

From: Susan Kankel [<mailto:susankankel@comcast.net>]
Sent: Saturday, August 27, 2016 1:16 PM
To: Council
Subject: North 40

August 27, 2016

To Council Members Spector, Sayoc, Jensen, Leonardis, and Rennie,

I respectfully request that you deny the current application from Grosvenor for several reasons:

- This proposal does not meet the Specific Plan with lower density in the Lark District. Instead, it loads the Lark district with intensely packed large structures.
- This proposal does not follow the BMP guidelines for affordable housing THROUGHOUT the development.
- This proposal does not seamlessly blend with the surrounding area, as per the Specific Plan, nor does it have the look and feel of Los Gatos, again as per the Specific Plan.
- This proposal does not address the unmet needs of Baby Boomers and Millennials, again as per the Specific Plan.
- This proposal does not spread residential units THROUGHOUT the entire 40+ acres, again as per the Specific Plan.

I do not believe that the current proposal can be adequately modified to meet the Specific Plan. If the Council chose to approve the application with conditions or modifications, I fear that we would be given the same basic plan with cosmetic changes - much like putting lipstick on a pig - and the underlying problems in such areas as density, senior housing, affordable housing, and residential of all types and economic levels spread throughout the property would not be addressed. This proposal does not reflect the Vision Statement of the Specific Plan in any way.

This is our only chance to get this right and create something that is beneficial to the Town. Please take the time to do it correctly.

Sincerely,

Susan Kankel
99 Reservoir Road

From: jplg159@juno.com [mailto:jplg159@juno.com]
Sent: Sunday, August 28, 2016 4:24 PM
To: Joel Paulson; Sally Zarnowitz; BSpector
Cc: Marico Sayoc; Rob Rennie; Steven Leonardis; Marcia Jensen
Subject:

I'm sending you another email to ask you to DENY the North 40 Development. You are NOT respecting the residents who are the ones who will be impacted by the massive traffic, and you must know crime will only get worse.

I live off Lark Ave. for 59 years, and so far it is a very safe neighborhood, but this will all change, more people mean more crime. How would you like it if you had to put up with the GRIDLOCK it will become? 100% worse than it is now. The way the plan is now, it is much too dense-if you could agree to many fewer houses and much more open space and no big business, maybe it would work. But with the traffic from Netflix, and the proposed development on Dell Ave. and Samaritan Drive, it will be a nightmare! Emergency vehicles will not be able to get through the extreme GRIDLOCK, (who will be responsible?) Please, please, JUST SAY NO!

I imagine none of you live near the area, or you would not let this pass.

Again, PLEASE DON'T LET THIS MESS GO THROUGH!

Remember, PLEASE SAY NO,

A concerned resident of this BEAUTIFUL SMALL,QUAINT TOWN

RECEIVED

AUG 28 2016

7:51 AM
TOWN OF LOS GATOS
PLANNING DIVISION

August 28, 2016

Town Council
110 East Main Street
Los Gatos, CA 95030

SUBJECT: LACK OF ACCESSIBILITY TO RESOURCES FOR SENIORS LIVING IN THE NORTH FORTY

Dear Mayor Spector, Vice-Mayor Sayoc, and Council Members Jensen, Leonardis, and Rennie:

We would like you to stop for a moment and think about the situation of a senior who moves into one of the senior units proposed for the North Forty. Usually, a senior housing complex is within easy walking distance of a grocery store. That failing, there's a shuttle provided by the complex. That failing, there's a bus right outside that runs frequently enough so you don't have to spend half your day getting food.

The North Forty senior units do not have the necessary resources a very low-income senior needs for daily living, and the resources the Town offers to very low-income seniors are too far away to be considered accessible.

TRANSPORTATION. The developer assumes that most of the very low-income seniors will not have their own cars. Only .5 parking spaces are allotted to each unit. Therefore, most of the seniors will need to use other forms of transportation.

Food and Services for Very Low-Income Seniors. There is no supermarket planned for the development. The "market hall" planned by the developer is projected as a specialty market with pricing that is not likely to be affordable for very low-income seniors.

So how will the very low-income seniors get food?

A car odometer was used to check distances to local food markets and other resources and then the distances were double-checked with MapQuest.

The closest markets are as follows: Nob Hill, at 15710 Los Gatos Boulevard is .9 miles away; Trader Joe's, at 15466 Los Gatos Boulevard, is .6 miles away.

However, some very low-income seniors will consider both Nob Hill and Trader Joe's too expensive. They are more likely to resort to the "brown bag" Fridays at the Adult Recreation Center, 208 East Main Street, during which they can fill bags with donated goods, largely canned goods. This is 3.5 miles away.

Or they may prefer to take advantage of the low-cost or free (donation of \$3 requested) lunch offered by the Live Oak Senior Nutrition Center at 111 Church St—3.5 miles away. These are offered on weekdays only—Monday, Tuesday, Thursday, and Friday at the Live Oak Center and on Wednesday at the Adult Recreation Center.

If seniors living in the development wanted to walk to the grocery to shop at Trader Joe's or Nob Hill, they would have to deal with an exceptionally busy intersection—the Los Gatos Boulevard/Lark intersection. Crossing at this intersection would be hazardous. As things stand now, seniors would have to cross the turning lane plus four lanes on Lark and then cross the six lanes on Los Gatos Boulevard. The Los Gatos Boulevard ticker starts counting at 29. The Lark Avenue ticker starts counting at 16. As I'm sure you're aware, the EIR reported that the Los Gatos Boulevard/Lark intersection had an LOS of D in the morning and C- in the afternoon.

Assuming that the Town wanted to accommodate the residents of the senior units for walking to resources and that many seniors walk more slowly or have canes or walkers and therefore need more time to cross at intersections, would we have to lengthen the crossing time at this extremely busy intersection, thus making queuing times even longer for drivers? There is nothing in the proposed project or the Specific Plan that seems to provide sufficient light and timing controls to accommodate seniors. This is the busiest intersection that is currently addressed by the off-site infrastructure improvements as to traffic and circulation. However, there has been no discussion in the EIR or in Planning and Public Works provisions that address timing of crosswalk clearances for seniors or people who are disabled.

Since the Los Gatos Boulevard/Lark intersection is so busy, seniors might decide to cross at the next intersection beyond Los Gatos Boulevard/Lark to reach, say, Trader Joe's. This would be the intersection at Los Gatos Boulevard and Gateway/Garden. This intersection seems slightly safer, but is still challenging. To cross Los Gatos Boulevard at this point, you need to cross 3 lanes plus a turning lane and then 3 more lanes. The timer for this crossing begins at 33. Traffic at this intersection is quite heavy during much of the day. You would then need to cross Gateway. To do this, you would cross 1 lane plus 1 turning lane and then 2 more lanes. The timer at this crossing begins at 24.

Many seniors won't want to walk to the supermarket or even be able to walk there. They certainly won't want to walk the more than 3 miles to the Adult Recreation Center or Live Oak Senior Nutrition Center. They will need public transportation. The public transportation near the development is inconvenient and, if the senior uses the bus stops closest to the senior apartments, forces the senior to walk across the street at dangerous intersections.

Buses. There is just one bus going southbound toward town that stops near the development, the 49. The VTA refers to the southbound bus stop for the 49 that is closest to the development as Los Gatos Boulevard and Burton; the stop is just south of Boulevard Tavern. Currently, it has no pullout and no place to sit and wait for the bus. The closest northbound stop is at Los Gatos Boulevard and Del Sol; there is a place to pull out in the parking lot of the medical office there but no place for a senior to sit. There is also no crosswalk here to get across Los Gatos Boulevard and continue walking to the apartments, so a senior is more likely to get off the bus at the next stop.

This stop is at Los Gatos Boulevard and Samaritan (in front of the Stanford Cancer Center) and people can also catch the 27, 48, and 61 here.

The route for the 49 bus can drop seniors near grocery stores along Los Gatos Boulevard and can also drop them near the Adult Recreation Center, Civic Center, Live Oak Nutrition Center, and library. However, for a senior there is a significant amount of walking both getting to the stops from the senior units and then crossing Los Gatos Boulevard to get to the supermarket or (for example) crossing Main Street to get to the Adult Recreation Center from the bus stops.

Bus cost for seniors is \$1.00 per trip, so \$2.00 for a round trip. A monthly pass costs \$25.

The buses run at intervals between 37 and 72 minutes. If a senior happens to miss a bus, he or she could end up waiting at a bus stop for up to an hour and 12 minutes. And at most of the stops, there would be no place to sit.

Going north, the route goes up Los Gatos Boulevard/Bascom to Camden and then Winchester to get to the Light Rail Station. Riders can transfer to line 48 (Los Gatos Civic Center to Winchester Transit Center Via Winchester Blvd), to the Light Rail, and to several lines at the Light Rail Station (37 West Valley College to Capitol Light Rail Station, 60 Winchester Transit Center to Great America, and 101 Camden and Highway 85 to Palo Alto) to go to other places (such as the medical facilities on Knowles), but such transfers simply increase the inconvenience of local public transit.

There are only 8 pickup times on weekends, and the bus does not go to Good Samaritan Hospital on weekends. On weekdays the bus does not run later than 8 PM. On weekends it does not run later than 7 PM.

There are no plans for reserved spots/pull ins/pull outs along South A Street and Neighbor Street for eventual bus stops within the development. There are no plans for shuttle service.

Two Hazardous Intersections. Getting back home (thus heading northbound) after shopping or after taking advantage of downtown senior resources could be even more of a problem than heading south. There are no crosswalks on Los Gatos Boulevard between Lark and Samaritan Drive; the closest northbound stop is at Los Gatos Boulevard and Del Sol, about halfway between Lark and Samaritan Drive, but there's no crosswalk to get you across to the development. (See Attachment A: Lack of Crosswalks Across Los Gatos Boulevard Between Lark Avenue and Samaritan Drive.)

The northbound bus stops that are closest to the development and also close to crosswalks are at Los Gatos Boulevard and Gateway (in front of the 76 gas station) and Los Gatos Boulevard and Samaritan (in front of the Stanford Cancer Center). From the Los Gatos Boulevard/Gateway stop, seniors could cross at the Los Gatos/Gateway intersection or walk to the Los Gatos/Lark intersection and cross there. We've already

described what we think are hazardous pedestrian crossings for seniors at these intersections.

If the seniors used the Los Gatos Boulevard/Samaritan stop instead, they would face even worse traffic. They would first have to cross Samaritan, with its 5 lanes of traffic and then cross Los Gatos Boulevard with its **eight lanes of traffic** (on the northbound side, 2 left turn lanes + 2 straight lanes + 1 right turn lane; on the southbound side, 3 lanes). The current timer starts counting at 27. Suppose the very low-income seniors are pushing a little cart and are walking with canes or walkers. This would be a highly challenging crossing.

Please see Attachments B and C, which show (B) the Los Gatos Boulevard/Lark intersection; and (C) the Los Gatos Boulevard/Samaritan Drive intersection.

Too Much Walking When Using a Bus. If we do the math, to get to the closest food market, which would be Trader Joe's (not a full-service supermarket), the senior walks roughly .05 mile from the senior unit to the southbound bus stop; takes the bus to the stop closest to Trader Joe's; then walks roughly .05 miles from the bus stop to the store; then walks roughly .05 miles back to the bus stop. If the senior then uses the northbound bus stop at Los Gatos Boulevard and Samaritan (since there is no crosswalk from the Los Gatos Boulevard/Del Sol stop), he or she must then walk another more than .2 miles to get to the senior unit. This is a significant amount of walking—.35 miles—for some seniors. Since seniors (and anyone else for that matter) can't carry large loads of groceries, they will probably have to make the trip to the grocery store at least twice a week.

Grocery Delivery. Safeway offers grocery delivery. However, you need to order online, you must order at least \$50 worth of groceries, and the delivery charge is \$9.95 for orders under \$150. It is unlikely that very low-income seniors will have sufficient funds available to pay these costs.

Other Public Transportation. Some transportation listed on the Los Gatos Town website is no longer available. The phone for Alan Aert's Senior Care Program has been disconnected. The St. Mary's Church Share the Care Program no longer offers transportation. Heart of the Valley offers free transportation by appointment; however, appointments must be made at least a week in advance and a senior can use the service only twice a month. Outreach services are available, but they may cost too much for very low-income seniors. According to the Los Gatos town website, seniors must be determined eligible for the program by a VTA screening process, and there is then a \$6.00 round trip charge.

Below is part of the Project Summary that was provided to the Conceptual Design Advisory Committee (CDAC) back in Oct/Nov 2015. It was Exhibit 7 to the March 30, 2016 PC meeting. This section describes senior affordable housing. We have highlighted areas in which the developers have, at the very least, painted an unjustifiably rosy picture of what seniors will find.

Senior Affordable Apartments: A community's senior residents are often unable to maintain their long time residences within a community and they must move into a home designed to fit their needs and budget. Unfortunately, the ability of these residents to stay within the community they know and love can be very difficult. The senior affordable apartments proposed with this plan will provide this opportunity, with elevator access and direct proximity to the neighborhood serving retail in the Transition district. Accessibility will be provided by elevators and drive up parking, and the community garden on the plaza will provide an opportunity to grow food and get to know your neighbors. Easy walkability to goods and services complete the ease of what could otherwise be a difficult transition. While 40 units are required to fulfil the Town's BMP program requirements, 50 affordable senior units are proposed (25% more BMPs than are required for the project). Additional information on the senior affordable apartments and Eden's extensive experience in programming this product type is attached in the BMP program details.

Information provided previously in this letter already shows that this description is misleading in these ways:

- The Market Hall is the only retail outlet that has been described to any extent, and we still don't know what it will contain. We know that it is intended as a "specialty" market, which implies that it will not feature low-cost items for very low-income seniors.
- We have no idea about any other retail. There is no commitment to a pharmacy, hairdresser, or other service in the development.
- There is no "easy walkability" to local resources. All the Town services currently aimed at very low-income seniors—the \$3 lunches, the free "brown bag" food—are provided on the opposite end of town, 3.5 miles away.

OTHER EDEN COMPLEXES. A little time was spent online looking at other Eden senior affordable complexes to see if they had the same accessibility issues as the proposed very low-income senior housing for the North Forty. One Eden complex close by is the Cambrian Center at 2360 Samaritan Place, San Jose. It has 153 low-income senior units. Unlike the complex being proposed, this complex has a bus stop right at the back gate.

Other Eden complexes that were checked out also had bus stops right in front of the complexes. This included Brentwood Senior Commons; Almond Terrace and Almond Court in Manteca (both with a Raley's and pharmacy right across the street); Monteverde Senior Apartments in Orinda (with a Safeway across the street) and Belle Terre in Lafayette. At the August 11 Town Council hearing, the representative from Eden noted that "we do have a couple of properties right next to a BART station ..."

One final point: The proposed apartments, most at 550 sq. ft., are small, but they are generally the size of the senior assisted living apartments one of us saw while touring assisted living facilities with her mother. However, there the small size is justified by the fact that meals are provided. The assumption is that the seniors may want to have breakfast in their own apartments but will have lunch and dinner in the community dining room. Therefore, there is no need to keep much food in their own apartments.

This is clearly different from the senior affordable housing offered here, which is for independent living. There is no dining facility, no provision for food. The small units have limited storage space for food, making it likely that the seniors will need to go shopping on a frequent basis. There will be an apartment manager, but the seniors will only be getting pamphlets telling them about services.

Some of us are seniors, and we are certainly in favor of more senior housing. However, we feel that the location of this senior housing is ill-advised.

Please deny the proposed development.

Sincerely,

Barbara Dodson

With the help and support of these concerned citizens:

Susan and Bob Buxton
Reuel Warkov, Patti Elliot, Jacob Warkov, and Evan Warkov
Bruce and Jackie McComb
Angelia Doerner
Shannon Susick
Don Dodson
Lainey and Bruce Richardson
Susan Kankel
Lucille and Sam Weidman
Diane Dreher
Amy Despars
Peter Dominick
Ken Arendt

Attachment A: Lack of Crosswalks cross Los Gatos Boulevard Between Lark Avenue and Samaritan Drive

Attachment B: Hazardous Crossing at the Los Gatos Boulevard/Lark Intersection

Attachment C: Hazardous Crossing at the Los Gatos Boulevard/Samaritan Drive Intersection

ATTACHMENT A: LACK OF CROSSWALKS ACROSS LOS GATOS BOULEVARD BETWEEN LARK AVENUE AND SAMARITAN DRIVE



A very low-income senior using the bus to return from the supermarket or from a trip downtown to use resources for very low-income seniors would have a problem because:

- There is a northbound bus stop across from the development but no crosswalk to use to reach the development.
- There are no crosswalks at all to use to cross Los Gatos Boulevard between Lark Avenue and Samaritan Drive in order to access the development.
- After getting off at the northbound bus stop either near Lark or near Samaritan Drive, the senior would need to cross at a highly hazardous intersection--either the Los Gatos Boulevard/Lark Avenue intersection or the Bascom Avenue/Samaritan Drive intersection.

ATTACHMENT B: HAZARDOUS CROSSING AT THE LOS GATOS BOULEVARD/LARK INTERSECTION



As it exists currently, the Los Gatos Boulevard/Lark intersection is dangerous for seniors. It is unlikely to become more pedestrian friendly if lanes are added.

- Seniors may walk more slowly, especially if they are pushing carts containing groceries or using canes and walkers.
- The current timers have a 29 count to cross Los Gatos Boulevard and a 16 count to cross Lark. Neither would give a slow-walking senior enough time to cross.
- As things stand now, seniors would need to cross 6 lanes at Los Gatos Boulevard.
- They would need to cross 4 lanes plus 2 turning lanes at Lark.
- Drivers at this intersection are frequently impatient and anxious to get where they are headed.
- There is extremely heavy traffic at this intersection during much of the day.

ATTACHMENT C: HAZARDOUS CROSSING AT THE LOS GATOS BOULEVARD/SAMARITAN DRIVE INTERSECTION



The Los Gatos Boulevard/Samaritan Drive intersection is dangerous for seniors.

- Seniors may walk more slowly, especially if they are pushing carts containing groceries or using canes and walkers.
- The current timer has a 27 count to cross Los Gatos Boulevard. This would not give a slow-walking senior enough time to cross.
- Seniors would need to cross 5 lanes at Samaritan Drive.
- They would need to cross 8 lanes at Los Gatos Boulevard.
- Drivers at this intersection are frequently impatient and anxious to get where they are headed.
- There is extremely heavy traffic at this intersection during much of the day.

From: John Shepardson [<mailto:shepardsonlaw@me.com>]
Sent: Monday, August 29, 2016 4:47 AM
To: BSpector; Marico Sayoc; Steven Leonardis; Robert Schultz; Council
Subject: No. 40 Density Bonus

Cut and paste from <http://landuselaw.jmbm.com/2015/01/residential-development-in-california-new-density-bonus-law-makes-new-affordable-housing-difficult-t.html>

Residential Development in California: New Density Bonus Law Makes New Affordable Housing Difficult to Build

JANUARY 7, 2015
By Matthew Hinks

Governor Brown signed into law on September 27, 2014, AB2222, which amends the State's Density Bonus Law ("DBL"), Gov't Code §§ 65915, et seq. to establish significant constraints upon the use of the incentives provided by DBL in connection with certain real estate developments. The main purpose of AB2222 is to eliminate density bonuses and other incentives previously available unless the developer agrees to replace pre-existing affordable units on a one-for-one basis. The impact of the bill will be significant because it will remove the economic incentive to undertake density bonus projects where existing units are subject to rent control ordinances or similar restrictions.

JS--The new law is a remedial statute that must be liberally construed to effectuate its purpose.

Cut & paste from <http://www.berliner.com/attorney/andrew-l.-faber>

- "Inclusionary Housing Requirements: Still Possible?," League of California Cities Meeting, City Attorneys Department, Los Angeles, 2014
- "Reducing the Traffic that Causes the Potholes: California's New 'Regional' Congestion Management Scheme," American Bar Association Annual Convention, Toronto

Quoting from <http://www.paloaltoonline.com/news/2014/01/28/new-density-bonus-law-put-to-immediate-test>

State law entitles developers of affordable housing to seek exemptions from the city and gives local jurisdictions little leeway to deny these requests. City Planning Director Hillary Gitelman noted at the Jan. 13 meeting that without a local ordinance, "The field is wide open for people to request whatever concessions they think of" and the city has a limited ability to say no.

Quoting from <http://www.kpbs.org/news/2016/jun/21/san-diego-boosts-affordable-housing-incentives/>

We need more (housing) units built," said Sean Karafin, director of policy and economic research for the San Diego Regional Chamber of Commerce. "We need our workforce to find affordable homes here in San Diego, so they're not looking to Seattle or to Portland or to Austin to find a more affordable climate."

Quoting from <http://hoodline.com/2015/11/city-planners-push-plan-for-more-density-affordability-across-sf-neighborhoods>

In 2013, a [state court ruled](#) that Napa County couldn't place potentially prohibitive affordability requirements on a new development for low-income farm workers.

Quoting from https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB744

e) The average construction cost per space, excluding land cost, in a parking structure in the United States is about \$24,000 for aboveground parking and \$34,000 for underground parking. In an affordable housing project with a fixed budget, every \$24,000 spent on a required parking space is \$24,000 less to spend on housing.

(f) The biggest single determinant of vehicle miles traveled and therefore greenhouse gas emissions is ownership of a private vehicle.

(g) A review of developments funded through the Department of Housing and Community Development's Transit-Oriented Development Implementation Program (TOD program) shows that lower income households drive 25 to 30 percent fewer miles when living within one-half mile of transit than those living in non-TOD program areas. When living within one-quarter mile of frequent transit, they drove nearly 50 percent less.

(j) Consistent with Chapter 488 of the Statutes of 2006 (AB 32) and Chapter 728 of the Statutes of 2008 (SB 375), it is state policy to promote transit-oriented infill development to reduce greenhouse gas emissions.

(3) (A) An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; subject to any other form of rent or price control through a public entity's valid exercise of its police power; or occupied by lower or very low income households, unless the proposed housing development replaces those units, and either of the following applies:

(i) The proposed housing development, inclusive of the units replaced pursuant to this paragraph, contains affordable units at the percentages set forth in subdivision (b).

(ii) Each unit in the development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a lower or very low income household.

(B) For the purposes of this paragraph, "replace" shall mean either of the following:

(i) If any dwelling units described in subparagraph (A) are occupied on the date of application, the proposed housing development shall provide at least the same number of units of equivalent size or type, or both, to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy. For unoccupied dwelling units described in subparagraph (A) in a development with occupied units, the proposed housing development shall provide units of equivalent size or type, or both, to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category in the same proportion of affordability as the occupied units. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(ii) If all dwelling units described in subparagraph (A) have been vacated or demolished within the five-year period preceding the application, the proposed housing development shall provide at least the same number of units of equivalent size or type, or both, as existed at the highpoint of those units in the five-year period preceding the application to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those persons and families in occupancy at that time, if known. If the incomes of the persons and families in occupancy at the highpoint is not known, then one-half of the required units shall be made available at affordable rent or affordable housing cost to, and occupied by, very low income persons and families and one-half of the required units shall be made available for rent at affordable housing costs to, and occupied by, low-income persons and families. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(C) Paragraph (3) of subdivision (c) does not apply to an applicant seeking a density bonus for a proposed housing development if his or her application was submitted to, or processed by, a city, county, or city and county before January 1, 2015.

JS

Sent from my iPhone

From: John Shepardson [mailto:shepardsonlaw@me.com]
Sent: Tuesday, August 30, 2016 12:04 AM
To: BSpector; Marico Sayoc; Steven Leonardis; Council; Robert Schultz
Subject: N. 40 (Density Bonus)

Quoting from [https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/23986/Attachment_34 - Letter from Remy Moose Manley received August 26 2016.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/23986/Attachment_34_-_Letter_from_Remy_Moose_Manley_received_August_26_2016.pdf)

Section 65915, subdivision (c)(3)(C), provides that the replacement housing requirement “does not apply to an applicant seeking a density bonus for a proposed housing development if his or her application was submitted to, or processed by, a city, county, or city and county before January 1, 2015.” (Italics added.) This provision does not say that the “application” must have been expressly for the bonus, rather than for the housing development as a whole. As development applications routinely do evolve over time, often over months or years, before being finally approved, it is reasonable to interpret this provision as referring to the submittal or processing of the housing development application.

JS Comments: The statute was amended in way that restricted developers from obtaining density bonuses. An additional hurdle was created. This remedial legislation must thus be **LIBERALLY CONSTRUED** to effectuate its purpose. The liberal construction does not cut in favor of the above legal analysis and in fact, the author makes no mention of the statutory construction rule that remedial statutes must be liberally construed to effectuate the purpose stated. I submit a more reasonable interpretation is that there must be express application for a density bonus. Since one did not occur, until after 1/1/2015, the developer is subject to the requirements of the remedial legislation.

Moreover, the project submitted in 2013 is admittedly different than the one now proposed.

The City of Los Angeles appears to interpret the statute different from Mr. Manley and more in light with the position I’m asserting here.

Granted, I’m no expert in land use law, so bear that in mind, in considering the above points.

John Shepardson, Esq.
(408) 966-9709

From: "Jeffrey Aristide" <jeffreynaristide@comcast.net>

To: bspector@losgatosca.gov

Cc: msayoc@losgatosca.gov, mjensen@losgatosca.gov, rennie@losgatosca.gov, sleonardis@losgatosca.gov

Sent: Tuesday, August 30, 2016 11:42:51 AM

Subject: The North 40 Development Proposal, Application S-13-090

Dear Mayor Spector--I have written you before, asking for the current North 40 Development Proposal, Application S-13-090...to be denied, based on legal grounds...as it has failed at least four (4) requirements of the Specific Plan, including "must have the look and feel of Los Gatos". I realize fully, all the emotion surrounding this project. With this in mind, I want to report to you my recent phone discussion I had, at the request of Steve Buster, Grosvenor--Senior Vice President, Development. Steve is in charge of this project. First off...Steve is a smooth operator...a like-able guy...who I believe is honest...and wants the best for his firm, clients/customers...and the Town of Los Gatos. I talked to him for over an hour on 8/23. In brief, is the following:

1. Steve repeated, over and over again, that his firm had changed their development plans to match and conform to any and all town requirements. And felt they were meeting all the spirit and intent required for a successful outcome. In fact, he claimed he had received glowing comments...all along the application process...some in written form...right up to this February.
2. Then, he feels...a small group of long-term citizens of Los Gatos, felt that the development as proposed, had no merit. Further, Steve stated that this group in large part is against just about all development of the North 40.
3. He stated, that two (2) of his associates had their cars vandalized, after the last meeting. As it relates to this...I strongly recommend a statement issued by your office...stating that any and all violent, illegal behavior will to addressed by legal action...and that this holds true for the North 40 Project...and anything else for that matter. I leave the wordage and action in your capable hands...but, ask you for some statement prior to the next meeting on 9/1. Including have Los Gatos Police present at that meeting...to make a stronger statement still.
4. Steve stated the project keeps getting smaller and smaller...over time. It started out at 750 living units, then was changed to 365...and it's now 270. Plus the project then, required a partner...that was not their original intent to have.
5. He knows the impact this development will have...but "feels many have over-blown fears about it". He knows how he would feel--if it was in his town, as he lives in Orinda, with his wife and four (4) young children.
6. He claims 20 living units per acre might look like "developmental over-kill"...when comparing it to 4 homes per acre. But there are several properties in and around Los Gatos...that have more...much more than 20 units per acre. It is common to have 30-80+ units per acre.
7. Steve just concluded a 600 unit project in Alameda...that took five (5) years to finish. The very people that were against the project, reported to Steve..."that they had no idea how nice the project would look...once it was built".
8. He said, it would be foolish to think, that his firm would build a project that wasn't high-quality, in good-taste and in high demand.
9. Grosvenor wants to be part of Los Gatos, and intends to stay. They want to manage commercial space, that is high-quality...and in demand. That it would not, compete with our current down town...but, rather compliment it..."by having a different mix of tenants".

10. Grosvenor is a 350 year old firm...that can weather a recession...should this project go forward...and a major recession occurs. Also, the leader and CEO of Grosvenor, died on 8/9, of an unexpected heart-attack at age 64...his 25 year son, becoming the 7th Duke of Windsor...will take over for his father.

11. In my over one hour discussion, Mr. Buster..."never mentioned taking legal action...against the town".

12. Mr. Buster reminded me several times, that his firm has already spent millions, and millions of dollars...just to bring the project to this point.

13. We ended our discussion, on a positive note...with him saying, that he can and will make changes--as required, that Grosvenor is a high-quality developer and prides itself on this fact. Thank-you.....Jeffrey N. Aristide, 102 Noble Court, Los Gatos, CA 95032-4719

DONNA M. VENERUSO (d.'09)
LEILA H. MONCHARSH

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August 30, 2016

RECEIVED

AUG 30 2016

@ 1:05pm

TOWN OF LOS GATOS
PLANNING DIVISION

Los Gatos Town Council
110 E. Main Street
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090; Vesting Tentative Map M-13-014 – North 40 Specific Plan Phase 1

Dear Mayor, Vice Mayor, and Council Members:

Our client, Barbara Dodson, requested that we submit comments to your Council in response to the Applicant's attorney letter of July 7, 2016. Specifically, she requested that we address the affordable housing legal issues and whether the proposed project complies with the Specific Plan. I am a land use attorney with a master's degree in urban planning. Over the last 20 years, I have occasionally analyzed projects designed for senior housing and have often analyzed projects for consistency with general plans. I came to four conclusions:

1. There is insufficient evidence in the record to support a finding that the Applicant is providing senior housing because the proposed housing does not provide accessibility
2. Because the proposed project site, without a shuttle service, lacks accessibility to necessary resources for low-income seniors, and because the Applicant has not proposed any other housing that qualifies for density bonuses, the Council should deny the project application
3. The proposed project is inconsistent with the General Plan and the Specific Plan in ways described by the Planning Commission. Further, because the Applicant is not providing senior housing with necessary accessibility, the project fails to satisfy the Town's "unmet needs" as required by the Specific Plan
4. The threats of a lawsuit by the Applicant are without basis, and overlook the standard of review that the superior court would apply to its lawsuit

1. The Proposed Senior Portion of the Project Does Not Comply with the Legislature's Policies Defining "Senior Housing"

The proposed project includes senior housing with 49 units for low-income seniors and 1 unit for a manager. The Applicant asserts that it is entitled to the density level in its entire project "by right" and that the Town Council has no discretion and therefore, must grant the requested permits.

It is true that in the event the Applicant provides low-income senior housing in its project, it is entitled to density bonuses.¹ The state policy defining “senior housing” is found in the state density bonus statute² and in Civil Code section 51.3, a copy of which is attached to my letter as Exhibit A for your convenience.

(a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.

The policy requires that for housing to qualify as “senior housing,” it needs to provide accessibility, a special living environment, and services that will accommodate seniors. For example, two floors of apartment units in the middle of a 44-acre lot with nothing around it would not meet the need for senior housing. Similarly, it would be difficult for the Council to conclude that a homeless shelter would qualify, either.

At the Town Council hearing on August 11, 2016, Council member Sayoc questioned whether the seniors would be isolated over the ground floor market hall. Her questions were directly on point with the state’s policy concerning accessibility of housing and services for seniors. However, as we reviewed the record it was very difficult to find specifics from the documents and statements made during hearings by Eden’s representative. The explanations consisted of vague generalizations—Eden would provide “services” or “would use its network” or would “provide a stimulating program for the seniors.”

The lack of specific information about the accessibility and services that are contemplated for the senior population was perplexing because the site is not one that in our experience would be developed for senior housing. Generally, municipalities encourage developers to place senior housing along transit-oriented corridors where seniors can fully participate in their communities. The General Plan Transportation Element for Los Gatos is consistent with the practice of requiring public transit for certain population groups.³ None of the material or statements by Eden answered the question whether the seniors living above the market hall would be able to meet daily needs such as obtaining food, going to hospital appointments, participating in the

1 Government Code section 65915, subdivision (b)(1)(C). We understand that the density bonus was calculated based on the category for low-income persons.

2 Government Code section 65915, subdivision (b)(C)

3 See Policy TRA-8.4: Coordinate with appropriate agencies to provide transit service in the Town for seniors . . . low income people, the physically disabled, and other groups with special needs.

Town's senior centers, accessing hairdressing services, or in other ways have services available to them. The only clear statement was that neither the developer nor Eden would be providing any shuttle service. While Civil Code section 51.3 does not require extraordinary or lavish services, some services are essential to conform to the state's policy and definition of "senior housing."

To analyze the accessibility issue, Ms. Barbara Dodson went to the perimeter of the proposed project site (since unfortunately citizens are not allowed into the project site since it is considered private property) and imagined she was a "senior" living in very low-income housing. She then carefully researched the claim made by Eden that there would be "[e]asy walkability to goods and services complet[ing] the ease of what could otherwise be a difficult transition."⁴ It became immediately apparent that there were inadequate resources within walking distance, especially for those seniors with any disability or those seniors co-residing with disabled children.⁵ The roadways are not safe, especially in crossing at intersections and the goods and services are too remote from the project site.

Ms. Dodson then turned her attention to bus service, measured the distance to the nearest essential services, and attempted to locate transit service. She found that while it would be possible to find a bus stop in front of the project site, when the bus arrived back at the bus stop across from the project site, there would be no crosswalk. Therefore, the seniors would need to go to intersections where they would have to cross many lanes of heavy traffic. Ms. Dodson also evaluated availability of other transportation resources by calling the services, which also proved unsatisfactory. She provides the outcome of her investigation in her letter, dated August 28, 2016.

The lack of accessibility and services in this senior housing project was not a topic that only Ms. Dodson noticed. Tom Picraux, the chairperson for the Los Gatos Community and Senior Services Commission spoke before the Planning Commission on July 12, 2016.⁶ He raised the very same issue of whether the developer or Eden would be required to provide the

⁴ March 30, 2016 Planning Commission hearing and repeated in Ms. Dotson's letter delivered to the Council on August 29, 2016.

⁵ A "qualified permanent resident" who would be eligible to live in the senior housing above the market hall would include a disabled person who is a child or granchild of the senior citizen and needs to live with the senior. (Civil Code section 51.3, subdivision (b)(3).

⁶ His comments begin on the video around 5:54.

type of services necessary for very low-income seniors. Specifically, he mentioned healthcare, nutrition, and case management, “or will this be something that falls on the backs of the Town?” He made it clear that his commission has attempted to meet these needs for Los Gatos seniors, but implied that the services for the North Forty very low-income senior residents needed to be provided by Eden.

During the August 11, 2016 hearing before the Town Council, a question was asked about how the developer and Eden would handle ventilation in the senior housing above the market hall. The answer, not surprisingly, was that air conditioning and ventilation units (HVAC) would be installed and located on the roof. Yet, we do not see anything in the proposed conditions regarding maintenance of these essential units which can be very expensive to maintain over time. This is a necessary service that very low-income seniors cannot obtain on their own.

Even something so simple as assuring that seniors waiting for a bus are provided with cover during winter weather has not been addressed, although it is a requirement in the General Plan. TRA-8.8 states that where feasible and appropriate

all new projects that are near existing transit services and/or destinations such as shopping areas, community centers, *senior* housing, and medical facilities shall be required to provide covered and partially enclosed shelters consistent with Santa Clara Valley Transportation Authority (VTA) Standards that are adequate to buffer wind and rain, and have at least one bench at each public transit stop.

The General Plan also requires that the Town make “land use decisions that encourage walking, bicycling, and *public transit use*.” (TRA-9.1 - emphasis added.)

The overall picture of the senior housing component is that little to no planning went into it other than developers seizing an opportunity to use disadvantaged seniors as a way to greatly increase the net return on their investment. That was never part of the Legislature’s policy or intent behind the density bonus benefits. The developer and Eden have not offered evidence that the project includes “*accessible* housing for senior citizens” and that it provides them with the “the special living environments and services” that they need. (Civil Code section 51.3, subdivision (a).) In reviewing the recent letter from the Department of Housing, it is obvious that this agency was unaware of the accessibility problems.

2. The Council Should Deny the Project Application

As shown in section 1, above, the Applicant was not entitled to a density bonus because its project does not meet the definition of “senior housing” in Civil Code section 51.3(a). As an additional reason for why the Town Council should deny the project, we refer the Council to the state code section allowing it to deny projects benefiting from density bonuses under

circumscribed situations.⁷ (The staff reports contain an abbreviated version of the state code, presumably based on the Town's ordinance implementing the state density bonus law. However, any conflict between the Town's implementing ordinance and the state density bonus law could cause a court to find fault with your Council. Therefore, the better practice is to use the state density bonus law itself when deciding whether to grant or deny a density bonus to a developer.)

The state law allows your Council to deny the application, which includes housing for very low-income seniors if three prongs are met: (1) The project would have a specific adverse impact on health or safety; (2) there is no feasible method to satisfactorily mitigate or avoid the specific impact without rendering the project unaffordable for the seniors or financially infeasible; and (3) the specific adverse impact is a significant, quantifiable, direct, and unavoidable impact, "based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Here is the entire text of the criteria your Council is required to follow:

The development project . . . as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. Inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety.⁸

The evidence in the record supports all three prongs of the test for denial of the density bonus. (1) The senior housing component of the project would have an adverse impact on health and safety for the public. The seniors living in the project would be part of the "the public." The isolation of the seniors above the market hall with no provisions for them to obtain necessary goods and services adversely affects their health and safety. The failure in the conditions of approval to require a shuttle service or maintenance of the ventilation system is also a threat to their health. Requiring them to use public transportation that would involve crossing multiple

⁷ See Government Code section 65589.5, attached as Exhibit B.

⁸ Government Code section 65589.5, subdivision (d)(2).

lanes of heavy traffic is an adverse impact on their safety and on the safety of drivers attempting to deal with seniors slowly walking through many lanes of traffic.

(2) There is no feasible way to satisfactorily mitigate the adverse impacts listed in section 1, above, without rendering the project unaffordable for the seniors or financially infeasible for the developer for two reasons: a. there is no way to move the buses around or change the numerous lanes of traffic into fewer lanes. A bridge over so many lanes of traffic so that the seniors could safely get across the street from the bus stop to the project would not be financially feasible. Nor is it likely seniors, especially those who are disabled, would be able to use the bridge without an elevator at both ends. b. Through its attorney the developer has made it clear that it is unwilling to do anything further with this project other than discuss the color of the paint on the buildings or make minor changes that can be approved by the Town's planner. It has entered into a streamlining agreement with September 7, 2016 as the final date for the Town's decision and after that, it prefers to sue the Town rather than mitigate the health and safety issues.

(3) The adverse impacts are significant because they deprive the seniors of the ability to access necessary goods and services, and ability to participate in the greater community outside the project units. It is quantifiable and direct because any planner can verify the information in Ms. Dodson's letter. The impacts she describes are also objectively verifiable by a Town traffic engineer. Also, a Town engineer can objectively verify that the senior housing requires a ventilation system and there is no provision in the conditions of approval for maintenance of it. The impacts described in section 1, above violate the state policy for "accessible" senior housing with adequate services under Civil Code section 51.3(a). The impacts described in section 1 are based on the roadway and public transportation conditions that existed when the developer's application was deemed complete.

Therefore, the Town should deny the project application because it necessarily includes "adverse specific impacts" that cannot be mitigated.

3. The Town Council Should Deny the Permit Application Because the Project Is Inconsistent with the General Plan and the Specific Plan

In its July 7, 2015 letter, the Applicant's attorneys contend that the Town cannot legally deny its project application since the project qualifies for the density bonus. Instead, it must follow the directives of Government Code section 65589.5, subdivision (j), which assumes that the project *complies* with the Town's General Plan and Specific Plan. Of course, that has been the Applicant's position all along-that it has developed a project that not only qualifies for a density bonus, but also complies with the General Plan and Specific Plan. The Planning Commission, after three days of lengthy hearings, disagreed. So, do we. The Town Council

should reject the approach that it cannot deny the application based on inconsistency with its General Plan and Specific Plan for several reasons:

As discussed in section 1, above, the proposed project is not entitled to a density bonus because it fails to provide senior housing as defined in Government Code section 51.3, subdivision (a). The evidence in the record demonstrates that accessibility to necessary resources for the very low-income seniors in the senior housing would be inadequate, the senior housing does not constitute a liveable environment for seniors, and that the Applicant refuses to do anything to mitigate the accessibility problems, instead preferring to pursue litigation

The Town is legally required to deny projects that are inconsistent with its General Plan or its Specific Plan. The Legislative policies requiring municipalities to develop and follow General Plans must be harmonized with the density bonus policy, especially under the facts here where the housing does not provide accessibility for seniors. Under Government Code section 65589.5, subdivision (d)(5), the Town may deny the project for inconsistency with the General and Specific Plans. None of the exceptions in this subdivision apply to this project or override the requirement in Government Code section 65589 that the local agency comply with state policies, other than those promulgated to encourage affordable housing

Even under the standard that the Applicant relies upon, contained in Government Code section 65589.5, subdivision (j), the Town can and should legally deny the application for the permits

We were unable to find a legal case where a density bonus was sought solely for the purpose of overriding the local agency's General Plan to increase market-rate housing, and was unrelated to improving the lives of underprivileged citizens. However, *Carson Harbor Village, LTD v. City of Carson* (2015) 239 Cal.App.4th 56 (*Carson*)⁹ is instructive. There, the superior court considered the denial of a permit application to convert a mobile home park from a rental facility into resident-owned lots. The opponents claimed that the application was a "sham," as might be suggested here, designed to get around the City's General Plan and ordinances. In *Carson*, the application was allegedly designed to get around local rent control ordinances. (*Id.* at pp. 60-61.) At first, the court of appeal in *Carson* ruled that the City could not deny the application based on inconsistencies between the proposed project and the General Plan, but then reversed itself. The City had denied the permit since the proposed conversion

⁹ Attached as Exhibit C.

was not bona fide because it was unlikely that many of the low income tenants living in the park would agree to buy their lots, the tenant survey improperly gauged support for the incentives, not the conversion, and the required tenant impact report did not include information requested about the wetlands and the displacement effect on current tenants. The City alternatively denied the application because it was inconsistent with its general plan's affordable housing and open space elements and posed a risk to the wetlands and its wildlife. (§ 66474, subds. (b) & (e).)

(*Carson, supra*, at p. 61.)

The superior court ruled against the City on the bona fide issue and held that inconsistency with a local agency's General Plan was an improper ground to deny the proposed conversion. Further, there was no evidence the proposal was inconsistent with the City's General Plan. (*Carson, supra*, at p. 62.) (Sound familiar with the facts now before the Town Council?)

The court of appeal reversed the superior court, first noting the priority that local agencies must give to their General Plan, a point that here Mayor Spector amply demonstrated during the hearing of August 16, 2016. It is worth quoting the court's statement, which contains ample citations to California Supreme Court cases. We have left out these citations to make the statement more readable:

All local governments must have a comprehensive and long-term general plan for the development of land within their boundaries. Acting much like a land-use constitution, it is the basic charter governing the direction of future land use within a locality. The propriety of virtually any local land use decision depends upon its consistency with the general plan.

(*Carson, supra*, at p. 62 - citations and quotation marks omitted.)

The court went on to discuss all of the competing legislative policies involved in the matter. As here, the proposed conversion implicated the Subdivision Map Act, which was "designed to promote orderly community developments . . ." Like the Density Bonus Law, the Map Act included provisions for denying the application for the map, including "inconsistency with an applicable general plan." Other competing policies involved the wetlands under the Coastal Act that conflicted with the policies of the Mello Act which included that "[t]he availability of housing is of vital statewide importance;" and "decent housing and a suitable living environment for every Californian... is a priority of the highest order." (*Carson, supra*, at p. 67.)

Furthermore, quoting a California Supreme Court case¹⁰ the court noted that the Map Act includes a provision that nothing in the Act affects a local agency's obligations to comply with applicable state and federal laws. (*Carson, supra*, at p. 67.) Again relying on the Supreme Court's directives, the court of appeal concluded that the Map Act was intended to operate in conjunction with other state laws and that the lower court had been required to "harmonize" the competing state policies and to reconcile inconsistencies between "statutory provisions wherever possible and, absent an express declaration of legislative intent, to avoid implied repeals unless the conflicting provisions were fatally irreconcilable and inconsistent." In the remainder of the *Carson* case, the court found sufficient evidence in the record to support the City's conclusion that the proposed conversion was inconsistent with the General Plan. (*Carson, supra*, at pp. 71-80.)

Here, the Applicant overlooks the very language that allows the Town Council to consider other state policies, including the state law requirement that it follow its own General and Specific Plans. Instead, the Applicant just relies on Government Code section 65589.5. However, it overlooks the preceding applicable code section—65589.¹¹ The relevant subdivisions state:

§ 65589. Construction of article:

- (a) Nothing in this article shall require a city, county, or city and county to do any of the following: . . .
- (c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.
- (d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

Here, the "elephant in the room" is interpreting Government Code section 65589.5 as to whether the Town can legally deny the permits given inconsistency with the General Plan. We agree with the Town's outside counsel—the section that seemingly allows the Town to deny the

¹⁰ *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783.)

¹¹ A copy is attached as Exhibit D.

permits on that basis is murky at best and without any legal precedent.¹² We offer some additional comments and are willing to take a stab at a prediction, based on the discussion above concerning competing policies.

To review for your Council: Government Code section 65589.5, subdivision (d) does not allow a local agency to disapprove a *housing development project* unless it “makes written findings, based upon substantial evidence in the record, as to one of the following:”, which is then followed by five instances when a local agency may deny permits for a proposed project that contains affordable housing for very low-income households. Government Code section 65589.5, subdivision (d)(5) allows the Town to deny the permits if it finds that the proposed project is “inconsistent with . . . the jurisdiction’s . . . general plan land use designation as specified in any element of the general plan . . .” However, this subdivision is followed by subdivision (d)(5)(A), which does not allow the Town to deny or conditionally disapprove a *housing development project* for very low-income people if the proposed project site has been identified in the Town’s housing element as one suitable or available for very low-income households.

The logical next step is to look at the definition of *housing development project* and as your outside attorney explains, the definition is problematic under subdivision (h)(B) as to what constitutes “Mixed-use developments.” We would add that subdivision (h)(3) defines *housing for very low-income households* as “at least 20 percent of the total units shall be sold or rented to lower income households . . .” The proposed project does not meet that definition and arguably does not meet the definition of a Mixed-use development, either.

Moreover, we note that under the code section, the test for a local agency to deny a permit is more relaxed if the proposed development complies with the General Plan than it is if it does not comply with it. Government Code section 65589.5, subdivision (j) only requires that if a local agency decides to deny a permit even though the proposed project is consistent with the General Plan, it must make findings that the project would have a specific, adverse impact on public health and safety and that there is no feasible method to satisfactorily mitigate or avoid that impact. Basically, the test in subdivision (j) is the same as in subdivision (d)(2), which we describe in section 1, above, and which does not contain nearly as many qualifiers for a local agency to deny a project as subdivision (d)(5)(A). The test for whether a local agency can disapprove a housing project should be more stringent if the proposal is inconsistent with the General Plan than if it is consistent with it. Instead, if subdivision (d)(5)(A) applies, the test is less stringent to the project here than inconsistent with the General and Specific Plans.

¹² See, letter of outside counsel, attachment 37, pp. 7-8.

Our prediction is that the courts will not struggle with sorting out the pitiful language in Government Code section 65589.5, but instead will revert to the time-honored practice of “harmonizing” the state’s policies between a local agency’s obligation to enforce its general plan and its obligation to provide affordable housing to very low-income seniors. Most likely, courts will continue to require that local agencies grapple with these competing policies, make a decision about granting or denying permits, write up the findings, and make sure that there is substantial evidence to support them!

Accordingly, the Town Council should find that substantial evidence supports that the proposed project is first, inconsistent with the state policies to promote accessible, “decent housing” to meet the needs of seniors and second, that in other regards it is inconsistent with both the General Plan and the Specific Plan.

There is adequate record that allows the Town Council to find that the proposed project is inconsistent with its General Plan and Specific Plan. As discussed in section 4, *infra*, the court expects the Town Council to utilize its goals and policies, keeping in mind that the General Plan and Specific Plan will contain a mixture of competing policies. It is up to the Town Council to look at the proposed project and decide which policies to apply to it.

The recommendations from the Planning Commission were sound, with particular mention of the work completed by Commissioner Hudes. He not only participated in drafting the Specific Plan, but verified facts and confronted the developer with questions before arriving at what the commission believed was a fair resolution. For example, one of the “Guiding Principles” in the Specific Plan was that the “The North 40 will embrace hillside views, trees, and open space.”¹³ He went to the site and looked for himself at the story poles and the plans. Commissioner Hudes then gave the developer’s expert an opportunity to rebut the concern that the proposed project was inconsistent with Policy O1, p. 2-11–“Promote and protect views of hillsides and scenic resources.” He explained why he disagreed with the expert, giving the developer another opportunity to respond. Eventually, the commission listed this inconsistency as one of its reasons for the recommendation to deny the permit.

The Planning Commission determined that the proposed project was inconsistent with Policy 3.2.6, p. 3-8 -- “Provide architectural elements, detailing and ornament to add richness and variety to building facades and facade depth and detail.” This policy was also part of the Town’s “Guiding Principles” and required the project to “look and feel like Los Gatos.” There was quite a bit of debate about whether the vision was too subjective and not objective enough to qualify for an inconsistency finding. However, as discussed below in section 4, the Specific Plan can

¹³ Specific Plan, p. 1-1.

enforce its vision and policies. The community came to hearings with many photographs demonstrating the architectural elements consistent with Los Gatos. The record amply demonstrated that the proposed project was “Anywhere Suburbia, U.S.A.” as opposed to the look and feel that should have been accomplished by following Policy 3.2.6 and the vision.

The record also supports a finding that the proposed development was inconsistent with Policy LU4, p. 2-2—“Commercial development within the Specific Plan Area shall be complementary to Downtown through careful control of uses and permitted square footage . . .” Policy LU6, p. 2-2 required that the commercial uses in the North 40 serve the residents and adjacent neighborhoods. There were several downtown commercial owners who explained that the proposed project threatened to cause leakage from the downtown into the North 40, crippling both commercial areas of Los Gatos. Commissioner Hudes inquired about the Specific Plan’s requirement that the developer obtain an Economic Impact Study¹⁴ to address this issue and the developer produced the author of that report. The commission concluded that the study was “flawed” because it did not discuss the key issue of leakage from the Downtown commercial uses.

Another Guiding Principle was that the North 40 will address the Town’s residential unmet needs.¹⁵ As shown in section 1, above, it does not meet the needs of very low-income seniors because necessary resources for the very low-income seniors would be inaccessible. It also did not meet the Town’s needs for housing that would accommodate market-rate seniors because the entire project contains multi-story buildings with no elevators, other than in the very low-income senior housing over the market hall.¹⁶

The proposed project is also inconsistent with the General Plan Housing Element as it relates to seniors and very low-income seniors. Goal HOU-4 on page 36 states “Ensure that all persons have equal access to housing opportunities. Policy HOU-4.1 states, “Support housing programs that protect individuals’ rights.” Because of the inaccessibility issues described above in section 1, the proposed project is inconsistent with several other General Plan Goals and policies on pages 39-40: Goal HOU-5 “Retain and expand affordable housing opportunities for seniors.” Policy HOU-5.2 states, “Allow and encourage small-scale living facilities of two to six seniors that may include nursing care services that can be integrated into existing neighborhoods

¹⁴ Specific Plan 2.4.2, p. 2-6

¹⁵ Specific Plan, p. 1-1

¹⁶ Specific Plan, p. C-2

as infill development.” And, Policy HOU-5.3 requires: “Work with existing senior lifestyle living and assisted living facilities in Los Gatos, and support the development of new senior housing that includes continuum of care facilities within the Town.”

4. The Applicant’s Threat of A Lawsuit Is Greatly Exaggerated

We agree with the Town’s outside lawyer that the Town should follow the directives of Government Code section 65589.5 regarding granting or denying permits for proposed affordable housing. And its list of pending or past cases in superior court does contain a few examples where the court took measures to correct problems with local agencies not complying with one or another of its requirements. However, the list also shows that past litigation has followed the typical pattern of courts leaving much of the decision-making to local agencies. The court does not substitute its judgment for that of the local agency by second-guessing whether a project is consistent or inconsistent with a General Plan. That decision is left up to the local agency with a presumption that its decision is correct.

On August 16, 2016, Council member Jensen presented a slide show to demonstrate that the *intent* of those who drafted the Specific Plan and the Council that approved it was consistent with various aspects of the proposed project. However, that is not the test utilized by the court. Instead, it applies the substantial evidence test and resolves

reasonable doubts in favor of the City’s finding and decision. (Ibid.) The essential inquiry is whether the City’s finding of consistency with the General Plan was reasonable based on the evidence in the record. As long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether we would have made that determination in the first instance. Generally speaking, the determination that a project is consistent with a city’s general plan will be reversed only if the evidence was such that no reasonable person could have reached the same conclusion.

(*Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (July 1, 2016) <<http://www.courts.ca.gov/opinions/documents/F071768.PDF>>, p. 10 - citations and quotation marks omitted (*Naraghi*).)¹⁷

The same standard of review applies when a local agency determines that a proposed project is *inconsistent* with its General or Specific Plan. (*Carson, supra*, 239 Cal.App.4th 56, at p. 62 [“. . . [W]e examine the entire record to determine whether the City’s findings were supported by

¹⁷ A copy of this recent decision is attached as Exhibit E.

substantial evidence. [] However, we begin with the presumption that the findings are supported by substantial evidence. It is the [Plaintiff's] burden to prove otherwise.”]

Furthermore, the court does not go back in time and look at the intent of the drafters and decision-makers of a General Plan to consider whether its land use decision should be upheld. Instead, it evaluates the proposed project in light of the General Plan's stated policies and goals. “[A] city's land use decisions must be consistent with the policies expressed in its general plan.” (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378.)

After determining whether the proposed project is consistent or inconsistent with the General Plan, the local agency then prepares written findings. The court does not apply its own preferences as to whether the local agency should have granted a proposed project.

Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. It is, emphatically, not the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence.

(*Naraghi, supra*, at p. 10.)

Council member Rennie expressed concern that the court might order the Town Council to approve the proposed project “as is” and deprive the Council of any further control over it. The statute does not provide for that potential result unless the Town Council acts in “bad faith.” The code defines “bad faith” as meaning “an action that is frivolous or otherwise entirely without merit.” (Government Code section 65589.5, subdivision (I).)

As shown above, the denial of the permits here would most likely be upheld by the court and there is ample evidence in the record to support the findings supporting that decision.

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Thank you for considering our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Leila H. Moncharsh". The signature is fluid and cursive, with a prominent initial "L" and a long, sweeping tail.

Leila H. Moncharsh, J.D., M.U.P.
Veneruso & Moncharsh

LHM:lm

cc: Ms. Dodson

EXHIBIT A

California Civil Code § 51.3. [Effective Until 1/1/2017] Limitations on occupancy, residence, use based on age.

CALIFORNIA CODES

CALIFORNIA CIVIL CODE

Division 1. PERSONS

Part 2. PERSONAL RIGHTS

Current through the 2016 Legislative Session

V 51.3. [Effective Until 1/1/2017] Limitations on occupancy, residence, use based on age

- (a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.
- (b) For the purposes of this section, the following definitions apply:
 - (1) "Qualifying resident" or "senior citizen" means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development.
 - (2) "Qualified permanent resident" means a person who meets both of the following requirements:
 - (A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.
 - (B) Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.
 - (3) "Qualified permanent resident" also means a disabled person or person with a disabling illness or injury who is a child or grandchild of the senior citizen or a qualified permanent resident as defined in paragraph (2) who needs to live with the senior citizen or qualified permanent resident because of the disabling condition, illness, or injury. For purposes of this section, "disabled" means a person who has a disability as defined in subdivision (b) of Section 54. A "disabling injury or illness" means an illness or injury which results in a condition meeting the definition of disability set forth in subdivision (b) of Section 54.
 - (A) For any person who is a qualified permanent resident under this paragraph whose disabling condition ends, the owner, board of directors, or other governing body may require the formerly disabled resident to cease residing in the development upon receipt of six months' written notice; provided, however, that the owner, board of directors, or other governing body may allow the person to remain a resident for up to one year after the disabling condition ends.

(B) The owner, board of directors, or other governing body of the senior citizen housing development may take action to prohibit or terminate occupancy by a person who is a qualified permanent resident under this paragraph if the owner, board of directors, or other governing body finds, based on credible and objective evidence, that the person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated by means of a reasonable accommodation; provided, however, that the action to prohibit or terminate the occupancy may be taken only after doing both of the following:

- (i) Providing reasonable notice to and an opportunity to be heard for the disabled person whose occupancy is being challenged, and reasonable notice to the coresident parent or grandparent of that person.
- (ii) Giving due consideration to the relevant, credible, and objective information provided in the hearing. The evidence shall be taken and held in a confidential manner, pursuant to a closed session, by the owner, board of directors, or other governing body in order to preserve the privacy of the affected persons.

The affected persons shall be entitled to have present at the hearing an attorney or any other person authorized by them to speak on their behalf or to assist them in the matter.

- (4) "Senior citizen housing development" means a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that has at least 35 dwelling units.

Any senior citizen housing development which is required to obtain a public report under Section 11010 of the Business and Professions Code and which submits its application for a public report after July 1, 2001, shall be required to have been issued a public report as a senior citizen housing development under Section 11010.05 of the Business and Professions Code. No housing development constructed prior to January 1, 1985, shall fail to qualify as a senior citizen housing development because it was not originally developed or put to use for occupancy by senior citizens.

- (5) "Dwelling unit" or "housing" means any residential accommodation other than a mobilehome.
- (6) "Cohabitant" refers to persons who live together as husband and wife, or persons who are domestic partners within the meaning of Section 297 of the Family Code.
- (7) "Permitted health care resident" means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident, or a family member of the qualifying resident providing that care. For the purposes of this section, the care provided by a permitted health care resident must be substantial in nature and must provide either assistance with necessary daily activities or medical treatment, or both.

A permitted health care resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident in the absence of the senior citizen from the dwelling unit only if both of the following are applicable:

- (A) The senior citizen became absent from the dwelling due to hospitalization or other necessary medical treatment and expects to return to his or her residence within 90 days from the date the absence began.
- (B) The absent senior citizen or an authorized person acting for the senior citizen submits a written request to the owner, board of directors, or governing board stating that the senior citizen desires that the permitted health care resident be allowed to remain in order to be present when the senior citizen returns to reside in the development.

Upon written request by the senior citizen or an authorized person acting for the senior citizen, the owner, board of directors, or governing board shall have the discretion to allow a permitted health care resident to remain for a time period longer than 90 days from the date that the senior citizen's absence began, if it appears that the senior citizen will return within a period of time not to exceed an additional 90 days.

- (c) The covenants, conditions, and restrictions and other documents or written policy shall set forth the limitations on occupancy, residency, or use on the basis of age. Any such limitation shall not be more exclusive than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same dwelling unit may be required to be a qualified permanent resident, a permitted health care resident, or a person under 55 years of age whose occupancy is permitted under subdivision (h) of this section or under subdivision (b) of Section 51.4. That limitation may be less exclusive, but shall at least require that the persons commencing any occupancy of a dwelling unit include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis. The application of the rules set forth in this subdivision regarding limitations on occupancy may result in less than all of the dwellings being actually occupied by a senior citizen.
- (d) The covenants, conditions, and restrictions or other documents or written policy shall permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 55 years of age for periods of time, not less than 60 days in any year, that are specified in the covenants, conditions, and restrictions or other documents or written policy.
- (e) Upon the death or dissolution of marriage, or upon hospitalization, or other prolonged absence of the qualifying resident, any qualified permanent resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident. This subdivision shall not apply to a permitted health care resident.
- (f) The condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential rental property shall have been developed for, and initially been put to use as, housing for senior citizens, or shall have been substantially rehabilitated or renovated for, and immediately afterward put to use as, housing for senior citizens, as provided in this section; provided, however, that no housing development

constructed prior to January 1, 1985, shall fail to qualify as a senior citizen housing development because it was not originally developed for or originally put to use for occupancy by senior citizens.

- (g) The covenants, conditions, and restrictions or other documents or written policies applicable to any condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential property that contained age restrictions on January 1, 1984, shall be enforceable only to the extent permitted by this section, notwithstanding lower age restrictions contained in those documents or policies.
- (h) Any person who has the right to reside in, occupy, or use the housing or an unimproved lot subject to this section on January 1, 1985, shall not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of this section.
- (i) The covenants, conditions, and restrictions or other documents or written policy of the senior citizen housing development shall permit the occupancy of a dwelling unit by a permitted health care resident during any period that the person is actually providing live-in, long-term, or hospice health care to a qualifying resident for compensation. For purposes of this subdivision, the term "for compensation" shall include provisions of lodging and food in exchange for care.
- (j) Notwithstanding any other provision of this section, this section shall not apply to the County of Riverside.

Cite as Ca. Civ. Code V 51.3

History. Amended by Stats 2000 ch 1004 (SB 2011), s 3, eff. 1/1/2001.

Previously Amended September 3, 1999 (Bill Number: SB 382) (Chapter 324).

Note: *This section is set out twice. See also Ca. Civ. Code 1 51.3, as amended by Stats 2016 ch 50 (SB 1005), s 5, eff. 1/1/2017.*

EXHIBIT B

California Government Code ◊ 65589.5. Housing development projects for very low, low or moderate-income households including emergency shelters.

CALIFORNIA CODES

CALIFORNIA GOVERNMENT CODE

Title 7. PLANNING AND LAND USE

Division 1. PLANNING AND ZONING

Chapter 3. LOCAL PLANNING

Article 10.6. Housing Elements

Current through the 2016 Legislative Session

h 65589.5. Housing development projects for very low, low or moderate-income households including emergency shelters

- (a) The Legislature finds and declares all of the following:
- (1) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.
 - (2) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.
 - (3) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.
 - (4) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects.
- (b) It is the policy of the state that a local government not reject or make infeasible housing developments, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action and without complying with subdivision (d).
- (c) The Legislature also recognizes that premature and unnecessary development of agricultural lands for urban uses continues to have adverse effects on the availability of those lands for food and fiber production and on the economy of the state. Furthermore, it is the policy of the state that development should be guided away from prime agricultural lands; therefore, in

implementing this section, local jurisdictions should encourage, to the maximum extent practicable, in filling existing urban areas.

- (d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon substantial evidence in the record, as to one of the following:
- (1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. If the housing development project includes a mix of income categories, and the jurisdiction has not met or exceeded its share of the regional housing need for one or more of those categories, then this paragraph shall not be used to disapprove or conditionally approve the project. The share of the regional housing need met by the jurisdiction shall be calculated consistently with the forms and definitions that may be adopted by the Department of Housing and Community Development pursuant to Section 65400. In the case of an emergency shelter, the jurisdiction shall have met or exceeded the need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. Any disapproval or conditional approval pursuant to this paragraph shall be in accordance with applicable law, rule, or standards.
 - (2) The development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. Inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety.
 - (3) The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.
 - (4) The development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.
 - (5)

The development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.

- (A) This paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the development project is proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation.
 - (B) If the local agency has failed to identify in the inventory of land in its housing element sites that can be developed for housing within the planning period and are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels pursuant to Section 65584, then this paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed for a site designated in any element of the general plan for residential uses or designated in any element of the general plan for commercial uses if residential uses are permitted or conditionally permitted within commercial designations. In any action in court, the burden of proof shall be on the local agency to show that its housing element does identify adequate sites with appropriate zoning and development standards and with services and facilities to accommodate the local agency's share of the regional housing need for the very low and low-income categories.
 - (C) If the local agency has failed to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit, has failed to demonstrate that the identified zone or zones include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7) of subdivision (a) of Section 65583, or has failed to demonstrate that the identified zone or zones can accommodate at least one emergency shelter, as required by paragraph (4) of subdivision (a) of Section 65583, then this paragraph shall not be utilized to disapprove or conditionally approve an emergency shelter proposed for a site designated in any element of the general plan for industrial, commercial, or multifamily residential uses. In any action in court, the burden of proof shall be on the local agency to show that its housing element does satisfy the requirements of paragraph (4) of subdivision (a) of Section 65583.
- (e) Nothing in this section shall be construed to relieve the local agency from complying with the congestion management program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

- (f)
- (1) Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.
 - (2) Nothing in this section shall be construed to prohibit a local agency from requiring an emergency shelter project to comply with objective, quantifiable, written development standards, conditions, and policies that are consistent with paragraph (4) of subdivision (a) of Section 65583 and appropriate to, and consistent with, meeting the jurisdiction's need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. However, the development standards, conditions, and policies shall be applied by the local agency to facilitate and accommodate the development of the emergency shelter project.
 - (3) This section does not prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the development project or emergency shelter.
- (g) This section shall be applicable to charter cities because the Legislature finds that the lack of housing, including emergency shelter, is a critical statewide problem.
- (h) The following definitions apply for the purposes of this section:
- (1) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.
 - (2) "Housing development project" means a use consisting of any of the following:
 - (A) Residential units only.
 - (B) Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of buildings that are two or more stories. As used in this paragraph, "neighborhood commercial" means small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood.
 - (C) Transitional housing or supportive housing.
 - (3) "Housing for very low, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code. Housing units targeted for lower income households shall be made available at a monthly housing cost that does not

exceed 30 percent of 60 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the lower income eligibility limits are based. Housing units targeted for persons and families of moderate income shall be made available at a monthly housing cost that does not exceed 30 percent of 100 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the moderate-income eligibility limits are based.

- (4) "Area median income" means area median income as periodically established by the Department of Housing and Community Development pursuant to Section 50093 of the Health and Safety Code. The developer shall provide sufficient legal commitments to ensure continued availability of units for very low or low-income households in accordance with the provisions of this subdivision for 30 years.
- (5) "Disapprove the development project" includes any instance in which a local agency does either of the following:
 - (A) Votes on a proposed housing development project application and the application is disapproved.
 - (B) Fails to comply with the time periods specified in subdivision (a) of Section 65950. An extension of time pursuant to Article 5 (commencing with Section 65950) shall be deemed to be an extension of time pursuant to this paragraph.
- (i) If any city, county, or city and county denies approval or imposes restrictions, including design changes, a reduction of allowable densities or the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed complete pursuant to Section 65943, that have a substantial adverse effect on the viability or affordability of a housing development for very low, low-, or moderate-income households, and the denial of the development or the imposition of restrictions on the development is the subject of a court action which challenges the denial, then the burden of proof shall be on the local legislative body to show that its decision is consistent with the findings as described in subdivision (d) and that the findings are supported by substantial evidence in the record.
- (j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:
 - (1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

- (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.
- (k) The applicant or any person who would be eligible to apply for residency in the development or emergency shelter may bring an action to enforce this section. If, in any action brought to enforce the provisions of this section, a court finds that the local agency disapproved a project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low, low-, or moderate-income households, including farmworker housing, without making the findings required by this section or without making sufficient findings supported by substantial evidence, the court shall issue an order or judgment compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the development project or emergency shelter. The court shall retain jurisdiction to ensure that its order or judgment is carried out and shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner who proposed the housing development or emergency shelter, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section. If the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of this section are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, shall be deemed approved unless the applicant consents to a different decision or action by the local agency.
- (l) If the court finds that the local agency (1) acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section and (2) failed to carry out the court's order or judgment within 60 days as described in subdivision (k), the court, in addition to any other remedies provided by this section, may impose fines upon the local agency that the local agency shall be required to deposit into a housing trust fund. Fines shall not be paid from funds that are already dedicated for affordable housing, including, but not limited to, redevelopment or low- and moderate-income housing funds and federal HOME and CDBG funds. The local agency shall commit the money in the trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low, very low, or low-income households. For purposes of this section, "bad faith" shall mean an action that is frivolous or otherwise entirely without merit.
- (m) Any action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure, and the local agency shall prepare and certify the record of proceedings in accordance with subdivision (c) of Section 1094.6 of the Code of Civil Procedure no later than 30 days after the petition is served, provided that the cost of preparation of the record shall be borne by the local agency. Upon entry of the trial court's order, a party shall, in order to obtain appellate review of the order, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an

amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant.

- (n) In any action, the record of the proceedings before the local agency shall be filed as expeditiously as possible and, notwithstanding Section 1094.6 of the Code of Civil Procedure or subdivision (m) of this section, all or part of the record may be prepared (1) by the petitioner with the petition or petitioner's points and authorities, (2) by the respondent with respondent's points and authorities, (3) after payment of costs by the petitioner, or (4) as otherwise directed by the court. If the expense of preparing the record has been borne by the petitioner and the petitioner is the prevailing party, the expense shall be taxable as costs.
- (o) This section shall be known, and may be cited, as the Housing Accountability Act.

Cite as Ca. Gov. Code □ **65589.5**

History. Amended by Stats 2015 ch 349 (AB 1516), s 2, eff. 1/1/2016.

Amended by Stats 2010 ch 610 (AB 2762), s 2, eff. 1/1/2011.

Amended by Stats 2007 ch 633 (SB 2), s 4, eff. 1/1/2008.

Amended by Stats 2006 ch 888 (AB 2511), s 5, eff. 1/1/2007.

Amended by Stats 2005 ch 601 (SB 575), s 1, eff. 1/1/2006

Amended by Stats 2004 ch 724 (AB 2348), s 4, eff. 1/1/2005

Amended by Stats 2003 ch 793 (SB 619), s 3, eff. 1/1/2004.

Amended by Stats 2002 ch 147 (SB 1721), s 1, eff. 1/1/2003.

Amended by Stats 2001 ch 237 (AB 369), s 1, eff. 1/1/2002.

Previously Amended October 10, 1999 (Bill Number: SB 948) (Chapter 968).

EXHIBIT C

239 Cal.App.4th 56, B250111, Carson Harbor Village, Ltd. v. City of Carson

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Case History

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239 Cal.App.4th 56

190 Cal.Rptr.3d 511

CARSON HARBOR VILLAGE, LTD., Plaintiff and Respondent,

v.

CITY OF CARSON, Defendant and Appellant.

B250111

California Court of Appeals, Second District, Eighth Division

July 31, 2015

[As Modification on August 21, 2015]

APPEAL from a judgment of the Superior Court of Los Angeles County No. BS133538. James C. Chalfant, Judge.

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COUNSEL

Aleshire & Wynder, William W. Wynder, Sunny K. Soltani and Jeff M. Malawy, for Defendant and Appellant.

Gilchrist & Rutter, Richard H. Close, Thomas W. Casparian, and Yen N. Hope, for Plaintiff and Respondent.

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OPINION

RUBIN, J.

The City of Carson appeals from the judgment in this mandate action directing it to approve Carson Harbor Village, Ltd.'s application to convert its mobilehome park from a rental facility to a subdivision of resident-owned lots. We reverse because substantial evidence supports the City's findings that allowing the conversion would be inconsistent with the open space element of its general plan by placing at risk a state and federally regulated wetlands area within the confines of the mobilehome park.

OVERVIEW

Cities must have general plans governing development, including the protection of open space, and must also deny proposed subdivisions that are inconsistent with their general plans. (Gov. Code, §§ 65300, 65302, 66474, subd. (b), 66498.6, 65567.)^[1] The conversion of a mobilehome park from individual space rentals to lot ownership is a subdivision subject to the subdivision laws. (§§ 66424, 66427.4, 66427.5, 66428.1.) The statute governing that procedure is concerned with protecting low-income renters and a proposed conversion may be denied if the applicable local agency determines that the proposal is a sham designed to dodge local rent control ordinances. (§ 66427.5.) However, that statute limits the scope of the local agency's hearing to the issue of compliance with those statutory requirements. (§ 66427.5, subd. (e).)

Previous Courts of Appeal held that the scope of hearing provision barred local agencies from imposing additional conditions related to the bona fide conversion issue. In reliance on those decisions, we held in our earlier decision in this case that the scope of hearing provision also prevented local agencies from denying a proposed mobilehome park conversion if it was inconsistent with elements of a city's general plan. (*Carson Harbor Village, Ltd. v. City of Carson* (Mar. 30, 2010, B211777) [nonpub. opn.] (*Carson Harbor I*).) Our Supreme Court's later decision in *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783 [149 Cal.Rptr.3d 383, 288 P.3d 717] (*Pacific Palisades*) has led us to reconsider that part of our decision in *Carson Harbor I* and conclude that at least under the facts of this case, they now can.

FACTS AND PROCEDURAL HISTORY

Carson Harbor Village, Ltd. (the park), is a mobilehome park in the City of Carson (City). It consists of 420 rental spaces on 70 acres of land, 17 acres of

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which are federally and state regulated wetlands and which is the only open space area within the City. In 2007 the City rejected the park's application to convert from rental spaces to a subdivision of individually owned lots. The primary reason for the denial was the City's finding that the proposed subdivision was a sham intended to skirt the City's rent control laws, based on the supposed inadequacy of tenant support surveys, as well as a lack of tenant support. The City also denied the application because the proposed subdivision was inconsistent with the affordable housing and open space elements of its general plan.^[2]

A 2008 mandate action by the park led to a trial court judgment against the City. The trial court found that: (1) even though a 2005 tenant survey had been inadequate, a 2007 survey by the park had been properly conducted; (2) in any event, the application could not be rejected based on a lack of tenant support; and (3) the City could not deny the application for inconsistency with its general plan. The City appealed and we reversed in part and affirmed in part in *Carson Harbor I, supra*, B211777.

We held that the City could find the subdivision plan was a sham based on the lack of tenant support and remanded the matter back to the trial court with directions to order the City to reconsider the application in light of the 2007 survey, along with directions to receive additional information that would clarify or supplement the application and the evidence received before. (*Carson Harbor I, supra*, B211777.) We also held that the City could not reject the application based on its supposed inconsistency with elements of its general plan. (*Ibid.*)^[3]

On remand, the City held new public hearings in 2011 and once more rejected the park's subdivision application. The City found that even though purchase incentives offered by the park had increased tenant support from 11 percent to 24 percent, that level of support was insufficient. The City also found that the proposed conversion was not bona fide because it was unlikely that many of the low income tenants living in the park would agree to buy their lots, the tenant survey improperly gauged support for the incentives, not the conversion, and the required tenant impact report did not include information requested about the wetlands and the displacement effect on current tenants. The City alternatively denied the application because it was inconsistent with its general plan's affordable housing and open space elements and posed a risk to the wetlands and its wildlife. (§ 66474, subs. (b) & (e).)

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The park brought another mandate action. The trial court issued an interim order that the City conduct a new hearing, and take expert evidence, concerning only the issue of whether the proposed conversion was bona fide. In 2012, the City held that hearing and once more rejected the park's subdivision application. The matter returned to the trial court, which found for the park on the bona fide conversion issue. The trial court also found that, in part based on our prior opinion, inconsistency with a local agency's general plan was not a proper ground to deny the application and that, in any event, there was no evidence the park's proposal was inconsistent with the City's general plan.

STANDARD OF REVIEW

We review the City's decision to deny the park's subdivision application under the substantial evidence standard. (*218 Properties, LLC v. City of Carson* (2014) 226 Cal.App.4th 182, 189 [171 Cal.Rptr.3d 608] (*218 Properties*)). We do not review and are not bound by the trial court's factual findings or legal conclusions. (*Ibid.*) Instead, our scope of review is the same as the trial court's: we examine the entire record to determine whether the City's findings were supported by substantial evidence. (*Ibid.*) However, we begin with the presumption that the findings are supported by substantial evidence. It is the park's burden to prove otherwise. (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 287 [82 Cal.Rptr.2d 569].)

DISCUSSION

1. The Laws Regarding General Plans and Subdivisions

All local governments must have a comprehensive and long-term general plan for the development of land within their boundaries. (§ 65300.) The general plan sits atop the hierarchy of land use regulations. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773 [38 Cal.Rptr.2d 699, 889 P.2d 1019] (*DeVita*)). Acting much like a land-use constitution, it is the basic charter governing the direction of future land use within a locality. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 542 [277 Cal.Rptr. 1, 802 P.2d 317].) The propriety of virtually any local

land use decision depends upon its consistency with the general plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570 [276 Cal.Rptr. 410, 801 P.2d 1161].)

The general plan must include seven elements – land use, circulation, conservation, housing, noise, safety, and open space – and must address each in whatever level of detail local conditions require. (*DeVita, supra*,

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9 Cal.4th at p. 773; §§ 65301, 65302.) Open-space land includes areas designated for the preservation of natural resources such as plant and animal life, including habitats for fish and wildlife species, along with streams and watershed lands. (§ 65560, subd. (b)(1).)

When enacting the open space elements law, the Legislature made several findings. (§ 65561.) The Legislature found that preserving open-space land was “necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.” (§ 65561, subd. (a).) The Legislature also found that increasing population “demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws....” (§ 65561, subd. (c).) Therefore the open space elements law was “necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.” (§ 65561, subd. (e).)

The Legislature also declared its intent in adopting the open space element law: “(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible. [¶] (b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.” (§ 65562.) Therefore, “[n]o building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.” (§ 65567.)

The Subdivision Map Act (§§ 66410-66499.37 (the Map Act)) is the primary regulatory control over the subdivision of real property in California. (*Pacific Palisades, supra*, 55 Cal.4th at p. 798.) The Map Act is designed to promote orderly community developments and involves an application process that culminates in public hearings to determine whether a subdivision map will be approved. (55 Cal.4th at p. 799.) The Map Act lists a number of circumstances that require denial of a map, including inconsistency with an applicable general plan (§ 66474, subd. (b)), and the likelihood that the proposed subdivision will cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat. (§ 66474, subd. (e).) Mobilehome park conversions are subdivisions subject to the Map Act. (§§ 66424, 66427.4, 66427.5, 66428.1; *Pacific Palisades*, at p. 800.)

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2. Mobilehome Park Conversion Statutes

In 1984, the Legislature passed the Mobilehome Park Resident Ownership Program (Health & Saf. Code, § 50780, et seq., (MPROP)) because mobile-home parks—a significant source of

affordable housing—were threatened by cost increases, physical deterioration, and pressures to convert them to other uses. (*Pacific Palisades*, *supra*, 55 Cal.4th at pp. 803-804.) MPROP was designed to encourage and facilitate the conversion of mobilehome park ownership by residents, local public entities, or qualified nonprofit housing sponsors. To that end, MPROP provides for public financing assistance for mobilehome park conversions. (*Id.* at p. 804.)

In 1991, the Legislature enacted the provision in dispute here—section 66427.5. Although it has gone through a cycle of judicial interpretations and responsive legislative amendments, its essence remains the same. When a mobilehome park's owner seeks to convert from rental to resident ownership by way of the subdivision process, it must take certain steps in order to avoid the economic displacement of residents who choose not to buy. The owner must: (1) offer each existing tenant an option to either buy his current rental space or continue as a tenant; (2) file a report on the impact of the conversion on the tenants; (3) obtain a survey of tenant support for the proposed subdivision pursuant to an agreement with any resident homeowners' association; (4) submit the survey results to the agency that will act on the subdivision application; and (5) for low income nonpurchasing residents, apply a rent control formula for the ensuing four years. (§ 66427.5, subs. (a)-(e).)^[4]

The process culminates in a hearing before the applicable local agency with authority to approve or disapprove the proposed subdivision. (§ 66427.5, subd. (e).) The troublesome issue here arises from the remainder of that subdivision, which states that “[t]he scope of the hearing shall be limited to the issue of compliance with this section.” (*Ibid.*) We next consider how that subdivision has been construed.

3. Legislative History of, and Appellate Decisions Construing, Section 66427.5

When section 66427.5 was enacted in 1991, it applied only to mobilehome subdivision conversions using public financing under MPROP. (Stats. 1991,

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ch. 475, § 2, p. 3324; *Colony Cove Properties, LLC v. City of Carson* (2010) 187 Cal.App.4th 1487, 1498-1499 [114 Cal.Rptr.3d 822] (*Colony Cove*).) The statute was amended in 1995 to remove the MPROP restriction and permit its application to all proposed mobilehome park conversions. (Stats. 1995, ch. 256, § 4, pp. 882, 883.) The 1995 amendment added provisions to avoid the economic displacement of tenants, including the requirements to: (1) offer residents a choice between buying or remaining as tenants; and, (2) file a report from the owner on the impact of the proposed conversion. (Stats. 1995, ch. 256, § 4, pp. 882, 883.) The 1995 amendment also added language to what was then subdivision (d) requiring a public hearing on the proposed subdivision that “shall be limited to the issue of compliance with this section.” (Stats. 1995, ch. 256, § 4, pp. 882, 883.) These amendments were silent on whether the conversion must be bona fide.

The court in *Donohue v. Santa Paula West Mobile Home Park* (1996) 47 Cal.App.4th 1168 [55 Cal.Rptr.2d 282] held that local rent control ordinances remained in effect after a subdivision was approved, but only until the first lot was sold. (*Id.* at p. 1175.) Worried that mobilehome park owners might take advantage of that holding and obtain relief from rent control once a single lot had been sold, the City of Palm Springs passed an ordinance requiring a showing that the proposed conversion was bona fide. This included a delay in lifting rent control until escrow closed on one-third of the lots. The court in *El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal.App.4th 1153 [118 Cal.Rptr.2d 15] (*El Dorado*), held that the ordinance violated section 66427.5 because the 1995

amendments strictly limited local agencies from imposing conditions beyond those required by the statute. (*El Dorado*, at pp. 1165-1166.)

The Legislature amended section 66427.5 in response to *El Dorado* by moving the compliance hearing requirement to subdivision (e) and adding a new subdivision (d) that required the subdivider to obtain and provide a survey of the tenants in order to determine their support for the proposed conversion. (§ 66427.5, subd. (d), added by Stats. 2002, ch. 1143, § 1, pp. 7398, 7399; *Pacific Palisades*, *supra*, 55 Cal.4th at p. 809.) The Legislature also enacted, but did not include in the codified amendments, a statement that it intended to address *El Dorado* and ensure that mobilehome park conversions under section 66427.5 were bona fide. (Stats. 2002, ch. 1143, § 2, pp. 7399-7400.) However, the Legislature rejected a proposed amendment that would have given local agencies the authority to impose additional conditions they found “ ‘necessary to preserve affordability or to protect nonpurchasing residents from economic displacement.’ ” (Sen. Amend. to Assem. Bill No. 930 (2001-2002 Reg. Sess.) June 26, 2002, § 1, p. 3, italics omitted; *Pacific Palisades*, at p. 809.)

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In *Sequoia Park Associates v. County of Sonoma* (2009) 176 Cal.App.4th 1270 [98 Cal.Rptr.3d 669] (*Sequoia Park*), the court invalidated a county ordinance that set a sliding scale percentage of tenant support in order to determine whether a proposed conversion was bona fide. The court held that through section 66427.5 the Legislature had expressly and impliedly preempted any local regulation of mobilehome park conversions. (*Sequoia Park*, at pp. 1275, 1297-1300.) The court in *Colony Cove*, *supra*, 187 Cal.App.4th 1487 invalidated a similar ordinance enacted by the City of Carson, holding that the 1995 amendments to section 66427.5 prevented local agencies from adopting tougher measures regulating mobilehome park conversions. (*Colony Cove*, at p. 1506.) The court added that the Legislature’s rejection of a proposal to allow local agencies to add conditions showed that “it continues to oppose local deviation from or addition to the statutory criteria.” (*Ibid.*)

4. The Pacific Palisades Decision

Two sets of statutes, not directly involved in the current appeal, were at issue in *Pacific Palisades*: the Coastal Act and the Mello Act. The California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act) empowers local agencies to regulate development within the state’s entire coastal zone. (Pub. Resources Code, § 30001.) The Mello Act (Gov. Code, §§ 65590, 65590.1) supplements the housing element provisions of the Government Code’s general plan scheme by establishing minimum requirements for affordable housing within the coastal zone. (§ 65590, subs. (b) & (k); *Pacific Palisades*, *supra*, 55 Cal.4th at p. 798.) The *Pacific Palisades* court considered whether a proposed mobilehome park subdivision in the coastal zone was subject to those provisions, or whether Government Code section 66427.5 occupied the field and barred their use by local agencies when considering a conversion application.

The park owner in *Pacific Palisades* brought a mandate action against the City of Los Angeles after the city refused to accept its subdivision application without also providing applications for a coastal development permit and for Mello Act approval. The trial court found for the owner, concluding that section 66427.5 set forth the exclusive requirements for subdivision approval, thus exempting the Coastal Act and the Mello Act from the subdivision application process. The Court of Appeal reversed, holding that the policy considerations behind the Coastal Act and Mello Act were more extensive than, and therefore took precedence over, those embodied in section 66427.5.

The Supreme Court affirmed, rejecting the park owner's contentions that, in line with *El Dorado*, *Sequoia Park*, and *Colony Cove*, Government Code section 66427.5 prevented local agencies from straying outside the requirements imposed by that section when passing on proposed mobilehome park

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conversions. Key to its analysis was the important policy considerations embodied in both the Coastal Act and the Mello Act. In enacting the Coastal Act, the Legislature found that the state's coastal zone was "a distinct and valuable natural resource of vital and enduring interest to all the people," that permanently protecting this resource was a "paramount concern" that was "necessary to protect the ecological balance of the coastal zone," and that making sure future developments complied with the act was "essential to the economic and social well-being of the people of this state...." (Pub. Resources Code, § 30001, subs. (a)-(d).) The Coastal Act relies heavily on local governments to achieve its purposes, and development permits issued under the Coastal Act are not just a matter of local law but also embody state policy. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 794.) The Coastal Act is to be liberally construed. (Pub. Resources Code, § 30009.)

As for the Mello Act, the court looked to the housing element provisions of the general plan statutes, as to which the Legislature declared: "[t]he availability of housing is of vital statewide importance;" and "decent housing and a suitable living environment for every Californian... is a priority of the highest order." (§ 65580, subd. (a).) The Mello Act supplements these provisions in the coastal zone, the court held. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 798.)

These "[s]ignificant state policies favor an interpretation of... section 66427.5" that does not strip away Coastal Act and Mello Act jurisdiction over land use within the coastal zone. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 803.) The *Pacific Palisades* court rejected the park owner's reliance on MPROP as a superseding legislative policy that favored mobilehome park conversions by simplifying the approval process for those conversions. "[N]othing in... section 66427.5 suggests a belief by the Legislature that this policy is of more importance than and overrides the 'paramount' and 'vital' concerns of the Coastal Act and the Mello Act." (*Id.* at p. 805.)

This conclusion was supported by other factors: (1) section 66498.6, subdivision (b) of the Map Act states that nothing in that act affects a subdivider's or local agency's obligations to comply with applicable state and federal laws, regulations or policies; (2) the other interests at stake; and (3) the absence of language in section 66427.5 that expressly excepts mobile-home park conversions from those laws, regulations, or policies. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) These factors "strongly suggest [that section 66427.5], like the other provisions of the Subdivision Map Act, is intended to operate in conjunction with other state laws." (*Ibid.*)

The *Pacific Palisades* court also relied on rules of statutory construction requiring the courts to harmonize and reconcile inconsistencies between

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statutory provisions wherever possible and, absent an express declaration of legislative intent, to avoid implied repeals unless the conflicting provisions were fatally irreconcilable and inconsistent. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) Applying these rules, the Supreme Court held that section 66427.5 could be "construed to require a hearing devoted exclusively to the issue of economic displacement of tenants *in addition* to the procedures and hearings required by other state

laws.” (*Pacific Palisades*, *supra*, at p. 805, original italics.) “Such a construction is consistent with the general application of the Subdivision Map Act *and* the Coastal Act and the Mello Act to developments within the coastal zone, harmonizing the provisions of all three acts.” (*Ibid*, original italics.) It was also consistent with the Mello Act’s express mandate that it applied to mobilehome park conversions within the coastal zone. (*Id.* at pp. 805-806, citing § 65590, subs. (b) & (g)(1).) The contrary construction advanced by the park owner not only failed to harmonize the three acts; it would also lead to an implied partial repeal by overriding their provisions. (*Pacific Palisades*, at p. 806.)

Finally, the Supreme Court rejected the park owner’s reliance on *El Dorado*, *Sequoia Park*, and *Colony Cove*, including the Legislature’s decision to forego an amendment that would have given local agencies additional regulatory authority. At issue in those decisions was a local agency’s attempt to add further conditions to section 66427.5 in order to avoid economic displacement of the park’s tenants. None considered “the specific issues presented by this case: whether the section exempts conversions from other state laws, such as the Coastal Act and the Mello Act, or bars local agencies from exercising the authority delegated to them by the Coastal Act and the Mello Act to require compliance with those acts and to reject or deny applications that do not establish compliance.” (*Pacific Palisades*, *supra*, 55 Cal.4th at pp. 809-810.)

5. The General Plan Open Space Element May Be Considered as Part of the Mobilehome Park Conversion Process

The City contends that *Pacific Palisades*’ reasoning applies to its reliance on the open space element of its general plan as an alternative ground for denying the park’s conversion application. We agree.

The policy concerns that underlie the open space element are strikingly similar to those of the Coastal Act that the *Pacific Palisades* court found so persuasive. In the Coastal Act, the Legislature declared that the coastal zone was a “paramount concern” whose protection was “necessary” to protect a valuable resource that was “essential” to the economic and social well-being of Californians. (Pub. Resources Code, § 30001, subs. (b)-(d); see *Pacific Palisades*, *supra*, 55 Cal.4th at pp. 794, 804.) Likewise, the Legislature found

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that the open space elements law was “necessary” to maintain the economy and to assure the availability of land for agriculture, recreation, and scenic beauty. (§ 65561, subd. (a).) Our increasing population demanded that local agencies take positive action to protect open space, and that the open space laws were “necessary” to promote the general welfare and protect the public’s interest in maintaining this limited and valuable resource. (§ 65561, subs. (c) & (e); see § 65562, subd. (a).)

The existence of these policies brings into play the same interpretive rules promoting statutory harmonization and rejecting implied repeals that motivated the *Pacific Palisades* court. Under the Map Act, local agencies must reject a proposed subdivision if it is inconsistent with their general plan. (§ 66474, subd. (b).) And while a local agency may approve a vesting tentative subdivision map that departs from local ordinances, policies, and standards (§§ 66474.2, 66498.1, 66498.4) those departures are permitted only to the extent they are “authorized under applicable law.” (§ 66498.4.) Furthermore, nothing in these tentative vesting map provisions “removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or federal laws, regulations, or policies.” (§ 66498.6, subd. (b); see *Pacific Palisades*, *supra*, 55 Cal.4th

at p. 805.) Likewise, the general plan open space law states that no subdivision may be approved unless it is consistent with a local open space plan. (§ 65567.)

Although the park relies on the availability of MPROP public financing to show that its proposed subdivision will not displace tenants, that program requires compliance with local plans and zoning laws as a prerequisite to funding.^[2] (Health & Saf. Code, § 50786, subd. (d)(3).) We do not see how the City could approve the subdivision based on the prospect of public financing for low incomes residents if the switch would be inconsistent with its general plan.

Section 66427.5 says nothing about excepting mobilehome park conversions from those requirements. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) Instead, section 66427.5 can be read to require a hearing on tenant economic displacement wholly apart from considerations of the open space element of the City's general plan. To hold otherwise would not just fail to harmonize these statutory provisions; it would also lead to their implied partial repeal. (55 Cal.4th at pp. 805-806.)^[6]

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The park does not address these concerns. Instead, it contends we cannot follow *Pacific Palisades* for three reasons: (1) our holding in *Carson Harbor I* that general plan inconsistency was not an available ground for denying a proposed mobilehome park conversion is law of the case; (2) the *Pacific Palisades* holding is limited to the Coastal Act and the Mello Act; and (3) under section 66427.2, conversions to condominium ownership are exempt from the Map Act's requirements. We take each in turn.

First, the park relies on outdated authorities to support its law of the case contention. An intervening Supreme Court decision such as *Pacific Palisades* has for some time been considered an exception to the law of the case doctrine. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 507, fn. 5 [121 Cal.Rptr. 705, 535 P.2d 1161]; *Ryan v. Mike-Ron Corp.* (1968) 259 Cal.App.2d 91, 96-97 [66 Cal.Rptr. 224].) The Court of Appeal decision in *Pacific Palisades* was filed in August 2010, and review was granted (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles*^[2] (Cal.App.)), months after our decision in *Carson Harbor I*. The City's 2011 resolution denying the park's subdivision application expressly relied on general plan inconsistency as an alternative ground in the event the Supreme Court affirmed the Court of Appeal's *Pacific Palisades* decision. The Supreme Court did so, and as a result the law of the case exception applies here.

Second, we acknowledge that the *Pacific Palisades* court limited its holding to the applicability of the Coastal Act and the Mello Act to mobilehome park subdivisions. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 803.) That was the issue presented to the court. The park contends that the court did more than that, reiterating the holdings of *El Dorado*, *Sequoia Park*, and *Colony Cove* that "section 66427.5 precludes local regulation of mobile-home park conversions to resident ownership . . ." (*Id.* at p. 810.) The park omits both the context and the court's qualifying language, which distinguished those decisions despite their seemingly broad statements precluding local regulation of mobilehome park conversions because none addressed "the specific issues presented by this case: whether the section exempts conversions from other state laws, such as the Coastal Act and the Mello Act, or bars local agencies from exercising the authority delegated to them by [those acts] to require compliance with those acts. . ." (*Ibid.*, italics added.)

In its introductory paragraph, the *Pacific Palisades* court framed its holding as a rejection of the notion that section 66427.5 exempts mobilehome park conversion "from the need to comply with

other state laws, ..." (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 792.) Elsewhere, the court distinguished *El Dorado*, *Sequoia Park*, and *Colony Cove* and held that the factors underlying

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its analysis "strongly suggest that [§ 66427.5] like the other provisions of the Subdivision Map Act, is intended to operate in conjunction with other state laws." (*Id.* at p. 805, italics added.) Based on this, we do not read *Pacific Palisade* to preclude its application where other state laws are concerned. To the contrary, we see it as an invitation to consider that issue and apply *Pacific Palisade*'s reasoning where appropriate.

Finally, the park contends that section 66474, part of the Map Act was not applicable under section 66427.2, which states: "Unless applicable general and specific plans contain definite objectives and policies, specifically directed to the conversion of existing buildings into condominium projects or stock cooperatives, ... [section 66474 and others not relevant here] shall not apply to condominium projects or stock cooperatives, which consist of the subdivision of airspace in an existing structure, unless new units are to be constructed or added."

This contention was raised without discussion or analysis of how it might apply here. For instance, the park simply assumes, without citation to authority, that section 66427.2 applies to mobilehome parks. We acknowledge that a mobilehome park might qualify under Civil Code section 4125, subdivision (b), which defines a condominium project as an undivided interest in the common area of real property, along with a separate interest in space called a unit, whose boundaries are included in a recorded final map. Even so, the park does not address why or whether the park's proposed subdivision "consist[s] of the subdivision of airspace in an existing structure, ..." (§ 66427.2.) Nor does it explain why or whether the City's open space element fails to include the requisite definite objectives and policies. (§ 66427.2.) We therefore deem the issue waived. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 732 [136 Cal.Rptr.3d 197].)

We alternatively affirm on the merits of this issue. First, the City's open space element defines the wetlands as the *only* open space area that required preservation as a habitat for plant and animal life. In light of the City's findings concerning the environmental risks posed by the proposed conversion (see Discussion, pt. 6.1, *post*), the open space element's stated need to preserve the only available open space is a specific enough directive as it arises exclusively in the context of the mobilehome grounds. The park does not suggest, and we do not believe, that anything more need be said, at least on the facts of this case.

Second, applying section 66427.2 on these facts would conflict with several other provisions. These include: section 66474, subdivision (e), which requires the disapproval of a proposed subdivision that poses a sufficient risk

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to the environment or fish and wildlife; section 65567, part of the General Plan scheme, which prohibits subdivision approvals that conflict with a local open space plan; section 66498.6, subdivision (b), which prohibits disregard of state laws and policies when approving a vesting tentative map; and MPROP, which requires compliance with local plans in order to obtain the public-assistance financing that the park relies on to show that the proposed conversion will be affordable for its low-income tenants. (Health & Saf. Code, § 50786, subd. (d)(3).)

In short, whatever application section 66427.2 might have here is outweighed by the competing statutory and policy considerations requiring compliance with the City's open space element in order to preserve that valuable resource. For the reasons set forth above, we therefore hold that local agencies may deny a proposed mobilehome park subdivision that is inconsistent with the open space element of their general plans.^[2] We next consider whether the evidence in this case supports the City's decision to do so.

6. Substantial Evidence Supports the City's Finding of Inconsistency With Its General Plan Open Space Element

6.1 The City's Contentions

The abridged version of the City's open space findings goes like this: the wetlands, which are the City's only open space, would be at risk from the proposed conversion to a common interest ownership because the residents would become unwilling and unsuitable stewards of that natural resource.

This conclusion was based on several factors. The open space element of the City's General Plan identifies the wetlands as the City's only open space area that required preservation as a habitat for plant and animal life. Abandoned oil wells were located near or within the wetlands. Contamination from dumping of oil by-products led to extensive litigation by the park against the well operators and others in

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the mid-1990s to recover its clean-up costs. The park settled that litigation and agreed to assume liability for future contamination. The wetlands serve as an outlet for several tributaries, which had been the cause of past contamination and concomitant litigation. Future contamination from illegal or accidental dumping of hazardous materials was still possible. Routine maintenance and general upkeep of items such as flood gates and drains were costly. The wetlands were subject to a complex scheme of state and federal regulations governing its maintenance. Residents were concerned about the time and costs involved in maintaining the wetlands, as well as future liability for contamination, and would be unable to meet their maintenance obligations or incur the costs required to do so if the mobilehome park conversion were approved.

On appeal, the City relies on *Dunex, Inc. v. City of Oceanside* (2013) 218 Cal.App.4th 1158 [160 Cal.Rptr.3d 670] (*Dunex*) to support these contentions. The *Dunex* court considered the appeal of a mobilehome park owner from Oceanside's denial of its application to convert to residential ownership. The mobilehome park was located within the coastal zone and therefore subject to the Coastal Act. The owner declined to provide an environmental report because the proposed subdivision would result in no physical changes to the property. The mobilehome park was located in a flood plain and one reason that Oceanside denied the application was its inconsistency with the city's local coastal plan.

Based on *Pacific Palisades, supra*, 55 Cal.4th 783, the *Dunex* court held that the application could be denied for inconsistency with Oceanside's local coastal plan. (*Dunex, supra*, 218 Cal.App.4th at pp. 1168-1169.) The court held that the city was warranted in finding that the proposed subdivision was inconsistent with its local coastal plan, which required minimization of risks to life and property in high flood areas. Even though the change in ownership would not add lots or create any physical changes to the property, "the city could reasonably conclude that individual ownership

would be an unacceptable increase in the risk to life and property *because it would move the flood risk to individuals far less able to either respond to or bear that risk than a single [mobilehome park] owner.*" (*Id.* at p. 1169, italics added, fn. omitted.)

The City contends that the *Dunex* rationale applies with equal force here because the evidence shows an unacceptable increase in the risk to the open space habitat if the individual residents became responsible for the wetlands, including its maintenance and any future contamination liability. The park does not discuss this issue and we therefore deem it waived. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1247-1248 [166 Cal.Rptr.3d 676].)

We alternatively conclude on the merits that the *Dunex* rationale applies here. First, this notion finds support in MPROP, where the Legislature

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provided that ownership by public entities or nonprofits was appropriate for older mobilehome parks whose residents "may collectively lack the experience or other qualifications necessary to successfully own and operate their own parks" because they were more likely to be threatened by physical deterioration. (Health & Saf. Code, § 50780, subd. (a)(3).) Second, it is the logical extension of our holding that *Pacific Palisades* extends to mobilehome park subdivisions that violate the open space element of a local agency's general plan. Transferring open space to unwilling guardians who lack the resources to adequately protect it surely poses a meaningful risk to that land, especially in light of the legislative mandate to strictly administer the open space laws. (§65561, subd. (c).) We next consider whether substantial evidence supports such a finding.

6.2 The Evidence Supports a Finding of Open Space Risk

A November 2003 environmental assessment report prepared at the request of the park's lawyers identified three oil wells in and around the wetlands that were active until they were abandoned and plugged in accordance with state law in 2002. Lab tests showed that residual hydrocarbon contamination above regulated levels was still present at one of those wells.

The report said that oil drilling and related activities began in 1938, with photographs showing "several oil derricks, mud pits, stock tanks and production equipment in the central and northern portions of the site." That basic configuration continued into the 1980s, when the property was converted into a mobilehome park. Three or more oil wells and associated drilling and production equipment were on the site from 1938 through 2002, and it was possible that unreported "wildcat" wells could be on or near the site.^[8] Oil and gas wells "are potential concerns when they seep oil or gas, and are not abandoned to current regulations, or have associated surface contamination. They may also be associated with methane hazards."

The park's environmental report determined that the site's oil production history was a recognized environmental concern under standard testing methods. That "means the presence or likely presence of hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any

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hazardous substances or petroleum products...." Although the report concluded the risks were not significant, the park's status as a recognized environmental concern was "not intended to include *de*

minimis conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.” (Original italics.)

The City’s 2011 resolution denying the park’s application relied in part on *Carson Harbor Village, Ltd. v. Unocal Corp.* (9th Cir. 2001) 270 F.3d 863, to verify that the park had sued the well’s operators because of oil contamination in the wetlands. According to the Ninth Circuit, the park sued the former well operators in federal court to recover approximately \$285, 000 in costs incurred from cleaning up lead and petroleum that covered an area measuring 75 feet wide, 170 feet long, and 5 feet deep. (*Id.* at pp. 868-869.) Andrew Vasquez, the secretary of the tenants’ homeowners association, testified at a 2011 public hearing that the park settled that action and agreed to “accept responsibility for liability for contamination of the park.” That testimony was never rebutted.^[9]

Documents prepared by the park show that the wetlands are regulated by both the state and federal governments and is home to protected wildlife. A Department of Fish and Game questionnaire filled out by the park in order to obtain permission to perform routine trash removal in the wetlands affirmed that the wetlands had been designated as “wild and scenic” under either state or federal law. An August 7, 2006, letter from the park’s lawyers to the City states that streambed maintenance was performed in late June or early July “to avoid disturbing the breeding season of protected wildlife.” The letter confirmed that the Department of Fish and Game “has primary oversight over the annual cleanup.”

The draft Covenants, Codes & Restrictions (CCRs) that the park prepared as part of the ongoing subdivision approval process states that the wetlands were federally protected and that the homeowners association to be formed upon subdivision “may be obligated, from time to time, to perform certain special maintenance of the Wetlands, which includes, but is not limited to, trash removal, repair of flood control gates, removal of damaged trees and replacement of French drains. The Association hereby affirms those obligations and intends that the City shall be a third party beneficiary of said obligations.”

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Photographs and written reports document the park’s annual clean-up efforts in 2006 and 2007. Approximately 250 trash bags were filled during the 2006 clean up. Photos from both years depict vast amounts of refuse strewn throughout the wetlands, some on the ground, some in the water impeding the flow through flood control gates. Annual maintenance costs were around \$50, 000.

During a 2007 hearing, city planning staff member Sheri Repp-Loadsman reported that the park owner had the marsh tested about 10 years earlier due to fears of possible contaminants entering from upstream.^[10] Although the Regional Water Quality Control Board found no contamination, Repp-Loadsman believed that the possibility remained because the wetlands accepted flow from other sources.

Several park residents testified in 2011 about their reluctance to take on the responsibility of maintaining the wetlands. In addition to homeowners association secretary Vasquez’s testimony that the park settled its earlier oil contamination lawsuit by agreeing to accept responsibility for contamination, he also testified that “[n]o resident has the skill or specialized training to maintain a state-protected wetlands.” Vasquez wondered whether it was reasonable to “expect that mobile home park residents can manage a complex and enormous wetlands” without the financial resources that the

park had. Vasquez added that he could not afford the liability that might come from any future oil contamination.

Park resident Louis Cogut testified that buying into the subdivision came with responsibility for the common areas, including “the foul aroma from that marsh.” Park resident Martin Garcia testified that the residents could not afford to buy or borrow money to fund a lot purchase. Long-time park resident Ivan Gulligan testified that the park’s decaying infrastructure, including the marsh, made buying his lot undesirable. Park resident David White testified at a 2007 hearing that 65 percent of the park’s residents were low income, including seniors on fixed incomes with high medical bills. Of those residents voting on the proposed conversion, 65 percent also opposed it.

Instead of engaging in any meaningful discussion or analysis of the evidence on appeal, the park simply restates some of the trial court’s findings from the 2008 and 2013 mandate actions. As noted earlier, we do not review the trial court’s findings and our focus is instead on the evidence in the administrative record. We therefore hold that the park has waived the substantial evidence issue. (*In re C.R.* (2008) 168 Cal.App.4th 1387, 1393 [86 Cal.Rptr.3d 335].) We alternatively hold on the merits that the City’s open space risk findings are supported by substantial evidence.

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The evidence shows that the wetlands require extensive yearly maintenance, subject to regulatory oversight by the state Department of Fish and Wildlife, as well as federal regulations. It has a history of past oil contamination and, according to the park’s 2003 environmental report, contamination at one well remains above regulated levels. In addition, the report identifies the site’s past oil production activities as a recognized environmental concern, meaning it posed a material, not de minimis, risk of harm to the environment. There is a possibility that other wells remain on the site.

When the park settled its action with well operators, it agreed to accept responsibility for oil contamination. The CCRs for the proposed subdivision would place responsibility for the wetlands directly on the individual lot owners through their homeowners association. The residents, nearly two-thirds of whom are low income, are reluctant or unable to take on that administrative and financial liability. Combined with the facts that the wetlands are the only open space in the City and are home to federally protected wildlife, questions concerning the residents’ willingness and ability to tend to this important natural resource supports the City’s findings that the proposed mobilehome park conversion was inconsistent with the open space element of its general plan (§ 66474, subd. (b)), and would likely cause substantial environmental damage or substantially injure that habitat and the creatures living there. (*Id.* at subd. (e).) These findings are not necessarily offset by the prospect of the homeowners association hiring a professional management company to oversee the park’s day-to-day operations. Once the City determined that the conversion would be inconsistent with the open space element of the City’s general plan, the City was required to reject the park’s application. (§ 65567.)

DISPOSITION

The judgment is reversed and the trial court is directed to enter a new and different judgment in favor of the City of Carson. Appellant shall recover its appellate costs.

Flier, J., concurred.

BIGELOW, P. J., Concurring and Dissenting:

I concur in part and respectfully dissent in part.

I agree with the majority opinion's conclusion that the City of Carson (City) properly considered the issue of whether Carson Harbor Village, Ltd.'s (the park) proposed conversion was inconsistent with the City's general plan. As I indicated in *Carson Harbor Village, Ltd. v. City of Carson*

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(Mar. 30, 2010, B211777) [nonpub. opn.], I do not read the mobile home park conversion statute (see Gov. Code, § 66427.5)^(L) to have established a stand alone process granting a park's residents a simple veto by vote over a proposed conversion. Section 66427.5 added a preliminary step in the subdivision process in the context of a mobile home park conversion to resident-owned spaces to address resident displacement concerns, leaving in place the broader structure of the Subdivision Map Act (§ 66410 et seq.). In *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783 [149 Cal.Rptr.3d 383, 288 P.3d 717], the Supreme Court clarified that section 66427.5 did not strip away California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act) and Mello Act jurisdiction over land use matters involving a proposed mobilehome park conversion. By parity of reasoning, I would find that section 66427.5 does not displace a subdivider's obligation to comply with the requirements of a city's general plan. (See § 65300 et seq.) As the majority notes, a city's general plan acts much like a land use constitution, governing future land use decisions within its jurisdiction. (*Leshner Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 542 [277 Cal.Rptr. 1, 802 P.2d 317].) I see no reason that a general plan ought to be afforded less importance than the Coastal or Mello Acts.

I depart with the majority opinion in its conclusion that substantial evidence supports the City's determination that the park's proposed conversion is inconsistent with the City's general plan. The "open space" element (see § 65560 et seq.) of the City's general plan is the only contested issue in the current case. As relevant to the current case, the City's "Open Space and Conservation Element" of its general plan reads as follows: "The Government Code requires that open space for the preservation of natural resources be incorporated into the General Plan. Such resources include areas required for the preservation of plant and animal life, areas of ecological and other scientific study value, rivers, streams, bays and estuaries, coastal beaches, and lake shores. The only such area identified within Carson is the lake within the Carson Village Mobilehome Park. This lake, covering approximately 17 acres, provides habitat for a variety of plants and small animals."

In my view, the issue is whether the park's proposed conversion will damage or endanger the lake, with its habitat for a variety of plants and small animals. I see no evidence in the record to support a conclusion that a change in the structure of the ownership of the park — from a landlord, single owner (a limited partnership) to a collective of individual owners with a managing homeowners' association — will harm the lake. A mobile home park with a lake was present before conversion and will still be present after conversion. The change in identity of the owner of the property, which is all that is truly at issue here, has not been shown to pose a danger to the lake.

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The majority opinion concludes that substantial evidence supports the City's finding that there would be a risk to the lake "because the residents would become unwilling and unsuitable stewards" of the lake. (Maj. opn., ante, at p. 72.) The ensuing discussion which follows, however, focuses on the environmental *conditions* of the lake, i.e., the physical problems and potential problems attendant with the lake. For example, the majority discusses trash, ongoing maintenance needs, and the future

potential need for remedial measures in the event of a contamination incident arising from capped oil wells in the area. However, the critical issue in this case is the *management* of the lake property. That is, whether there is evidence that the physical conditions of the lake are only capable of being properly managed with the existing single-owner structure in place, as opposed to a homeowners association after conversion. I do not see any such evidence. There is no evidence in the record to support a conclusion that the park's residents acting through a homeowners association would be less suitable stewards of the lake property than the current landlord, single owner of the property, or that the City would incur more difficulties in compelling needed environmental remedial measures against numerous individual owners acting through a homeowners association than it would against a landlord, single-owner of the property.

I acknowledge that *Dunex, Inc. v. City of Oceanside* (2013) 218 Cal.App.4th 1158 [160 Cal.Rptr.3d 670] (*Dunex*) supports the majority's opinion, but I am not convinced. *Dunex* offers no discussion of any evidence supporting its conclusion that a change from a landlord, single-owner structure to a homeowners association, multiple-owner structure poses a risk to open space. *Dunex* seems simply to accept that a city may find that individual owners of a mobilehome park will not be as good citizens as a prior landlord, single-owner had been. If *Dunex* is stating that the individual owners of a mobile home park will not have the financial resources to respond to problems as the prior landlord, single owner did, its conclusion is based on speculation as to the financial condition of the prior landlord owner. There is no *evidence* cited in *Dunex* actually showing the financial ability of *anyone* to address environmental problems. In the absence of evidence that a homeowners association would be less responsible, and or have less resources in matters of property management than a landlord, single owner of a property, I would affirm.

The only evidence in the record here concerning the *management* of the lake property is that the current owner undertook clean-up efforts in 2006 and 2007, and that annual maintenance costs are around \$50, 000. It is undisputed that there are 420 spaces in the park. Thus, the annual maintenance costs divided amongst residents would be approximately \$120, or about \$10 per month. I would not find the imposition of \$10 per month in maintenance costs to support a conclusion that the management of the park will be harmed in the future.

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I would affirm the trial court's judgment directing the City to approve the park's application to convert its mobile home park from a rental facility into a subdivision of resident-owned lots with a homeowners association.

Notes:

[1] All further undesignated section references are to the Government Code.

[2] Although the parties' primary focus has been on issues related to the extent of tenant support for the proposed conversion, our decision is based solely on the open space issue under the City's general plan. We therefore discuss the tenant support issues only briefly.

[3] As we set forth in part 5 of our Discussion, we were wrong. (See fn. 7, *post.*)

[4] The statute was amended in 2013 to provide that the local agency may deny a subdivision application if less than half the residents approve of the conversion. (§ 66427.5, subd. (d)(5).) Therefore, if the City were to consider the application in the first instance today, it could deny it based solely on the most recent tenant survey results. The City contends that we

can and should apply this new provision on appeal. However, we held in *218 Properties, supra*, 226 Cal.App.4th 182 that the City could not do so. (*Id.* at p. 194, fn. 7.) In any event, because we reverse on another ground we need not revisit that issue.

^[5] The actual availability of those funds in light of the state's recent budget problems was in dispute.

^[6] This conclusion carries extra weight in light of Health & Safety Code section 50786.

^[7] Reporter's Note: Review granted on December 1, 2010, S187243. On November 29, 2012, the Court of Appeal opinion was affirmed. For Supreme Court opinion, see 55 Cal.4th 783.

^[8] By doing so we acknowledge that we were wrong to hold otherwise in *Carson Harbor I, supra*, B211777. Presiding Justice Bigelow's dissent in that case pointed out that section 66427.5 was merely a "preliminary step in the subdivision process in the context of a mobilehome park conversion, adding a special hearing on the limited issue of resident displacement under the section as a whole, apart from the normally followed processes for approval of a tentative map [citation] and approval of a final map [citation]. I do not believe that section 66427.5, subdivision (e), was intended to eliminate the broader structure of the Subdivision Map Act vis-à-vis a tentative map and a final map, and the approval of the same.... As I read the statutes, once a subdivider and local agency have finished the required hearing to determine compliance with section 66427.5, the now-deemed compliant informational materials, are ready for the tentative map approval process." (*Carson Harbor I, supra*, B211777.) As we read *Pacific Palisades*, she was correct.

^[9] The existence of other wells was confirmed in the City's 2012 environmental report, which said that there were 13 abandoned wells on the property dating back to the 1920s. Some of those were plugged with wood or stove pipe casings. That report was prepared for the court-ordered 2012 hearing on the bona fides of the park's conversion application and therefore was not a basis for the 2011 City finding that the proposed subdivision was inconsistent with its open space plan. Because we limit our analysis to the open space issue, which was decided by the City in only its 2011 resolution, the 2012 expert evidence plays no part in our analysis.

^[10] It also appears that despite the park owner's financial resources and legal representation, the park owner was unable to recover his clean-up costs from the well operators under federal law because he failed to comply with its complex requirements. (*Carson Harbor Village v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1260, applying CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601 et seq.)

^[11] The park contended in its federal court action for contamination from dumping oil by-products that certain government agencies were also liable for lead on the property that resulted from contaminated storm water runoff. (*Carson Harbor Vill. v. Unocal Corp., supra*, 270 F.3d at p. 869.)

^[12] All further statutory codes are to the Government Code.

EXHIBIT D

California Government Code 65589. Construction of article.

CALIFORNIA CODES

CALIFORNIA GOVERNMENT CODE

Title 7. PLANNING AND LAND USE

Division 1. PLANNING AND ZONING

Chapter 3. LOCAL PLANNING

Article 10.6. Housing Elements

Current through the 2016 Legislative Session

M65589. Construction of article

- (a) Nothing in this article shall require a city, county, or city and county to do any of the following:
 - (1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.
 - (2) Disapprove any residential development which is consistent with the general plan.
- (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.
- (c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.
- (d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

Cite as Ca. Gov. Code M65589

EXHIBIT E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

NARAGHI LAKES NEIGHBORHOOD
PRESERVATION ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF MODESTO,

Defendant and Respondent;

BERBERIAN HOLDINGS, L.P.,

Real Party in Interest and Respondent.

F071768

(Super. Ct. No. 2006259)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Frank Dougherty, Judge. (Retired Judge of the Merced Super. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Law Office of Donald B. Mooney and Donald B. Mooney for Plaintiff and Appellant.

Meyers, Nave, Riback, Silver & Wilson and Edward Grutzmacher for Defendant and Respondent.

Downey Brand and Donald Sobelman for Real Party in Interest and Respondent.

Following the approval by the City of Modesto (the City) of a shopping center project (the project) that would be adjacent to an established residential neighborhood, Naraghi Lakes Neighborhood Preservation Association (appellant) filed a petition for writ of mandate challenging the approval of the project. Appellant claimed the City failed to follow the City of Modesto Urban Area General Plan (the General Plan), and did not adequately comply with certain requirements of the California Environmental Quality Act (CEQA).¹ The trial court denied the writ petition and entered judgment in favor of the City. Appellant appeals, contending the project was improperly approved and the petition should have been granted because, allegedly, (1) the project was inconsistent with the General Plan regarding the size of neighborhood shopping centers, (2) the City failed to make findings necessary under the General Plan's rezoning policy, (3) the City failed to comply with CEQA because the environmental impact report (EIR) improperly rejected feasible mitigation measures as to traffic impacts, and (4) no substantial evidence supported the City's CEQA findings regarding urban decay and the statement of overriding considerations. Having reviewed appellant's contentions in light of the entire record, we are unable to conclude that the City prejudicially abused its discretion on any of the grounds raised. Accordingly, the judgment of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

The Project Description

The project proposed by real party in interest Berberian Holdings, L.P. (real party) is the construction of a new shopping center on approximately 18 acres of vacant land situated in northeast Modesto. The new shopping center, as proposed, will include

¹ CEQA is found at Public Resources Code section 21000 et seq.

Unless otherwise indicated, all further statutory references are to the Public Resources Code.

CEQA's policies are implemented through regulations known as the CEQA Guidelines (Guidelines) found at California Code of Regulations, title 14, section 15000 et seq.

approximately 170,000 square feet of floor area, with a grocery store serving as the anchor tenant. The proposed site of the project is two contiguous parcels, one 12 acres in size and one six acres in size, bounded by Sylvan Avenue (north), undeveloped land and a storm water detention basin (south), Oakdale Road (east) and Hashem Drive (west). The completed project (i.e., the new shopping center) as proposed by real party will have two large buildings, one that is 78,290 square feet and another that is 66,230 square feet, each of which will be partitioned into spaces for various tenants. The smaller building is planned to include a 51,730 square foot area for the anchor grocery store tenant. Four freestanding pad buildings, ranging in size from 4,200 square feet to 7,670 square feet, are also part of the overall project. The project calls for 816 parking spaces.

An established residential neighborhood borders the project site on the west side along Hashem Drive. The project will provide an eight-foot tall masonry wall with a decorative cap along the west and south property lines. A 16-foot wide landscaped planter on the west side of the masonry wall will provide a further buffer between the development and the residences to the west. The project will be required to provide layered landscaping, shrubs and ornamental trees in the 16-foot wide planter area.

The project necessitates a General Plan Amendment to redesignate the project site from Mixed-use (MU) and Residential (R) zoning to Commercial (C), and to rezone the same property from Planned Development Zone P-D(211) to a new Planned Development Zone, to allow development of a shopping center.

General Plan's Neighborhood Plan Prototype (NPP)

There is no dispute that the project site is located within an area covered by the NPP policies of the General Plan. The General Plan, at chapter III, part C, paragraph 2, explains the purpose of the NPP policies as follows: "The [NPP] was developed in 1974 to provide a 'blueprint' for development of future residential neighborhoods. The [NPP] is designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses. The

[NPP] is a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies. As of the baseline year of 1995, much of the Baseline Developed Area has been developed according to this Prototype. [¶] Within the Modesto community, ‘Neighborhoods’ are typically one mile by 3/4 mile (approximately 480 acres in size), and bordered by Arterial streets or Expressways.”

The General Plan’s NPP provisions then go on to describe the various *policies* that are applicable to the subject neighborhoods. After stating policies relating to housing types and the location of elementary schools and parks within each neighborhood, the NPP policies call for a neighborhood shopping center, described as follows: “A 7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood. The shopping center should be located at the intersection of two Arterial streets, as shown in Figure III-2.” (General Plan, ch. III, part C, § 2, ¶ d.)

The Site’s Entitlement History

The same site has been approved for commercial development as a shopping center on two occasions prior to the instant project. Historically, the zoning for that location has been P-D(211), which allows condominium apartments and cluster houses. In 1981, the City approved a rezoning of the 12-acre parcel² to allow for the development of a shopping center at the corner of Sylvan Avenue and Oakdale Road. When that project did not get developed, the zoning was returned back to P-D(211). In 1987, the City again approved a request to rezone the 12-acre parcel for a shopping center development. When the planned shopping center did not proceed within the time limit for development, the City repealed the zoning changes and returned the zoning to P-D(211). The two shopping center entitlements previously approved (in 1981 and 1987)

² Recall that the entire project site is 18 acres, consisting of two vacant parcels, one of 12 acres and one of six acres. The past entitlements involved the 12-acre parcel only.

for this site entailed proposed developments that were approximately 12 acres in size with approximately 80,000 square feet of leasable space.

Real Party's Initial Application and City's Initial Environmental Study

In November 2011, real party submitted an application to obtain necessary approvals for the proposed project. As noted above, the project set forth in real party's application consisted of a shopping center development on the 18-acre site at the corner of Sylvan Avenue and Oakdale Road, including approximately 170,000 square feet of leasable space with a grocery store as the anchor tenant. The completed shopping center would be called The Marketplace. It would also include an eight-foot tall wall and landscaping as a buffer on the western side of the shopping center along Hasham Drive. Additionally, an integral part of the project was a General Plan amendment to redesignate the project site from Mixed-use (MU) and Residential (R) to Commercial (C) and to rezone the same property from Planned Development Zone, P-D(211) to new Planned Development Zone (P-D) to allow development of a shopping center on the project site.

On May 11, 2012, the City released the results of an initial study, which reported that the Project was within the scope of the General Plan master EIR (MEIR) and that, pursuant to CEQA, no additional environmental review was required. The initial study concluded that the project would have no significant effects on the environment and was consistent with the General Plan and the MEIR. Regarding traffic impacts, the initial study included a traffic study prepared by the engineering firm of Kimley-Horn & Associates (the first traffic study).

The project was first brought before the City of Modesto Planning Commission (the Planning Commission) on August 6, 2012, and testimony was received. A second hearing before the Planning Commission took place on September 17, 2012. Appellant and individual residents of the neighborhood nearby the project site submitted letters stating their concerns or objections to the project due to apparent adverse impacts on the environment such as urban decay, traffic, noise, and General Plan inconsistency. The

Planning Commission recommended approval of the project by the city council, and a public hearing before the city council was set for October 23, 2012.

On October 23, 2012, appellant submitted a detailed comment letter to the city council, setting forth purported deficiencies in the City's and/or the planning staff's assessment of the project's impacts. Appellant asserted that the project created significant traffic, noise, urban decay, General Plan inconsistency and other environmental impacts. In addition, appellant submitted a peer-reviewed traffic memorandum, prepared by VRPA Technologies, which asserted that the first traffic study used incorrect methodologies to measure traffic impacts. VRPA's memorandum asserted that when the proper methodology was used, there were unmitigated traffic impacts of a significant nature at several intersections. The city council ultimately continued the public hearing to January 8, 2013.

On January 3, 2013, real party submitted a letter to the city council, acknowledging that the most efficient course of action would be to prepare a project EIR, since that process would allow the issues raised in appellant's letter to be analyzed and put to rest. The project application was taken off of the city council's meeting agenda and the EIR process formally began with the notice of preparation on February 4, 2013.

The EIR Process and Project Approval

The draft EIR (DEIR) was completed on June 19, 2013, and a public comment period commenced on June 20, 2013, and continued through August 5, 2013. The DEIR included a new, much more extensive traffic analysis. Based on that analysis, the DEIR acknowledged the existence of significant traffic impacts that were allegedly unavoidable at several intersections and roadway segments near the proposed project. The City received only three comment letters on the DEIR, two from public agencies and one from appellant. Appellant's comment letter included a memorandum from its traffic consultant pointing out that the DEIR's analysis of traffic impacts had misapplied certain of the City's thresholds of significance. The City apparently agreed because it promptly revised

the traffic report and the relevant sections of the DEIR and issued a recirculated DEIR (RDEIR) for public comment from August 26 to October 10, 2013. The City received only three comment letters on the RDEIR, the same three as before. Appellant submitted a comment letter concerning the RDEIR, outlining alleged deficiencies in the RDEIR's analysis of impacts, alternatives and mitigation measures. The City responded to all comment letters received on both the DEIR and RDEIR in the final EIR (FEIR).³

On November 18, 2013, after nine months of work on the EIR, the project returned to the Planning Commission. Testimony was received at the hearing. Appellant's attorney spoke against the project, emphasizing the significant impacts on traffic that would not be adequately mitigated and General Plan inconsistency, among other things. The Planning Commission believed the concerns expressed by appellant were adequately addressed in the EIR. At the conclusion of the hearing, the Planning Commission adopted resolutions recommending that the city council certify the EIR and approve the project.

On December 10, 2013, the city council held its first public hearing on the EIR and the project. Appellant submitted written objections to the project, including challenges to the EIR's conclusions regarding infeasibility of certain mitigation measures as to traffic impacts. At the conclusion of the hearing, the city council closed the public hearing and continued consideration of the EIR and project to allow staff time to review appellant's recent submittal to ensure that the EIR had fully and adequately analyzed all environmental impacts.

We note that the EIR in this case followed a standard organizational approach that sought to address all of the necessary issues. Among other things, it described the

³ Unless otherwise indicated, the term EIR refers to the FEIR, which is understood to include and incorporate (1) the DEIR and the RDEIR, (2) all comments received, (3) the City's responses to comments or points raised in the review process, and (4) any other information added by the City. (Guidelines, § 15132.) We sometimes refer to the FEIR or DEIR separately, when it is helpful or convenient to do so.

project, summarized the potentially significant environmental impacts, discussed development alternatives to the project, and analyzed mitigation measures, including a delineation of which measures were feasible and which were infeasible. Further, the EIR in this case included a detailed description of the project's traffic impacts at several intersections and roadway segments that would be significant impacts but mitigation would allegedly be infeasible. The EIR also purported to explain why the project, despite its size, was in harmony with the policies of the General Plan.

On January 7, 2014, the city council adopted resolutions Nos. 2014-16 through 2014-18, certifying the EIR and making necessary project approvals. The city council also conducted the first reading of ordinance No. 3597-C.S., which was approved on the consent calendar at the January 14, 2014, city council meeting. The approvals included certification of the EIR and other CEQA findings, approval of the project application, and amendment to the General Plan and zoning. The City posted a notice of determination regarding the project on January 8, 2014.

Petition for Writ of Mandate

On February 6, 2014, appellant filed its verified petition for writ of mandate and complaint for declaratory relief (the petition) in the trial court. On March 5, 2015, after full briefing on the issues and a hearing, the trial court denied the relief sought in the petition. In its written order, the trial court reviewed the record and rejected each of appellant's claims. No abuse of discretion was found by the trial court. Judgment was entered in favor of the City and real party, and against appellant, on March 30, 2015. This appeal followed.

DISCUSSION

I. General Plan Consistency

Appellant argues the project was in conflict with the General Plan in several key respects and that, consequently, the City abused its discretion in approving the project. Among the claims of General Plan inconsistency, appellant argues that the project did not

comply with the NPP policy regarding the size of the shopping center, and that certain mandatory findings necessary to rezoning of the site were not made. We begin by summarizing the applicable law and the standard of review relating to challenges based on alleged General Plan inconsistency.

A. Applicable Law and the Standard of Review

A city must adopt a “comprehensive, long-term general plan” for its physical development. (Gov. Code, § 65300.) The general plan serves as a “‘charter for future development’” and contains the city’s fundamental policy decisions about such development. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1194.) The policies in a general plan typically reflect a range of competing interests. (*Ibid.*; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142 (*Save our Peninsula*)). “General plans ordinarily do not state specific mandates or prohibitions. Rather, they state ‘policies,’ and set forth ‘goals.’” (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378 (*Napa Citizens*)). Nevertheless, a city’s land use decisions must be consistent with the policies expressed in its general plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570; *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815 (*Friends of Lagoon Valley*); Gov. Code, § 65860.) “[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, at p. 570.)

The rule of general plan consistency is that the project must at least be *compatible* with the objectives and policies of the general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717–718 (*Sequoyah Hills*); *Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 817.) “[S]tate law does not require precise conformity of a proposed project with the land use designation for a site, or an exact

match between the project and the applicable general plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be ‘*compatible* with the objectives, policies, general land uses, and programs specified in’ the applicable plan. [Citation.] The courts have interpreted this provision as requiring that a project be “‘in agreement or harmony with’” the terms of the applicable plan, not in rigid conformity with every detail thereof.” (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678 (*San Franciscans*)). To reiterate, the essential question is “whether the project is compatible with, and does not frustrate, the general plan’s goals and policies.” (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.)

As has been accurately observed by one court: “It is beyond cavil that no project could completely satisfy every policy stated in [a city’s general plan], and that state law does not impose such a requirement. [Citation.] A general plan must try to accommodate a wide range of competing interests ... and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be ‘in harmony’ with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence. [Citations.]” (*Sequoyah Hills, supra*, 23 Cal.App.4th at pp. 719–720.)

Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816; *Napa Citizens, supra*, 91 Cal.App.4th at p. 357; *Sequoyah Hills, supra*, 23 Cal.4th at p. 717.) “We may neither substitute our

view for that of the city council, nor reweigh conflicting evidence presented to that body.” (*Sequoyah Hills, supra*, at p. 717.)

Moreover, judicial review of consistency findings is highly deferential to the local agency. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.) “[C]ourts accord great deference to a local governmental agency’s determination of consistency with its own general plan, recognizing that ‘the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role ‘is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.’ [Citation.]” (*San Franciscans, supra*, 102 Cal.App.4th at pp. 677–678, quoting from *Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)

In our review of the City’s consistency findings in this case, our role is the same as that of the trial court; we independently review the City’s actions and are not bound by the trial court’s conclusions. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 357.) In applying the substantial evidence standard, we resolve reasonable doubts in favor of the City’s finding and decision. (*Ibid.*) The essential inquiry is whether the City’s finding of consistency with the General Plan was “reasonable based on the evidence in the record.” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637.) “[A]s long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether *we* would have made that determination in the first instance.” (*Id.* at p. 638.) Generally speaking, the determination that a project is consistent with a city’s general plan will be reversed only if the evidence was such that no reasonable person could have reached the same

conclusion. (*San Franciscans, supra*, 102 Cal.App.4th at p. 677; accord, *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 26 (*San Diego Citizenry Group*).

B. NPP Policies

Appellant first of all asserts that the project violates the NPP policies of the General Plan. The NPP policy provision at issue relates to the need for local shopping centers in the neighborhoods to which the NPP applies, and provides as follows: “A 7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood.” The same policy provision states that the shopping center “should be located at the intersection of two Arterial streets, as shown in Figure III-2.”

We begin our consideration of this issue by noting how the City interpreted this General Plan policy in the proceedings below. The position taken by the City planning staff throughout the project review process, which was expressly adopted by the City in its findings approving the project, was that the project was consistent with the General Plan, including the NPP policies. The City concluded the project was consistent with the NPP policies because the project (1) provided for a neighborhood shopping center and (2) was properly located at an intersection of arterial streets. Further, while it was acknowledged that the project was larger than the neighborhood shopping center described in the NPP policies, the City understood that the depictions set forth therein were meant to provide guidance in the orderly development of neighborhoods, but were not mandatory limitations on the size of shopping centers. In support of this flexible interpretation, it was noted by staff in the proceedings before the Planning Commission and the city council that several other shopping centers had been approved by the City that exceeded the NPP policy’s acreage and square footage descriptions. As one staff report states: “It should be noted that since these policies were adopted, the City has approved eight neighborhood shopping centers that exceeded the size called for in this

policy, and in each case the City found the project consistent with the General Plan.” It was also noted by staff that for many years the market trend in grocery stores has been for higher square footage, which was represented by the developer to be more economically viable.

In the instant appeal, appellant disagrees with the City’s flexible interpretation and takes the position that all of the policies and descriptions set forth in the NPP should be treated as mandatory development standards. Appellant emphasizes that the project at hand is double the acreage amount and 70,000 square feet above the total leasable space contemplated in the NPP. Further, appellant points out that the City did not update the wording of the NPP in either 1995 or 2008, the two most recent occasions on which the City updated its General Plan and, therefore, any attempt to dismiss the NPP as being an outmoded relic in need of updating does not comport with the City’s conspicuous failure to revise it. Additionally, appellant argues the City’s position that shopping center developments larger than what is depicted in the NPP have routinely been approved by the City is flawed, because not all of the referenced shopping centers were in areas covered by the NPP policies. Finally, appellant argues that if the policies in the NPP were simply flexible goals to guide development, there would be no need for paragraph (f) of the NPP policies, which provides for minor adjustments to accommodate existing development in an area.

The City and real party (together respondents) have filed a joint respondents’ brief in the instant appeal. Respondents insist that the NPP policy’s enumerations of acreage and leasable square footage when describing a prototypical neighborhood shopping center were not meant as rigid development mandates, but rather were flexible descriptions to provide a basic model or pattern to guide the future development of the applicable neighborhoods.⁴ Respondents argue that the project, although bigger than the

⁴ We note that the subject NPP policy, which states that a “7-9 acre neighborhood shopping center” containing “60,000 to 100,000 square feet of gross leasable space” should be

shopping center depicted in the NPP, was essentially compatible with its main goals of providing a needed neighborhood shopping center at the intersection of two arterial streets.

In support of their position, respondents rely on the plain language of the NPP policies as well as the City's history or past practice of flexibly interpreting the NPP policies. As to the NPP's wording, the terms "prototype" and "model" are used in the NPP to describe its overall purpose, which reasonably suggests that the policies stated therein were intended to provide a guiding pattern or a model for future development of applicable neighborhoods. Indeed, the NPP expressly states that it is "a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies," and a "'blueprint' for development of future residential neighborhoods." Further, the NPP states that it was "designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses." As the City planning staff put it in the proceedings below, "the policies were developed with the intent to provide guidance on how to arrange or lay out land uses in a neighborhood." Additionally, the use of the word "should" in the vast majority of the NPP policies, including the policy at issue in this appeal, while the mandatory term "shall" was used in one instance not applicable to this case, provides a reasonable basis for the more flexible construction of the acreage and square footage provision, as urged by respondents.⁵ Based on the foregoing observations, we conclude that the wording of the NPP is reasonably consistent with the interpretation given to it by the City. Of course, we are required to accord "great

located in "each neighborhood" is not overtly phrased in terms of a mandatory cap or limitation. Thus, it may simply be a *descriptive estimate* of the usual or typical size of such a shopping center. Such a possibility fits the more flexible approach adopted by the City, with the City presumably having discretion to approve bigger or smaller centers when deemed advisable.

⁵ Paragraph (g) of the NPP policies states a mandatory requirement: "If the expressway is a Class A expressway, there shall be no Collector streets intersecting with the expressway." Virtually all of the remaining policy statements use the word "should."

deference” to the City’s interpretation of its own General Plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)⁶

Appellant replies that the “[m]inor adjustments” clause in paragraph (f) of the NPP policies indicates strict compliance should be required as to all policy terms, including the size descriptions for neighborhood shopping centers. We think appellant reads too much into that provision, which states in full that “Minor adjustments to the [NPP] can be made to accommodate existing development in an area.” The provision is narrowly focused on what to do about *existing development* in an area. On that issue, it simply allows the City to work around existing uses or conditions on the ground; that is, it may make minor adjustments to accommodate for the same. Contrary to appellant’s suggestion, the provision does not address the broader concern of whether to make all other NPP policies mandatory and binding limitations.

In addition to the plain wording of the NPP policies, respondents assert that “[t]he City’s past practices also demonstrate the City’s consistent construction of the NPP Policies as providing guidance to inform development, not inflexible mandates ... [since] [t]here are multiple examples of the City’s approval of shopping center projects that exceed the prototype in either acreage, square footage, or both.” Respondents appear to be correct on this point. The two previous entitlements approved at the project site in 1981 and 1987 went substantially beyond the total acreage described in the prototype, each seeking to utilize 12 gross acres. The Lakes shopping center is located in an area covered by the NPP policies, and it exceeded the square footage parameters by 4,000 square feet. Other examples identified by respondents and mentioned in the record include the Standiford Square shopping center (at 10.22 acres and 112,579 sq. ft.), the

⁶ We are not suggesting that the framing of the NPP in terms of policies and goals (i.e., using the word “should”), rather than as rigid mandates, renders them merely advisory in nature. The test of compatibility still applies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) Nevertheless, in deciding on the question of compatibility, we believe the nature and flexibility of the policy under consideration are important factors.

Dry Creek Meadows shopping center (at 11.25 acres and 112,146 sq. ft.), and Wood Colony Plaza (at 13.76 acres and 171,171 sq. ft.), the latter being larger than the project in total square footage.⁷

Appellant counters that at least two of the prior shopping center developments referenced by the City staff in the proceedings below (i.e., the Crossroads shopping center and Village Center) were not subject to the NPP policies. Respondents do not respond to appellant's objection as to Village Center, but argue that the NPP policies would have been applicable to the Crossroads shopping center because it was approved and constructed prior to the City's establishment of the Redevelopment Planning District in that location. We think that uncertainty remains regarding these two challenged examples. Nevertheless, this discrepancy noted by appellant only relates to a part of the overall record and is insufficient to undo the remainder of the evidence on this point. Even if the disputed examples are not counted, there is still sufficient substantial evidence in the record to confirm respondents' position that there has been a consistent practice to treat the acreage and square footage description in the NPP policy as a flexible guide to neighborhood development, rather than a strict limitation on the size of shopping centers.⁸

As we summarized above, general plan consistency may be found where a project is compatible with, and does not frustrate, the general plan's goals and policies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) In deciding that question, we are required to accord great deference to an agency's determination that a project is consistent with its

⁷ In addition, respondents assert two further examples of approvals of shopping centers where the NPP policies were allegedly in effect, but the acreage and square footage numbers of the NPP were exceeded (i.e., Obrien's Marketplace and the Crossroads shopping center).

⁸ We note that in the trial court, respondents distilled from the administrative record the "eight other shopping centers subject to NPP policies" that exceeded the acreage and square footage numbers stated in the NPP policy at issue. The eight were then summarized in a diagram that was attached to the trial court's ruling on petition for writ of mandate.

own general plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.) That 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.” (*Ibid.*) Furthermore, “[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes.” (*Ibid.*)

In applying our deferential review, we decide whether the City’s finding of consistency with the General Plan was “reasonable based on the evidence in the record.” (*California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at p. 637.) “[A]s long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether *we* would have made that determination in the first instance.” (*Id.* at p. 638.) “An agency’s finding that a project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.” (*San Diego Citizenry Group, supra*, 219 Cal.App.4th at p. 26.)

We find no abuse of discretion in the City’s determination that the project was consistent with its General Plan, including the NPP policies. First, aside from the increased size of the shopping center over the prototypical size, the project fits and is compatible with NPP policies by placing a neighborhood-serving shopping center at the corner of an intersection served by two arterial streets, exactly as depicted on the NPP map, and complying with all other relevant policies. Second, the City’s approval of a larger shopping center does not violate the General Plan because the NPP acreage and square footage descriptions were reasonably construed by the City as flexible guides to development, not rigid development limitations. That construction was reasonable based on the language of the NPP policies as well as the City’s own past practices in applying

the NPP provisions. For all of these reasons, we uphold the City's determination that the project was consistent with the NPP policies of the General Plan.

C. Rezoning Policies

Appellant contends the City failed to proceed in a manner required by law because, allegedly, it failed to make mandatory findings required by the General Plan's rezoning policy. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 837–838 [reversal of approval of subdivision map required where governing body failed to make legally mandated finding of consistency with general plan].) Respondents argue that all of the necessary findings were adequately made in connection with the several concurrent approvals on the project. On balance, we agree with respondents.

The General Plan's "Community Development Policies" contain a policy governing zoning changes (the rezoning policy), which requires the City to make certain findings when it approves a zoning change. The rezoning policy of the General Plan states, in relevant part, as follows:

"Zone changes may be approved anywhere in the General Plan Area, if the following findings are made:

"(1) The requested zone change is required by public convenience or necessity.

"(2) The requested change will result in an orderly planning use of land resources.

"(3) The requested zone change is in accordance with the community's objectives set forth in: '[NPP]' policies presented in Section C-2, below (for property within the Baseline Developed Area); or a Specific Plan prepared in accordance with this chapter (for property within the Planned Urbanizing Area); or the Redevelopment Plan (for property within the Redevelopment Area).

"(4) Adequate environmental mitigation has been provided through the implementation of appropriate mitigation measures established

by the [MEIR] and any supplements to the MEIR. Traffic and public facility issues are particularly relevant in this analysis.”

The City made several approvals relevant to the project, each with an array of detailed findings, including (1) resolution No. 2014-16 (approval of FEIR and mitigation measures and adoption of a mitigation monitoring and reporting program or MMRP, etc.), (2) approval of ordinance No. 3597-C.S. (zoning changes enacted), and (3) resolution No. 2014-17 (approval of amendment to General Plan and adoption of findings of General Plan consistency). As pointed out by respondents, the City’s findings specified in connection with its approval of ordinance No. 3597-C.S. clearly satisfied the first three of the four findings required by the rezoning policy. The same three concerns are covered to a further extent in the City’s findings made concerning its approval of resolution No. 2014-17. This leaves only the fourth of the necessary findings under the rezoning policy, which requires a finding of “[a]dequate environmental mitigation ... through the implementation of appropriate mitigation measures”

We agree with respondents that the fourth and final finding under the rezoning policy of “[a]dequate environmental mitigation” was satisfied by the City’s particular findings made in connection with approval of resolution No. 2014-16. In a series of recitals, resolution No. 2014-16 first summarized the history of environmental review of the project, including the City’s initial study that analyzed the project in relation to the MEIR, the City’s decision to prepare a project-level EIR after certain concerns relating to traffic and urban decay (among others) were raised, the preparation of the DEIR, RDEIR, and FEIR regarding the project, and the fact that environmental impacts, mitigation measures and alternatives were analyzed therein. Resolution No. 2014-16 then adopted the FEIR’s findings, analysis and conclusions as the City’s own, made certain CEQA findings including necessary findings relating to mitigation measures, adopted a mitigation monitoring and reporting program (MMRP), and made further, more detailed findings in an attachment that included a statement of overriding consideration. The

MMRP contained mitigation measures derived from both the MEIR and from the project-level FEIR and, therefore, it appears to have included appropriate mitigation measures established by the MEIR and by “any supplements to the MEIR.” In addition, it is clear from the administrative record that the City staff and the Planning Commission, in recommending approval of the project, indicated that the adoption of feasible mitigation measures under the project EIR (including the MMRP) provided the requisite “[a]dequate environmental mitigation” for purposes of the rezoning policy. Therefore, it appears that the findings in resolution No. 2014-16 were intended to satisfy the environmental adequacy finding under the rezoning policy. On balance, we conclude that the necessary findings under the rezoning policy were made by the City.⁹

In the second prong of its claim that the City failed to make findings sufficient to comply with the rezoning policy of the General Plan, appellant argues that even if findings were made, they were noncompliant on their face because the findings required by the rezoning policy as to environmental mitigation included a substantive component that “[a]dequate environmental mitigation” has been provided “through ... appropriate mitigation measures.” (Italics added.) Appellant argues that the word “adequate” should be construed to mean that all significant environmental impacts—such as traffic impacts—be mitigated to less than significant levels. Since the project entails certain traffic impacts that were found to be significant but mitigation was deemed to be

⁹ The City could have been clearer by more closely tracking its findings with the precise terms of the rezoning policy, and by including all four of the necessary findings together within the City’s rezoning approval. It should not have been necessary to locate any of the required findings among the other, concurrently adopted findings of the City. Nevertheless, since adequate findings were *in fact* made, we will affirm rather than elevate form over substance. To the extent that appellant is complaining that a fuller or more conspicuous elaboration of the MEIR’s mitigation measures might have been made in the project EIR (or in the MMRP), appellant has failed to demonstrate error by showing that a material omission of any applicable mitigation measure occurred and, in any event, failed to raise that particular point below.

infeasible, appellants argue the rezoning policy's mandatory findings requirement (of adequate environmental mitigation) was violated in this substantive sense.

We reject this line of argument because, among other things,¹⁰ appellant's proffered interpretation of adequate mitigation is not reasonable in light of other policies in the General Plan. Goal No. 6.f. of the General Plan provides that the "highest possible levels of service for all transportation modes" be maintained on the City roadways, but only as "consistent with the financial resources reasonably available to the City and without unreasonably burdening property owners or developers with excessive roadway improvement costs." Similarly, goal No. 7.b. of the General Plan provides: "The City may allow individual locations to fall below the City's LOS [level of service] standards in instances where the construction of physical improvements would be infeasible, be prohibitively expensive, significantly impact adjacent properties or the environment, significantly impact non-motorized transportation systems, or have a significant adverse effect on the character of the community." When the rezoning policy is construed in light of these other provisions of the General Plan, the meaning of what is adequate mitigation under the circumstances must make allowances for the fact that mitigation is not required where it is infeasible. Therefore, appellant has failed to demonstrate that the City erred by simply adopting findings that did not require infeasible mitigation.¹¹

D. Other General Plan Policies

Additionally, appellant contends the approval of the project was inconsistent with, or failed to adequately comply with, two more General Plan provisions or policies—namely, goals Nos. 6.f. and 7.e. Respondents object that since these specific contentions

¹⁰ For the reasons stated in the discussion above, we believe the findings adequately met the substance of the rezoning policy's finding requirements.

¹¹ Whether the findings of infeasibility were supported by substantial evidence is considered in our discussion regarding CEQA compliance. Here, we address only whether the City complied with the rezoning policy's finding requirements.

were not raised in the administrative proceedings below, they may not be raised in the present appeal. In light of the necessity of exhaustion of remedies, respondents are correct.

Under the exhaustion doctrine, regardless of whether the legal issues stem from CEQA or a failure to comply with a general plan, a party may not litigate issues in court that were not fully and fairly presented to the agency before it rendered the challenged decision. (Pub. Resources Code, § 21177, subd. (a); Gov. Code, § 65009, subd. (b)(1); *California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at pp. 615–616.) The rationale for the exhaustion doctrine is that the agency is entitled to learn the contentions of interested parties before litigation is instituted. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) “The essence of the exhaustion doctrine is the public agency’s opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.” (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) To advance the exhaustion doctrine’s purpose, the exact issue must have been presented to the administrative agency. (*Sierra Club v. City of Orange*, *supra*, at p. 535.) General environmental comments, generalized references, or isolated or unelaborated comments will not suffice. (*Id.* at p. 536.) The objections must be “sufficiently specific so that the agency has the opportunity to evaluate and respond to them.” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (*Ibid.*) The exhaustion of remedies requirement is jurisdictional. (*Sierra Club v. City of Orange*, *supra*, at p. 535.)

There is no indication in the record that appellant, or any other person, presented the specific contention in the administrative proceedings below that the project’s

approval was incompatible with goals Nos. 6.f. and 7.e. of the General Plan.¹² Therefore, under the exhaustion doctrine, these issues were not preserved for purposes of the instant judicial challenge and will not be considered.

II. Compliance with CEQA

Appellant contends the City failed to comply with CEQA in several respects, including that (1) the findings of infeasibility as to certain mitigation measures were not supported by substantial evidence, (2) the urban decay findings were not supported by substantial evidence, and (3) the findings made in connection with the statement of overriding considerations were not supported by substantial evidence. We now consider such claims, beginning our discussion with a summary of the standard of review for CEQA issues.

A. CEQA Standard of Review

Our review under CEQA is de novo in the sense that we review the agency's actions as opposed to the trial court's decision. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*)). However, our inquiry extends only to whether there was a prejudicial abuse of discretion. (§ 21168.5.) "Such an abuse is established [(1)] 'if the agency has not proceeded in a

¹² Goal No. 6.f. states: "The highest possible levels of service for all transportation modes (vehicle, transit, pedestrian, and bicycle) shall be maintained on City roadways, consistent with the financial resources reasonably available to the City and without unreasonably burdening property owners or developers with excessive roadway improvement costs. On roadways where the LOS is expected to exceed LOS F, the City should consider mitigation measures other than road widening, such as the addition of bicycle lanes, improved pedestrian access, improved transit service, and the establishment of walkable development patterns. Data from the General Plan Traffic Analysis, described in the Traffic Appendix of the [MEIR], as updated from time-to-time, shall be used to evaluate the effectiveness of traffic mitigation measures adopted by the City Council."

Goal No. 7.e. states, in relevant part, that where an EIR is prepared for projects that could cause further traffic degradation below certain levels, the preparation of a comprehensive traffic study "shall include appropriate measures to update the General Plan Traffic Analysis for all subsequent Specific Plans, and for development within the affected Baseline Developed Area and Redevelopment Area, and shall conform to the Traffic Study Guidelines."

manner required by law or [(2)] if the determination or decision is not supported by substantial evidence.” (*Vineyard, supra*, at p. 426; see § 21168.5.) The nature of our judicial review of these two types of error “differs significantly.” (*Vineyard, supra*, at p. 435.) We determine de novo whether the agency has employed the correct procedures, “scrupulously enforce[ing] all legislatively mandated CEQA requirements,” but we apply the more deferential substantial evidence test to the agency’s substantive factual conclusions. (*Ibid.*)

As here, legal challenges under CEQA often relate to the adequacy of the information or analysis in the EIR. The EIR is “the heart of CEQA” and the primary mechanism to alert local agencies and the public to environmental impacts of proposed projects. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d. 376, 392 (*Laurel Heights*)). A public agency must prepare an EIR for any project that may have a significant impact on the environment. (§ 21100, subd. (a)). Among other things, the EIR must describe the proposed project and its environmental setting, identify and analyze the significant effects on the environment, state how those environmental impacts can be mitigated or avoided, and identify and discuss alternatives to the project. (Pub. Resources Code, §§ 21100, subd. (b), 21002.1, subd. (a); Guidelines, § 15126; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 979 (*California Native Plant Society*)).

CEQA “requires an EIR to reflect a good faith effort at full disclosure”; however, “it does not mandate perfection, nor does it require an analysis to be exhaustive.” (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (*Dry Creek*)). The courts have looked “not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (Guidelines, § 15151.) In reviewing an agency’s determination to approve an EIR, “The court does not pass on the correctness of an EIR’s environmental conclusions, but determines whether the EIR is sufficient as an informational document.” (*Dry Creek, supra*, at p. 26; see § 21168.5; *Laurel Heights*,

supra, 47 Cal.3d at pp. 392, 407.) “An adequate EIR must be ‘prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. (Guidelines, § 15151.) It ‘must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’ [Citation.]” (*Dry Creek, supra*, at p. 26.)

In challenges that are predominantly a dispute over the factual findings and conclusions reached in an EIR, “[t]he court must uphold an EIR if there is any substantial evidence in the record to support the agency’s decision that the EIR is adequate and complies with CEQA.” (*Dry Creek, supra*, 70 Cal.App.4th at p. 26; see *Laurel Heights, supra*, 47 Cal.3d at p. 392.) For example, CEQA challenges concerning the amount or type of information contained in the EIR, the scope of the analysis, the choice of methodology or the reliability of data are all factual determinations reviewed for substantial evidence. (*Madera Oversight Coalition, Inc. v. City of Madera* (2011) 199 Cal.App.4th 48, 101 (*Madera Oversight Coalition*); *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *California Native Plant Society, supra*, 177 Cal.App.4th at p. 986.) Likewise, in a factual dispute over “‘whether adverse effects have been mitigated or could be better mitigated’ [citation], the agency’s conclusion would be reviewed only for substantial evidence.” (*Vineyard, supra*, 40 Cal.4th at p. 435.)

Frequently, disputes center on the question of whether relevant information was omitted from an EIR. (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 (*Association of Irrigated Residents*)).) Because a fundamental purpose of an EIR is to provide public agencies and the public with detailed information about the effect that a project is likely to have on the environment, the absence of information in an EIR may potentially constitute a failure to proceed in a manner required by law. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco*

(2014) 227 Cal.App.4th 1036, 1046 (*Citizens for a Sustainable Treasure Island*).

However, “The absence of information in an EIR does not per se constitute a prejudicial abuse of discretion. (§ 21005.) A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*Dry Creek, supra*, 70 Cal.App.4th at p. 26; accord, *Citizens for a Sustainable Treasure Island, supra*, at p. 1046; *California Native Plant Society, supra*, 177 Cal.App.4th at pp. 986–987; *Association of Irrigated Residents, supra*, at p. 1391.) When that level of insufficiency of the EIR as an informational document has occurred, the agency has not proceeded in a manner required by law and reversal is required. (*Vineyard, supra*, 40 Cal.4th at 435, citing *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220 (*Bakersfield Citizens for Local Control*).

As the above overview reflects, in evaluating an EIR for CEQA compliance, “a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts.” (*Vineyard, supra*, 40 Cal.4th at p. 435.) In other words, “our choice of the proper standard of review depends upon identifying correctly whether the question concerning the adequacy of the EIR’s disclosures ... is a question of law or a question of fact.” (*Madera Oversight Coalition, supra*, 199 Cal.App.4th at p. 101.) To summarize the nature of our inquiry in deciding the standard of review: “[T]he omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decisionmaking by the agency or informed participation by the public. [Citation.] We review such procedural violations de novo. [Citation.] By contrast, we review an agency’s substantive factual or policy determinations for substantial evidence. [Citations.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 987.)

Here, it appears that appellant is essentially claiming that the City's findings, which were adopted in the course of approving the EIR and in making related CEQA determinations, were not based on substantial evidence in the record. In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) Under this standard, we may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. Nor may we weigh conflicting evidence and determine who we think has the better argument. Courts do not have "the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Ibid.*) Rather, "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." [Citation.] That deferential review standard flows from the fact that 'the agency has the discretion to resolve factual issues and to make policy decisions.' [Citation.]" (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 985.)

CEQA's Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).)

B. Infeasibility Findings as to Certain Traffic Mitigation Measures

According to appellant, the EIR is inadequate because the findings stated therein that certain mitigation measures were "infeasible" were not supported by substantial evidence in the administrative record. To put it differently, appellant asserts that there *were* feasible mitigation measures proposed that the City declined to impose without providing adequate explanation for that decision supported by substantial evidence. We

begin our discussion of this issue with an overview of what CEQA requires concerning mitigation measures and findings of infeasibility.

1. The CEQA Mitigation Requirement

“The core of an EIR is the mitigation and alternatives sections.” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at p. 564.) An EIR must describe “feasible [mitigation] measures which could minimize significant adverse impacts.” (Guidelines, § 15126.4, subd. (a)(1).) “Mitigation” includes: “(a) Avoiding the impact altogether by not taking a certain action or parts of an action. [¶] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. [¶] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. [¶] (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. [¶] (e) Compensating for the impact by replacing or providing substitute resources or environments.” (Guidelines, § 15370.) “Feasible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Resources Code, § 21061.1; Guidelines, § 15364.) “Whether a mitigation measure ... is feasible ‘involves a balancing of various “economic, environmental, social, and technological factors.’”” (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 381, citing *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417.)

In section 21002 of CEQA, the Legislature declared, “it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects” “Section 21002 has been described as a ‘substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures.’” (*Mountain Lion*

Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 134 (*Mountain Lion*.) This substantive mandate ‘is effectuated in section 21081.’ (*Ibid.*)” (*Friends of Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 120.)

“Under [section 21081], a decisionmaking agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures. [Citations.] The requirement ensures there is evidence of the public agency’s actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical process by which the public agency arrived at its decision. [Citations.]” (*Mountain Lion, supra*, 16 Cal.4th at p. 134; accord, *Friends of Kings River v. County of Fresno, supra*, 232 Cal.App.4th at p. 120.) One such specific finding provided under section 21081 is that one or more mitigation measures identified in the EIR are determined to be “infeasible” due to “[s]pecific economic, legal, social, technological, or other considerations.” (§ 21081, subd. (a)(3).)

In summary, “[u]nder CEQA, ‘a public agency is not required to favor environmental protection over other considerations, but it must disclose and carefully consider the environmental consequences of its actions, mitigate adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process.’ [Citation.] [¶] As relevant here, a project with significant environmental impacts may be approved only if the decisionmaking body finds (1) that identified mitigation measures and alternatives are infeasible and (2) that unavoidable impacts are acceptable because of overriding considerations. [Citations.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 982, citing *Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra*, 126 Cal.App.4th at p. 1198.)

2. *The Necessity of Infeasibility Findings*

As we have explained, where an EIR has identified significant environmental effects that have not been mitigated or avoided, the agency may not approve the project unless it makes findings that “[s]pecific economic, legal, social, technological, or other considerations ... make *infeasible* the mitigation measures or alternatives identified in the [EIR].” (Pub. Resources Code, § 21081, subd. (a)(3), italics added; see Guidelines, § 15091, subd. (a)(3).) Such infeasibility findings “constitute the principal means chosen by the Legislature to enforce the state’s declared policy ‘that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects’” (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 350, quoting § 21002.) “If the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion. The analysis must be sufficiently specific to permit informed decision-making and public participation, but the requirement should not be construed unreasonably to defeat projects easily.’ [Citation.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 982.) An agency’s infeasibility findings must be supported by substantial evidence in the record. (Pub. Resources Code, § 21081.5; Guidelines, § 15091, subd. (b).)

3. *The City’s Infeasibility Findings*

In its traffic analysis, the EIR identified a number of intersections or roadway segments surrounding the location of the project site that would be impacted by the project to a significant degree during peak traffic hours, and other intersections or segments that would have such peak hour impacts based on a cumulative impacts analysis. Each intersection or roadway segment was analyzed in light of LOS criteria, based on such factors as increased volume of traffic or delays during peak hour traffic congestion, with technical thresholds of significance utilized by the City to determine

when an impact would be deemed to be significant. As to each such intersection or roadway segment for which a significant traffic impact was identified, potential mitigation measures were discussed in the EIR, such as installation of traffic signals, right turn lanes, adding lanes, implementing overlap phasing, lane restriping, real party's (or the project's) payment of fair share fees, or other options, depending on the particular location and traffic setting. In several instances, the proposed mitigation measures were adopted by the City, including use of fair share fee payments. In other instances, the City determined that proposed mitigation measures were infeasible for specified reasons.

To support its findings that certain mitigation measures were infeasible, a variety of supporting factors were set forth by the City. Which factor or factors were asserted in a particular instance depended on the respective intersection or segment involved and the nature of the mitigation measure being proposed. Among the several factors or grounds of infeasibility stated by the City were the following: (1) existing business establishments in some areas¹³ weighed against acquiring additional right-of-way needed for certain road expansion measures; (2) one or more of the proposed measures would result in a conflict with General Plan standards¹⁴ for circulation; (3) the project's contribution to traffic increases was too small to justify requiring it to build the entire improvement constituting the mitigation measure; (4) there were no identified funding sources for a proposed mitigation measure to be fully funded and successfully built when needed; and (5) another project was already required to build out one of the proposed

¹³ As noted by respondents, goal No. 7.b. of the General Plan allows the City to reject traffic improvements that will significantly impact adjacent properties, or that will have a significant adverse effect on the character of the community.

¹⁴ We note the Guidelines expressly state that, for purposes of an EIR's analysis of project alternatives, consistency with the general plan is a factor. (See Guidelines, § 15126.6, subd. (f)(1).) Due to the importance of compliance with a general plan's fundamental policy elements, we assume that such consistency is likewise a relevant consideration for purposes of considering the feasibility of mitigation measures. (See, e.g., *City of Del Mar v. City of San Diego*, *supra*, 133 Cal.App.3d at pp. 415–416.)

intersection improvements (i.e., a traffic signal). The foregoing circumstantial and contextual information, recited as supporting grounds of infeasibility, was provided in the administrative record to the City in the form of staff reports and attachments, and was reiterated in the EIR. Along with these factors, the City was also aware of, and took into consideration, the magnitude of the estimated expense of each proposed mitigation measure and the proportionate share of the traffic impact attributable to the project. The cost estimates were largely provided in the first instance by appellant's traffic expert, although the City's traffic staff also supplied some of the financial estimates. For our purposes, the important thing is the City had that data before it and considered it.

By and large, the above facts and circumstances are among the type of considerations that should appropriately go into an agency's assessment of whether a measure is feasible or not. (See Pub. Resources Code, § 21061.1; Guidelines, § 15364 [“[f]easible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors”].) At first glance, it appears there was substantial evidence in the record that potentially supported the infeasibility findings that were made by the City when it considered the proposed mitigation measures. Moreover, the City's findings in that regard are presumed correct and appellant has the burden of affirmatively demonstrating otherwise. “The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination.” (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

Appellant falls short of meeting that burden, in part because of its unfocused briefing on this issue. Appellant's opening brief does not clearly identify the particular mitigation measure (or measures) claimed by appellant to have been erroneously deemed infeasible, nor does it recite the basis for the City's findings or adequately explain to this

court why appellant believes the City's findings in that specific matter lacked the support of any substantial evidence in the record. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656 [the appellant has burden to demonstrate error by presenting legal authority and factual analysis on each point made, supported by appropriate citation to the material facts in the record].) Instead, appellant's opening brief makes a generalized argument, asserting error in the abstract while only briefly alluding to particular segments or intersections and particular mitigation measures. In a complex matter such as this, we believe that appellant has not met its burden on appeal. "As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261,1266.) Further, merely incorporating by reference matters filed in the proceedings below (e.g., administrative letters of VRPA Technologies, appellant's traffic consultant) is not a substitute for adequately *briefing* the specific arguments. (*Keyes v. Bowen, supra*, at p. 656 ["The appellant may not simply incorporate by reference arguments made in papers filed in the trial court, rather than briefing them on appeal."].)

But even considering the merits of appellant's contentions, we are not persuaded that the City prejudicially abused its discretion in making its feasibility findings. The main thrust of appellant's argument is that the City should have found feasible certain of appellant's proposals that real party (or the project) be required to pay more impact fees (also called fair share fees) that would go toward the cost of improvements needed at several distinct intersections or segments of roadway as to which a significant traffic impact still remained. Appellant's position is apparently that, as a general principle, it is *always* feasible (as a mitigation method) to impose more monetary fees on a project, since the collection of any amount of additional funds will always constitute at least an incremental step in the direction of eventually having enough money to accomplish the

needed improvements. As explained below, we disagree with appellant's over-simplified approach to the extent that it amounts to a blanket rule that does not adequately account for other factors bearing on the issue of feasibility, including when fee-based mitigation is proposed.¹⁵ In any event, as will be seen in the discussion below, the City's findings of infeasibility concerning the proposals to impose additional fair share fees on the project were adequately based on relevant factors that were supported by evidence in the record.

Of course, fee-based mitigation plans may be approved by an agency as a viable method of achieving mitigation in some circumstances. Under CEQA Guidelines, an EIR may determine that a project's contribution toward the cost of a proposed mitigation measure adequately mitigates the project's proportionate share of a particular cumulative impact: "An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable [(i.e., not significant)] ... if the project is required to implement *or fund* its fair share of a mitigation measure or measures designed to alleviate the cumulative impact." (Guidelines, § 15130, subd. (a)(3), italics added.) However, the same provision of the Guidelines further states that the lead agency "shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." (*Ibid.*) In other words, the EIR and the lead agency adopting it must be able to substantiate that the fee-based mitigation plan is reasonably likely *to actually accomplish* the means of effecting substantial mitigation (e.g., the completion of a proposed road improvement).

Consistent with this principle, courts addressing the issue have held that while some "unavoidable uncertainties" as to funding and implementation are generally allowed, "a commitment to pay fees without any evidence that mitigation will actually

¹⁵ We note that feasibility determinations properly involve a balancing of factors. (*Citizens Opposing a Dangerous Environment v. County of Kern, supra*, 228 Cal.App.4th at p. 381.) It is difficult to square appellant's blanket approach with this fact.

occur is inadequate.” [Citations.]” (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 938, quoting *City of Marina v. Board of Trustees of California State University, supra*, 39 Cal.4th at pp. 364–365.) There must be a plan, enforceable by the City, reasonably ensuring that sufficient traffic funding will actually be obtained and will accomplish the required mitigation. (*Tracy First v. City of Tracy, supra*, at p. 938.) In summary, a traffic impact fee may be found to be an appropriate form of mitigation only if it is “linked to a reasonable plan for mitigation” (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122) and “sufficiently tied to the actual mitigation of the impacts of increased traffic” (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 141; accord, *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189). As to the timing for completion of the improvement constituting the mitigation of traffic impacts, as long as there is a reasonable plan for actually realizing that mitigation feature, the plan may be deemed adequate under CEQA even if does not include a “time-specific schedule” for the accomplishment thereof. (*Save Our Peninsula, supra*, at p. 141). On the other hand, where the record supports a conclusion that the actual mitigation measure (e.g., a road or traffic improvement to be built through impact fees) could not be adequately funded and accomplished in a successful manner within a reasonable period of time, the measure may be deemed infeasible. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 365; accord, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 785.)

Here, the City’s traffic planning does incorporate the use of fair share fees to facilitate mitigation, which included imposing such fees on the project itself. As explained in the DEIR: “The City has a Capital Improvement Program (CIP) for improvements on Oakdale Road from Floyd Avenue to Sylvan Avenue. The CIP project includes improvements to the Oakdale Road and Floyd Avenue intersection that would add a southbound dedicated right turn lane, thereby resulting in two southbound through lanes. In addition, Oakdale Road will be widened to install a third northbound through

lane north of the Oakdale Road and Floyd Avenue intersection. The City CIP project improves the function of the intersection and partially mitigates the identified impact [¶] This intersection improvement project will be implemented as part of the City's CIP program and *the proposed project will contribute its fair share to the completion of the Oakdale Road CIP Project through the payment of Capital Facility Fees*" (Italics added.) Payment of such fees was made a condition of approval of the project. The FEIR provided further detail on how this would be applied. In regard to mitigation measure No. 3.3.1 (at Oakdale Road and La Forge Drive; intersection No. 6), the MMRP section of the FEIR stated: "Consistent with the City's CIP program, [real party] will provide a fair share contribution to the delineation of a westbound right turn lane at the Oakdale Road at LaForce Drive Intersection." In regard to mitigation measure No. 3.3.3 (at Oakdale Road and Floyd Avenue; intersection No. 8), it was stated that "Consistent with the City's CIP program, [real party] will provide a fair share contribution to the installation of a southbound right turn lane at the Oakdale Road at Floyd Avenue Intersection and the installation of a third northbound through lane north of the intersection."

Appellant believes that more should have been required, and its opening brief makes passing reference to intersections Nos. 3, 4 and 6, and to road segment No. 3 (as so numbered in the EIR), as examples of where the City allegedly erred in finding infeasible appellant's proposals to seek to accomplish mitigation through imposition of additional impact fees. Again, although we believe the briefing is inadequate to meet appellant's burden, we will briefly comment on these four matters. As to road segment No. 3 (which is the segment of Oakdale Road between Mable Avenue and Sylvan Avenue), appellant proposed widening the northbound segment of Oakdale Road by an additional lane, and it estimated the cost of this improvement at \$500,000. Since the project was expected to increase traffic by 5.4 percent at peak hours along this segment, appellant urged that the project (or real party) should be required to pay 5.4 percent of the

total cost of the improvement. The City rejected the proposal as infeasible based on several facts and circumstances. First, the unmitigated impact would only exist for an interim period because the improvement was already required to be constructed in association with the development of the nearby Tivoli project. Second, based on the small proportion of the project's impact (about 5.4 percent) relative to the overall cost of the improvement and the lack of an identified funding source that would be adequate to cover the remainder of the cost to complete the improvement in the short term, the City determined it was infeasible to expect to be able to successfully accomplish this improvement prior to its construction as part of the Tivoli project.

As to intersection No. 3 (Oakdale Road at Mable Avenue), which would operate at an unacceptable LOS F under cumulative conditions (during peak hours) even without the proposed project, the implementation of the project would contribute more than five percent to the service volume of an approach at peak hours and increase average intersection delay at that time of day. Actual mitigation to an acceptable LOS grade would require "delineation of eastbound and westbound right-turn lanes, addition of a second eastbound and westbound left-turn lane, addition of a fourth northbound and southbound through lane, addition of a second southbound left-turn lane, and right-turn overlap phases for the westbound and eastbound movements." The total cost was estimated at over \$2 million, and appellant proposed that the project pay a \$50,000 fair share fee towards the mitigation measures. The City rejected these extensive mitigation measures for several reasons, including that the lane additions/road expansions in that location would significantly exceed standards in the General Plan for collector street/principal arterial street intersections, which would result in General Plan inconsistency. Further, the addition of new lanes would also require the acquisition of additional right-of-way that would significantly impact existing development, which the record showed included a residence and veterinary hospital. Finally, the City observed that there was no identified funding source for the remainder of the costs involved for

accomplishing the proposed mitigation measures. Apparently, the City did not see how implementing a CIP or similar plan at this particular site would be able to generate sufficient funding to successfully accomplish the needed mitigation, nor was it aware of any other funding sources. As noted, a commitment to pay fees without any evidence that mitigation will actually occur is inadequate. (*Tracy First v. City of Tracy, supra*, 177 Cal.App.4th at p. 938.) Appellant has not shown any facts to the contrary. Similar types of factors, such as General Plan inconsistency, the need to obtain right-of-way that would interfere with existing business, and the lack of adequate funding sources to actually accomplish the mitigation, were cited by the City in rejecting mitigation measures for intersections Nos. 4 and 6.

While the City's discussions of its grounds for finding infeasibility in the above instances were far from perfect, and arguably should have been more specific, we believe they were not fatally deficient as to the presentation of adequate factual grounds to support the ultimate findings. The City's analysis did explain in meaningful detail the reasons and facts supporting the infeasibility conclusions, and the analysis was sufficiently specific to permit informed decision-making and public participation. Further, the particular factors cited by the City did appear to be supported by evidence in the administrative record, typically in the form of staff reports and attachments, and appellant has failed to convincingly demonstrate otherwise. We conclude that this particular attack on the City's approval of the project falls short.

C. Evaluation of a Project Alternative

Appellant challenges the analysis in the EIR of one of the project alternatives. Section 5.4.4 of the DEIR sets forth the evaluation comparing the project to the "Reduced Project Alternative" (alternative No. 4). Under the Reduced Project Alternative, a 12-acre shopping center development would be developed on the northern portion of the project site, and condominiums (66 units) and apartments (196 units) would be developed on the remaining six acres. The DEIR compared the various environmental effects of this

potential alternative with the project's anticipated effects, including with respect to aesthetics, air quality, biological resources, climate change, geology and soils, hazardous materials, hydrology and water quality, land use and urban decay, noise, public services and utilities, and traffic and circulation.

CEQA Guidelines provide that an EIR "shall describe a range of reasonable alternatives to the project ..., which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a).) As to the level of analysis required, the Guidelines state: "The EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison." (*Id.*, subd. (d).) Here, as indicated above, it is clear that the EIR complies with the applicable regulation.

The City reviewed the EIR's analysis and ultimately concluded in its findings that the Reduced Project Alternative would not adequately meet project objectives or be economically feasible. Therefore, the Reduced Project Alternative was rejected. The findings stated, among other things, that although the Reduced Project Alternative would slightly lessen some of the proposed project's significant impacts, it would not further respondents' objectives related to the scope and scale of the commercial component of the project because economic viability in the grocery store industry has necessitated an increasing size of grocery stores, with an increasing variety of goods and services offered. This, in turn, has led to increased shopping center sizes to maintain an economically viable ratio of grocery store to other retail space within the center. A further consideration affecting the viability of a smaller center at this location is the access restrictions that would result from application of the City's standards to the smaller site, which would result in only two driveway accesses to the smaller shopping

center. In making these findings, the City found credible the information from respondents, which provided further detailed analysis relating to economic viability. Substantial evidence in the record supported these findings. Indeed, as was aptly stated by the trial court in its ruling below, “[t]here is a reasonable inference that if the Project were reduced to 12 acres it would suffer the same fate as the other proposed projects suffered in 1981 and 1987.” Furthermore, consistent with CEQA (see § 21081), the City made findings in a statement of overriding considerations setting forth reasons for moving forward with the project despite there being some unmitigated impacts.

Based on what we have stated, it appears that the EIR and the City’s findings with respect to the Reduced Project Alternative complied with CEQA. The description and evaluation of this alternative was adequate, and the City properly considered that information but ultimately rejected the alternative as infeasible as specified within its findings that were based on substantial evidence in the record.

Nevertheless, appellant suggests that under Guidelines section 15126.2, subdivision (b), the EIR was inadequate as an informational document in its discussion of the Reduced Project Alternative. Preliminarily, we would point out that Guidelines section 15126.2 addresses the matters that should be discussed in an EIR regarding significant environmental impacts. *Another* section of the Guidelines—section 15126.6—is the one that is primarily applicable to the discussion of relevant project alternatives. As we have noted above, the EIR fully complies with section 15126.6. Appellant has failed to adequately explain, with discussion of legal authority, why an EIR that is in compliance with the specific provision that is directly applicable to the analysis of alternatives should nevertheless be deemed inadequate in regard to that analysis in the present case.

Although not altogether clear, it would appear that appellant is attempting to seize upon an isolated sentence in Guidelines section 15126.2, subdivision (b). That provision, after stating that an EIR should “[d]escribe any significant impacts, including those

which can be mitigated but not reduced to a level of insignificance,” further states that “[w]here there are impacts that cannot be alleviated without imposing an alternative design, their implications and the reasons why the project is being proposed, notwithstanding their effect, should be described.” We note that the EIR *did* provide this type of descriptive information in its discussion of the project’s significant environmental effects and potential mitigation, which subject areas would seem to be the probable context of the wording of Guidelines section 15126.2, subdivision (b), since it entails what should be considered *without* imposing an alternative design. Thus, appellant’s line of argument appears to be misplaced. In any event, appellant’s cursory mention of this issue fails to adequately demonstrate that the EIR is deficient under that provision, nor does appellant provide legal authority or cogent legal argument to support the provision’s application to the EIR’s discussion of the project alternative. Moreover, as already noted above, the EIR complies with the applicable Guidelines with respect to evaluation of alternatives. For all of these reasons, no prejudicial abuse of discretion on this issue has been demonstrated.

D. Findings as to Urban Decay

Appellant asserts that there was no substantial evidence in the record to support the EIR’s findings that the project would have no significant urban decay impacts. We disagree with appellant’s assertion, as we shall briefly explain.

While economic or social impacts of a project are not in themselves treated as significant environmental effects, CEQA is concerned with whether a project’s economic or social impacts will cause adverse physical changes in the environment. (Guidelines, § 15131.) For example, the economic or social impacts of a project could foreseeably result in a downward spiral of store closures and long-term vacancies that create physical deterioration to an urban environment, an impact usually referred to in CEQA parlance as “urban decay.” (*Bakersfield Citizens for Local Control*, *supra*, 124 Cal.App.4th at pp. 1204, 1212–1213 [EIR should have analyzed the potential urban decay impacts from

two regional big box retailers situated in relatively close proximity in a saturated retail market].)

Here, the DEIR analysis contained a description of the market setting, both in a regional and local level, including indications of improving market conditions and declining vacancy rates (as the City emerged from the past real estate recession) and statistical evidence that when vacancies arise in the City, there is a history of successful backfilling (or re-tenanting) of such vacant commercial space with new commercial uses. Where vacancies presently exist, a visual scoping indicated the properties remain well maintained. The project is not a regional supercenter, but more of a traditional anchor grocery store, only somewhat larger. It meets different needs and draws from a more limited trade area than such regional supercenters. After considering the size of the project, the market conditions, the history of backfilling in the City, the flexibility for some commercial spaces being repurposed, and the City's consistent enforcement of property maintenance ordinances, it was determined that the project would not result in significant urban decay impacts. The City's analysis in the EIR was supported by substantial evidence in the record, including City staff reports and testimony, other expert testimony, and an economic report from Terranomics. The City's findings were further supported by evidence and testimony of real party, as an experienced commercial developer familiar with both the retail market setting and the physical condition of existing shopping centers in the area.

Appellant puts more weight or credibility on other evidence, would want to see more exhaustive data, and disagrees with the City's conclusion. On review, such arguments are beside the point. In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) Under this standard, we may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. Nor may we weigh conflicting evidence

and determine who we think has the better argument. (*Ibid.*) Since there was substantial evidence in the record to support the City's urban decay findings, appellant's argument fails.

E. Statement of Overriding Considerations

Appellant's final CEQA attack on the City's approval of the project is that the City's findings regarding the benefits of the project in its statement of overriding considerations did not have the support of substantial evidence in the record. Again, we disagree with appellant's assessment.

An agency must adopt a statement of overriding considerations when it approves a project in spite of significant, unavoidable environmental impacts. (Pub. Resources Code, § 21081, subd. (b); Guidelines, § 15093.) The agency must find, with respect to significant effects of the project, which were unavoidable, that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (§ 21081, subd. (b).) "The statement [of overriding considerations] reflects the 'final stage' in the agency's decisionmaking process." (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 356 (*Cherry Valley*)). It is intended to show the balance the agency struck in weighing the benefits of a proposed project against its unavoidable environmental risks. (*Id.* at p. 357.) The findings must be supported by substantial evidence in the record. (Guidelines, § 15093, subd. (b).) "A lead agency's decision to approve a project despite its significant environmental impacts is a discretionary policy decision, entrusted to it by CEQA, and will be upheld as long as it is based on findings of overriding considerations that are supported by substantial evidence." (*Cherry Valley, supra*, at p. 357.)

In its statement of overriding considerations, the City made findings that the benefits of the project outweighed unavoidable impacts. The specific benefits of the project referred to by the City in its findings included (1) economic development and job

creation; (2) creation of transportation and infrastructure improvements; (3) increase in tax revenues; and (4) the advancement of several General Plan policies.

In support of the finding that the project would spur economic development and job creation, there was substantial evidence in the record that the project was in an area of town currently underserved, in part because older grocery stores had relocated or closed and in part because the number of residents in the vicinity had significantly increased. Since there was a substantial market demand for the project within this area of town surrounded by residential neighborhoods that would be served by it, the City could reasonably infer that new jobs would be created.¹⁶ The project would meet this demand and expand retail services in northeast Modesto, providing an opportunity for businesses to locate into modern and attractive commercial space. Based on the same factual basis, the City could also reasonably infer that once the anchor grocery store and other retail businesses were established at the project site, this increased development would expand the City's public revenues in terms of additional property and sales tax revenue.

On the issue of jobs and tax revenues, appellant maintains that a comprehensive market study had to be conducted to determine the precise number of jobs and tax dollars that would be generated, but it fails to cite any provisions of CEQA or the Guidelines for that proposition. In reality, CEQA only requires that the findings be supported by substantial evidence in the record. (Guidelines, § 15093, subd. (b).) Appellant also argues there is a potential risk that some jobs would simply represent workers coming from existing businesses that decided to relocate to the project's commercial shopping center. But even if that were true in the short run, the City has a history of successfully backfilling vacated stores with new tenants, as noted previously. We conclude there was

¹⁶ The precise number of jobs was not specified. One business person estimated that if Save Mart became the anchor tenant, it would bring 100 to 120 jobs. Appellant's traffic consultant factored into its analysis 90 retail and service employees.

substantial evidence in the record to support the City's findings that the project would indeed lead to job creation, economic growth and increased tax revenues.

Additionally, the project would plainly result in the construction of a number of needed and beneficial transportation improvements, including bus transit improvements. Infrastructure improvements to accommodate growth are a recognized benefit that can be relied upon in a statement of overriding considerations. (*Cherry Valley, supra*, 190 Cal.App.4th at p. 357.) The City's findings also cited certain General Plan policies that would be furthered. Although appellant characterizes the cited General Plan policies as too generalized to be a suitable consideration, it does not refute this factor. On balance, we conclude that the City's findings in support of its statement of overriding considerations were adequately supported by substantial evidence in the record. Although appellant disagrees with the City's final decision to balance the considerations involved in the way that it did, appellant has failed to show the City prejudicially abused its discretion.

DISPOSITION

The trial court's denial of the petition for writ of mandate and the resulting judgment in favor of City is affirmed. Each party shall bear their own costs on appeal.

KANE, J.

WE CONCUR:

HILL, P.J.

SMITH, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NARAGHI LAKES NEIGHBORHOOD
PRESERVATION ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF MODESTO,

Defendant and Respondent;

BERBERIAN HOLDINGS, L.P.,

Real Party in Interest and Respondent.

F071768

(Stanislaus Super. Ct. No. 2006259)

**ORDER GRANTING PARTIAL
PUBLICATION**

It appearing that part of the nonpublished opinion filed in the above entitled matter on June 7, 2016, meets the standards for publication specified in California Rules of Court, rule 8.1105(c), IT IS ORDERED that the opinion be certified for publication in the Official Reports with the exception of parts I.C., I.D., and II. of the Discussion.

KANE, J.

WE CONCUR:

HILL, P.J.

SMITH, J.

**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

**RECEIVED**

August 25, 2016

AUG 31 2016

via Post office mail

MAYOR & TOWN COUNCIL

The Honorable Barbara Spector, Mayor
and Members of the Town Council
Town of Los Gatos
110 E. Main St.
Los Gatos, CA 95030

RE: North 40 Specific Plan and Housing Element and Related Requirements

Dear Mayor Spector & Members of the Town Council:

The purpose of this letter is to provide guidance and assist the Town of Los Gatos in its decision making regarding the Grosvenor, SummerHill Homes and Eden Housing development application (development application). The Department understands the Town is considering this development application which includes 320 residential units of which, 49 homes will be affordable to very low income senior households. The development application uses State Density Bonus Law pursuant to Government Code Section 65915. The Department further understands the development application is proposed on a site previously rezoned for a capacity of 270 units to permit multifamily uses by right (without discretionary action) and to provide adequate sites to accommodate its regional housing need for lower income pursuant to GC Section 65583(c)(1) and 65583.2(h) and (i). The development application will meet a variety of the Town's housing needs and appropriately conducted approval will meet statutory requirements.

California's high housing cost and lack of housing supply compromise the ability to access opportunity (jobs, health, stability) for families and individuals, including working families and persons with special needs. Homeownership rates are the lowest since the 1940s and the State has not met its projected needs for new housing in the last fifteen years. The State disproportionately has 21 percent of the Nation's homeless population and over half of all households overpay for shelter.

With that context, the Department, among other things, is responsible for administering State housing element law (Article 10.6 of the Government Code), including reviewing local housing elements. In May 2015, the Department found the Town's housing element in compliance with State law. The element contains many important programs to address critical housing needs and fulfill statutory requirements. The Department offers the following to assist the Town in the implementation of its housing element and decision-making consistent with the General Plan.

Rezoned Sites: The housing element includes Action HOU-1.7 to rezone 13.5 acres and provide adequate sites to accommodate the regional housing need for lower income households. The Department understands the Town has rezoned acreage to implement Action HOU-1.7, including permitting multifamily uses by-right. This rezoned capacity must meet several specific requirements pursuant to

Government Code Sections 65583(c)(1) and 65583(h) and (i). Most prominently, rezoned sites must permit multifamily uses by right which means without discretionary action and shall not constitute a “project” for purposes of the California Environmental Quality Act. While design review is allowed under the statute, by right decision making must follow development standards that are objective, fixed, predictable, clear, quantifiable, written, warrant little to no judgement and should be applied in a manner that affirmatively facilitates development. An application for development on sites rezoned by right to accommodate the Town’s regional housing need should not be subject to excessively burdensome conditions of approval and generally should not be subject to a public hearing or public comment.

While the development application being subject to public hearings is concerning and potentially inconsistent with by right requirements, the Department encourages the Town to apply its decision making consistent with statutory requirements. Otherwise, actions would be inconsistent with the Town’s General Plan and statutory requirements and could require an amendment to the housing element.

No Net Loss: As the Department understands the circumstances, the development application does not trigger a need to rezone additional sites under No Net Loss Law (GC Section 65863) even though less units affordable to lower income households are proposed in the development application than identified in the housing element. While the intent of No Net Loss Law is to maintain sites to accommodate the regional housing need by income group throughout the planning period, the law is triggered by a reduction in residential density. The development application does not propose a reduction in density on the proposed site. However, the Department encourages the Town to continue its policies and programs, such as Policy HOU-2.4, Actions HOU-1.1, HOU-1.6, HOU-2.1, HOU-2.2 and HOU-8.1 to continue identifying and modifying opportunities to meet the Town’s housing needs. The Department welcomes the opportunity to assist identifying strategies for meeting the Town’s housing goals, including encouraging additional affordability and housing types.

Future Regional Housing Need Allocation (RHNA) Cycles: Approving the development application consistent with the various by right requirements would be consistent with the housing element and result in no carryover of capacity to the future RHNA cycle pursuant to GC Section 65584.09. Denying the development application may or may not have an impact on future RHNA cycles. For example, the future RHNA will be subject to methodology processes and factors (GC Section 65584.04) and there is potential for sub-regional delegation (GC Section 65584.03).

State Density Bonus Law (SDBL): The intent of State Density Bonus Law (GC Section 65915) is to contribute significantly to the feasibility of development for lower income households. Once an applicant meets eligibility criteria, a density bonus and concessions and incentives are entitled and should, in and of themselves, not require discretionary action (GC Sections 65915(f)(5) and (j)(1)). Specifically, no denial process is available for a density bonus. Based on the Department’s understanding, the development application meets eligibility criteria

under GC Sections 65915(b) and (c). Applicants meeting multiple eligibility criteria (Section 65915(b)(1)) may select which criteria to use (Section 65915(b)(2)). For example, the development application could select to use the density bonus under Very Low income households or Seniors. To interpret and require the density bonus under the senior criteria (GC Section 65915(b)(1)(C)) would be inconsistent with the intent of statute. Also, applicants may request a density bonus over the maximum allowable density under the general plan or zoning (Sections 65915(f) and (o)(2)).

Housing Accountability Act: The Town must consider the Housing Accountability Act (GC Section 65589.5) and at least subdivision (j) which applies to all development regardless of the level of affordability.

RHNA Progress: Approving and permitting the development application would be considered progress toward the Town's regional housing need and can be reported as RHNA credit in the annual report on implementation of the general plan, as required, pursuant to Government Code Section 65400.

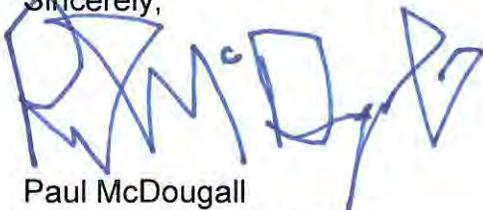
Various Other Statutes: The Town is encouraged to consider various statutory requirements such as:

- GC Section 65913 (Least Cost Zoning) requires local governments to make a diligent effort to reduce development costs through land use controls.
- GC Section 65008 declares any action null and void that denies residence to individuals or groups of individuals and prohibits discrimination against housing based on method of financing or intended occupancy by lower income persons.

Funding Incentives: Taking action consistent with housing element policies and programs can assist the Town in meeting requirements for a variety of funding programs. For example, the Department's Housing Related Parks Program provides financial incentives to cities and counties permitting housing affordable to lower income households. More prominently, the One Bay Area Grants utilize scoring criteria related to meeting housing objectives through the housing element and approval of housing for all income levels.

The Department wishes Los Gatos success in implementing the goals and objectives of its housing element. The Department appreciates the opportunity to provide comments. If you have any questions, please contact Paul McDougall, of our staff, at (916) 263-7420.

Sincerely,



Paul McDougall
Housing Policy Manager

From: Pilar Lorenzana-Campo [<mailto:pilar@siliconvalleyathome.org>]
Sent: Wednesday, August 31, 2016 10:19 AM
To: BSpector; Marico Sayoc; Marcia Jensen; Steven Leonardis; Rob Rennie
Cc: Joel Paulson; Attorney; Town Manager
Subject: Re: September 1, 2016: Town Council Meeting on North 40 Phase 1 Application

Good morning, Mayor Spector, Vice-Mayor Sayoc, and Town Council Members Jensen, Leonardis, and Rennie.

I hope this email finds you all well. I am writing to reiterate our support for the North 40 Phase 1 application. We urge you to take action to approve the project swiftly for the reasons listed below.

Increased market-rate and affordable housing stock. In addition to 270 new market rate homes that will improve the Town's jobs and housing imbalance, the project will bring about 50 new homes which will be affordable to seniors living on a fixed income. As of the most recent data, Los Gatos has a 1.7:1 ratio of jobs to employed residents. This imbalance forces Los Gatos workers to commute further out to find housing that's affordable to them.

Traffic concerns. Many in the community oppose the Project due to a belief that new homes will increase traffic in the community. In fact, the persistent under-production of housing has caused the congestion problems faced by Los Gatos, other communities in Santa Clara, and the broader Bay Area region. Creating new homes for the Town's current and future workers is a key strategy for alleviating congestions on our roads.

Aging in place and connectivity. The senior housing component of the project is ideally located to allow our elderly citizens to access retail spaces easily and to use public transit. Far too few of our elderly are able to age in place, and this project will allow some of our elderly to benefit from the retail, open space, and community benefits arising from the North 40 project.

Last, but not the least, we commend the Council and staff for the very thorough analytical and engagement process undertaken for the North 40 project. Enclosed is the coalition letter we submitted previously on this application.

Thank you for all that you do.

Sincerely,

Pilar Lorenzana-Campo
Policy Director
pilar@siliconvalleyathome.org
c. (408) 215-8925

SV@Home
95 South Market Street, Suite 300, San Jose, CA 95113

From: Pilar Lorenzana-Campo
Sent: Saturday, August 6, 2016 7:10 PM
To: bspector@losgatosca.gov; msayoc@losgatosca.gov; mjensen@losgatosca.gov;
sleonardis@losgatosca.gov; rennie@losgatosca.gov
Cc: jpaulson@losgatosca.gov; attorney@losgatosca.gov; manager@losgatosca.gov
Subject: RE: August 9, 2016: Town Council Meeting on North 40 Phase 1 Application

Dear Mayor Specter, Vice-Mayor Sayoc, and Town Council Members Jensen, Leonardis, and Rennie.

On behalf of our members and coalition partners, we strongly urge the Town Council to grant approval to the North Forty Phase 1 (Project) application. The Project will create an estimated 320 new homes, including 50 affordable homes for seniors, that will serve to partially mitigate Los Gatos' severe housing needs.

Thank you for your consideration. We appreciate the opportunity to provide feedback and would be happy to respond to any questions that you may have.

Sincerely,

Pilar Lorenzana-Campo
Policy Director
pilar@siliconvalleyathome.org
c. (408) 215-8925

SV@Home
95 South Market Street, Suite 300, San Jose, CA 95113



Leadership Board

Ron Gonzales, Chair
Hispanic Foundation of Silicon Valley

Ken Lung, Vice Chair
MidPen Housing

Kevin Zwick, Treasurer
Housing Trust Silicon Valley

Kathy Thibodeaux, Secretary
KM Thibodeaux Consulting LLC

Shiloh Ballard
Silicon Valley Bicycle Coalition

Bob Brownstein
Working Partnerships USA

Amie Fishman
Non-Profit Housing Association of Northern California

Poncho Guevara
Sacred Heart Community Service

Janice Jensen
Habitat for Humanity East Bay/Silicon Valley

Jennifer Loving
Destination: Home

Chris Neale
The Core Companies

Andrea Osgood
Eden Housing

Kelly Snider
Kelly Snider Consulting

Jennifer Van Every
The Van Every Group

Staff

Leslye Corsiglia
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Tel: 408.977.7714
Fax: 408.438.3454
info@svathome.org
www.svathome.org

TRANSMITTED VIA EMAIL

August 6, 2016

Los Gatos Town Council
110 E. Main Street
Los Gatos, CA 95030

Dear Mayor Spector, Vice-Mayor Sayoc, and Town Council Members Jensen, Leonardis, and Rennie.

RE: August 9, 2016: Town Council Meeting on North 40 Phase 1 Application

Silicon Valley at Home (SV@Home) is the voice of affordable housing in Silicon Valley, representing a broad range of interests, from leading employers that drive the Bay Area economy, to labor and service organizations, to affordable and market-rate developers who provide housing and services to those most in need.

We thank and commend the staff and Council for the thoughtful analysis and extensive engagement process that have resulted in a proposed mixed-use development that responds appropriately to the needs of the Town and its residents. The proposed community - with walkable retail, public open space, and a range of housing opportunities - will be a diverse and sustainable neighborhood that both provides important community amenities and responds to unmet housing needs.

On behalf of our members and coalition partners, we strongly urge the Town Council to grant approval to the North Forty Phase 1 (Project) application. The Project will create an estimated 320 new homes, including 50 affordable homes for seniors, that will serve to partially mitigate Los Gatos' severe housing needs.

The median home sales price in Los Gatos is now \$1.6 million and median rent for all properties in the Town, including all unit sizes, was a staggering \$4,450 a month (source: Trulia). With these high housing prices, even tech employees, with an average income of \$113,300, must pay more than 30% of their income toward rent. And, it is much harder for other workers, both those working in the tech industry and those working in other fields, to afford these high rents.

Recent data produced by Working Partnerships shows that white-collar contract industry workers' earnings averaged \$53,200, and blue-collar contract industry workers' earnings averaged \$19,000. At a 30% of income standard, these households could afford rents of \$1,330, and \$475 respectively.

Housing is a regional concern. All communities need to take action to meet the housing needs of their residents and workers. In the previous Regional Housing Needs Allocation (RHNA) cycle (2007 to 2014), the Town permitted a total of 228 units, representing 41% of its share of housing. The North 40 Project-- the culmination of many years of planning, countless opportunities to seek input, and careful review and thoughtful feedback from many stakeholders—will enable the Town to meet 43% (270 homes out of 619 homes required) of its share of housing growth for the current RHNA cycle (2015 to 2022). While this action will enable the Town to meet its goals for market-rate housing, the 50 senior units represent only a small percentage of the affordable homes needed, so more work must be invested to plan for and develop new homes for lower- and moderate-income families who work and live in our community.

Your support of this Project is of critical importance, helping to ensure that Los Gatos addresses its housing needs. Data collected by UC Davis shows that the Town has 11 low-wage workers competing for each affordable home. **To alleviate the existing lack of housing, we strongly urge you to approve the Project without delay.**

Thank you for your consideration. We appreciate the opportunity to provide feedback and would be happy to respond to any questions that you may have.

Sincerely,

Pilar Lorenzana-Campo, Policy Director, **SV@Home**

Kevin Zwick, Executive Director, **Housing Trust Silicon Valley**

Poncho Guevara, Executive Director, **Sacred Heart Community Service**

Jennifer Loving, Executive Director, **Destination: Home**

Michael Lane, Policy Director, **Non-Profit Housing Association of Northern California**

Amanda Montez, Senior Director, **Silicon Valley Leadership Group**

Steve Levy, Director, **Center for Continuing Study of the California Economy**

Matt Vander Sluis, Program Director, **Greenbelt Alliance**

Charisse Ma Lebron, Director of Health and Policy, **Working Partnerships USA**

Sandy Perry and Ron Johnson, **Affordable Housing Network of Santa Clara County**

Mathew Reed and Anthony King, **Sacred Heart Housing Action Committee**

cc: Laurel Prevetti, Town Manager, manager@losgatosca.gov

Rob Schultz, Town Attorney, attorney@losgatosca.gov

Joel Paulson, Community Development Director, jpaulson@losgatosca.gov

From: Babette Goldstein Ito [<mailto:babettegoldstein@yahoo.com>]
Sent: Wednesday, August 31, 2016 12:57 PM
To: Steven Leonardis; Planning; Marcia Jensen
Subject: Re: No on North 40 as proposed

Hi Steve and Marcia -I know this is a lot of work. Would really appreciate a revised version that took traffic and schools, open space into consideration. I can't imagine and wouldn't want to imagine a los gatos with the plans as is. Thank you very much,

Babette Ito
127 Worcester Loop
LG 95030

From: Babette Goldstein Ito <babettegoldstein@yahoo.com>
To: "sleonardis@losgatosca.gov" <sleonardis@losgatosca.gov>
Sent: Tuesday, August 9, 2016 9:43 AM
Subject: No on North 40 as proposed

Hi - Pls take the planning commission recommendation and vote NO on proposed North 40. The current plans have too many large scale homes and not enough green space, traffic abatement plans or look and feel of los gatos. This development as is will be only beneficial to the developers and not to Los Gatos citizens. There needs to be less units, more parking, green space and a real plan for conversion into the community.

Thank you,
Babette Ito
127 Worcester Loop
LG

From: mpmillen@aol.com [mailto:mpmillen@aol.com]

Sent: Wednesday, August 31, 2016 1:35 PM

To: Council

Subject: North 40 Project and latest reports and issues

Dear Council Members,

I wanted to offer a few additional thoughts on this project as you reach your final conclusions on whether to reject or deny this application.

I believe this project will seriously harm the downtown Los Gatos business district and our community in general.

I believe this project will create an unsafe and unworkable traffic circulation nightmare, and not only will traffic in and out of Los Gatos become bumper to bumper every day, but I believe there is a major health and safety issue with blocking access to the local hospital and emergency room at Good Samaritan Drive. Someone will needlessly die in the back of an ambulance, while stuck in a traffic jam at the North 40 if this project goes through. Minutes make a difference when someone is bleeding out, has a head injury, or suffers a heart attack. This reality is not being addressed.

I was deeply concerned about some of the comments of Council Member Jensen at the last meeting. Council Member Jensen seemed to be improperly considering deeply divisive "social justice" and political considerations related to World War 2 in her analysis, and in her decision making on this proposal. Such matters are not appropriate, and cannot justify a legally defective application.

I also want to point out two critical issues that I believe establish that this development is not "by right", is not entitled to density bonuses, and is not lawful.

First, the commercial development portions of this project establish that this is not a "housing development project" under Gov. Code Sec. 65589.5(h)(2) since the commercial sections are not "small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood." There are also sections that have no residential component and so do not satisfy this code section. Therefore, everything related to this project that is based on an assumption that the project meets the definition of Govt Code Sec. 65589.5(h)(2) is incorrect and unlawful, including claims it is "by right" and claims it is entitled to density bonuses.

Further, the RMM letter of August 26, 2016 is wrong where at pg. 7, RMM suggests that there are 2 ways to interpret this code section. There is only one way. Either a project is (A) "residential units ONLY." , or it meets the definition of (B) for mixed used (which it clearly does not). The word "limited" clearly requires that the project's commercial components be both "neighborhood commercial" and on the first floor of any building. There is no "or" in section (B) it is an - "and" - which means both criteria must be satisfied. RMM should be chided for such poor analysis.

There is no case law interpreting "neighborhood" commercial because the definition is clear and unambiguous. Santana Row is not "neighborhood commercial" serving the needs of "neighborhood residents", and the applicants desire to make this a regional commercial shopping and dining destination like Santana Row is obvious from the applicants public statements, designs, drawings, sales tax revenue and financial projections, and literature.

Next, if the town approves this project it will be illegally allowing the destruction of what I understand are 16 single family detached dwellings with yards. The RMM letter at pg. 6 incorrectly concludes that a new standard and formula not found anywhere in the law (square footage of all the replacement units compared to the square footage of all destroyed units) be adopted and applied. This is probably the most absurd statement in the RMM letter. This is flatly incorrect, clearly ultra vires, and violates the law. The law requires equivalent size and/or type. The reasons for this are clear.

The legislature wisely did not want developers to tear down quaint low income detached single family homes on large lots, and replace them with super high density cracker box apartments or condos for low income residents. This would harm the quality of the low income housing supply stock not improve it. It is not merely the number of units but the quality of those units, that is key to providing low income families with appropriate housing.

California case law is very clear that when the legislature uses "ordinary" words that they must be given their ordinary meanings. There is zero possibility that the town or developer can lawfully adopt some newly invented square footage formula to satisfy this legal standard. "Equivalent size or type" means exactly what it says. If 16 low income single family detached homes of 2000 square feet each on 8000 square foot lots are destroyed, then the replacement units must, at a minimum be either: 1) single family detached homes, or 2) have similar inside and outside square footage as the units lost to development.

Further, the fact that all these proposed new low income units will be age restricted to those 55 and older (forever) further proves this project application is improper, as none of the current homes are age restricted. The age restriction of the low income units alone is enough to lawfully deny the entire project.

Curiously, the developer appears to be attempting to place the entire specific plan housing allotment on about half the specific plan land area. In what sense does this comply with and honor the specific plan?

I urge the council to deny this project. The density of the homes should be spread out across the entire 42 acres of the specific plan area (as called for in the plan). The low income units that are being destroyed are not being replaced with equivalent size units or equivalent type units. The new age restrictions on low income units prevent the applicant from lawfully triggering the density bonus law. This project, and the "density bonus" the developer claims, do not comply with the law. The commercial portions do not meet the requirements of Govt Code Sec. 65589.5 and so the entire project is flawed and illegal. This project will create major health and safety problems by blocking access to the local hospital and ER.

It is clear that the town has many valid and legally proper reasons to deny this application. It does not meet the requirements of the law or the specific plan.

Finally, I want to point out that some have suggested that the project should be approved to "avoid litigation." I believe that if this project application is approved there will be litigation against the town and the town will lose.

This project does not comply with the law, creates many new problems, displaces families with children from critical low income housing in Los Gatos, and improperly claims legal rights and density bonuses to which it does not appear to be entitled.

This all appears to be an effort to strongarm the town into approving a development project that will harm Los Gatos for generations.

These are the main reasons I am against this application. I am confident the Council has the courage to deny this project application.

I believe summary denial is lawful, and will result in the developer quickly working with the town to create a new project that adds to our community and does not divide it.

Deny the project now before the law changes. This is your last chance to act.

Thank you for your consideration of these important matters.

Sincerely,

Mark Millen
25 Montgomery Street
Los Gatos, CA 95030
(408) 891-6344 - cell

From: Jak VanNada [<mailto:jvannada@gmail.com>]

Sent: Wednesday, August 31, 2016 3:07 PM

To: Council

Cc: Laurel Prevetti

Subject: Letter to Council 8-31-16 re No 40.docx

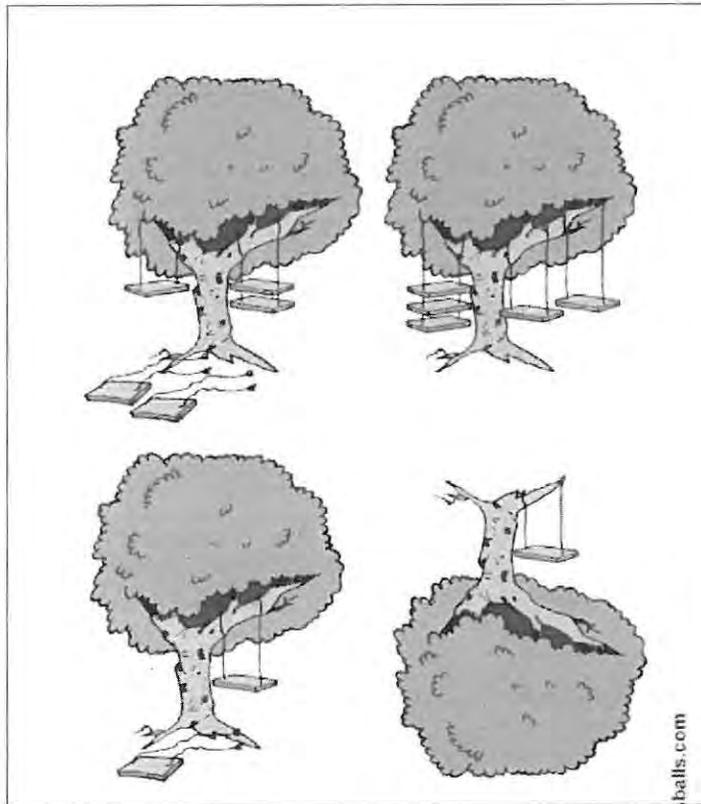
Council,

Please take a look at this opinion prior the council meeting on the 1st.

Jak Vannada

- After following the Planning Commission and Town Council hearings on the Phase 1 application for the North 40, I can't see where any facts have been presented to support denial of the North 40 phase 1 application.
- Neither Barbara, Marico nor Steve gave one single compelling, fact-based rationale for denial.
- In fact, the developer did everything, and more, asked of them by this and every preceding council.
- The council avoided making decisions by vetting this project over such a long period of time that it went through a "reset".
- You're headed that direction again.
- But this time, you'll avoid making a decision by forcing a good developer to look like the bad guy who will sue you, and, they will win, because they followed YOUR directions.
- This is nothing but politics.
- Exactly the opposite of why we voted for you.
- You outsourced an EIR to determine what this site could support.
- The council constructed the Specific Plan, refusing to let the developer with over 400 years of experience, have any input.
- The Specific Plan was 100% YOUR document.
- YOU should own it.
- YOU cut down the maximum space that could be developed; the developer complied.
- Nowhere in YOUR document did YOU tell the developer to spread the housing around equally in Phases 1 and 2.. In fact, in the Specific Plan YOU constructed put most of the residential in the Lark and Transition districts.
- They did that.
- Now you tell them you didn't want them to do what you told them to do.
- YOU told the developer to construct housing that fit the towns unmet needs.
- They did that.
- YOU either gave them objective directions, or YOU gave them subjective suggestions that left the door open.
- Now you realize that was a mistake and YOU want to change the rules.
- After 5 years and a design that YOU approved, YOU want to make it appear that the developer made you do it.
- Under YOUR administration, YOU agreed to have 364 units built to help the town meet the state and regional requirements of high density housing.
- YOU told them to do that.

- But now, YOU want it to look like they got greedy and have overdeveloped the property that the EIR says could be even more dense (and thus, more profitable!)
- Now you want cottage clusters which don't qualify as affordable housing?
- According to your EIR, the developer could have constructed more square footage of housing; more square feet of commercial; and more square feet of office.
- You required an unprecedented 30 % of open space. When have you ever required any other developer to put in space open to the public?
- Instead of designing in only 30% of open space, the developer designed an even greater 43% of open space, reducing the intensity that YOU did not want.
- The developer did more than you requested for Phase I.
- Every objection Mayor Spector had has been successfully answered or refuted as baseless or in contrast to what was actually stated in the Specific Plan.
- Every objection by Ms Doerner and Mr. Dominick has been successfully answered or refuted, also baseless or in contrast to the actual law.
- Mr. Leonardis's request for more information has been answered.
- In addition to paying the required Traffic Mitigation Fees, the developer has offered to construct an additional \$11,000,000 of traffic improvements
- In addition to working with the schools as you requested, the developer is giving them over \$6,000,000. No other developer has come close to this offer.
- Netflix got you to approve 65 foot high buildings, and gave us nothing in return.
- Are you getting even with Netflix for stiffing the town?
- If you built a new home on property you owned, and you built it according to the zoning code, would you let the neighbor design it for you?
- Could they do a better job than you and your architect?
- Can you or the residents of this town design a development better than a company that has done this since 1677?
- Several members of this council and many residents think they can. But, don't forget this aged joke below. It's not a joke. You may get what YOU'RE asking for.



- You asked us to participate in the process for the past 5 years.
- We did that.
- The advisory committee could not come to a clear decision, but you did create a Specific Plan using many of our suggestions and input.
- Now, you want to negate years of OUR work.
- You will lose credibility.
- You will lose people who cared enough to show up.
- You may gain the vote of these people who didn't care for 5 years, but they won't stay around for you in the future.
- They only use mass media where they can mask their opinions in anonymity.
- They won't put in the hard work where people sit in rooms for long hours hashing over the details.
- They won't help, and on the next projects, we won't either. Your decision making process will be so tainted, no one will want to put in the time.
- But, that may be what you want. However, keep in mind that we'll all show up to bitch at the last minute about the hard work you've done.
- Jak Vannada, 44 year resident of Los Gatos, Vietnam Vet, who has 3 children and 6 grandkids who can't afford to live here.

From: Maria Ristow [mailto:ristows@comcast.net]
Sent: Wednesday, August 31, 2016 5:31 PM
To: Council
Subject: my opinion of the Phase 1 application for the North 40

To the Los Gatos Town Council,

I have followed the Planning Commission and Town Council hearings on the North 40 for at least three years, and I can't see where any facts hold up to support denial of the North 40 phase 1 application. In its denial the Planning Commission majority clearly "felt" the application wasn't what the Town wanted, but their findings all appear to be subjective.

When the hearings moved to the Town Council, Councilperson Jensen laid out the process and explained why she would support the application. Councilperson Rennie asked for some modifications but also moved to approve the application. Council members Spector and Sayoc did not offer any fact-based finding for denial. Council member Leonardis asked for more information on issues raised, and these have now been answered by outside counsel, HCD and the applicant. This entire series of hearings should be about architecture and site, yet this opportunity to deal with these important details is being squandered by attempts of the council members to find one technical reason to deny the application.

The fact that a large number of residents in Town vocally oppose this application doesn't mean it's not legally (or planning-wise) the right thing to support. The present Specific Plan was created by the Town over a period of almost 4 years, approved by the Planning Commission and then approved by the Town Council in June of 2015. During the approval hearings, LGCA as well as other groups and individuals gave input for changes. Some suggestions were adopted, others not. At that time, one criticism LGCA had of the Specific Plan was that it was "not specific enough." Yet you, the present sitting Town Council, approved it and left room to allow "flexibility." Now some of you are talking about "intent" and intensity. The failure to define and specify exactly how much housing goes where in the zones has led to a proposal placing much of the housing in the Lark and Transition Districts. The Plan clearly allows it. Your lack of foresight to anticipate such a scenario does not render this application out of compliance.

It's been pointed out that both Leonardis and Spector did not vote to approve the final Specific Plan. Yet, of the more than 30 motions that went into the Plan, they each only voted against 5 of the motions, and none of those related to housing or anything covered in this application. The issues they did not approve were mainly the removal of a chart dictating number of stores at various sizes, or the support of the Historic Preservation Committee recommendations to retain overall agrarian feel. These issues could be brought up after this application and perhaps an amendment to the Specific Plan considered. But BOTH of these Council members voted to approve 27 of the 32 motions and this application falls under all the provisions they approved. (<http://lg-ca.com/who-voted-for-which-parts-of-the-specific-plan/>)

All along, there has been some resistance to anything being built at the North 40, but the Specific Plan clearly provides for development. A planned approach to development of the North 40 is important for this Town, and that was recognized by the creation of a Specific Plan. Some residents don't want anything and their goal is simply to stop this project. These people are ignoring at least six years of council and citizens' hard efforts, and there is a great potential that a lawsuit will cost the town a small fortune. This council did not approve a sales tax for this fall, so we will clearly have to cut services or projects to pay for a lawsuit we are likely to lose.

Certainly the pressure from upset residents and business owners must be immense. Yet all of you took

office with an oath to uphold the law and to make the best choices for our entire Town. Your view must be for the future, not the immediate present.

At the last meeting, the Mayor Spector gave nothing objective for denial, and she even mentioned issues that don't apply to Phase 1. For instance, why would a developer not proposing a hotel in this phase include it in a study? Perhaps 20 other uses NOT proposed should also be in the study? This makes no sense to me. The mayor cannot produce any objective criteria upon which to deny this. Both she and Councilwoman Sayoc sounded vague-- like they were reaching to back up "feelings" that this application isn't quite what they want. In that case the Specific Plan should have been more specific! The council majority has backed themselves into a corner. Now they may leave the Town open to lawsuit from building or housing advocacy groups if not the developers.

Both Councilman Rennie and Councilwoman Jensen laid out good reasons to approve the application. It is my hope that they don't change their minds now as it will make them look like they've folded to political pressure – something both said they would not do. Councilman Leonardis asked questions that have all been answered. He does not appear to have a fact-based reason to deny. I am hoping both Council people Spector and Sayoc have read over all the material and understand why approval is the only legal and logical step.

Thinking is difficult. That's why most people react. We need a Town Council that leads, plans and follows through. Please be that Town Council.

Thank you. I appreciate the work you all do on so many issues before this Town.

Maria Ristow

29-year resident of Los Gatos

From: Shannon Susick [<mailto:ssusick@comcast.net>]
Sent: Wednesday, August 31, 2016 9:58 PM
To: BSpector; Marico Sayoc; Marcia Jensen; Steven Leonardis; Rob Rennie
Cc: Laurel Prevetti; Joel Paulson; Robert Schultz
Subject: on the Eve of September 1st....North 40

Good Evening Mayor Spector & Council,

This evening, as for the past few weeks, months & for some of you years; the mind and heart must be full and sleep.... perhaps fleeting if at all.

Your time and efforts- no matter your position on the first North 40 application, are appreciated by all your constituents and by the many residents and concerned citizens that have written, spoken and attending some or all of the meetings & hearings.

Out of the deep love of this Town by an overwhelming majority of the residents whom you represent comes the mandate to deny the current application, review the Specific Plan and ensure that the intent of the creators of the Specific Plan is met with future applications.

Despite the time and energy spent by yourselves and those before you, what is imperative tomorrow is that the best decision be made for future of our Town, its residents and all those impacted by this enormous proposed project. Yes, the process is exhausting, but the result will live in perpetuity and must be positive and in compliance. Now is the time to stay strong and know you are doing the right thing.

Legal findings have been brought forward by the Planning Commission, staff, Mayor & Council and residents that support a motion to deny the current application and review the Specific Plan. We can do so much better.....this is only the 1st application for what is one of the last orchards in this valley & our Town.

Thank you again for all your time, energy and strengths.....truly.

Shannon Susick
(408) 316-9559

Findings for Denial; 1st North 40 Application
8/30/2016

1. Require that the development meet the Specific Plan with lower intensity in the Lark District.
2. Follow the Town's BMP guidelines for affordable housing throughout the development.
3. Require that the development seamlessly blend with the surrounding areas.
4. Require that the application be denied because the economic study fails to address these elements:
 - a. The Town's identified commercial leakages which included general merchandising
 - b. The identified need for 10,000 sq. ft. or above of commercial units
 - c. The new office and hotel uses which were suggested
 - d. The number of commercial units by square footage
5. Require that the development comply with Appendix 6C of the Specific Plan and meet the unmet needs defined as Generation Y and Baby Boomers.

*please note that areas of great concern that are not in the purview of the Council for the current application due to outside agreements and certification of the EIR include the impact on schools & traffic.

**while there are mitigation measures and dollar amounts offered by the developer; none would be required if the impact of this project on the Town and its residents was less adverse and of a smaller magnitude.



From: John Shepardson <shepardsonlaw@me.com>
Sent: Wednesday, August 31, 2016 10:40 PM
To: BSpector; Marico Sayoc; Steven Leonardis; Rob Rennie; Marcia Jensen; Council; Laurel Prevetti
Subject: N. 40 (Good Sam Expansion)
Attachments: IMG_1087.JPG; ATT00001.txt; IMG_1088.JPG; ATT00002.txt; IMG_1089.JPG; ATT00003.txt

713,700 feet of commercial and parking space on 9.3 acres.



NOTICE OF DEVELOPMENT PROPOSAL

The City of San Jose's Planning, Building and Code Enforcement Department has received an application for a development permit at this property



PROJECT DESCRIPTION: General Plan Amendment to change the Land Use/Transportation Diagram designation from Neighborhood/Community Commercial to Regional Commercial and a Planned Development Zoning to rezone from the CP Commercial Pedestrian Zoning District to the CG(PD) Planned Development Zoning District to allow up to 380,000 square feet of commercial space and 253,700 square feet of parking structures, and the removal of 27 ordinance sized trees and 147 non-ordinance sized trees on a 9.3-acre site

PROJECT ADDRESS: 2505-2577 Samaritan Drive

PROJECT FILE: GP15-014 and PDC15-028

APPLICANT: SAMARITAN MEDICAL CENTER

COUNCIL DISTRICT: 9

SHR AREA: No

For Additional Information:

- View information and/or submit comments of this City of San Jose's On-Line Permitting web page at <http://www.sjpermits.org> by using the project file number located above.
- Contact **Lea Simvoulakis** in the Planning Division at 408-535-7837 or by e-mail at Lea.Simvoulakis@sanjoseca.gov
- Visit the Planning Division's Public Information Openness Meetings through Friday, October 10, 2015 at City Hall, 200 East Santa Clara Street.
- Muốn biết tin tức bằng tiếng Việt xin vui lòng liên hệ với Văn phòng Dịch vụ Khách hàng số 408-535-7807 và đọc các tài liệu GP15-014/PDC15-028.
- Para información en Español acerca de esta solicitud, comuníquese con Elizabeth Zapata al 408-535-7806 o envíe un correo electrónico al número de proyecto GP15-014 y PDC15-028.

DEVELOPMENT PROPOSAL

Planning and Code Enforcement Department
Development permit at this property

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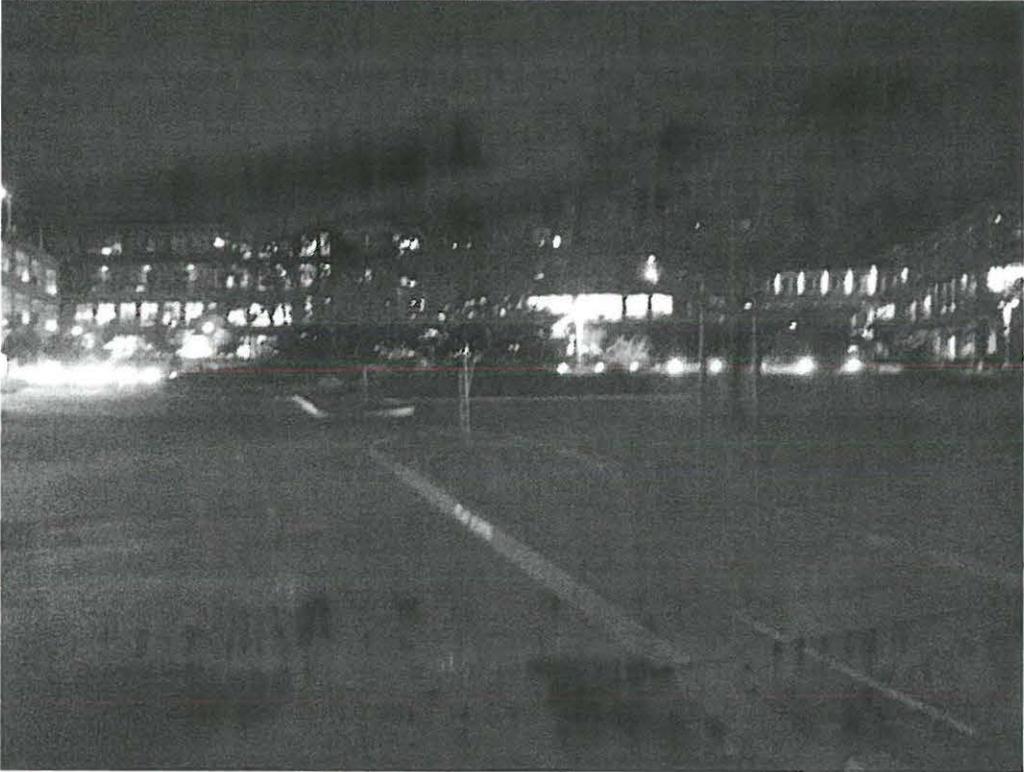
On-line Permitting web page at <http://www.sjpermits.org> by using the project file number located above.
or by email at Lea.Simvoulakis@sanjoseca.gov
through Friday, October 10, 2015 at City Hall, 200 East Santa Clara Street.
Muốn biết tin tức bằng tiếng Việt xin vui lòng liên hệ với Văn phòng Dịch vụ Khách hàng số 408-535-7807 và đọc các tài liệu GP15-014/PDC15-028.
Para información en Español acerca de esta solicitud, comuníquese con Elizabeth Zapata al 408-535-7806 o envíe un correo electrónico al número de proyecto GP15-014 y PDC15-028.

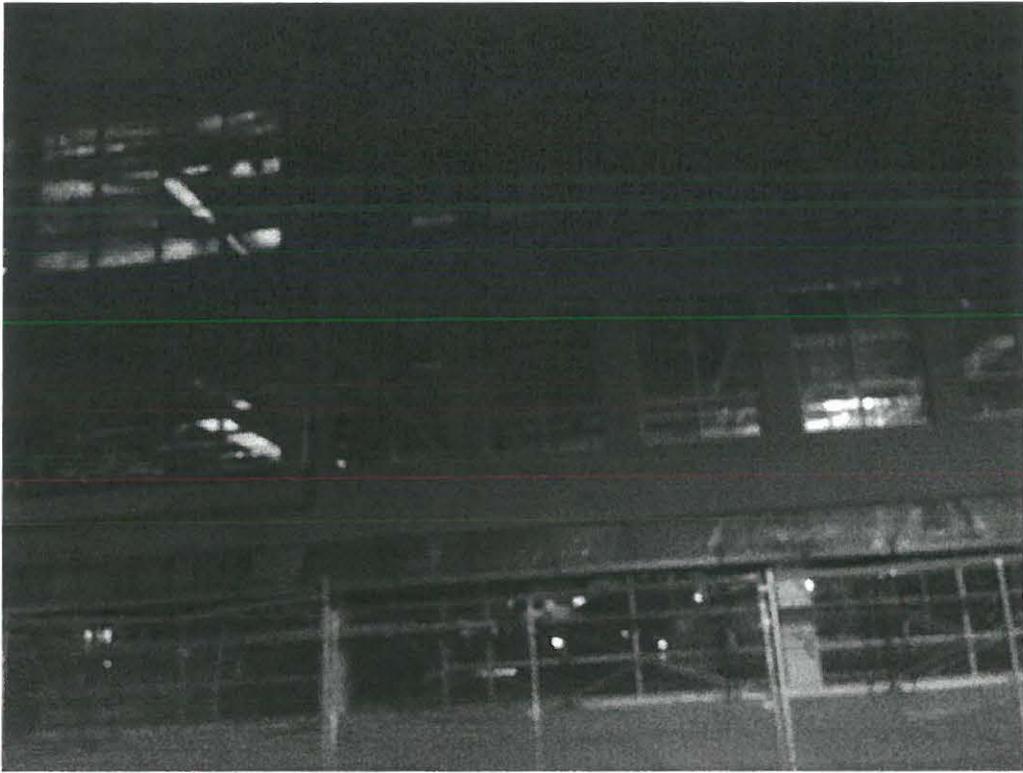












From: Lee Quintana [mailto:leeandpaul@earthlink.net]
Sent: Thursday, September 01, 2016 7:37 AM
To: Laurel Prevetti
Subject: North 40

September 1, 2016

To: Mayor Spector and Town Council
Subject: Phase 1 North 40 Specific Plan

Rather than duplicating what has already been written I would like to add my name to the letters in the Desk Item written by Maria Rostow and Jak VanNada.

However, I am still hopeful that the Council will approve Phase 1 with a few some added conditions. If that is the case I would again request that Council consider amending the Conditions of Approval to:

- 1) Include all the publicly accessible space proposed by the Applicant in a Public Access Easement (approximately 7 acres), rather than just the Community Park.
- 2) Prohibit fencing of publicly accessible spaces
- 3) Provide small signs identifying publicly accessible spaces are for public use

In addition, that should the Council approve changes to the architecture parallel to Lark Avenue, please consider only changing some of the elevations so that there appears to blending or weaving the more traditional "Los Gatos" styles with the architecture proposed by the application.

Thank You for your consideration,

Lee Quintana
5Palm Ave.

August 31, 2016

TOWN OF LOS GATOS
PLANNING DIVISION

To: Town Council

The following consolidates my comments concerning the "Legal Requirement to Replace Units" in rebuttal to points and assertions made in letters made by Goldfarb Lipman (dated August 22 '16) and by Remy Moose Manley (dated August 26 '16). I stand firm in my comments and interpretations as discussed in detail in my letters to you dated Aug 8 '16, Aug 10 '16 (*emphasis added reg intent of the law*) and Aug 15 '16.

Legal Cites and References	Responses a la Goldman Lipman	Responses a la Remy Moose Manley	Rebuttals a la Doerner SaveOurHood@yahoo.com
"Application Date" and Applicability of Legal "Replacement Requirement"			
<p>"Paragraph (3) of subdivision (c) [the replacement housing provision] does not apply to an applicant seeking a density bonus for a proposed housing development if his or her application was submitted to, or processed by, a city, ... before January 1, 2015."</p>	<p>"There is no doubt that the application for the Project was submitted to, and processed by, the Town before January 1, 2015. The applicants submitted the A&S and VTM to the Town on Nov 14 '13. The Town ... processed... and requested more info on Dec 18 '13."</p> <p>"The term "application" ... referring to the date of the initial application for the Project ..."</p>	<p>"In fact, an important earlier provision ... supports this broader view. Section 65915, ... (b)(1), provides that a city shall grant one density bonus ... when an applicant ... seeks and agrees to construct a housing development " that will contain some %s of units of ... low income persons or families or senior housing. From this early context in the statute, it is reasonable to interpret subdivision (c)(3)(C) as referring to the original application for a housing development ..."</p>	<p>Obviously, the facts as to the "Application Filing Date" (Nov '13) and the date the Town requested more information (Dec '13) in an effort to complete the Application are not in question. So, let us simply concede to these facts – that the exclusionary condition concerning the "Requirement to Replace Existing Units" applies to this Application and that, where used elsewhere in 65915, we have a clear understanding of the definition of "the date of application".</p>
"Application Date" and Definition of "Maximum Allowable Residential Density"			
<p>What is the "maximum allowable residential density" applicable to the Current Proposal?</p>	<p>"... a "density bonus" is: "A density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the city."</p> <p>"Maximum allowable residential density" ... is defined as: "The density allowed under the zoning ordinance and land use element of the general plan ..."</p> <p>Both the ... land use element ... as amended ... on June 17, 2015, and the Specific Plan, which acts as the zoning for the site, state that the maximum capacity of the ... site is 270 units.</p>	<p>"The law states that the starting point for determining a density bonus is the "maximum allowable residential density as of the date of the application...."</p> <p>"Here, the Town General Plan states that the maximum capacity of this project site within the North 40 Specific Plan is 270 units."</p>	<p>I have conceded to the fact that the "date of the application" is Nov/Dec 2013. However, both Goldfarb and Remy are using "maximum allowable residential density" as of June 2015. From Feb '93 until June 17 '15 – the Town's zoning ordinance and land use element of the General Plan was as follows:</p> <p>In February 1993, the Town adopted the Highway 85/Vasona Light Rail Element of the General Plan. This General Plan amendment changed the land use designation along both sides of Los Gatos Boulevard between Lark Avenue and Samaritan Drive from residential and agricultural to mixed use commercial. Additionally, the General Plan amendment stated that the area west of Los Gatos Boulevard bordered by Highways 85 and 17 and Lark Avenue (Sub-area 4.1) should be developed with mixed used commercial, comprised of destination retail with limited neighborhood commercial and other uses that would supplement the primary use.</p> <p>Allowable land uses included: Destination retail, neighborhood commercial, lodging, high-turnover and quality restaurants, office (other than medical), entertainment and recreation, public/civic uses, and transportation related development.</p> <p>"Maximum allowable residential density" = "0"</p>

August 31, 2016

The Definition of "Application Date" is NOT Arbitrary – It Must be Consistently Applied
IF Dec 2013 – AB 2222 Does Not Apply + Max Allowable Residential Density is "0" ==> DENY PROJECT
IF June 2015 – Max Allowable Residential Density is "270 (with Adjs)" ==> AB 2222 APPLIES
The Following Assumes the Applicants Will Opt for June 2015

Legal Cites and References	Responses a la Goldman Lipman	Responses a la Remy Moose Manley	Rebuttals a la Doerner SaveOurHood@yahoo.com						
<p>659159(c)(3) – Amendments made Pursuant to AB 2222 – Requirements to Replace Existing Units</p>	<p>The Applicants .. completed a .. survey - .. 20 units are on the site. One has been used for storage for >10 A second unit was owner-occupied before being purchased by the Applicants and has not been leased since. This leaves 18 units that may have been available for rent in the last five years.</p>		<p>My direct, on-site observations and inspections yielded 19 units. In addition, Figure 4 in the EIR (dated Apr '14) shows 2 additional units (one on Lark and one on LGB that I could not personally observe (located in "No Trespassing" zone) but cars were present at each – for a total of 21 units.</p> <p>The entirety of (c)(3)(B)(i) is included in the Goldfarb letter – Ms Kautz's statements reg units currently vacant are irrelevant – replacement units are still required. BTW, the "long-time" vacant unit is still listed on Metro-scan as being a 2Bd/1Bth and is current on taxes paid; the other unit continued to be rented by the prior owner until his death in Feb '16.</p> <p>To my knowledge, 20 units were occupied as of June '15 and one was vacant – yielding a total of 21 units requiring replacement.</p>						
	<p><i>"Currently ... AB2556, a 'clean up' bill ... provides that " 'equivalent size' means that the replacement units contain at least the same total number of bedrooms as the units being replaced." The affordable senior units contained in the Project meet the standard in AB2556: they provide more total bedrooms than do the existing 18 potential rental units: 49 bedrooms will be provided, while 39 exist."</i></p>	<p><i>"The applicant's counsel's letter dated Aug 22 '16 notes that there is a bill (AB 2556) ... to clarify the replacement housing provisions. If that bill passes and is signed, then according to the applicant's counsel, the proposed project would meet and exceed that requirement for bedrooms"</i></p> <p>Disappointing that the only "conclusion rendered" was to refer to the Applicant's Counsel.</p>	<p>There is no legal weight to proposed legislation. However, there is ambiguity in the current State law text. In addition, I find that Ms. Kautz has been extremely dismissive in her interpretation of the proposed "clean-up" text. The "clean-up" text (verbatim and red-lined) is:</p> <p><i>"(B) For the purposes of this paragraph, replace" shall mean ...:</i></p> <p><i>(i) If any dwelling units described in subparagraph (A) are occupied on the date of application, the proposed housing development shall provide at least the same number of units of equivalent size or type or both, to be made available..."[(ii)has the same provisions for vacant units]</i></p> <p><i>"(D) For purposes of this paragraph, "equivalent size" means that the replacement units contain at least the same total number of bedrooms as the units being replaced."</i></p> <p>"At Least the Same Number of Units" = 21</p> <p>"... of equivalent size" (contain at least the same total number of bedrooms):</p> <table data-bbox="1036 1633 1344 1730"> <tr> <td>2 bedrooms</td> <td>16 Units</td> </tr> <tr> <td>1 bedroom</td> <td>4 Units</td> </tr> <tr> <td>4 bedrooms</td> <td>1 Unit</td> </tr> </table>	2 bedrooms	16 Units	1 bedroom	4 Units	4 bedrooms	1 Unit
2 bedrooms	16 Units								
1 bedroom	4 Units								
4 bedrooms	1 Unit								

All Proposed affordable units are one bedroom rentals with the exception of the Manager's Unit which has 2 bedrooms. Therefore, the Current Proposal is NOT replacing 16 "existing units of equivalent size". The Current Proposal does NOT comply with § 65915 as amended by AB 2222 ==> DENY PROJECT

August 31, 2016

THE SPIRIT AND INTENT OF THE STATE DENSITY BONUS LAWS AS AMENDED BY AB 2222

In addition to the preceding, I firmly believe that utilizing the affordable units constructed pursuant to these replacement requirements in the total number of affordable units used to determine 65915(b) eligibility requirements and subsequent calculation of available density bonus percentages pursuant to 65915(f) is **contrary to the State's core objective in ONLY REWARDING developers for the construction of NEW affordable housing**. Else, as an extreme example, a developer could 1) demolish 10 affordable units, 2) build 10 "new" replacement affordable units, 3) claim 100% in meeting the 65915(b)(1)(B) eligibility requirements of 5%, 4) utilize the remaining "95%" [A] to determine the 65915(f)(2) 35% bonus percentage, and 5) build an additional 4 units – **with NO ADDITIONAL /NEW AFFORDABLE HOUSING BEING MADE AVAILABLE TO THE POPULACE**. Oh, and like the Current Applicants – they will be 4 large, at-market "for-sale" units versus small rental units.

In the Current Proposal – assuming compliance with the replacement requirements (non-compliance of which already is a foundation for denial) – **the actual density bonus should be calculated as follows:**

- Total of 49 VLI units LESS the 21 Replacement Units = 28 VLI Units
- 28 VLI Units vs 237 Base Density = 11.8% thereby meeting the 65915(b)(1)(B) 5% criteria
- [A] 11.8% LESS the 5% = 6.8% when applying table at 65915(f)(2) → @6%=22.5% bonus; @7%=25% bonus. I understand that all fractional units are rounded up – but do not know where the rounding rules concerning %s are located. **So, bonus units would be between 54 and 60 – not 83.**

[A] The last sentence in 65915(f) BEFORE you look at the tables to determine the level of density bonus reads:

The amount of density bonus to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b).

Therefore the 5% "criteria percentage" is deducted from the percentage of total **NEW** affordable housing. In other words, the amount of affordable housing "above and beyond" the minimum expected by the State is what qualifies for a bonus.

Bill Analysis of Assembly 2222 which amended Section 65915 to add the "replacement requirement" and can be found at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_2201-2250/ab_2222_cfa_20140506_131240_asm_comm.html. According to the author:

"Adequate and affordable housing is an issue of statewide concern. Yet, the change made to the density bonus law by SB 1818 had the reverse effect and has resulted in fewer affordable units. Buildings that were built pre-SB 1818 that are proposed to be demolished and replaced may now qualify for a density bonus under the new SB 1818 structure. SB 1818 inadvertently created a loophole whereby developers that propose to demolish pre-SB 1818 buildings are not required to begin the new project with the same number of affordable units. As a result, a new project may result in less affordable units than previously existed on the parcel. This bill addresses the loophole created by SB 1818 and ensures that affordable units are preserved when a development proposes to demolish a site and the new proposal is to replace the outdated structure with a new residential structure by ensuring that the project begins with the same number of affordable units. Additionally, this bill increases the classification of affordability from 30 years to 55 years. This change is consistent with other state and local programs and ensures that affordable units remain affordable. AB 2222 will preserve and promote the supply of affordable units for years to come."

- Arguments in support - None on file.
- Arguments in opposition - None on file.
- Double-referral - This bill was heard by the Housing Community Development Committee on April 30, 2014, and passed with a 7-0 vote.

TO: Town Council

Excerpt from Aug 22, 2016 Letter from Goldfarb Lipman:

"The Project is a development project for more than five residential units. The Project includes residential units located on contiguous sites that are the subject of one development application. Only one tentative subdivision map has been submitted for the entire Project. As required by this section, the bonus has been calculated by including all of the residential units that are the subject of the same development application. The fact that the single development application is submitted by more than one entity, who are together the "applicant," is irrelevant in calculating the density bonus."

Excerpt from Aug 26, 2016 Letter from Remy Moose Manley:

"Third Bullet Point – Mr. Dominick asserts that the density bonus law allows only a single applicant for a project invoking the law, and that the partnership of Grosvenor USA Limited and Summerhill Homes for this project's application violates the intent of the density bonus law.

*Response – While Government Code section 65915 refers to "an applicant," it nowhere specifies that an "applicant" may not consist of more than one entity working in a legal partnership on a particular project. The density bonus law does not give any indication that the use of the singular term "applicant" was intended to exclude **partnerships**; rather, it seems more likely that the term was used because project applications are typically submitted **on behalf of one named entity**. Moreover, an interpretation of the statute that allows **such partnerships** to reap the advantages provided in the law seems entirely consistent with the purpose and intent of the statute, which is to increase the amount of affordable housing in the State.*

*The project application proposes the requisite "housing development" to qualify for a density bonus, in that it proposes more than five residential units on contiguous sites that are the subject of one development application. (Gov. Code, § 65915(i).) The term "applicant" is not defined in the statute, and therefore there is **no legal basis for presuming that the statute excludes partnerships acting under a single applicant's identity.**"*

This is the crux of the issue. Goldfarb's letter refers to multiple individual applicants. Remy's letter alludes to the need for a legal relationship required for compliance.

No evidence has been provided (although requested) as to the legal association of the ApplicantS (sometimes refers to Applicant, Applicants or by individual names). In fact, there are some instances where "Applicant" only relates to Grosvenor and Summerhill – other times it includes Eden. All references allude to the fact that they are acting "independently" – whereby efforts by Eden necessary to achieve the density bonus is benefitting Grosvenor and/or Summerhill. Is there evidence that the three entities are "working in a legal partnership"?

RECEIVED

SEP -1 2016 @ 8:14am

TOWN OF LOS GATOS
PLANNING DIVISION

From: Angelia Doerner [mailto:saveourhood@yahoo.com]

Sent: Thursday, September 01, 2016 9:03 AM

To: Council; BSpector; Marico Sayoc; Marcia Jensen; Steven Leonardis; Rob Rennie

Cc: Laurel Prevetti; Attorney; Planning

Subject: North 40

Rest assured, I will be avidly communicating with our State representatives regarding the atrocities prevalent in this Current Proposal.

- **Most troublesome** to me is the outright neglect afforded to our BMP ordinances!! Not only are they using small rental units to achieve at-market for-sale profits, they are further expanding the abuse by consolidating them into a "senior living arrangement" - because it is the cheapest way to maximize their profits. Even though, initially, they requested a waiver of virtually all of BMP guidelines, NOW the developer is claiming they don't need a waiver as the "**Staff and Town Attorney said they didn't**"! OUR STAFF AND TOWN ATTORNEY HAVE NO AUTHORITY WHATSOEVER TO MAKE SUCH CONCLUSIONS/REPRESENTATIONS ON THE PART OF THE TOWN. **This matter deserves discussion from the dais!**
- Also the **abuse of the law by providing small rental units as affordable to obtain a bonus - then using ALL bonus units for "for sale" units.** If I had more "free" time, and if we had a Town Attorney with any chutzpah, I am confident we could make an argument that the bonus units should be allocated between rental and "for sale" units in the same proportion as the "pre-bonus" development. I was unable to find any case law where the type of development we are dealing with has been brought before a court or, more importantly, ever been done in practice - in California or in other States with similar density bonus laws. It reeks of manipulating the law in bad faith on the part of the developer and **taints our Town by association.**
- The entire debate on applicability of replacement housing. In addition, the comment made by Ms. Kautz that "this only relates to rentals" is ludicrous and only speaks to more revisions to be added to DRAFT AB 2556. There are already provisions in the "replacement code" that makes it clear that both rentals and "for-sale" units are covered. References include "**rental or housing costs**"; "55-year provisions for rentals" and direct referral to code text with how "for-sale" units shall be handled into perpetuity; etc.,

God's speed tonight on making a decision worthy of how much this Town can offer to a new group of residents on the North 40 - if it is developed:

- within the Vision and Guiding Principles of the Specific Plan,
- complies with our BMP ordinance that speaks to the core of our Town character, and
- provides all with a clear conscience regarding adherence to the intent and spirit of the law to increase our supply of quality affordable housing.

Thank you for your service.

Angelia Doerner

Live Simply, Laugh Often

From: John Shepardson [mailto:shepardsonlaw@me.com]
Sent: Thursday, September 01, 2016 9:20 AM
To: BSpector; Council; Laurel Prevetti
Subject: N. 40 (Traffic Chocking Life)

See **Trump** on Page 12

Protesters' signs in Spanish read: "Trump you are a monster."
"Stop the offenses of Trump and EPN," referring to Mexican President Enrique Peña Nieto.

Front page on Merc 9/1/16

'It's become a monoculture'

Mayor: Tech is choking life out of Palo Alto



MICHELLE QUINN
COLUMNIST

Downtown Palo Alto used to be the startup capital. Firms like Facebook and Google started small there, grew bigger and then moved out when they became too large.

But, according to Pat Burt, the mayor of Palo Alto, the city's role as a tech incubator is in danger. Large employers like Palantir Technologies, the secretive private software firm, and Amazon, which has a large research center in the heart of the Peninsula city, have taken over, he says.

"It's become a monoculture," Burt says.

And he wants to do some-

thing about that — to actually say no to some kinds of growth. Burt has been looking at re-vamping a decades-old zoning ordinance that would force tech companies to move out when they get too big.

Cities everywhere are creating tech zones to attract firms with high-paying jobs. Most American mayors salivate at the thought of tech employers coming to their towns. Not Burt.

Palo Alto has already been criticized for wanting the jobs that come with being a tech corporate headquarters but not keeping pace with housing

development. Now, it appears, some of its leaders are not sure about the job growth either.

Burt may sound crazy, but I can see his point. Job growth is a great thing, but if the influx of workers and traffic chokes the life out of a city, public officials have to ask if it's too much.

The funny thing is that the question, which has become a common debate in San Francisco and Oakland, hasn't been asked as often in the heart of Silicon Valley.

Palo Alto has long been a perfect startup location — close to

See **Quinn** on Page 12

S ON THE GO
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BUSINESS ____ C12
CLASSIFIED ____ B7
COMICS/TV ____ B10

LOTTERY ____ A2
MOVIES ____ EYE22
OBITUARIES ____ B6

OPINION ____ A14
PUZZLES ____ B4, C10
ROADSHOW ____ A2

WEATHER
Mostly sunny. H: 62-83 L: 51-59
Full weather report on Page B12

TEAMING UP FOR HIGH SCHOOL

goldfarb
lipman
attorneys

1300 Clay Street, Eleventh Floor
Oakland, California 94612
510 836-6336

RECEIVED

SEP -1 2016 @9:53am

TOWN OF LOS GATOS
PLANNING DIVISION

M David Kroot

September 1, 2016

Lynn Hutchins

via email

Karen M. Tiedemann

Thomas H. Webber

Dianne Jackson McLean

Michelle D. Brewer

Jennifer K. Bell

Robert C. Mills

Isabel L. Brown

James T. Diamond, Jr.

Margaret F. Jung

Heather J. Gould

William F. DiCamillo

Amy DeVaudreuil

Barbara E. Kautz

Erica Williams Orcharton

Luis A. Rodriguez

Rafael Yaquián

Celia W. Lee

Dolores Bastian Dalton

Joshua J. Mason

Vincent L. Brown

Hana A. Hardy

Caroline Nasella

Eric S. Phillips

Elizabeth Klueck

Daniel S. Maroon

Justin D. Bigelow

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Re: **Response to Letter Submitted by Leila H. Moncharsh (August 30, 2016)**

Dear Town Manager Prevetti:

This letter is written on behalf of Grosvenor USA Limited and Summerhill Homes (collectively, the "Applicants") in relation to Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014 (collectively the "Planning Applications") for 320 residences and 66,000 gross sq. ft. of neighborhood commercial space located in the North Forty Specific Plan area (the "Project"). This letter provides a brief response to the letter submitted by Leila H. Moncharsh on August 30, 2016 on behalf of Barbara Dodson.

Eligibility of the Project for a Density Bonus. As verified in the August 25, 2016 letter from the Department of Housing and Community Development (HCD) and the August 26, 2016 memo from Remy Moose Manley, the project is eligible for a density bonus because the proposed senior housing will be occupied by very low income households. The bonus has not been calculated based on the building's status as senior housing but on its status as very low income housing.

Requirements for Senior Housing. Physical requirements for senior housing are contained in Civil Code Section 51.2, which requires elevator access, a common room, some common open space, and compliance with requirements for access and design contained in the Fair Housing Act, Americans with Disabilities Act, and Title 24 of the California Code of Regulations. The senior housing has been designed to meet all of these standards.

Comments regarding "accessibility" referenced no adopted standard and were based on the accessibility of the current vacant site. The attached letter from Eden Housing, proposed developers of the senior housing, describes some of the additional "accessibility" features proposed as part of the Project (including, for instance, the Market Hall and the other neighborhood-serving retail businesses and improved access to bus service). With those features, the senior housing will score the maximum possible points for neighborhood amenities when being considered for highly competitive federal tax credits. All maintenance costs for ventilation and other utilities are the responsibility of the building owner; rents to the residents cannot exceed those affordable to very low income households.

San Francisco

415 788-6336

Los Angeles

213 627-6336

San Diego

619 239-6336

Goldfarb & Lipman LLP

While nothing in State law, the Town's General Plan, or the North Forty Specific Plan requires that senior housing be located in any particular area or be served by a shuttle bus, the location and access available to this proposed senior housing, as well as the additional services to be provided to residents, exceed any adopted standard.

Standards for Approval and Denial of the Project. The letter from Ms. Moncharsh misstates the standards for approval and denial of the Project. The Town's decision on the Project must comply with these statutes and policies:

1. The Housing Element of the Town's General Plan and the Housing Element Law, which require that the approval be "by right." See HCD letter of August 25, 2016.

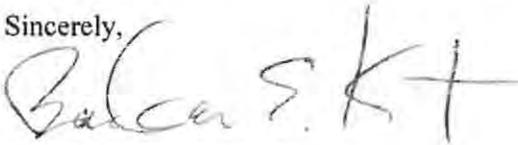
2. Section 65589.5(j) of the Housing Accountability Act, which requires that a denial or reduction in density be based on noncompliance with "objective" standards. Town staff has concluded in several staff reports that the Project is consistent with the General Plan and the Specific Plan and has found no basis for denying the Project based on inconsistency with objective standards. The Town has adopted no objective, identified, written *public health or safety* standards, policies, or conditions relating to senior housing that the Project does not comply with.

3. The density bonus statute (Section 65915), which contains no provisions allowing denial of a density bonus for a project that is eligible for a density bonus. HCD's letter of August 25, 2016, the August 26, 2016 memo from Remy Moose Manley, and the August 26, 2016 staff report have all concluded that the Project is eligible for a density bonus and so it must be granted.

The August 26, 2016 staff report delineates the litigation risk to the Town.

Please feel free to contact us if you have any further questions.

Sincerely,



BARBARA E. KAUTZ

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director
Sally Zarnowitz, Planning Manager
Town Council



August 31, 2016

Laurel Prevetti, Town Manager
Town of Los Gatos
110 E. Main Street
Los Gatos, CA 95030

22645 Grand Street
Hayward, CA 94541

510.582.1460 Phone
510.582.6523 Fax

RE: North 40 Phase 1 – Senior Affordable Housing

Ms. Prevetti,

This letter is partly in response to correspondence received by the town on August 30, 2016. As well, we have restated some of our comments in our letter dated August 11, 2016 which responded to similar questions and comments during Town Council and Planning Commission Public Hearings.

Senior Housing Experience

Since our inception nearly 50 years ago, Eden Housing has developed and acquired more than 8,000 residential units in cities throughout the San Francisco Bay Area, the Central Valley, and Southern California. Our experience with senior housing dates back to our very first multifamily development -- 150 affordable rental housing units for senior citizens in Hayward. The project, Josephine Lum Lodge, opened in 1973. Since then, **we have developed over 2,000 homes specifically for seniors in 30 properties.** As a developer and owner of property across the state, we have worked on a wide range of developments -- from urban, transit-adjacent sites to suburban neighborhoods to small cities and towns in rural areas. We are committed to designing developments that complement these varied contexts, are of the highest quality, and meet the needs of our residents. A few example senior developments that are similar in context to the North Forty (i.e. more suburban), include:

- Monte Verde Senior, Orinda
- Warner Creek, Novato
- Fireside, Mill Valley
- Wicklow Square, Dublin
- Cottonwood Place, Fremont

Each development site and community has unique challenges and goals, but the need for long-term, high quality affordable housing is clear. Just looking at Eden’s own portfolio and waitlists, we have over 22,000 people waiting for a home – nearly 3 times the number of units we have in our portfolio.

“Accessibility” of the Proposed Development:

A. Neighborhood amenities:

Correspondence to the Town included one individual’s personal, subjective assessment of the site’s appropriateness for the senior development. First, this assessment was made on existing conditions, and not of the final development. Among other improvements and new amenities such as the Market Hall, the development team is working the VTA to ensure that the bus line on the East side of Los Gatos Blvd. is accessible via sidewalk and a crosswalk at the new signalized intersection at Neighborhood Street. Second, rather than respond to these accessibility assessments with our own opinions, we offer the following information from a public agency that has been making awards to help fund affordable housing since 1987.

In California, The California Tax Credit Allocation Committee (TCAC) allocates federal and state tax credits to the developers of housing for low-income households. It’s most competitive type of tax credit, the 9% federal Low Income Housing Tax Credit, is consistently oversubscribed and TCAC has created a system to prioritize the allocation of these awards. One of the components is a score for the neighborhood amenities available to a proposed development (measured by distance to such things as transit, grocery stores, parks, etc). This ensures that the state allocates this limited funding mechanism on projects that meet



the goals and priorities established by public policy. This proposed development scores the maximum possible points on this scoring system – for both neighborhood amenities and all other scoring categories

B. Building amenities & accessibility design features:

Next, the building includes several design features to meet the needs of the senior residents. These include:

- Elevators
- Community room for social gatherings, educational programming and other service programming
- Community gardens
- Accessible washers and dryers for the disabled
- All units will be adaptable to enable minor changes (bathroom grab bars, lower counters, etc.) to the home environment when residents' physical capacities diminish over time.
(Note: At least 5% will be "built-out" or fully accessible from the start, and at least 2% of the units will be equipped to suit the needs of the hearing or visually impaired.)

Maintenance Costs

Seniors will not be charged or expected to maintain HVAC systems of the proposed development. TCAC and other regulatory bodies limit the amount a property owner can charge for rent. All maintenance costs of the building are borne by the property owner/operator, in this case, Eden Housing.

Unmet Need for Senior Affordable Housing in Los Gatos

The following data and information speak to the unmet need for senior affordable housing in the Town of Los Gatos.

1. **A growing "interest list" for this development:** Though we have done no marketing for the senior affordable housing at the North 40 nor do we have the approvals to commence the project, over 30 people have signed onto Eden's interest list for this property. This list of 34 seniors includes 14 seniors who currently live in the town of Los Gatos.
2. **Census data for the Town documents hundreds of eligible seniors:** According to Census data, 1,440 people in Los Gatos are below the national poverty level; and 339 of these people are 65 years and over.¹ The national poverty level equates to 16% AMI for a household of one person and 19% AMI for a household of two persons in Santa Clara County.² However, our units are open to seniors with incomes up to 50% AMI. Therefore, there are likely significantly more than the 339 seniors currently living in Los Gatos that would be eligible to live in the senior affordable housing at the North 40.
3. **Few of options for Very Low Income (VLI) seniors in Los Gatos:**
As shown in the Town's recent history of affordable housing development, units restricted to Very Low Income and below are often the hardest to produce. According to data provided in the last two Housing Elements, only two housing units have been produced at the VLI level in the past 15 years.³

¹ Source: American Community Survey, 2014.

² National poverty level in 2014 was \$11,670 for a household of one person and \$15,730 for a household of two persons. Source: U.S. Department of Health and Human Services

³ Source: 2007-2014 Housing Element and 2015-2023 Housing Element.

Table: New Construction Need vs. Housing Units Produced, 2002-2014

Affordability	New Construction Need	Housing Units Produced
Very Low and below	199	2
Low	144	95
Moderate	177	9
Above Moderate	186	565
Total	706	671

Supportive Services Provided at the North 40 Senior Affordable Housing

Eden's work goes beyond building high quality buildings to creating a community for the residents who live in our housing and a permanently affordable, high quality asset for the cities where we work. As a fully integrated non-profit development corporation, Eden has two subsidiary companies – Eden Housing Management, Inc. (EHMI), Eden's property management company, and Eden Housing Resident Services, Inc. (EHRSI), which provides services to our senior and family communities.

Eden is committed to supporting our senior residents to "age in place" and live independently in a dignified, healthy, and productive way. To reach this goal, Eden provides supportive services designed to meet the specific and unique needs of our senior residents, including a wide range of programs and referrals tailored to each individual resident. Services are provided by Eden Housing Resident Services staff as well as by community partners.

Supportive programming at our senior properties, like the North 40 Senior Affordable, encourages community building and self-reliance, reduces isolation, and helps our residents to "age in place" as long as possible. Sample of the services include:

- Group classes: exercise, nutrition, budget management/fraud prevention/financial education, personal security and safety preparedness, local transportation options.
- Individual and group support services addressing health, nutrition, and wellness issues provided onsite or in the nearby community: flu shots, wellness clinics, food bag distribution, etc.
- Self-enrichment and social activities: arts and crafts, ESL, music, reading groups, etc.
- Green education: recycling, water conservation, energy conservation, and healthy living.

Community partners in the Silicon Valley region include:

- Second Harvest Food Drive
- Health Insurance Counseling and Advocacy Program
- Health Trust (health clinics and programs)
- On Lok (social services and health care)
- Sourcewise (community resources and services)
- Meals on Wheels
- San Jose State University nursing program
- OUTREACH transportation service

Please feel free to contact me at 510-247-8103 or aosgood@edenhousing.org if you have additional questions.

Sincerely,



Andrea Osgood
Director of Real Estate Development

goldfarb
lipman
attorneys

1300 Clay Street, Eleventh Floor
Oakland, California 94612
510 836-6336

M David Kroot
Lynn Hutchins
Karen M. Tiedemann
Thomas H. Webber
Dianne Jackson McLean
Michelle D. Brewer
Jennifer K. Bell
Robert C. Mills
Isabel L. Brown
James T. Diamond, Jr.
Margaret F. Jung
Heather J. Gould
William F. DiCamillo
Amy DeVaudreuil
Barbara E. Kautz
Erica Williams Orcharton
Luis A. Rodriguez
Rafael Yaquián
Celia W. Lee
Dolores Bastian Dalton
Joshua J. Mason
Vincent L. Brown
Hana A. Hardy
Caroline Nasella
Eric S. Phillips
Elizabeth Klueck
Daniel S. Maroon
Justin D. Bigelow

September 1, 2016

via email

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Re: **Additional Information Regarding North Forty**

Dear Town Manager Prevetti:

This letter is written on behalf of Grosvenor USA Limited and Summerhill Homes (collectively, the "Applicants") in relation to Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014 (collectively the "Planning Applications") for 320 residences and 66,000 gross sq. ft. of neighborhood commercial space located in the North Forty Specific Plan area (the "Project"). This letter provides additional information supporting the statements made in our letter of August 22, 2016.

Description of Initial Application for North Forty.

We enclosed with our August 22, 2016 letter a project description dated April 30, 2014 and submitted to the Town on May 12, 2014. We enclose with this letter the initial project description submitted to the Town on November 14, 2013. As was earlier demonstrated by the April 30, 2014 description, the Project now deemed complete was substantially similar to that originally submitted in 2013: 320 units v. 335 units originally submitted; 50 affordable senior units v. 61 units originally submitted; and unchanged 66,000 sf of commercial space. The density of the project has never increased from that submitted in 2013 – in fact the density has decreased.

The Applicants have preserved email and other correspondence to the Town regarding the original submittal of the application should the Town desire further verification of the project proposed prior to January 1, 2015.

Size of Existing Units and Proposed Low-Income Units.

Attached are statements from the five property owners who own rental property included in the Project area verifying the number of potential rental units; the total square footage of those units; and the total number of bedrooms in those units. These statements verify that 18 potential rental units exist, with a total of 39 existing bedrooms and total size of 17,162 sf. Calculations showing that the proposed 49 senior affordable units (excluding all common areas) total 28,520 sf with 49 bedrooms are

San Francisco
415 788-6336
Los Angeles
213 627-6336
San Diego
619 239-6336
Goldfarb & Lipman LLP

September 1, 2016
Page 2

shown on sheet 3.23. The senior affordable building, including all common areas and community space, totals 47,811 sf (Sheet 3.22).

Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. E. KAUTZ', written over a light blue grid background.

BARBARA E. KAUTZ

Attachments:

1. Property owner letters verifying size and number of potential rental units.
2. Project description submitted to Town on November 14, 2013.

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director
Sally Zarnowitz, Planning Manager
Town Council

T. YUKI FARMS

P.O. Box 567 • Los Gatos, California 95031 • (408) 356-1478

August 30, 2016

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014 (the "North Forty Project")

Dear Town Manager Prevetti:

I am the representative of the Yuki family, the owners of a portion of the above-referenced North Forty Project property consisting of the APNs below. Thirteen rental units are located on the Property (collectively, the "Rental Units") at the following addresses:

16391 Bennett Way / 424-07-024
16386 Bennett Way / 424-07-035
16415A Bennett Way / 424-07-025
16415B Bennett Way / 424-07-025
16418A Bennett Way / 424-07-031
16418B Bennett Way / 424-07-031
16435 Bennett Way / 424-07-027
16439 Bennett Way / 424-07-027
16442 Bennett Way / 424-07-070
16399 Lark Ave. / 424-07-100 *
16483 Lark Ave / 424-07-100 *
14975 Los Gatos Blvd. / 424-07-084
15111 Los Gatos Blvd. 424-07-100*

*address is not specifically listed in APN search

One additional dwelling on the Property located at 16434 Bennett Way (APN 424-07-070) is unoccupied and has been used for storage for the past 10 years.

I have personal knowledge regarding the size and physical layouts of the Rental Units. Additionally, I confirmed from our property records that the Rental Units consist of 12,470 square feet and include 28 bedrooms.

T. YUKI FARMS

P.O. Box 567 • Los Gatos, California 95031 • (408) 356-1478

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Morimoto', written in a cursive style.

Edward S. Morimoto, Yuki Family Representative

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director

SummerHill Homes™

777 California Avenue
Palo Alto, CA 94304

August 30, 2016

by e-mail

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014
(The "North Forty Project").

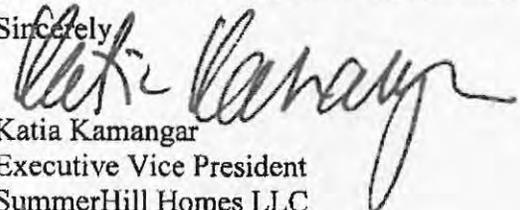
Dear Town Manager Prevetti:

I am an authorized representative for SummerHill N40 LLC, the owner of a portion of the above-referenced, North Forty Project property consisting of APN No. 424-07-090 (the "Property"). The Property contains one rental unit located at 15133 Los Gatos Boulevard (the "Rental Unit"). I have personal knowledge regarding the size and physical layout of the Rental Unit.

1. I confirmed by review of the public records and an exterior visual survey that the Rental Unit consists of 1,140 square feet and has 2 bedrooms.

Regarding an additional dwelling owned by SummerHill N40 LLC located at 16394 Bennett Way, SummerHill was informed by the preceding owner, and on that basis believes, that such property was owner occupied at the time of application for the Project on November 14, 2013 and remained owner occupied until purchased by SummerHill on May 5, 2016, and that it has remained vacant since May 5, 2016.

Sincerely


Katia Kamangar
Executive Vice President
SummerHill Homes LLC

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director



GROSVENOR

Via Email

August 31, 2016

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

RE: Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014
(The "North Forty Project")

Dear Town Manager Prevetti:

I am an authorized representative for Grosvenor, the owner of a portion of the Project property consisting of APN Nos. 424-07-026 and a portion of 424-07-085 (the "Property"). Two rental units are located on the Property at 16425 Bennett Way and 15001 Los Gatos Blvd, respectively (collectively, the "Rental Units"). I have personal knowledge of the size and physical layout of the Rental Units.

Additionally, I confirmed by visual inspection that the Rental Units consist of 1,530 square feet and include a total of 4 bedrooms. There are three bedrooms at 16425 Bennett Way (a secondary unit was built that may have been occupied but appears to not be constructed to code). 15001 Los Gatos Boulevard has one bedroom.

Sincerely,

Andrei Gog
Asset Manager

Grosvenor

Direct Line: 415-268-4053
Email: Andrei.gog@grosvenor.com

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director

August 25, 2016

by e-mail

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014
(The "North Forty Project")

Dear Town Manager Prevetti:

I am the owner of a portion of the above-referenced, North Forty Project property consisting of APN No. 424-07-037 (the "Property"). One rental unit at 16370 Bennett Way is located on the Property. I have personal knowledge regarding the size and physical layout of this rental unit.

I have confirmed by detailed investigation that this rental unit consists of 1,042 square feet and has 2 bedrooms/1 baths.

Sincerely,



Elizabeth K. Dodson

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director

August 25, 2016

by e-mail

Laurel Prevetti, Town Manager
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

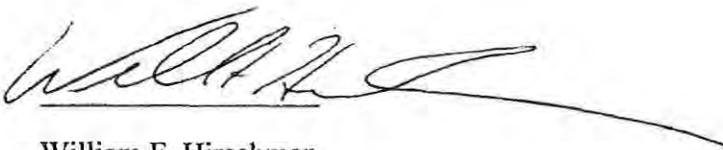
Re: Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014
(The "North Forty Project")

Dear Town Manager Prevetti:

I am the owner of a portion of the above-referenced, North Forty Project property consisting of APN No. 424-07-036 (the "Property"). One rental unit at 16378 Bennett Way is located on the Property. I have personal knowledge regarding the size and physical layout of this rental unit.

I have confirmed by detailed investigation that this rental unit consists of 980 square feet and has 3 bedrooms/2 baths.

Sincerely,

A handwritten signature in black ink, appearing to read 'William F. Hirschman', with a long horizontal flourish extending to the right.

William F. Hirschman

cc: Rob Schultz, Town Attorney
Joel Paulson, Community Development Director



North 40 Project Description and Letter of Justification

Summary:

Phase I of the North 40 is a comprehensive proposal by Grosvenor, SummerHill Homes, and Eden Housing to realize the Town's vision for the areas described as the Lark and Transition Districts. The proposal is for a master plan that will provide continuity with the development of future phases, including the Northern District. In this proposal we believe that we have brought The Town's Draft Specific Plan, including the Specific Plan Vision Statement and Guiding Principles, to life.

Approximately 66,000 square feet of retail and restaurant offerings, including an intimate 18,000 +/- square foot Market Hall, are proposed in the Transition District to serve this new community as well as the existing surrounding neighborhoods.

The residential homes proposed include diverse residential types that target the Town's unmet needs: for young professionals, move-down buyers and seniors. These include 61 senior affordable apartments directly above the Market Hall, 91 high-quality move-down condominiums adjacent to the senior housing, and 183 homes designed with the young professional or couple in mind. All new homes will be complimented by and provide convenient access to goods and services in the new neighborhood retail shops. A network of paseos, parks, and gathering spaces linked by orchard trees and community gardens provide open space that is well over 30% of the project area, with beautiful view corridors and places for residents to come together.

The proposed community is a celebration of the Los Gatos quality of life, and focuses on the Draft Specific Plan's Vision Statement and Guiding Principles:

Town Council Vision Statement:

The North 40 reflects the special nature of our hometown. It celebrates our history, agricultural heritage, hillside views and small town character. The North 40 is seamlessly woven into the fabric of our community, complementing other Los Gatos residential and business neighborhoods. It is respectful of precious community resources and offers unique attributes that enrich the quality of life of all our residents.

Guiding Principles:

- *The North 40 will look and feel like Los Gatos*
- *The North 40 will embrace hillside views, trees, and open space.*
- *The North 40 will address the Town's residential and/or commercial unmet needs.*
- *The North 40 will minimize or mitigate impacts on the Town's infrastructure, schools, and other community services.*

Open Spaces

The Draft Specific Plan requires a minimum of 30% of each application to be dedicated as open space, which is more open space than is found in many existing Los Gatos communities. Because the open space requirements are such a prominent element of the Draft Specific plan, the open spaces created within the proposed community are more than merely green areas or parks to meet a minimum requirement. Instead, the greens have been thoughtfully designed as buffers between existing roadways, connecting paseos, community gardens, gathering places, and view corridors. The open space elements will be a prominent feature, linking the districts and future residents while paying tribute to the agricultural history of the property. In addition, the amenities provided within the open spaces will not only appeal to the young professionals, seniors and move-down buyers but will also complement the existing open space offerings within the Town. Overall, the proposal includes over 40% of the area as open space (30% is required) and over 24% as "green" open space (20% is required), which demonstrates the focus that these spaces have been given in driving the design of the community.

The applicant has enlisted Los Gatan Les Kishler to advise on the design, maintenance and programming of community gardens and orchard treatments. Together with the project's landscape architects, the vision for the proposed open space programming has been established, and includes the following:

Orchard Buffers and Plantings: A 30' orchard buffer is proposed both along Lark Avenue and Los Gatos Boulevard along the property frontage. The area along Lark Avenue will include a multi-use trail that can be utilized by pedestrians and bicyclists, and offers path through the orchard trees. A vineyard will greet community members as they enter the neighborhood serving retail area in the Transition District. The majority of the orchard plantings are fruit-bearing, and will provide opportunities for community or local group harvesting. Based on recommendations, a number of varieties are proposed, which work together to maintain long-term soil fertility as well as a diverse offering of produce, including almond, apricot, apples, peaches, citrus, persimmons and pomegranate. In addition being located within the buffer along

existing roads, the orchard treatments are continued along A Street and within the paseos.

Community Gardens: Transition and Lark District residents will be able to connect in the joint community gardens in the Central Community Park. Thirty nine plots are programmed in the community park, so community members will be able to adopt-a-plot. The gardens strive to bring together the young professionals, seniors and move down buyers in one location. Additional smaller raised garden beds will be included in the open space plaza of the Eden building to provide more gardening opportunities for the seniors as Eden has had great success with this program in the past. Finally, a community garden is proposed for an onsite restaurant use. This garden will not only grow produce that can be utilized in the restaurant, but will also offer a staging area for cooking demonstrations.

Paseos and View Corridors: In addition to the Grand Paseo found on the southeast portion of the property, numerous paseos (in connection with right-of-ways) have been strategically situated to unite the residents and provide view sheds towards the hillsides. In addition to A Street, there are three paseos that offer southern views, and multiple paseos and pedestrian corridors that provide views to the east. Further, these paseos offer connectivity throughout the districts, which will encourage pedestrian and bicycle use within the North 40.

Additional Amenities: A variety of additional active and vibrant open space amenities are proposed. These include places to gather with neighbors, unwind, relax, and embrace the outdoor lifestyle that Los Gatans relish. A bocce court in the Central Community Park, multiple fire pits, large outdoor communal grilling and dining areas, a dog park and walking trail for four legged friends, turf areas with sun shades and hammocks can all be found in the park and paseo areas. In addition, the move-down buyers will enjoy a resort-like common plaza area complete with pool, exercise facilities, and lounge chairs. The retail portion of the property will host a vineyard, café seating and relaxing plaza spaces. Together, the districts will provide a unique synergy of amenities.

Residential Program:

Between the Lark and Transition Districts, five distinct residential programs will be offered, all tailored to meet the Town's unmet needs for places for young professionals, empty nesters, and income-restricted seniors to live. These include 91 high-end "move down" condominiums,



61 senior affordable apartments directly above the Market Hall, and 183 homes designed with the young professional or couple in mind. The floor plans are as diverse as the people that will live here, with a range of square footages and creative design. Focus has been given to what each generation wants on the inside of their homes, such as gourmet kitchens for move down buyers who love to entertain and media spaces and offices for the young professionals. Exteriors have also been carefully designed to include elements that are both contemporary while remaining true to the agrarian roots of the property. Finishes such as wood trim, corrugated metal, and barn doors compliment grand windows and terraces. Finally, products are parked in either podium-garages (Move Down and Senior) or private garages (Young Professional) to meet the Specific Plan parking requirements.

Move Down Condominiums: 91 condominiums ranging in size from approximately 1,400 to 2,500 square feet have been designed with the move-down Los Gatos resident in mind. This buyer may have a much larger home that they no longer want to maintain and are ready to move into a full-service condominium while retaining their Los Gatos address. Semi-private elevators provide access to the units, providing secure and exclusive access to residents who are accustomed to an estate lifestyle. Concierge services enables the owner to travel without any worries about security or maintenance surprises. A resort-style pool, work out facility, and lounge area offers a place to relax, work-out and mingle with neighbors. Interior space boasts gracious entries, great rooms for entertaining, and luxurious master suites and retreats. Large private terraces are accessed from each unit and compliment the indoor-outdoor lifestyle.

Senior Affordable Apartments: A community's senior residents are often un-able to maintain their long time residences within a community and they must move into a home designed to fit their needs and budget. Unfortunately, the ability of these residents to stay within the community they know and love can be very difficult. The senior affordable apartments proposed with this plan will provide this opportunity, with elevator access and direct proximity to the neighborhood serving retail in the Transition district. Accessibility will be provided by elevators and drive up parking, and the community garden on the plaza will provide an opportunity to grow food and get to know your neighbors. Easy walkability to goods and services complete the ease of what could otherwise be a difficult transition. Additional information on the senior affordable apartments and Eden's extensive experience in programming this product type is attached in the BMP program details.

Young-Professional Residences: 183 homes and flats in three product designs are proposed with the young professional in mind. Averaging 1.86 bedrooms and



approximately 1,500 square feet, these homes offer a place that the next generation of young Los Gatos will want to live. The Draft Specific Plan requires 15% of the units to be two story; however, this plan far exceeds this requirement with over 25% of the homes having two-story elements. A range of product types include the Garden Cluster, Rowhome, and Courtyard Cluster Homes. Nineteen floor plans provide this buyer with the options and variety that they desire. Media rooms, home offices, open floor plans, loft living, and large screen walls for gaming and movie watching offer a work at home, play at home lifestyle. Bedrooms on separated levels provide for roommate opportunities, home offices, or space for visitors. Contemporary finishes such as open-tread stairs, concrete countertops, and large windows provide bright, current, and comfortable living. Exterior spaces range from intimate living-level open spaces (which are fenced for a dog) to gracious terraces and second story porches. These private open spaces feed off the main living area to allow for additional space to hang out and relax with friends.

Retail/Commercial Program:

This application establishes the retail component of the Transition District which is intended to be the community hub of the new North 40 neighborhood. The neighborhood serving retail will become a place to draw this part of Los Gatos together to integrate the new North 40 community into its surroundings. It features a mix of community focused retail which is anchored by the Market Hall, an approximately 18,000 square feet hall that will feature artisan foods and products. The remaining 48,000 square feet of commercial space will include personal services, soft goods, and restaurants/cafes.

The transition district retail hub provides a common amenity for the residents of the new neighborhood. Millennials and empty-nesters are beginning to exhibit a similar taste in living environments—living near cafes, restaurants, and every day personal service needs. While they may not desire similar home styles, they do share the desire to interact with neighbors and friends.

The Transition District works as a stand-alone retail program but is intended to be integrated in the larger hybrid-retail program that is currently envisioned in the Specific Plan. This retail hub has been designed in a way that allows it to seamlessly plug into future development in the Northern District. The program hopes to elevate the quality and design of retail offerings along Los Gatos Boulevard while complementing recently completed developments in close proximity. The transformation of this stretch of Los Gatos Boulevard will improve the quality of the experience of driving along the boulevard while also increasing property values in the areas.



Exceptions:

The vast majority of the proposal adheres to or exceeds the requirements of the Draft Specific Plan, including open space percentages, two-story requirements. Limited exceptions are being requested based on exceptional product design and offerings and the proposal meeting or exceeding the Draft Specific Plan's Vision Statement and Guiding Principles.

Height Measurement: The Draft Specific Plan's policy is to measure massing from existing grade, which works well for smaller individual development parcels. The size of the North 40 requires a mass-grading operation for drainage and cut-fill balancing. Once the site is balanced, areas within the project may be higher or lower than existing grade. After the site is balanced, it is anticipated that the site will average approximately 1.5' higher than existing grade. However, there is also generally a drop from Los Gatos Boulevard to the interior of the site (in some places as much as 10'). Therefore, even a structure that is 35' will read as being much shorter from Los Gatos Boulevard. In order to achieve a variety of roof pitches, to balance the site (and therefore minimize off-hauling and Green House Gas emissions during construction), and to achieve cross-drainage, it is requested that height be measured from the finished grade of the balanced site.

Product Height Exception – Conditional Use Permit for the Move Down

Condominiums:

To respond to the Draft Specific Plan's goal of providing a diverse selection of housing types to serve the Towns unmet needs, the Move Down condominium homes are designed with practical yet luxurious one-level living in mind. Semi-private elevator banks and secured underground parking will attract an empty-nester buyer who expects high-end resort-style living and amenities. The Move Down condominiums are located above ground-floor retail, which has an expected floor to ceiling height of 15'. To achieve a luxurious feel in interior spaces, generous floor to ceiling heights of up to 10' are proposed for the residential units. These gracious interior clear ceiling heights are necessary to provide an elegant and exceptional condominium home for the discerning Los Gatan buyer. The combination of the gracious retail and residential heights result in an overall building height of up to 45' for the three-story elements of the buildings and 58' for the limited four-story elements (this includes a generous allowance for parapets and roof slope). An additional 5% open space in this area has been provided for the additional height requested between 35' and 45' for the 3 story elements of the buildings. For the limited amount of building elements that exceed 45', the Draft



Specific Plan calls for a Conditional Use Permit which is being applied for with this application. In keeping with the intent of the Draft Specific Plan, this increased height request is occurring in the middle of the site, close to the freeway. This places the increased height in an appropriate place on the site, allowing for the massing of the project to build up from 1 and 2-story buildings along Lark and Los Gatos Boulevard to these taller buildings in the middle of the site.

Product Height Exception – Conditional Use Permit for the Senior Affordable Rental Housing:

The senior affordable housing is proposed at the Heart of the District, above the Market Hall. This location provides a central location to goods and services for future residents to enjoy. Because of the plate height of the Market Hall, the overall height of this building is proposed up to 49'. The Draft Specific Plan specifies that for heights up to 45', an additional 5% of landscaping is required in the area of consideration. This additional landscaping area has been provided for in this application for the requested height to 45', a Conditional Use Permit is being applied for with this application to increase the height from 45' to 49' for the Senior Affordable building. Similar to the Move Down location, the location of this height exception occurs in the middle of the site, allowing for a gradually increasing height transition from Lark and Los Gatos Boulevard's. In addition to the convenient location adjacent to neighborhood serving goods and services, the senior affordable housing will offer Eden Housing's exemplary on-site resident services and the appropriate spaces to offer these services such as a plaza-level community garden, a community room, a computer center and a library or exercise room. For more detailed information on the Below Market Product, please see attached additional information specific to the BMP program.

Below Market Product: 62 Senior Affordable Apartments are proposed to satisfy the Town's affordable housing requirement. While these homes are all within one structure (rather than being dispersed through the application site area) they are in very close proximity to the high end move down condominium program and strategically located at the center of all community activity—Market Hall. Grosvenor and Eden Housing feel strongly that affordable housing and high-end housing can and should co-exist in close proximity to each another. Mixed-income neighborhoods are more sustainable and we believe that what is proposed is a model for long term success. In addition, the goal was to develop a BMP program that continues to target unmet needs within the Town while achieving maximum affordability for Los Gatan seniors. The proposed location allows for immediate access to new services, and centrally locates the residents within the new



community. For more detailed information on the Below Market Product, please see attached additional information specific to the BMP program.

Senior Affordable Parking:

The parking ratio proposed for the senior affordable apartments is 0.6 spaces/unit. Because these are all senior one-bedroom units, the amount of parking necessary is far less than a traditional affordable project with multiple bedrooms targeted towards a family renter. Additionally, studies consistently show that people with lower incomes typically own fewer cars than their higher income counterparts. Finally, for those seniors who do own cars at move-in it is common that over time these individuals drive less as they grow older and eventually sell their car. Eden Housing has great experience in building this type of product and consistently builds senior housing with parking ratios at or below 0.6 spaces/unit. Many of the cities in which Eden provides Affordable Senior Housing require only 0.5 spaces/unit for this product type.

Conclusion:

The Phase I North 40 application has thoughtfully applied the North 40 Draft Specific Plan's Vision Statement and Guiding Principles in its design. The North 40 proposes a new community that celebrates the Los Gatos lifestyle. The commercial/retail component provides much needed restaurant and retail offerings to the new neighborhood and surrounding community on the North End of Los Gatos, featuring goods and services that are appealing for Millennials and empty nesters. The residential program feeds off of this common community amenity with a mix of housing styles that target young adults, empty nesters and seniors with further affordability needs. Finally, tying all of these components together, the carefully designed open space and public realm have been inspired by the agrarian roots of the site and the Town of Los Gatos.



To: Town Council

From: Melanie Hanssen

Subject: Getting the North 40 Phase 1 application to comply with the Specific Plan

The North 40 represents an unprecedented opportunity to address a number of unmet needs in Los Gatos, as well as satisfy state requirements for affordable housing.

Unfortunately, as discussed in the Planning Commission hearings and recommendation, the current proposal does not satisfy the objective requirements of the N40 specific plan that require the applicant to (a) address unmet needs or (b) provide for less intense housing in the Lark District and (c) finally provide for seamless transition to the rest of the community (item c not part of the Planning Commission recommendation but discussed in hearing and in required in the Specific Plan). There were other parts of the proposal that were found by the Planning Commission not to be in compliance with the Specific Plan, but I am writing about unmet needs and intensity.

Considering the requirements of the Specific Plan, clearly the 49 units of senior affordable housing proposed in Phase 1 do satisfy the state/Housing Element requirement for affordable housing. This will be a great step forward that the Town has never had—this many units of truly affordable housing. I am sure that Council is aware the the senior affordable housing will be rental, not ownership model, which is the only way they can be affordable. Also, the economics of this type of housing require government intervention to correct the high cost issue in the form of tax credits, subsidies, and more. That is why Eden Housing will be managing this part of the process within the overall proposal. In any case, this senior affordable housing is really one of the best parts of this proposal.

As is well understood, the Housing Element requires that 13.5 acres within the N40 be rezoned to 20 units per acre to achieve the state mandated requirements.

Here is where the proposal falls short. While the proposal does have 13.5 acres of units that are 20 DU per acre, we have 320 units minus 49 affordable units—271 total that do not (a) address unmet needs or (b) provide for lower intensity housing in the Lark District, both of which are required in the Specific Plan.

Senior move-down housing—The senior affordable housing proposed for the top of the market hill is not the housing that our single family homeowner seniors will be able to step down into. Clearly if they own a single family home today, seniors will not be able to qualify for the low income levels to be able to rent those apartments. According to our Housing Element, fully 1/3 of the population of Los Gatos will be over 65 during the planning period. Council member Rennie mentioned during the last hearing that he was very moved by a conversation he had with a senior citizen that did not know where to go from her single family home. Testimony was made during the Planning Commission hearings that the Terraces in Los Gatos have a 2-year wait to be able to move in. Obviously, there is a need for senior step-down housing and there is no reason that this cannot be designed at 20 DU per acre. It seems that Summerhill Homes has added a few single story units that might be applicable to seniors since the original proposal but how many of these 271 units are designed to meet the needs seniors who are clearly a huge part of the Town? Given the statistics, at least 1/3 or more of these units should be designed for the move-down senior market. Instead, Summerhill has decided that they want to build homes for young professionals working at Netflix (they testified to this in the hearings). But this isn't addressing our huge unmet need for move-down housing for seniors. Did Summerhill Homes even talk to any of our senior citizens about what they wanted? There does not appear to be any evidence of this. Yet Summerhill did bus in Netflix employees that do not live in Los Gatos today to identify in a focus group the housing products that would appeal to them. Clearly this does not accomplish the requirements of the specific plan which are to address the unmet needs in our Town. Another proposal could refocus this effort to (a) meet our unmet needs and (b) achieve the density requirements.

Millennials—Here again, the Phase 1 proposal does not truly meet the unmet needs of millennials that live in today or grew up in Los Gatos. Did Summerhill Homes poll the millennials that grew up here and can't afford to live here now? How can we say this proposal satisfies the requirements of addressing unmet needs? Several residents have submitted alternate suggestions that would include instead of 1500 square foot units, many more units that are 500-750 square feet. Not only would this help with affordability, but it would also create less intense buildings in terms of size. When asked about this in the hearing, Summerhill

stated they did not see a market for “for sale” units that are 500 square feet—those would be rental units that Summerhill does not wish to build. But the Town does not need to work with Summerhill make a profit. There is an opportunity to build smaller units in several locations within the North 40 and offer these as rental, not purchase, to satisfy more of the unmet needs in Town of our own millennials. And this would also meet the density requirements of our Housing Element.

Lower intensity housing in Lark District/transition to community—The applicant has stated in their recent responses that the housing in the Lark District is less intense than the housing in the Transition District. But it is lower intensity than what was envisioned when the Specific Plan was created? And does it provide for a seamless transition to the surrounding community? Across Lark Avenue, the existing neighborhood has many single story units. Would it not be possible to add some single story units at 20 DU per acre within the Lark district? Even if the Specific Plan needed to be amended to eliminate the need for a CUP on the cottage cluster units, wouldn't this be vastly superior (and more in compliance with the lower intensity requirements) versus the huge quantity of nearly 35 foot buildings currently proposed within the Lark District? Another option would be to reduce the size of the units while not increasing the number of units. This would lower the intensity but not the density of these units.

While not discussed in the Planning Commission recommendation, it was also discussed in the hearings that the Specific Plan is relatively silent regarding placement of the housing in specific districts. Not considering the school district issue (which is prohibited anyway), there are many reasons to spread the housing more fully through the North 40 in terms of managing traffic and absorbing the impact of this much new development over time vs. in Phase 1. In addition, the current proposal is very heavily focused on residential but the Specific Plan requires a self-contained community. To achieve this self-contained community would rely on a full complement of neighborhood serving commercial which is not planned in Phase 1. What will it be like with 320 housing units having to leave the neighborhood and drive into the rest of Los Gatos for the majority of their shopping needs/errands? Right now it would be difficult to build 20 DU per acre in

the Northern District with residential required to be above commercial and a 35 foot height restriction but this could be reviewed and also there is an additional opportunity to build in the rest of the Transition District in Phase 2 or beyond. If the Town Council does decide to deny this application, there is an opportunity to provide more direction within the Specific Plan on this subject and make this development opportunity something that meets our unmet needs and achieves the density required in our Housing Element.

I do hope that the Town Council will seriously consider the recommendation of the Planning Commission and deny the project. The North 40 is a once in a lifetime opportunity to provide housing and commercial property that addresses unmet needs and also to provide for affordable housing. There are many ways to generate a new proposal that meets the requirements of the North 40 specific plan as well as our Housing Element.