County's adopted General Plan to require affordable housing conditions that are "legally permissible" under California law in order to implement the County's existing affordable housing policy embodied in Policy H-1.0

As it stands now, the County Board of Supervisors is required to impose a condition requiring an affordable housing component for projects seeking a General Plan amendment. The pending Newland Sierra project does not contain such an affordable housing component, and therefore is inconsistent with the existing General Plan. The courts have explained what "legally permissible" means within the context of affordable housing:

> [I]t is well established that ***price controls are a constitutionally permissible form of regulation with regard to real property*** as well as to other types of property or services. . . . Accordingly, just as it would be permissible for a municipality to attempt to increase the amount of affordable housing in the community and to promote economically diverse developments by ***requiring all new residential developments to include a specified percentage of studio, one-bedroom, or small-square-footage units, there is no reason why a municipality may not alternatively attempt to achieve those same objectives by requiring new developments to set aside a percentage of its proposed units for sale at a price that is affordable to moderate- or low-income households***.

---

[2] See Enclosure 2; see also Newland Sierra *FAQ*, *Types of Housing*, https://www.newlandsierra.com/faq/ (last visited Apr. 17, 2018).

(*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435 [emphasis added] ("*CBIA*").) Therefore, the County may impose price control requirements on proposed new developments or require new residential developments to include a specified percentage of affordable units. The pending Newland Sierra project does not include either, despite the County's General Plan policy requiring "legally permissible" action to ensure that General Plan amendment projects include an affordable housing component.

The County May Immediately Impose an Affordable Housing Requirement on Newland Sierra. Implementing a requirement for a percentage of affordable homes within a new development is something the County can immediately implement and is required to implement under the express provisions of the General Plan. The General Plan policy is already in place that imposes a requirement on the pending Newland Sierra Project. Here, there is a clear nexus between the imposition of affordable housing requirements on development and the effects on the region. (See e.g. *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643 [government may impose permitting condition without running afoul of the Takings Clause if it demonstrates an essential nexus and reasonable relationship between the permitting condition and a deleterious public impact of the development].)

In any event, the California Supreme Court has ruled that no "nexus" requirement applies to a condition requiring an affordable housing component for a residential development project. (*CBIA*, *supra*, 61 Cal.4th at 474-75, 479 [rough proportionality/nexus requirements do not apply to restrict developer's use of property].) The Supreme Court relied upon *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 to reach this conclusion. (*Id*. at 475-76.) *Ehlrich* involved the imposition of conditions on a case-by-case basis, rather than through a broader inclusionary housing ordinance, enabling a greater amount of discretion for the deployment of the city's police power. (*Ehlrich*, *supra*, 12 Cal.4th at 869.) As such, the County may rely on its existing General Plan and implement appropriate inclusionary zoning requirements as a project condition on Newland Sierra prior to project approval. (*CBIA*, 61 Cal.4th at 477 ["Moreover, as we have explained above, the validity of the ordinance's requirement that at least 15 percent of a development's for-sale units be affordable to moderate- or low-income households does not depend on an assessment of the impact that the development itself will have on the municipality's affordable housing situation.].)

Though the law on this issue is firmly established, i.e., the County certainly does have the authority today to impose an affordable housing condition on the Newland Sierra project, if County Counsel somehow disagrees with this legal conclusion and believes that further steps are needed to make an affordable housing component "legally permissible," then County Counsel should be directed to prepare any appropriate documents needed to implement this mandatory portion of the adopted General Plan, and any processing of the current General Plan amendment project of Newland Sierra project, should be suspended until the County adopts an ordinance to implement its own General Plan requirements. The County could simply impose the same requirement for affordable housing as upheld by the California Supreme Court in the City of San Jose case, using the wording of any ordinance or conditions adopted by the City of San Jose. Along with any other General Plan change or zoning ordinance amendment that is included in the Newland project approvals, County staff and the County Counsel can simply include project

conditions and/or an ordinance adopting affording housing requirements approved in the San Jose case, at the same time as the Board considers any other project approvals.

We ask that the County Chief Administrative Officer and County Counsel be directed to immediately propose project conditions or any other legal documents required to implement General Policy H-1.9 for the Newland project, and no further processing of the Newland project should occur until these actions are taken to implement General Plan Policy H-1.9. If County Counsel concludes that General Plan Policy H-1.9 is unenforceable, and the County lacks the legal authority to impose conditions requiring affordable housing components under the terms of that Policy, the Board should request County Counsel to describe the reasons for this conclusion.

Failure to pay attention the mandatory requirements of General Plan Policy H-1.9 will only result in needless delays and disruptions in any decisions the Board may make with respect to new developments covered by this Policy, such as Newland.

We thank you for your time and attention to our comments, and ask that they be incorporated both into the administrative record for the Newland Sierra Project and this Agenda Item 5. Please do not hesitate to contact me should you have any questions.

Best regards,

Christopher Garrett

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Kathy Van Ness, Golden Door
Darin Neufeld, County Planning and Development Services
Mark Slovick, County Planning and Development Services
Ashley Smith, County Planning and Development Services
Stephanie Saathoff, Clay Co.
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10/1 ARM Jumbo	4.250%	4.537%

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Apr 13 2018	4.50% : (--)	+0.01	4.05%	0.45
Apr 12 2018	4.49% : (--)	+0.02	4.08%	0.41
Apr 11 2018	4.47% : (--)	-0.02	4.18%	0.29
Apr 10 2018	4.49% : (--)	+0.00	4.17%	0.32
Apr 09 2018	4.49% : (--)	+0.01	4.17%	0.32
Apr 06 2018	4.48% : (--)	-0.01	4.15%	0.33
Apr 05 2018	4.49% : (--)	+0.01	4.14%	0.35
MBA 30 Year Fixed (weekly)				
Mar 18 2018	4.68% : (0.46)	-0.01	4.36%	0.32
Mar 11 2018	4.69% : (0.45)	0.04	4.30%	0.39
Mar 04 2018	4.65% : (0.58)	0.01	4.36%	0.29
Freddie Mac 30 Year Fixed (weekly)				
Apr 08 2018	4.42% : (0.40)	0.02	4.14%	0.28
Apr 01 2018	4.40% : (0.50)	-0.04	4.14%	0.26
Mar 25 2018	4.44% : (0.50)	-0.01	4.30%	0.14

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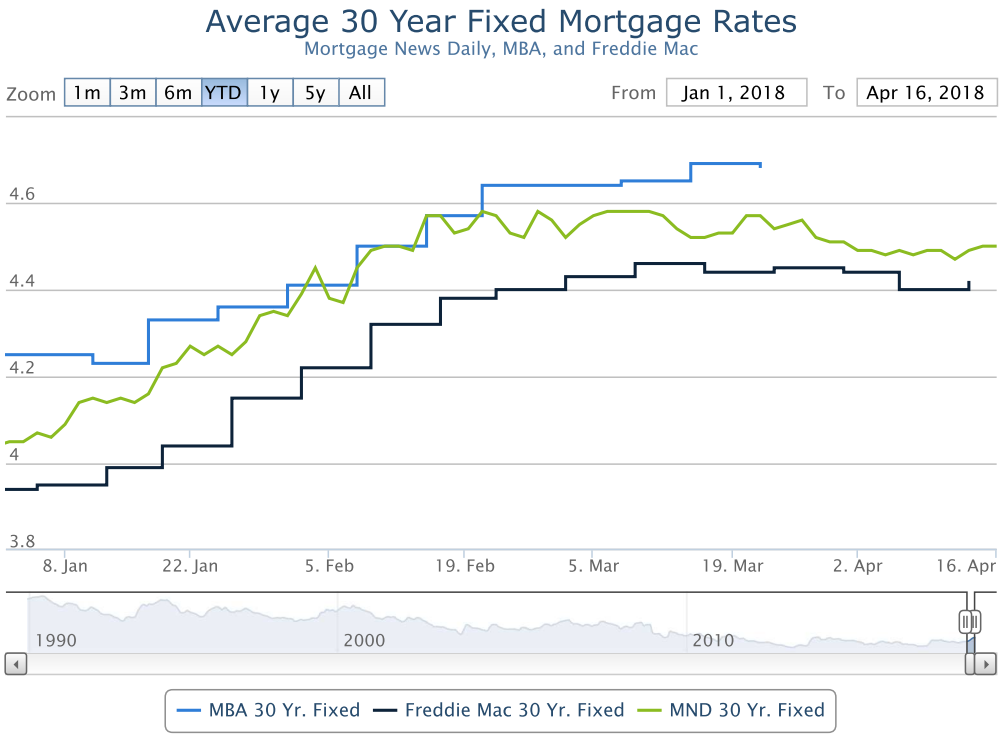

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SOURCE:

Mortgage News Daily
Mortgage Bankers Association
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About this Data

Affordable Housing

Who Needs Affordable Housing?

Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care. An estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing. A family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States.

Where Can Individuals Find Assistance?

Individuals looking for assistance can:

- Find rental, homebuyer, and homeowner assistance
- Find resources for homeless persons, including, youth, veterans, and the chronically homeless
- Find help for victims of foreclosure and Hurricane Sandy and for persons living with HIV/AIDS

What is HUD Doing to Support Affordable Housing?

Within the Office of Community Planning and Development, the Office of Affordable Housing Programs (OAHP) administers the following grant programs designed to increase the stock of housing affordable to low-income households.

- The HOME Investments Partnerships Program (HOME) provides grants to States and local governments to fund a wide range of activities including 1) building, buying, and/or rehabilitating housing for rent or homeownership or 2) providing direct rental assistance to low-income families. It is the largest Federal block grant program for State and local governments designed exclusively to create affordable housing for low-income households.
- The National Housing Trust Fund (HTF) supports the acquisition, new construction, or reconstruction of rental units for extremely low-income families or families with incomes below the poverty line, whichever is greater.

HUD's Office of Housing and Office of Public and Indian Housing also administer programs to increase the amount of affordable housing available for low-income households across the nation.

What Information Does HUD Provide?

The HUD Exchange provides a hub for HOME Program information, tools and templates, research, evaluations, best practices, guides, training manuals, and more including:

- HOME Laws and regulations
- Policy guidance (Policy Memos, HOME *FACTS*, HOMEfires)
- HOME Frequently Asked Questions (FAQs)
- HOME Dashboard Reports and other HOME Reports

Related tools and resources can be accessed through HOME Topics.

The HUD Exchange also provides:

- **Email Updates** – To receive CPD communications about program policy, upcoming trainings, resources, reporting deadlines, technical assistance, and more, sign up on the HUD Exchange Mailing List.
- **Training Opportunities** – For information on upcoming events, self-paced online training, and recorded webinars, go to Training and Events.
- **Grantee Information** – To view amounts awarded to organizations under HUD programs over the past several years, go to CPD Allocations and Awards. To learn more about the agencies and organizations that have received funding, visit About Grantees.
- **Assistance with Reporting System Questions** – If you have a question related to eCon Planning Suite or IDIS, please submit your question and get a response through Ask A Question.
- **In-depth Advising** – To learn about extended communication or long-term assistance available to CPD grantees, visit Technical Assistance.

If you are an organization with a policy question related to HOME,or National Housing Trust Fund (HTF) please contact your local HUD Field Office for assistance.

How Can My Organization Receive Funds?

Participating jurisdictions receive HOME grants through a formula to fund housing programs which meet local needs and priorities. To find out about how to apply for HOME assistance in your community, contact an agency nearest to your community.

ENCLOSURE 2

(/)

NEWLAND SIERRA (/)

Stay Updated

San Diego's First Carbon Neutral Community

Benefits of a Specific Plan Compared to the Current General Plan

Minimizing Traffic Impacts

Reducing Vehicle Miles from the Community

Managing the Threats of Wildfires

Promoting Water Conservation

Types of Housing

Q: What types of housing will be built?

A: A mixture of for-sale homes is proposed. No apartments or rental homes are proposed. The homes will be a variety of single-family detached homes, attached townhomes, cluster homes, age-targeted, and larger lot single-family homes.

Share your thoughts with us by clicking here (/contact)

Q: Will there be any rental units?

A: No rental apartment buildings are proposed for the community.

Share your thoughts with us by clicking here (/contact)

Q: Are there any "affordable housing" requirements for the community?

A: The County of San Diego does not require subsidized or otherwise "income-restricted" housing to be provided in a project. However, we do plan to have a variety of housing types available, including some at price points that are attainable for middle-income families.

Share your thoughts with us by clicking here (/contact)

Community Character

Parks

Trails and Open Space

Wildlife

Vineyards

Commercial Area

Schools

Grading

Miscellaneous

CONTACT US (/CONTACT)

Newland COMMUNITIES (http://www.newlandcommunities.com/) NASH North America Sekisui House (http://nashcommunities.com/)

Equal Housing Opportunity

†The project description is part of the Specific Plan and draft EIR for the project. The specific details of the project description are subject to refinement as it moves through the approval process.

ENCLOSURE 2

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

Carmel Valley Association, Inc., a California nonprofit corporation, Petitioner vs. County of Monterey; Board of Supervisors of the County of Monterey, and DOES 1 THROUGH 15, Respondents, Rancho Canada Venture LLC, Carmel Development Company; R. Alan Williams; Does 16 through 30, inclusive Real Parties in Interest.	CASE NO.: 17CV000131 **Intended Decision**

This matter came on for court trial on February 2, 2018. All sides were represented through their respective attorneys. The matter was argued and taken under submission.

This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein. (Cal. Rules of Court, rule 3.1590(c)(1).)

Background

On April 22, 2004, the Lombardo Land Group submitted a development project application to the County of Monterey. (AR 7222-7225.) The application was for a Combined Development Permit, rezoning, use permit, General Plan Amendment, a Specific Plan, and a Vesting Tentative Map for a "a proposed mixed-income new neighborhood." (AR 7222, 7224.) The Applicant proposed 280 units,[1] of which 50% would be deed-restricted Affordable and Workforce units. (AR 7224.)

In January 2008, the County circulated a Draft Environmental Impact Report (DEIR) for what it identified as the "Rancho Canada Village Specific Plan." (AR 214.) That DEIR received

[1] The Applicant subsequently changed its proposal to seek the creation of 281 units. (AR 237.)

56 comment letters, many of which criticized its adequacy on a number of substantive grounds. (See, e.g., AR 8923, 9397-9401, 9596-9608, 19050-19116.) At that time, the firm preparing the DEIR was also working on an EIR for the County's General Plan update. That project took priority, forcing the Applicant to wait for its completion to proceed. (AR 11347-11348.)

The new General Plan went into effect on October 26, 2010. (AR 13574.) It included changes to the Carmel Valley Master Plan (CVMP). CVMP Policy CV-1.6 established a new residential subdivision building limit of 266 new residential lots or units in Carmel Valley. (AR 103, 11807, 11824.)[2] In recognition of the proposed Project, the 2010 General Plan established a Special Treatment Area (CVMP Policy CV-1.27) of "[u]p to 40 acres" for the Project site. (AR 14036.) Within that Special Treatment Area, residential development was allowed at "a density of up to 10 units/acre,"[3] and was required to include "a minimum of 50% Affordable/Workforce Housing." (*Ibid.*)

Further, the 2010 General Plan raised the minimum affordable housing requirement for all new housing development across the County to 25%, and committed the County to amending its Inclusionary Housing Ordinance, Monterey County Code Chapter 18.40 (Inclusionary Housing Ordinance or Ordinance) to reflect this change. (AR 13583.) To date, no such amendment has occurred.

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[2] The findings, General Plan EIR, and Final EIR all recite that the original version of the 2010 General Plan contained a residential unit cap of 266 units. (AR 103, 3738, 11807, 11824.) However, the actual language of the General Plan refers to a residential unit cap of *200* units. (AR 13616.) No party explains this discrepancy. The difference, however, is irrelevant to the court's analysis. For ease of reference, the court assumes throughout this decision that the initial cap was 266 units.

[3] Notwithstanding this density designation, the Special Treatment Area is still subject to the building cap. (AR 13616 ["[n]ew residential subdivision Carmel Valley *shall be limited* to creation of 200 new units"], 14031.)

Finally, the General Plan mandated that, within 12 months, the County develop a Development Evaluation System (DES) in order to assess new development projects proposed outside of certain priority development areas based on a pass-fail grading system. (AR 13578-13579.) The General Plan defines "Community Areas, Rural Centers and Affordable Housing Overlay districts" as "the top priority for development in the unincorporated areas of the County." (AR 13578.) The County has not yet promulgated the DES.

Following the adoption of the General Plan, several lawsuits were filed, including one brought by Petitioner. (AR 19524.) Petitioner and the County ultimately reached a settlement, agreeing to an amendment to CVMP Policy CV-1.6 to reduce the residential subdivision limit in Carmel Valley from 266 new units to 190 new units. (AR 19964-19983; see also AR 3738.) The Board approved this amendment on February 12, 2013. (AR 14031-14032.) Of the 190-unit cap, 24 of the units were reserved for another property, meaning that, absent a general plan amendment, the Project was limited to 166 units. (AR 13617, 3738.)

Rather than abandoning the Project and commencing the permitting and environmental review process anew, Real Parties developed a new 130-unit alternative (Alternative), which it claimed was intended to "respond[] to various concerns raised by the public during the processing of the [] [P]roject." (AR 18768.) Real Parties explained to the County that the Alternative addressed "most, if not all, of the concerns expressed by the public, and which include[d] flood control, utility, recreational, water supply, moderate income housing and other features that would benefit the community." (AR 18771.) Real Parties provided the County with extensive information on the Alternative, including proposed maps, property development standards, and a detailed description of the specific Project impacts the Alternative would alleviate. (AR 18768-18782.) Nevertheless, Real Parties insisted that the Alternative was "not a resubmittal for a new project." (AR 18770.)

Real Parties then worked with the County and its EIR consultant to prepare a Recirculated Draft Environmental Impact Report (RDEIR), to include, inter alia, a lengthy discussion of the Alternative. (AR 17126-17130, 1348-1372.) Real Parties asked the EIR consultant to "provide an equal level of analysis of the 130-unit alternative" and the Project. (AR 17142.) To accomplish this task, the EIR consultant was forced to put the analysis of the Alternative in the "Project Description" chapter along with the Project, rather than in the Alternatives chapter.

On June 1, 2016, the County released the RDEIR. (AR 18541.) The RDEIR's "Project Description" chapter discussed both the Project and the Alternative, in significant, and roughly equivalent, detail. (AR 1321, 1348-1372.) The remaining six alternatives were described as before, in less detail, in the RDEIR's alternatives chapter. The RDEIR concluded that the 130-unit Alternative was the "environmentally superior alternative." (AR 18537, 18541-18543.) In November 2016, the County issued its Final Environmental Impact Report (FEIR).[4]

On November 9, 2016, County Planning Staff recommended that the Planning Commission advise the County Board of Supervisors (the Board) to approve the 130-unit Alternative and certify the EIR. (AR 4099.) Staff also explained that, under the Alternative, an amendment to the Special Treatment Area language in CVMP Policy CV-1.27 would be required to reduce the affordability requirement from 50% to 20%. (AR 4107.) At the subsequent hearing on November 16, 2016, the Planning Commission voted 4-3 to adopt staff's recommendation to recommend approval of the Alternative and certification of the FEIR. (AR 5256-5279.) However, the Planning Commission did not recommend that the Board adopt the proposed General Plan amendment, because it did not secure a majority of the Commission's vote. (AR 5347-5348.)

[4] The FEIR eliminated one alternative due to a change in ownership of the relevant property. (AR 134, 3803-3806, 3808-3809.)

On December 13, 2016, the Board unanimously approved the 130-unit Alternative based upon a revised vesting tentative map submitted by Real Parties in Interest (Real Parties). (AR 5360-5361.) The Board also approved a General Plan amendment to the CMVP Policy CV-1.27 Special Treatment Area for the Rancho Canada property, reducing the 50% of affordable/workforce housing to 20%, and rezoning the Property from public quasi-public to Medium Density Residential for 129 lots, and Low Density Residential for the Alternative's Lot 130. (AR 5361.) As to inclusionary housing, the Board stated:

"Finding NO. 18: INCLUSIONARY HOUSING: The Alternative complies with the Inclusionary Housing Ordinance requirement to provide a minimum of 20% onsite affordable housing units. (MCC, Chapter 18.40) Unusual circumstances exist making it appropriate to modify the requirements of the Inclusionary Ordinance so that 20% Moderate-income housing, as proposed by the Alternative, is allowed in-lieu of the 8% Moderate-income, 6% Low-income and 6% Very Low income." (AR 143.)

Finally, the Board adopted Condition No. 112, which required Real Parties to comply with the Ordinance by constructing 25 on-site rental units affordable to moderate-income households. (AR 211.)

Administrative Record

The court admitted the approximately 30,000-page administrative record into evidence.

Together with its opposition brief, the County filed a supplemental administrative record comprised of 1) omitted public comments on the 2008 DEIR; 2) the County 2015-2023 Housing Element, dated January 26, 2016; and 3) a Board Order entitled "2016 Annual Progress Report for the General Plan and Housing Element, and accompanying staff report," dated July 18, 2017.

Petitioner does not object to the addition of omitted public comments on the 2008 DEIR. Consequently, the court admits these comments into the administrative record.

Petitioner does object, however, to the additions of the Housing Element and Board Order to the record. Petitioner notes that the Housing Element "does not qualify as part of the record of proceedings" under Public Resources Code, § 21167.6, subdivision (e). Petitioner maintains that the Board Order should not be part of the record because it did not exist at the time the Board approved the Project, December 13, 2016, and is hence "extra-record evidence."

Petitioner has two claims against the County: 1) its claim that the County has failed to implement the General Plan, brought under Code of Civil Procedure section 1085; and 2) its claim that the County improperly approved the Project in violation of the California Environmental Quality Act (CEQA),[5] brought under Code of Civil Procedure section 1094.5. The County offered both the Board Order and the Housing Element in response to Petitioner's General Plan implementation arguments under Code of Civil Procedure section 1085, not as to project approval. "[A] proceeding in mandate [under section 1085] may consider 'all relevant evidence, including facts not existing until after the petition for writ of mandate was filed.' [Citations.]" (*Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 895.) Accordingly, whether the Housing Element is deemed "part of the record of proceedings" under Public Resources Code, § 21167.6, subdivision (e), is irrelevant. Similarly, the fact that the Board Order did not exist at the time the Board approved the Project is immaterial, since the Order does not relate to Petitioner's project-specific claims.

Consequently, the court admits both documents into the administrative record.

Requests for Judicial Notice

The County seeks judicial notice of three documents: 1) MCC Chapter 18.40; 2) the County's 2015-2023 Housing Element; and 3) Petitioner's Petition for Writ of Mandate against the County filed on November 24, 2010 in this court, case number M109442.

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[5] See Public Resources Code section 21000 et seq.

The court takes judicial notice of MCC Chapter 18.40, as it must since it is relevant, under Evidence Code section 451, subdivision (a).

The County intended its request as to the Housing Element as an alternative ground for admission should this court deny the County's attempt to amend the administrative record. Because the court has admitted this document into the record, judicial notice is unnecessary.

The court takes judicial notice of Petitioner's Petition for Writ of Mandate against the County filed on November 24, 2010, case number M109442, as a record of a court of this state, under Evidence Code section 452, subdivision (d)(1).

Discussion

1.0 Petitioner raises several claims under Code of Civil Procedure section 1085.

Petitioner seeks writs of traditional mandate under Code of Civil Procedure section 1085. Petitioner argues that 1) the County must be compelled to implement the DES; 2) the County must be compelled to amend its Inclusionary Housing Ordinance to conform to the 2010 General Plan; 3) the County erred in finding that the Alternative was consistent with General Plan Policy LU-1.19; 4) the Alternative is inconsistent with the Ordinance, because the County erred in its calculation of the minimum number of affordable housing units; and 5) the County erred by departing from the Ordinance's requirement that the affordable housing units provided be distributed among households of varying defined levels of income.

The County responds that 1) its decision not to implement the DES and failure to amend its Ordinance were legislative acts justified by the County's prioritization of other tasks; 2) the Alternative was consistent with General Plan Policy LU-1.19 because although there is no DES, the Board analyzed the Alternative against the criteria set forth in Policy LU-1.19; 3) the Board's calculation of the minimum number of affordable housing units was not arbitrary and capricious; and 4) unusual circumstances supported excepting the Alternative from the

Ordinance's requirement that the affordable housing units provided meet specified income requirements.

Additionally, 1) the County contends that Petitioner has waived its right to challenge the County's failure to timely adopt the DES; and 2) that Petitioner has failed to exhaust its administrative remedies as to its claims that the County did not timely adopt the DES or amend its Inclusionary Housing Ordinance. Because these arguments are threshold matters, the court will address them first.

1.1 Petitioner has not waived its right to challenge the County's failure to timely adopt the DES.

The County maintains that, by virtue of a clause in a settlement agreement, Petitioner has waived its right to challenge the County's failure to timely adopt the DES. Petitioner responds that the release does not cover such claims.

On November 24, 2010, Petitioner filed a petition for writ of mandate against the County alleging CEQA violations relating to the 2010 General Plan Update. The parties eventually entered into a settlement agreement. (AR 19964-19983.) As part of that agreement, executed on September 24, 2012, Petitioner released the County and its Board from all claims as of the Agreement's effective date "arising from or relating to certification of the Final EIR for the 2010 Monterey County General Plan and approval of the 2010 Monterey County General Plan as adopted by the Board of Supervisors on October 26, 2010." (AR 19967.) The County notes that Petitioner's claim regarding the County's failure to timely promulgate the DES within 12 months of the 2010 General Plan's effective date was ripe on October 26, 2011. It therefore contends that the claim was subject to the release.

The County's argument is without merit. The release related only to claims concerning the certification of the FEIR and the County's approval of the General Plan. Petitioner's claim

regarding the timeliness of the DES implementation is not such a claim; it relates to the implementation of the General Plan, not the General Plan's FEIR, or approval process.

1.2 Petitioner's claims are not barred for failure to exhaust its administrative remedies.

The County asserts that Petitioner has failed to exhaust its administrative remedies as to its claims that the County did not timely adopt the DES or amend its Inclusionary Housing Ordinance. The County insists that Petitioner was required to exhaust all available administrative appeals and to raise its precise objections to the County's General Plan implementation "in a manner that [would have given] the County notice of and an opportunity to act on the issue."

1.2.1 The "Appeal Exhaustion" doctrine does not apply.

The County insists that Petitioner's objections to the County's General Plan implementation efforts were never properly before the Board of Supervisors because those objections were only raised in the context of the Project approval process.

"[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321, internal citations omitted.) Nevertheless, the exhaustion doctrine does not apply when the relevant statute under which review was offered does not establish "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566.)

The County fails to identify any procedure in the County Code or General Plan that Petitioner could have followed to place their specific objections before the Board outside the context of the Project. Simply put, no such administrative remedy was available, and hence, the exhaustion doctrine does not apply. (*Id.* at p. 566.)

1.2.2 The "Issue Exhaustion" doctrine does not apply.

The County argues that Petitioner is required to satisfy what it calls "issue exhaustion." According to the County, Petitioner was required to present its exact objections below so that the County would have had the opportunity to act and render litigation unnecessary.

The County's argument relies entirely on citations to CEQA and administrative mandate cases. (See, e.g., *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 [CEQA]; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136 [County redevelopment plan reviewed under Code Civ. Proc., § 1094.5].) This is no accident. CEQA expressly mandates such "issue exhaustion." (Pub. Resources Code, § 21177, subd. (a).) The rule also applies in administrative mandamus petitions under Code of Civil Procedure section 1094.5 (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019.) In both cases, the actions are direct appeals from administrative proceedings at which an agency could act to resolve a party's objections, such as by modifying the project or rejecting it in its entirety. Were there no such rule, a party could "withhold any defense then available to [her] or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, *on expanded issues*, in the reviewing court. [Citation.]" (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104, italics in original.) The rule is thus necessary "'to preserve the integrity of the administrative proceedings and to endow them with a dignity beyond that of a mere shadow-play.' [Citation.]" (*Id.* at pp. 1019-1020.)

Here, Petitioner's challenges to the County's General Plan implementation are brought as part of its petition for writ of *traditional* mandate under Code of Civil Procedure section 1085, not section 1094.5. It is true that Petitioner simultaneously seeks CEQA relief for its claims related to the Project, but the County's exhaustion argument does not relate to those claims. As to Petitioner's general plan implementation claims, no hearing or other administrative process

occurred.[6] Nevertheless, the County complains that Petitioner raised the relevant issues but only did so "in conjunction with the Project." But as discussed *ante*, the County does not identify any administrative procedure during which Petitioner could have raised these issues outside the context of the Project approval process. Regardless, Petitioner stated its precise objections in detail below, both orally and in writing. (E.g., AR 5422, 5435, 20102, 20105, 20333.)

1.3 Standard of Review.

Petitioner seeks writs of mandate compelling the County to implement the DES and to amend its Inclusionary Housing Ordinance to conform to its General Plan. The County contends that its failure to take either action stemmed from deliberate decisions to prioritize other mandatory General Plan tasks. The County insists that these decisions were legislative in character. Petitioner responds that the decisions were not legislative because they did not involve enacting or amending the General Plan but rather, 1) as to the DES, failing to implement that Plan's mandatory direction; and 2) as to the Inclusionary Housing Ordinance, failing to implement the Government Code's mandatory statutory command.

Code of Civil Procedure section 1085 "permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. Mandate will lie to compel performance of a clear, present and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty. [Citation.]" (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 972.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a

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[6] Code of Civil Procedure section 1085 nonetheless applies when one of the three mandatory criteria of Code of Civil Procedure section 1094.5 are not met. (See *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585.) These criteria include whether the agency decision was "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency." (*Ibid*, internal citations omitted.)

given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]" (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501-502.) Hence, "[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." (*Great Western Savings & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.) "Mandamus has long been recognized as the appropriate means by which to challenge a government official's refusal to implement a duly enacted legislative measure." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58; *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1231.)

Legislative action is the formulation of a rule to be applied in future cases. (*McGill v Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 1776, 1785.) Legislative action includes the adoption or amendment of a general plan (*Yost v. Thomas* (1984) 36 Cal.3d 561, 570), "investigation and information gathering in aid of, or as a basis for, prospective legislation" (*Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1266), adoption of a general zoning ordinance (*San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 212), and the determination of jurisdictional boundaries (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 387). "Review of a local entity's legislative determination is through ordinary mandamus under section 1085." (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.) "Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support. [Citation.]" (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 992.) When undertaking this inquiry, "the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. [Citation.]" (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) Moreover, the court "'must ensure that an

agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.' [Citation.]" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 577.) Courts conduct this 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." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212.)

Accordingly, the court must determine "whether the [County] had a ministerial duty capable of direct enforcement or a quasi-legislative duty entitled to a considerable degree of deference." (*Carrancho, supra*, 111 Cal.App.4th at p. 1266.) Because they involve discretionary decisions within the core ambit of an agency, "[q]uasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." (*Western States Petroleum Assn., supra*, 9 Cal.4th at p. 576.) Whether the provision at issue "impose[s] a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation. [Citation.]" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.) In making such a determination, "[w]e examine the 'language, function and apparent purpose' of the statute. [Citation.] . . . 'Even if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty.' [Citation.]" (*Ibid.*)

1.4 The County's failure to implement the DES was not an abuse of its discretion.

General Plan Policy LU-1.19 mandates that the DES "shall be established within 12 months of adopting this [2010] General Plan," or October 26, 2011. The DES has not yet been implemented.

Petitioner argues that the County had a mandatory, ministerial duty to comply with this Policy by timely promulgating the DES. The County contends that its failure to act was a legislative decision based on 1) numerous obstacles to the task's completion, including lawsuits, resultant amendments to the General Plan, and reduced staffing; and, based in part on these obstacles, 2) a discretionary choice to prioritize other mandatory General Plan tasks. The County notes that, over the past three years it has worked with the public and stakeholders to develop the DES and that "the final development of the DES will be a priority" going forward. It maintains that its decision to prioritize other tasks was not arbitrary or capricious. Petitioner responds that the County's inaction was not a legislative act because while amending a General Plan may be legislative, implementing Plan policies is not.

General Plan Policy LU-1.19 contains mandatory language. Nevertheless, the County must exercise "significant discretion" in developing the DES. (*Sonoma AG Art, LLC v. Department of Food and Agriculture* (2004) 125 Cal.App.4th 122, 127, citation omitted.) Policy LU-1.19 requires the County to develop "a pass-fail system" to assess proposed projects and their impact on County resources. (AR 13579.) Additionally, the County must devise "a mechanism to quantitatively evaluate development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the overall quality of the development." (*Ibid.*) That mechanism must include nine criteria, but the County has the discretion to include additional criteria if it deems them necessary. (*Ibid.*)

Further, the County must make discretionary decisions with respect to the devotion of limited resources to the development of the DES. The County is in a far better position than this court to allocate these resources appropriately in light of other priorities and budgetary constraints. Consequently, the court concludes that the County's decision as to the timing of its implementation of the DES is legislative in character, and may be overridden only if it is

"arbitrary, capricious or entirely lacking in evidentiary support. [Citation.]" (*Corona-Norco Unified School Dist.*, *supra*, 17 Cal.App.4th at p. 992.)

The 2010 General Plan required the County to draft over 100 new ordinances, plans, and programs to implement the Plan's Policies and goals. (AR 21029, 21034.) This process has required "interdepartmental coordination, obtaining technical information from county consultants, and scoping with stakeholders through extensive public outreach." (AR 21034.) Moreover, since the Plan's adoption, the County's Planning Department has experienced significant turnover, with several key positions still vacant. (AR 21029.) In addition, litigation over the General Plan led to settlements requiring the adoption of General Plan amendments. (AR 21035-21036.) These issues required the County to "reallocate staff resources to process current planning entitlements, in accordance with the Permit Streamlining Act." (*Ibid.*) Nevertheless, the County has applied the DES' criteria to projects where applicable, ensuring the intent of the Policy has been observed. (AR 106.) Finally, the County has shown that development of the DES remains a priority. (See, e.g. AR 21026, 21030, 21040-21041.)

The court cannot therefore say that the County's decision to prioritize other legislative tasks is an abuse of its discretion entitling Petitioner to a writ of traditional mandate.[7]

1.5 The County's failure to timely amend the Inclusionary Housing Ordinance was an abuse of its discretion.

General Plan Policy LU-2.13 requires "consistent application of an Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583.) Policy LU-2.13 also mandates that any such ordinance require that 6% of units be affordable to "very low-income households"; 6% of units

[7] This conclusion should not be construed as an approval of the County's lengthy period of inaction. The court concludes only that, in the absence of arbitrary and capricious decision-making, the question whether the County's inaction was appropriate is a political one, which lies outside the court's purview.

be affordable to "low-income households"; 8% of units be affordable to "moderate-income households"; and 5% of units be affordable to "Workforce I income households." (AR 13584.)

The Ordinance is inconsistent with Policy LU-2.13's 25% affordable housing requirement, because it requires only 20% of "the total number of units approved for the residential development" to be inclusionary. (MCC, § 18.40.070.A.) The Ordinance is also inconsistent with Policy LU-2.13's mandated distribution of housing units among different income levels, because it does not require that 5% of new inclusionary units be affordable to "Workforce I income households." (See MCC, § 18.40.110.A.)

Although the General Plan does not contain a specific time trigger for the necessary amendments, state planning and zoning law provides that the County "shall" amend the Ordinance "within a reasonable time so that it is consistent with the general plan as amended." (Gov. Code, § 65860, subd. (c).) No such amendment has yet occurred. Accordingly, Petitioner argues that the County had a mandatory, ministerial duty to comply with state planning and zoning law by timely amending its Inclusionary Housing Ordinance to conform to the General Plan. Petitioner further argues that the more than seven years since the General Plan was enacted — and hence, when the inconsistency arose — is not a "reasonable time" in which to act. The County contends that its failure to act was a legislative decision based on 1) a weighing of "competing interests," such as "the economic downturn"; 2) the fact that "very few inclusionary units [] have been produced"; and 3) "outside deadlines" such as "the deadline to adopt the Housing Element." The County claims it has been proceeding "diligently" as to the amendment process in the past few years.

Government Code section 65860, subdivision (c), mandates that the County amend its Ordinance to conform to the 2010 General Plan "within a reasonable time." "The obvious purpose of subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan . . . ." (*Lesher Communications, Inc. v. City of*

Walnut Creek (1990) 52 Cal.3d 531, 546.) But while that section contains mandatory language, the enactment and amendment of zoning ordinances are legislative acts. (*Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 835; *Yost*, *supra*, 36 Cal.3d at pp. 570-571.) Consequently, the arbitrary and capricious standard applies to the question of whether the County has unreasonably delayed its amendment of the Ordinance. (*Corona-Norco Unified School Dist.*, *supra*, 17 Cal.App.4th at p. 992.)

The County's delay was arbitrary and capricious. The County delayed its amendment on many of the same grounds as it deferred development of the DES, namely myriad other important tasks necessitated by the amendment of the General Plan and a paucity of staff available to address those tasks. (AR 21029, 21034-21036.) But unlike the DES, which as discussed *ante*, required significant time and discretion to develop, amending the Ordinance to conform it to the General Plan would require nothing more than approving the specific percentages already decided by the County, as set forth in Policy LU-2.13. (AR 13583-13854.)

Further, the suggestion that this act was not a priority for the County is unreasonable. The general plan is the "constitution for future development located at the top of the hierarchy of local government law regulating land use." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, internal citations omitted.) Hence, "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent *must be brought into conformity with the general plan.* [Citation.]" (*Lesher*, *supra*, 52 Cal.3d at p. 541, italics added; Gov. Code, § 65860, subd. (a) [zoning ordinances *shall be consistent with the general plan . . .*"].)

The County's attempt to justify its inaction based on "competing interests and outside deadlines" is also unpersuasive. The County references a passage in its Housing Element in which it states, "due to the recent economic crisis, very little new development has been constructed in the County and few new inclusionary units have been produced." (AR 20914.)

Contrary to the County's suggestion, the observation that little development, including "few new inclusionary units" underscores the need for *more* inclusionary development. Regardless, the statement is conclusory, and the County has not cited supporting evidence in the record. (See *People v. Bassett* (1968) 69 Cal.2d 122, 139 [substantial evidence "must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case"].) Similarly, the County's statement in briefing that "outside deadlines (such as deadlines to receive grant monies)" justify its failure to act is unsupported by either explanation or citation to the record. Further, the other statement the County references from its Housing Element, that it "anticipates revisiting the Inclusionary Housing Ordinance to ensure consistency with the General Plan and reflect market condition" (AR 20980), is inadequate assurance in light of the County's already considerable delay. Finally, the fact that the County has discussed the need to revise the Ordinance at a Housing Advisory Committee meeting is insufficient to establish that the County is acting diligently. (AR 17705-17709.)

The court recognizes that it owes the County significant deference in reviewing its inactivity for abuse of discretion. (*California Hotel & Motel Assn.*, *supra*, 25 Cal.3d at p. 212.) Nevertheless, even that broad deference has limits. (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461 [even under arbitrary or capricious review, a "reasonable basis for the decision" is required]; see also *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 79 [the arbitrary or capricious standard "encompasses," inter alia, "conduct not supported by a fair or substantial reason"].) In short, the court cannot say that the County's delay of over seven years in implementing a simple amendment to its Inclusionary Housing Ordinance was reasonable. (Gov. Code, § 65860, subd. (c).)

1.6 The Alternative is consistent with General Plan Policy LU-1.19.

Petitioner contends that the County erred in finding that the Alternative was consistent with General Plan Policy LU-1.19. Petitioner further contends that without a DES, any finding of consistency with that Policy is *per se* improper. The County responds that although it has not enacted a DES, it nevertheless evaluated the Alternative in light of the criteria prescribed by Policy LU-1.19. (See AR 106-109.) Petitioner does not challenge the substance of the County's evaluation. Instead, Petitioner replies that these criteria were nonexclusive and that their application is valid only in the context of a quantitative, pass-fail system, as the Policy envisions the DES will be.

As to the County's general plan consistency findings, the court must assess whether the County "acted arbitrarily, capriciously, or without evidentiary basis. [Citation.]" (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96.) The County's consistency findings "can be reversed only if [they are] based on evidence from which no reasonable person could have reached the same conclusion. [Citation.]" (*A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648.) The Board's reading of its General Plan "comes to this court with a strong presumption of regularity." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) "This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.]" (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142.) This court's role "is simply to decide whether [County] officials considered the applicable policies and the extent to which the proposed project conforms with those policies. [Citations.]" (*Sequoyah Hills, supra*, 23 Cal.App.4th at pp. 719-720.)

The Board determined that the purposes underlying Policy LU-1.19 could be adequately served by evaluating the Alternative in light of the Policy's minimum criteria. Specifically, it found, "the fact that the County has not adopted the DES does not preclude consideration of the

project. This resolution includes evaluation of this development in accordance with Policy LU-1.19." (AR 106.) The Board explained that "based on the specific facts associated with this application it is determined that the project would pass the DES, if a pass/fail scoring system were in place." (*Ibid.*) And, after a discussion of the Alternative's consistency with the majority of the criteria, the Board concluded that the Alternative was consistent with Policy LU-1.19. (AR 107-109.)

The Board engaged in a thorough analysis of the DES' criteria; its finding that the Alternative is consistent with Policy LU-1.19 is not "arbitrar[y], capricious[], or without evidentiary basis. [Citation.]" (*Concerned Citizens of Calaveras County, supra*, 166 Cal.App.3d at p. 96.) The court cannot say "no reasonable person could have reached the same conclusion. [Citation.]" (*A Local & Regional Monitor, supra*, 16 Cal.App.4th at p. 648.) It is possible that the Board would have reached a different conclusion if a formal DES were existent, but it is not this court's role to so speculate. (*Sequoyah Hills, supra*, 23 Cal.App.4th at pp. 719-720.)

Petitioner argues that even if the above is so, the use of a pass-fail system is a fundamental, mandatory policy to which the Alternative must conform. The court disagrees. It is true that "the nature of the policy and the nature of the inconsistency are critical factors to consider." (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1341.) "A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear. [Citation.]" (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) "In other words, a project's consistency with a general plan's broader policies cannot overcome a project's inconsistency with a general plan's more specific, mandatory and fundamental policies. [Citations.]" (*Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91, 101.) But these principles do not apply here.

Policy LU-1.19 provides that, for certain areas, including the one in which the Project is located, a DES "shall be established . . . . *The system* shall be a pass-fail system and shall include a mechanism to quantitatively evaluate development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the overall quality of the development." (AR 13578-13579, italics added.) Policy LU-1.19's mandatory language applies to the requisite elements of the DES *once established*, not to specific projects.

1.7 The Alternative is only partially consistent with the Inclusionary Housing Ordinance.

Petitioner argues that the Alternative is inconsistent with the Inclusionary Housing Ordinance in two ways. First, Petitioner maintains that the County erred in its calculation of the minimum number of affordable housing units by considering only new units as opposed to total units. Second, Petitioner asserts that the County erred by departing from the Ordinance's requirement that the affordable housing units provided be distributed among moderate-, low-, and very-low-income households.

Before reaching these arguments, it is necessary to address the standard of review. Petitioner argues that the court independently reviews the County's interpretation of the ordinance. The County responds that its determination that the Alternative conformed to its ordinance is entitled to deference.

Petitioner is correct that, to the extent that the Board's decision rests on its interpretation of the ordinance, "a question of law is presented for our independent review. [Citation.]" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219.) However, the County is correct that its interpretation is entitled to deference. (*Ibid.*) Indeed, "[t]he appropriate mode of review . . . is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction." (*International Business Machines v. State Bd. of*

Equalization (1980) 26 Cal.3d 923, 931, fn. 7.) "How much weight to accord an agency's construction is situational, and greater weight may be appropriate when an agency has a comparative interpretive advantage over the courts, as when the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*American Coatings Assn., Inc., supra,* 54 Cal.4th at p. 461, internal citations omitted.) Further, a body which adopts an ordinance "in its legislative capacity has unique competence to interpret th[e] [ordinance] when applying [it] in its adjudicatory capacity." (*Save our Peninsula Committee, supra,* 87 Cal.App.4th at p. 142.)

1.7.1 The County's calculation of the minimum number of affordable housing units was reasonable.

Petitioner contends that the County erred in its calculation of the minimum number of affordable housing units. The Inclusionary Housing Ordinance provides, "To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the total number of units approved for the residential development . . . ." (MCC, § 18.40.070.A.)[8] The Project will provide 25 such units. The Project consists of 130 units, but five of these units already exist. If the calculation is based on the total number of units, the Ordinance would require 26 units. If instead, as the County determined, only new units need be considered, only 25 units would be required. Petitioner argues that the term "total number of units" means what it says. The County interprets

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[8] Normally, General Plan Policy LU-1.19 would require development in the Project area to contain 35% affordable housing. (AR 13579.) Additionally, Policy LU-2.13 requires amendment of the Ordinance to mandate that "25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583.) However, as part of the approvals, the Board amended the text of CVMP Policy CV-1.27, which addresses the specific area in which the Project is located, to clarify, "*Notwithstanding any other General Plan policies,* residential development may be allowed with a density of up to 10 units/acre in this area with a minimum 20% affordable housing." (AR 145, italics in original.) The amended language effectively renders the portions of General Plan Policies LU-1.19 and LU-2.13 quoted above inapplicable to the Project.

the Ordinance to refer only to new construction, noting that the County Code defines "residential development" as the construction of "new or additional dwelling units and/or lots." (MCC, § 18.40.040.Y.)

Petitioner's interpretation is not without merit. However, this court owes considerable deference to the Board because that body adopted the Ordinance in its legislative capacity (*Save our Peninsula, supra*, 87 Cal.App.4th at p. 142) and because interpretation of the Ordinance is "entwined with issues of fact, policy, and discretion." (*American Coatings Assn., Inc., supra*, 54 Cal.4th at p. 461, internal citations omitted.) Moreover, the County's interpretation is both reasonable and supported by the text of the Ordinance.

As used in MCC section 18.40.070.A, the term "total number of units approved" is modified twice by the term "residential development," which is defined as the construction of "new or additional dwelling units and/or lots." (MCC, § 18.40.040.Y.) This is logical; the term "development" implies new or modified property. Likewise, the Ordinance's stated purpose repeatedly emphasizes development:

"The purposes of this Chapter are to enhance the public welfare, benefit the property being *developed*, assure compatibility between future housing *development* and the housing units affordable to persons of very low, low, and moderate income, and ensure that remaining *developable* land in the County is utilized in a manner consistent with State and local housing policies and needs." (MCC, § 18.40.030, italics added.)

In short, the County did not err in its interpretation of the Ordinance.

1.7.2 The County's decision to exempt the Project from the normal distribution of affordable housing units was not supported by substantial evidence.

Finally, Petitioner disputes the Board's finding that the Project complied with the Ordinance notwithstanding that it would construct 25 rental units affordable to moderate-income

households only. The County claims that "unusual or unforeseen circumstances" justified this departure from the normal distribution of affordable housing units among households of different income levels.

MCC section 18.40.110.A requires projects to set aside 8% of the total units in the development for moderate-income households, 6% for low-income households, and an additional 6% for very-low-income households.[9] The Ordinance also provides that this distribution may be departed from where "as a result of unusual or unforeseen circumstances, it would not be appropriate to apply, or would be appropriate to modify, the requirements of this Chapter . . . based on substantial evidence, supporting that determination." (MCC, § 18.40.050.B.2.)

Here, the Board found "unusual or unforeseen circumstances" present. Although not expressly stated, it appears the Board concluded that the reduction in the area unit cap effected by the County's 2013 amendment to the CVMP was the relevant unforeseen circumstance.[10] Thus, the Board cited the applicant's representation "that due to the significant reduction in units proposed between the Project and the Alternative it is not financially feasible to comply with the Inclusionary Ordinance's requirements, particularly related to providing low and very low-

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[9] The Ordinance defines these terms as referring to households "with an annual income which does not exceed one hundred twenty (120) percent of the median income, adjusted for household size" [moderate-income household]; "with an annual income which does not exceed HUD's annual determination for low income households with incomes of eighty (80) percent of the median income, adjusted for household size" [low-income household]; and "with an annual income which does not exceed HUD's annual determination for very low income households earning fifty (50) percent of median income, adjusted for household size" [very-low-income household]. (MCC, § 18.40.040.Q, T, and BB.)

[10] By contrast, the County's choice of the 130-unit Alternative alone was not an "unusual or unforeseen circumstance." The County had the power to approve the Project or an alternative, especially if the County adjudged that alternative less harmful to the environment than the Project. (Pub. Resources Code, §§ 21002-21002.1, 21004; Guidelines, § 15002, subd. (a)(3); *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1041 [rejecting claim that CEQA was violated where the agency approved a narrower project than the one described in an EIR].)

income units." (AR 143.) In support of this finding, the County referenced two letters from local banks, both of which state that bank financing would not be available if the Alternative complied with the Ordinance's requirements. (AR 20413-20414.) Petitioner contends that this evidence is insufficient because, inter alia, it is unsure "what these letters are responding to and the nature of the request."[11] Petitioner does not elaborate, but the court agrees with its underlying sentiment; the bank letters lack sufficient foundation to constitute substantial evidence.

"'Substantial evidence'[12] requires evidence of 'ponderable legal significance.' [Citation.] It is not synonymous with 'any' evidence." (*Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, 47.) Thus, "[s]ubstantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Such evidence must be reasonable, credible, and of solid value." (*California Youth Authority v. State Personal Bd.* (2002) 104 Cal.App.4th 575, 584-585, internal citations omitted.) Further, substantial evidence "'must actually be 'substantial' proof of the essentials which the law requires in a particular case.' [Citations.]" (*United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 392-393.) Expert opinion may constitute substantial evidence, but only if the expert's opinion is "based on conclusions or assumptions supported by evidence in the record. Opinion testimony which is

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[11] Petitioner further contends that 1) it is "unclear" whether Real Parties "currently have bank financing for the Project"; and 2) "difficulty obtaining bank financing" is not an unusual or unforeseen circumstance. Petitioner's arguments mischaracterize the County's point. It is irrelevant whether Real Parties currently have bank financing. The County relies on the letters to support the applicant's claim that it would be financially infeasible to comply with the Ordinance's prescribed allocation of affordable housing units. Moreover, "difficulty obtaining bank financing" is not the unusual or unforeseen circumstance at issue. Rather, as stated above, the amendment of the CVMP's unit cap and resulting development of the Alternative was the "unforeseen circumstance" that the applicant argued rendered strict compliance with the Ordinance economically infeasible. (See AR 20413-20414.)

[12] MCC Chapter 18.40 does not define "substantial evidence." The court presumes that the County intended the term to be defined and applied as it has been in other contexts, such as, for example, in review of a petition for writ for administrative mandate. (Code Civ. Proc., § 1094.5, subd. (c).)

conjectural or speculative 'cannot rise to the dignity of substantial evidence.' [Citation.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

Neither letter is of "'ponderable legal significance'" because 1) neither letter explains in sufficient detail how the "unforeseen circumstance" rendered it economically infeasible for Real Parties to comply with the Inclusionary Housing Ordinance; and 2) the record does not document any of the assumptions upon which the relevant opinions are based. (*Newman, supra*, 10 Cal.App.4th at p. 47.) The first letter, from Monterey County Bank, states "the loss in revenue generated by an increase in the percentage or allocation of inclusionary housing renders your project economically infeasible to enable us to offer you bank financing. These requested changes to the inclusionary housing would result in insufficient cash flow and profit necessary to support bank financing." (AR 20413.) The letter does not provide any basis for its conclusion of a potential "loss in revenue." (*Ibid.*) The letter details neither the revenue the Project would generate nor the resulting loss in revenue from complying with the Ordinance. Similarly, the letter speaks of "insufficient cash flow and profit," but because the bank does not tie these terms to specific numbers, it is impossible to determine whether this conclusion is reliable. (*Ibid.*)

Nor is the 1st Capital Bank letter substantial evidence of financial infeasibility. The Bank states that financing is "problematic" and that "in discussions" between unnamed parties "we have considered the inclusion of 6% low and 6% very low levels of affordability for the inclusionary homes in rendering this determination." (AR 20414.) The Bank follows with a conclusory paragraph suggesting that only Real Parties' preferred outcome "may be considered to qualify for loan financing." (*Ibid.*) The letter provides no support for either point.

Finally, the County asserts that the Board of Supervisors also based its decision on the belief that "moderate income housing fit the particular needs of Carmel Valley." The County bases this claim on a single statement by a Supervisor made at the December 13, 2016 Board of Supervisors meeting at which the Alternative was approved. (AR 5485.) There, the Supervisor

opined that exempting the Alternative from the normal distribution of affordable housing was "eminently reasonable" based on, inter alia, "the area's existent affordable housing including the Pacific Meadow and more." (AR 5485:5-8.) The Supervisor offered no further explanation or supporting facts. (*Ibid.*) Likewise, the County fails to cite to evidence in the record substantiating the comment. Absent evidentiary support, the comment does not constitute substantial evidence. (See *California Youth Authority, supra*, 104 Cal.App.4th at pp. 584-585.)

Put simply, the conclusory opinions set forth in the bank letters and in the aforementioned testimony "'cannot rise to the dignity of substantial evidence.'" (*Roddenberry, supra*, 44 Cal.App.4th at p. 651, citation omitted.)

2.0 Petitioner brings several CEQA Claims.

Petitioner raises a number of claims under CEQA. Specifically, Petitioner contends that 1) the EIR's Project Description is unstable and "shifting"; 2) Real Parties effectively abandoned the Proposed Project in favor of the Alternative, but feigned otherwise; and 3) the EIR did not analyze a reasonable range of alternatives.

Real Parties respond that 1) the Project Description is not unstable because the 281-Unit Project and the 130-Unit Alternative are differentiated throughout the EIR; 2) the Project remained the true project throughout the EIR process; and 3) the EIR analyzed a sufficient range of legally feasible alternatives.

2.1 The EIR's Project Description is not "shifting" or "unstable."

Petitioner argues that the EIR's Project Description "straddles" both the Project and the Alternative, impermissibly shifting between them, causing confusion, and vitiating the EIR's function as a vehicle for public participation in the environmental review process.

"The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Resources Code, § 21002.1.)

To meet these goals, an EIR must adequately define the project. "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. [Citation.]" (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655.) "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*County of Inyo, supra*, 71 Cal.App.3d at pp. 197-198.) Nevertheless, "[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal." (*Id.* at p. 199.)

"With respect to an EIR's project description, only four items are mandatory: (1) a detailed map with the precise location and boundaries of the proposed project, (2) a statement of project objectives, (3) a general description of the project's technical, economic, and environmental characteristics, and (4) a statement briefly describing the intended uses of the EIR and listing the agencies involved with and the approvals required for implementation. (Guidelines, § 15124.)" Aside from these four items, the Guidelines advise that the project description should not 'supply extensive detail beyond that needed for evaluation and review of the [project's] environmental impact.' (Guidelines, § 15124.)" (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269-270.)

Petitioner's argument relies heavily on *County of Inyo, supra*, 71 Cal.App.3d 185. There, the City of Los Angeles proposed to increase groundwater pumping to supply growing water

needs. (*Id.* at p. 189.) The EIR initially described the project as "a proposed increase of 51 cfs[13] in the long-term subsurface extraction rate and an increase of 65 cfs in the high-year rate, these increases being destined solely for 'unanticipated' uses within the Owens Valley." (*Ibid.*) However the EIR went on to discuss proposals "far broader than the initially described project" including a water conservation program, rearrangement of reservoir operations, and the extraction of groundwater at a significantly higher rate than proposed in the initial project description. (*Id.* at p. 190.) Further, the EIR shifted between these descriptions repeatedly, as did the final approval resolution. (*Id.* at pp. 190-191.) Consequently, the court concluded the City's "selection of a narrow project as the launching pad for a vastly wider proposal frustrated CEQA's public information aims." (*Id.* at pp. 199-200.)

County of Inyo is distinguishable. Here, the RDEIR does not shift between differing descriptions of the project. Instead, the Project Description chapter of the RDEIR demarcates between the 281-Unit Proposed Project and the 130-Unit Alternative:

"The Rancho Cañada Village Project (Proposed Project) would develop an 81-plus-acre area within the West Course at Rancho Cañada Golf Club in Carmel Valley, California, an unincorporated area of Monterey County (County). The project site would be comprised of a mix of residential and recreational uses, including a 281-unit residential neighborhood and 39 acres of permanent open space and common areas within the 81-plus acres.

"The 130-Unit Alternative is proposed as a planned unit development (PUD) on approximately 82 acres. This alternative proposes similar uses as the Proposed Project but with a lower number of overall units and lower density." (AR 1348, fn. omitted.)

The RDEIR goes on to note that the Project and the Alternative are proposed for the same geographical location. (AR 1349.) However, it then describes them separately. The RDEIR

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[13] The term "cfs" denotes "cubic feet per second" of water extracted.

begins with a detailed description of the Project, setting forth the distribution of proposed housing, open space and common areas, a restoration and mitigation plan, neighborhood parks, a circulation framework, utilities, drainage, design guidelines, and construction plans. (AR 1352-1364.) The RDEIR then presents a similar level of detail as to the Alternative. (AR 1364-1373.) Throughout the RDEIR, the Project and the Alternative are clearly differentiated (see, e.g., AR 18430), and the Project is consistently identified (See, e.g. AR 1315, 1352 [describing the Project as "a 281-unit residential neighborhood"]; 1840).[14]

Accordingly, Petitioner's claim that the Project Description is "unstable" is meritless.

2.2 The EIR's Project Description is not accurate.

Petitioner also argues that the EIR's Project Description is inaccurate to the extent it suggests that the Proposed Project, not the Alternative, is the true project.

"The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449.) These goals cannot be accomplished without an accurate project description. (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 199 ["an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR"].) "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." (*San Joaquin Raptor*, *supra*, 27 Cal.App.4th at p. 730.)

As the RDEIR recognized, the 2010 General Plan and 2013 amendment to the CVMP effectively limited residential subdivision development in Carmel Valley to 166 new units. (AR

[14] Additionally, the Project did not proceed from a narrow description to a "vastly wider proposal." (*Id.* at pp. 199-200.) In fact, the reverse is true. The Alternative is significantly narrower than the Project; it was designed in part to reduce Project impacts. (AR 1365, 18541, 18768.)

1319.) To facilitate the Project, then, "the residential unit cap from residential subdivision would need to be raised to 305 units." (*Ibid.*) Shortly thereafter, Real Parties developed the 130-unit Alternative. (AR 18768.)

Real Parties provided the County with extensive information on the Alternative, including proposed maps, property development standards, and a detailed description of the specific impacts the Alternative would alleviate. (AR 18768-18782.) Real Parties asked the EIR consultant to "provide an equal level of analysis of the 130-unit alternative" and the Project. (AR 17142.) However, to accomplish this task, the EIR consultant was forced to put the analysis of the Alternative in the "Project Description" chapter along with the Project, rather than in the Alternatives chapter. (*Ibid.*) Thus, the RDEIR's "Project Description" chapter discussed both the Project and the Alternative, in significant, and roughly equivalent, detail. (AR 1321, 1348-1372.)

The remaining six alternatives were described as before, in much less detail, in the RDEIR's alternatives chapter. (AR 1843-1856.) Neither Real Parties nor the County offer any explanation why the Alternative was treated differently than the other six alternatives. Only the Alternative was analyzed "at a level of detail equal to that for the Proposed Project." (AR 1321.) Of the remaining six alternatives,[15] only two, Alternatives 1 (the No-Project Alternative) and 4 (the Low Density Alternative) would satisfy the CVWP's unit cap. (AR 1322-1323, 1325.) The RDEIR rejected both of these alternatives for failure to meet basic project objectives. (AR 1322, 1325.) Perhaps most tellingly, the Project itself failed to meet the CVWP's unit cap, a point the County expressly discussed in its findings. (AR 135.)

Real Parties note that CEQA does not prohibit the County from structuring its EIR in this fashion. Indeed an EIR need not follow any particular format so long as it contains the information required by CEQA and the Guidelines. (Cal. Code of Regs., tit. 14 (Guidelines),

[15] As mentioned *ante*, the FEIR subsequently eliminated one of these alternatives due to a change in ownership of necessary land. (See fn. 2, *supra*; AR 134, 3803-3806, 3808-3809.)

§ 15120, subd. (a).) Lead agencies may tailor their EIRs "to different situations and intended uses . . . consistent with the guidelines . . . ." (Guidelines, § 15160.) Here however, the error is not specifically the way in which the EIR is structured. Rather, the EIR's structure evinces that the Alternative was the actual project under consideration.

"The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 199.) The Project's history demonstrates that the "Alternative" effectively replaced the Project as the true project under consideration, and that consequently, the existing Project Description is inaccurate. Absent an accurate project description, the EIR could not fulfill its central function to provide sufficient information to allow the public and decision-makers to "ascertain the project's environmentally significant effects, assess ways of mitigating them, and consider project alternatives." (*Sierra Club*, *supra*, 163 Cal.App.4th at p. 533; *County of Inyo*, *supra*, 71 Cal.App.3d at pp. 192-193.) In short, the EIR's inaccurate project description violated CEQA.[16]

2.3 The EIR's Alternatives analysis does not satisfy CEQA.

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[16] Petitioner asserts a number of other indicators in the record in support of this conclusion. None are persuasive. For example, Petitioner observes that the vesting tentative map approved by the Board was not the original map, but rather, "a wholly new map" for the Alternative. (AR 98.) However, CEQA authorizes the County to adopt an alternative rather than the project proposed, particularly if the County determines that alternative would be less harmful to the environment. (Pub. Resources Code, §§ 21002-21002.1, 21004; Guidelines, § 15002, subd. (a)(3).) "Decisionmakers . . . have the flexibility to implement that portion of a project which satisfies their environmental concerns." (*Dusek*, *supra*, 173 Cal.App.3d at p. 1041.) Additionally, Petitioner erroneously suggests that the Alternative, rather than the Project was considered by the Planning Commission. In fact, the staff report reveals that both were considered. (AR 4104-4119.) The page that Petitioner cites in the record (AR 4123) is a page from staff's Draft Resolution to the Planning Commission. Regardless, the court's conclusion makes it unnecessary to discuss these and Petitioner's other arguments along these lines.

Finally, Petitioner argues that the six alternatives analyzed in the EIR[17] do not represent a reasonable range of alternatives. The court notes that, because the Alternative was actually the Project, only five true alternatives were considered. The court also notes that the alternatives analysis was fatally skewed because it was undertaken in comparison to the Project, not the Alternative. (Pub. Resources Code, § 21002.1 [one purpose of an EIR is "to identify alternatives to the project"]; Guidelines, § 15126.6 ["[t]he EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison *with the proposed project*"].) But even were this not the case, the alternatives analysis would still be deficient.

Petitioner contends that three of the alternatives were infeasible because they proposed densities in excess of the 190-unit cap established by CVMP Policy CV-1.6. Real Parties respond that the settlement did not divest the County's land use authority or police power to approve alternatives in excess of the cap through a general plan amendment, and hence the alternatives were legally feasible.

"The core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565.) An EIR must examine "a range of reasonable alternatives." (Guidelines, § 15126.6, subd. (a).) CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR; no set number of alternatives is necessary to constitute a legally adequate range. (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 566.) The court will uphold the County's "selection of alternatives unless it is 'manifestly unreasonable' or inclusion of an alternative does not 'contribute to a reasonable range of alternatives.' [Citation.]" (*Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966, 1018.) This determination is "subject to a rule of

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[17] Petitioner focuses on the RDEIR, which contained *seven* alternatives, overlooking that the change to *six* alternatives did not occur until the FEIR. (See fn. 2, *supra*.) This distinction does not affect the court's analysis, however.

reason." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407.)

Additionally, the alternatives examined must be "potentially feasible." (Guidelines, § 15126.6, subd. (a).) For these purposes, "feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.) "[A]n alternative is not feasible where there is no way to legally implement it. [Citation.]" (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 602.)

As discussed *ante*, CVMP Policy CV-1.6 limits development in the relevant area to 190 new units, for which 24 are already accounted. (AR 14031-14032.) And, as Petitioner suggests, three of the five true alternatives proposed exceed the Policy's unit cap; both the FEIR and the County's findings acknowledge that approving any of these alternatives would require a General Plan amendment. (AR 135-136, 3738.) It is also true that the settlement agreement between Petitioner and the County does not "restrict the County's land use authority or police power in any way with respect to future legislative, administrative or other actions by the County." (AR 19972.) Hence, Real Parties are correct that the three alternatives were legally feasible. Indeed, had the Board approved one of the three relevant alternatives, it could have simultaneously amended the general plan to raise the unit cap. The Board took exactly this step by amending CMVP Policy CV-1.27 as part of its Resolution certifying the FEIR and approving a Combined Development Permit for the Alternative. (AR 98, 102.)

But the mere fact that the three relevant alternatives were legally feasible does not mean they were *practically* feasible. Amending the General Plan to enlarge the cap would have violated the County's settlement agreement with Petitioner. (AR 3738.) While the County had the power to do this, it is clear that it did not have the will. The County's own findings explain that the inconvenience, expense, and political costs to the County were too great to make any of

the four relevant alternatives "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364; see *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 313 [EIR properly rejected alternative uses for a site because the site was zoned only for a particular use].) Hence, as to Alternative 3, which proposed a 186 unit project (AR 1849-1852), the County explained:

> "The 190-unit cap was instituted as a result of settlement of litigation and retaining the cap avoids unnecessary controversy over the maximum level of residential development that is allowable within the CVMP area and avoids potential renewal of litigation under the settlement agreement. From a policy standpoint, the Medium-Density Alternative is not acceptable because it does not comply with the CVMP unit cap" (AR 135).

The County drew the same conclusion as to Alternatives 5 and 6, both of which proposed 281-unit projects (AR 136), and as to the "Proposed Project" itself (AR 135).

Only two alternatives, Alternatives 1 (the No-Project Alternative) and 4 (the Low Density Alternative) would satisfy the CVWP's unit cap. (AR 1322-1323, 1325.) Although CEQA requires an EIR to explore a "no project" alternative (Guidelines, § 15126, subd. (e)), that "alternative" is not a true alternative because, by definition, it would meet "*almost none* of the project's objectives." (*Watsonville Pilots Assn v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1090, italics in original.) Consequently, the EIR effectively examined only a single feasible alternative.

CEQA requires that an EIR provide "enough of a variation to allow informed decision making. [Citation.]" (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151.) A single alternative cannot fairly be termed a "reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." (Guidelines, § 15126.6, subd. (a).) The court therefore concludes that the County's selection of alternatives was "manifestly unreasonable," in violation of CEQA. (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265.)

Disposition

The petition for writ of mandate is partially granted. Petitioner's request for a writ compelling the County to develop and promulgate the DES is denied. The remainder of the requested writ relief is granted.

The court directs Petitioner's attorney to prepare an appropriate judgment and writ consistent with this ruling, present them to opposing counsel for approval as to form, and return them to this court for signature.

Dated: 4/24/18

Hon. Lydia M. Villarreal
Judge of the Superior Court

CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **Intended Decision** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

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Dated: APR 24 2018

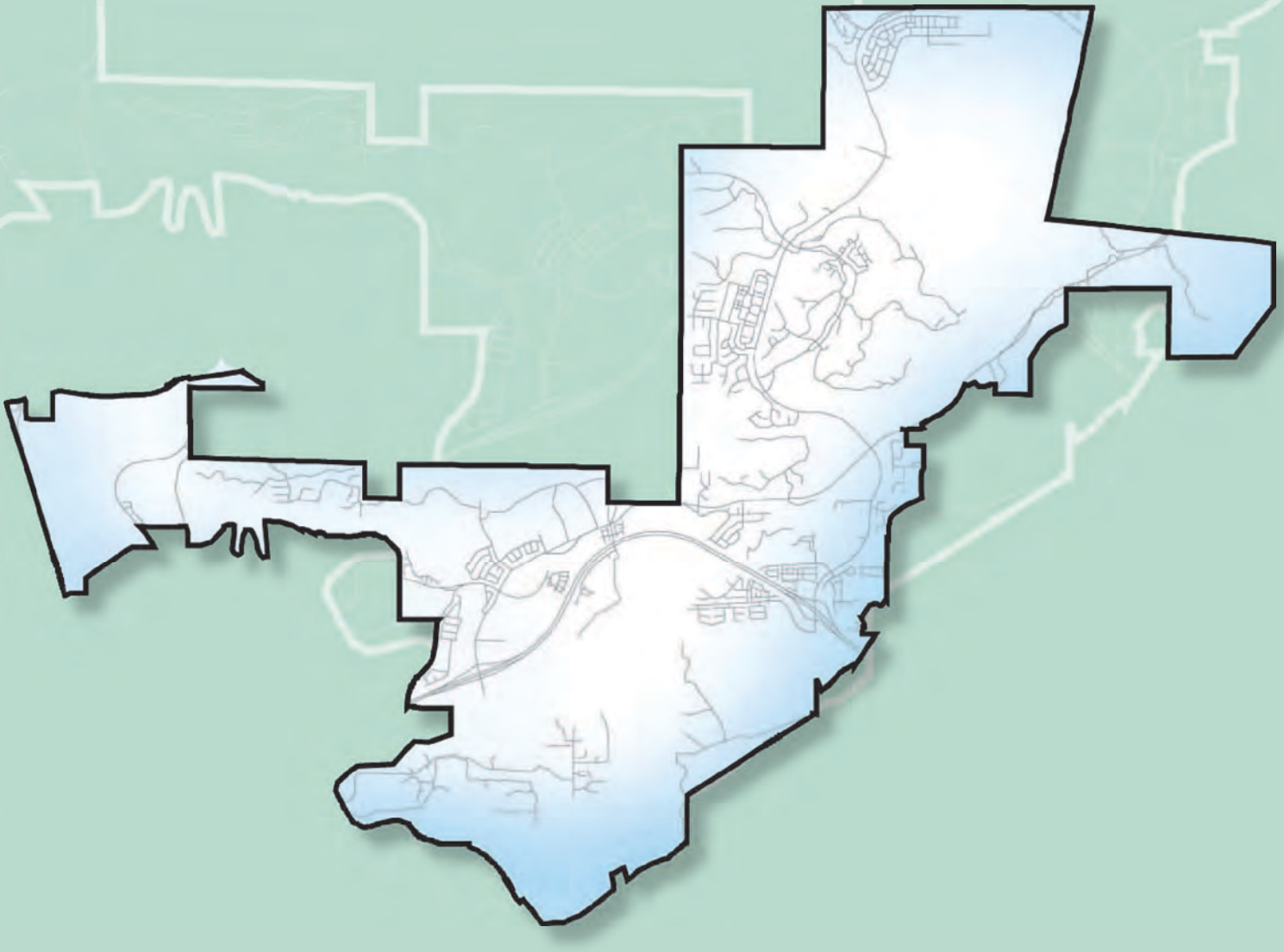
Chris Ruhl, Clerk of the Superior Court,

Deputy Clerk

Sally Lopez

ENCLOSURE 3

North City Future Urbanizing Area
Framework Plan



THE CITY OF SAN DIEGO

NORTH CITY FUTURE URBANIZING AREA

FRAMEWORK PLAN

City of San Diego Planning Department
202 C Street, MS 4A
San Diego, CA 92101

Printed on recycled paper.

7. AFFORDABLE HOUSING AND HOUSING FOR PERSONS WITH SPECIAL NEEDS

Section 3, Land Use, defines the location, amount, and type of housing to be built in the NCFUA. Principles for the design of residential areas are included in **Section 4, Urban Design**. The principles in this section address housing needs that are unlikely to be satisfied by the market, but that must be met in order to create diverse communities meeting the needs of San Diego residents.

7.1 GUIDING PRINCIPLES: HOUSING

7.1a Include housing affordable to all income levels in the NCFUA.

7.1b Provide the area's "fair share" of affordable housing and housing for persons with special needs, consistent with the City's Housing Element and the Regional Fair Share Distribution prepared by SANDAG.

7.1c Recognize that market economics will not result in the production of housing units for low-income households without specific requirements that they be included in development projects.

7.1d Funds collected by the City in lieu of construction of affordable dwelling units within the NCFUA shall be retained for future construction of affordable units within the NCFUA and shall not be distributed for use citywide.

7.2 IMPLEMENTING PRINCIPLES: INCLUSIONARY HOUSING REQUIREMENTS

7.2a Apply to residential development projects the inclusionary requirements in effect for the NCFUA under the City's planned residential development provisions. These requirements specify that residential development projects must provide housing on-site, affordable to low-income families as certified by the San Diego Housing Commission.

This requirement can be fulfilled by: 1) a set aside of no less than 20 percent of the units for occupancy by, and at rates affordable to, families earning no more than 65 percent of median area income, adjusted for family size, or 2) a dedication of developable land of equivalent value. The affordable units must remain affordable for the life of the unit and should be phased proportionate to development of the market-rate units. The bedroom composition of the affordable units should be similar to that of the market-rate units. Developers of projects with ten or fewer housing units and projects falling within the estate and very low-density residential category may, at the discretion of the City, satisfy the requirements of the inclusionary program by donating to the City an amount of money equivalent to the cost of achieving the level of affordability required by the inclusionary program.

7.2b Affordable units should be dispersed throughout the NCFUA, primarily in or near the compact communities.

7.2c In planning for the NCFUA, recognize that the mandated level of affordability will require that developers be granted a density increase of 25 percent over the otherwise maximum allowable residential density, as well as at least one additional concession or incentive as described in California Government Code section 65913.4. Subarea planning studies should anticipate the awarding of the density bonus in analyzing demand for public facilities and in projecting future population.

7.2d If the City of San Diego adopts a citywide inclusionary housing program, the citywide program will take precedence.

7.2e If the City of San Diego adopts a citywide inclusionary housing program that includes measures to offset the cost of providing affordable housing, such as incentives relating to permit processing, development standards, and project financing, these offsets should apply in the NCFUA.

7.3 IMPLEMENTING PRINCIPLES: HOUSING FOR PERSONS WITH SPECIAL NEEDS

7.3a Consistent with State Law (Welfare and Institutions Code Section 5115 et seq), recognize the 24-hour care of six or fewer mentally disordered or otherwise handicapped persons as residential use. Therefore, facilities caring for such persons in residential structures are not required to obtain conditional use permits. (However, state licensing is required in all cases).

7.3b Recognize the need for group housing and housing for persons with special needs or desires. Such housing can include congregate care for elderly persons, single-room occupancy hotels, housing for temporary workers, housing with supportive services such as daycare built into the development, and co-housing (an alternative form of housing which combines individual units with facilities for shared meals, child care and other support services) by establishing that, such uses are welcome in the NCFUA in areas designated by the Framework Plan for buildings and activities of compatible type and intensity. Encourage the siting of such housing during subarea plan preparation.

7.3c Encourage developers to work with builders and operators of group housing during subarea and project planning, and to integrate such housing into their projects.