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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

Carmel Valley Association, Inc., a California nonprofit corporation,

Petitioner,

vs.

County of Monterey, Board of Supervisors of the County of Monterey, and DOES 1 THROUGH 15,

Respondents,

Rancho Canada Venture, LLC, Carmel Development Company, R. Alan Williams, and DOES 16 THROUGH 30,

Real Parties in Interest.

Case No.: 17CV000131

PETITIONER'S REPLY BRIEF

[CEQA CASE]

Date: October 6, 2017
Time: 9:00 a.m.
Dept.: 1
Judge: Honorable Lydia M. Villareal

Action filed: January 12, 2017

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The County argues that it is entitled to additional grace from the requirements of its enacted General Plan. Essentially, the County argues that while it was required to adopt the Development Evaluation System (DES) six years ago, it should be given more time to develop the DES simply because it has other priorities. However, the deadline to develop the DES was self-imposed. The General Plan intended development, like the Project in this case, to be reviewed pursuant to the DES.

The County similarly asks to be excused from the requirements to update its Affordable Housing Ordinance to synchronize with the greater requirements of affordable units established under the 2010 General Plan. The General Plan is the constitution for all development. The California Supreme Court has summarized the requirement that all land use decisions must be in compliance with a general plan: "The keystone of regional planning is consistency – between the general plan, its internal elements, subordinate ordinances, and all derivative land use decisions." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572; *see also*, *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1210-1213. "[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*, 52 Cal.3d at 553 (citing *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806). The general plan functions as a " 'constitution for all future developments,' " and land use decisions must be consistent with the general plan and its elements. *Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at 570. Thus, to the extent the Affordable Housing Ordinance is not updated by the County, the County must follow the requirements of the General Plan in lieu of the Affordable Housing Ordinance.

With respect to the Project itself, the heart of Petitioner's argument is that the 2016 DEIR conveys a shifting project description which straddles both the 281-unit and 130-unit project, and fails to provide an accurate project description. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199. Relying on evidence in the record, the Petitioner argues that by the time the EIR was recirculated in 2016, the 281-unit proposal

was defunct and no longer the actual subject of the EIR. This is supported by the fact that 281-units, originally proposed in 2004, is now facially infeasible under the current General Plan's building cap. Despite recognizing that Policy CV-1.6, which establishes a 190-building cap for Carmel Valley, is part of the 2010 General Plan and applicable to the Rancho Canada Village Project (Project),[1] the Real Parties and County argue[2] that "the County did not and could not under California law waive its legislative and discretionary authority, and had the power to consider and did duly consider real parties in interest's 50% affordable/workforce housing project," (Real Parties' Opposition, pg. 1: 18-21), and that this lawsuit "is a continuation of Carmel Valley Association's longstanding opposition to any development in Carmel Valley." (Real Parties' Opposition, pg. 2: 2-4).[3] The Petitioner never argues that the County must waive its legislative and discretionary authority. The County could certainly amend its General Plan

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[1] The County recognizes that "[t]he Project is subject to the 2010 General Plan." (AR 6). The 2010 General Plan was amended on February 12, 2013 to establish a unit cap of 190 units for the Carmel Valley. (AR 14031). This amendment arose out of a settlement agreement between the Petitioner and County regarding the County's certification of the EIR for the 2010 General Plan. (AR 19964 – 19978). CV-1.6, amended as of February 12, 2013, established a unit cap of 190 units, and is now incorporated into the 2010 General Plan. (AR 14031).

[2] The Real Parties in Interest, Rancho Canada Venture, LLC and R. Alan Williams (Real Parties) and the Respondents, County of Monterey and Board of Supervisors of the County of Monterey, (County or Respondents) filed separate Opposition Briefs. Pursuant to the Real Parties' Statement of Joinder and Incorporation by Reference, any argument made by the County may also be attributed to the Real Parties. In addition, pursuant to the County's statement of reliance on arguments made by Real Parties, any argument made by the Real Parties may also be attributed to the County: "For the reasons stated above and those presented in the opposition brief filed by Real Parties, the court should reject Carmel Valley Association's Petition for Writ of Mandate." (Respondent's Opposition, pg. 22: 9-10).

[3] The Real Parties cite to a Carmel Valley Association bulletin to support its assertion of Petitioner's "longstanding opposition to any development in Carmel Valley. (AR018524-018526)." (Real Parties' Opposition, p. 2: 3-4). This bulletin discusses the Carmel Casitas affordable housing development in Carmel Valley which proposes "borrowing" affordable requirements for other development already approved or proposed. The bulletin's point is that the County's affordable housing ordinance may not contemplate allowing development to eschew affordable housing requirements by passing on these requirements to another development. The bulletin alerts its members regarding Carmel Casitas' possible subversion of the intent of the affordable housing ordinance as a question for Petitioner's members and does not show that Petitioner's motive for bringing this action "is a continuation of Carmel Valley Association's longstanding opposition to any development in Carmel Valley."

1 to allow for more development than what was decided in 2010, or as a result of subsequent
2 amendments pursuant to settlement. However, when considering this Project, it must ensure
3 compliance with the General Plan in effect, at the time of project approval, as stated above.
4 Though the Real Parties insist that "the EIR accurately describes the 281-unit project"
5 (Real Parties' Opposition, pg. 1: 18-19), noticeably, the Real Parties never assert that the Real
6 Parties were still considering the 281-unit Project by 2016, the year the City recirculated the
7 DEIR. In fact, the subject of the June 27, 2014 letter from Real Parties' legal representative to
8 the County to revive the Rancho Canada Village project was not reconsideration of the 281-unit
9 proposal, but rather a "project alternative for the Rancho Canada Village (RCV) Project." (AR
10 18768-18771). The Real Parties also never refute that in 2009, the Project applicant conveyed
11 to the County that he had decided to "pull back on the RCV until the General Plan and [Carmel
12 Valley Master Plan] have been processed." (AR 11401). Furthermore, the Real Parties do not
13 dispute that the Val Verde tie back levee, which is discussed alongside Real Parties' purported
14 flood control measures for the Project, is non-existent. (Real Parties' Opposition, pg. 12: fn. 7).
15 Instead of addressing the substantive issues raised by public testimony regarding the Project's
16 shifting description, the Real Parties wholly dismiss all public testimony cited to by Petitioner
17 as "self-serving." (Real Parties' Opposition, pg. 10: 23). Nor do Real Parties contest the
18 comment provided by LandWatch of Monterey County stating that "at the Carmel Valley Land
19 Use Advisory Committee hearing, the applicant publicly identified the 130-unit alternative as
20 the proposed project." (AR 18641) (*See* Opening Brief, pg. 29: 19-21).
21 Finally, the Real Parties argue that the EIR presented a reasonable range of alternatives.
22 (Real Parties' Opposition, pg. 12: 7-8). The Real Parties' logic is that even though four of the
23 seven alternatives propose units in excess of the building cap established under CV-1.6, the
24 Board still could exercise its "land use authority or police power in any way with respect to
25 future legislative, administrative or other actions by the County." (Real Parties' Opposition, pg.
26 12: 19-20). But this is irrelevant as to CEQA's definition of feasible, as discussed *infra*. When
27 confronted with the fact that the 130-unit Project was analyzed "at a level of detail equal to that
28 of the Proposed Project," (AR 1843) indicating that it is the actual Project, the Real Parties'

response is: "The simple fact is that the County chose to include a detailed analysis of the 130-Unit Alternative in the EIR." (Real Parties' Opposition, pg. 8: 22-23). The shifting project description renders the EIR's alternative analysis legally insufficient because (1) the 130-unit proposal is the actual Project and therefore cannot also be identified as the environmentally superior alternative and (2) the alternatives analysis fails to provide a reasonable range of feasible alternatives because four of the seven alternatives are infeasible because they exceed the current building cap. (AR 1847 – 1856).

A. The Court Should Independently Review the County's Failure to Implement a Mandatory Provision of the General Plan

1) The County's Failure to Perform Mandatory Duties is Not a Legislative Act and the Court Reviews the County's Failure to Perform Mandatory Duties as a Question of Law for which No Deference is Owed

The County argues the adoption of a general plan, amendment to a general plan, or any relevant policy is a legislative act and that courts "cannot interfere with legislative discretion, and may overturn an agency's legislative decision only if that decision is arbitrary, capricious, wholly lacking in evidentiary support, or fails to conform to the procedures required by law." (Respondent's Opposition, pg. 3: 7-10). However, the Petitioner is not challenging a legislative act of the County, such as the adoption or amendment to a General Plan. Petitioner's claim against the County concerns the County's failure to comply with mandatory provisions of its General Plan.

"A general plan may be issued in 'any format.'" *Orange County for Parks & Recreation v. Superior Court* (2016) 2 Cal.4th 141, 153. The County chose to include a mandatory provision in the General Plan concerning the DES: "This Development Evaluation System shall be established within 12 months of adopting this General Plan." (AR 13579). In addition, it is the General Plan that requires that the DES "shall be a pass-fail system and shall include a mechanism to quantitatively evaluate development in light of the policies of the General Plan, and the implementing regulations, resources and infrastructure, and the overall quality of the development." (AR 13579). Finally, the County also elected to increase its inclusionary housing stock by requiring that "The County shall assure consistent application of an

Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583). Petitioner is challenging the County's failure to implement mandatory provisions the General Plan requires, and not the County's adoption of these provisions.

2) The County Relies on Inapposite Case Law to Argue that Its Determination of Consistency with the General Plan is Entitled to Great Deference

The County argues that a "local agency's determination of a project's consistency with its General Plan is entitled to 'great deference' 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.'" (Respondent's Opposition, pg. 4: 6-9, citing *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677-678). However, in this particular case, Petitioner's argument is based on clear and mandatory provisions set forth in the General Plan and not provisions subject to discretionary interpretation. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777 is controlling. "A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." *Endangered Habitats League, supra,* 131 Cal.App.4th at 782. The County also relies on *Sequoyah Hills Homeowners Association v. City of Oakland* ("*Sequoyah Hills*") (1993) 23 Cal.App.4th 704. (Respondent's Opposition, pg. 4: 26-27). However, in *Sequoyah Hills*, the court upheld the consistency determination because none of the policies relied on by the petitioner were mandatory. *Sequoyah Hills, supra,* 23 Cal.App.4th at 719. Here, the policies are mandatory and under *Endangered Habitats League*, must be followed.

The County's failure to establish the DES within a year of adopting the General Plan and failure to assure consistent application of an Affordable Housing Ordinance requiring that 25% of new housing units be affordable constitutes a failure to proceed in a manner required by law because these provisions are set forth under the General Plan as mandatory duties. Code of Civil Procedure Section 1085 provides that a writ of mandate "may be issued by any court,. . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an

office." Because these claims against the County clearly implicate ministerial and mandatory duties, none of the County's reasoning or reliance on case law regarding a local agency's legislative acts are applicable to Petitioner's claims against the County. (*See* Respondent's Opposition pg. 3: 6-16, citing *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723, 728-29, and *Fullerton Joint High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 786)).

The County's failure to perform its mandatory duties, to implement the DES within one year of adopting the General Plan and to update its affordable housing ordinance, constitutes a failure to proceed in a manner required by law. Even under the County's standard of review, a writ can be granted for a failure "to conform to the procedures required by law." The General Plan required the development of the DES. It is a mandatory provision of the General Plan. To now state that it is the legislative prerogative of the County to ignore this mandatory provision makes a mockery of the entire General Plan process. In effect, if the County's position is adopted, the General Plan's mandatory provisions can be simply ignored, rendering the document meaningless.

B. The Court Exercises Its Independent Judgment when Reviewing the County's Interpretation of Local Ordinances

The County further argues that the "independent review standard is only appropriate when the local agency is interpreting state law." (Respondent's Opposition, p. 3: 21-22). This position is erroneous. The County cites *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243 to support its position, but *No Oil, Inc.* did not concern interpretation of an ordinance, but rather a local agency's finding that a "project was consistent with City's General Plan." *No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at 243. Petitioner's argument is that evidence in the record demonstrates that the County staff recognized the Project did not satisfy the affordable housing ordinance, and yet the County Board of Supervisors approved the Project with an interpretation and application of the Ordinance that is contrary to law. (Opening Brief, pgs. 19-23). As stated in Petitioner's Opening Brief, case law makes clear that:

> To the extent that the administrative decision rests on the [County's] interpretation or application of the Ordinance, a question of law is presented for [the court's] independent review. (See, e.g., *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668. The interpretation of statutes and ordinances is 'ultimately a judicial function.' *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290.)

MHC Operating Limited Partnership v. City of San Jose (2004) 106 Cal.App.4th 204, 219.

C. The Petitioner Has Not Waived Its Right to Raise the Issue of the County's Noncompliance with Mandatory Provisions of Its General Plan

The County argues that when the Petitioner settled a lawsuit with the County in 2012 regarding the County's certification of the 2010 General Plan, the Petitioner "waived its right to bring any claim against the County with regard to its adoption of a DES pursuant to General Plan Policy LU-1.19." (Respondent's Opposition, pg. 5: 20-24). No good deed goes unpunished. This argument misapplies the terms of the settlement agreement Petitioner has with the County pertaining to the County's certification of the EIR for the 2010 General Plan. (AR 19964 – 19983).

On November 24, 2010, Petitioner filed a petition for writ of mandate against the County "generally alleging violations of the California Environmental Quality Act ("CEQA") including failure to validly certify a Final Environmental Impact Report for the 2010 General Plan Update and adopt findings conforming to the requirements of CEQA and the CEQA Guidelines." (AR 19964). The County argues that "[a]s part of that settlement, Petitioner generally released all claims against the County which 'CVA had, now has or as of the Effective Date of this Agreement has against' the County with regard to the County's approval of the General Plan. (AR 19967)." (Respondent's Opposition, pg. 5: 10-13). But the County conflates two separate issues.

As part of the settlement agreement, the Petitioner released claims against the County. But the scope of the release only covers claims pertaining to the EIR process for the 2010 Monterey County General Plan and does not extend to independent claims unrelated to the County's certification of the EIR and approval of the General Plan on October 26, 2010. The language of the settlement agreement is as follows:

> Upon adoption of the Agreed Amendments as set forth in Section 2.2, CVA shall be conclusively deemed to have released the Board of Supervisors of the County of Monterey, the County of Monterey, the County of Monterey and Does 1 through 50, and their respective heirs, administrators, successors, assigns, agents, employees, officers, partners and directors (the "Released Parties") from all rights, actions, claims, debts, demands….whether known, suspected, or unknown, at law or in equity, which CVA had, now has or as of the Effective Date of this Agreement has against the Released Parties, or any of them, ***arising from or relating to certification of the Final EIR for the 2010 Monterey County General Plan and approval of the 2010 Monterey County General Plan as adopted by the Board of Supervisors on October 26, 2010***…

(AR 19967). The settlement agreement released claims against the County arising from certification of the Final EIR for the 2010 Monterey County General Plan and the ***approval of*** the General Plan. The Petitioner did not waive rights to enforce the very General Plan that was the subject of the settlement between the County and the Petitioner.

In addition, the settlement agreement has a specific "No Waiver" provision:

> No custom or practice which exists are arises between or among the Parties in the course of administering this Agreement will be construed to waive any Party's rights to (i) insist upon the performance by any other Party of any covenant in this Agreement or (ii) exercise any rights given it on the account of any breach of such covenant.

(AR 19974).

In the case at bar, the Petitioner is not seeking to litigate any issues pertaining to the County's adoption of the General Plan or its certification of the EIR for the General Plan. The Petitioner alleges claims as to the County's failure to implement its mandatory duties stemming from the adopted General Plan. The issues pertaining to the County's failure to adopt the DES and to ensure consistent application of the Affordable Housing Ordinance unambiguously fall outside of the scope of the settlement agreement. Petitioner is not barred from seeking judicial relief as to these issues.

The County also argues that:

> As Petitioner points out, General Plan Policy LU-1.19 requires that a DES "shall be established within 12 months of adopting this [2010] General Plan." (AR 13579). The General Plan was adopted on October 26, 2010 (AR 13579, 21034). As such, Petitioner's claim that the DES should have been adopted by October 26, 2011 is covered in Petitioner's general release of claims which "CVA had, now has or as of the Effective Date of this Agreement" because it was before the settlement agreement was signed on

> September 24, 2012. Therefore, Petitioner has waived its right to bring any claim against the County with regard to its adoption of a DES pursuant to General Plan Policy LU-1.19….

(Respondent's Opposition, pg. 5: 17-22). The 2010 General Plan was adopted on October 26, 2010. Policy LU-1.19 of the General Plan states that the DES "shall be established within 12 months of adopting this General Plan." (AR 13579). The Petitioner filed its lawsuit pertaining to the County's certification of the EIR for the 2010 General Plan, on November 24, 2010. (AR 19964). Not only is the County's failure to establish the DES within a year of the General Plan outside the scope of the settlement agreement, as discussed *supra*, at the time Petitioner filed its lawsuit on November 24, 2010, the issue regarding the County's failure to establish the DES was not yet ripe.

D. Petitioner Fully Exhausted All Available Administrative Remedies

The County alternatively argues that the Petitioner failed to exhaust its administrative remedies regarding the County's failure to establish the DES and update its Affordable Housing Ordinance as required under the General Plan. (Respondent's Opposition, pg. 6: 10-12). This argument has no merit. The Petitioner raised the specific issues regarding the County's failure to establish the DES and update its Affordable Housing Ordinance as required under the General Plan in front of both the Planning Commission and the Board of Supervisors before filing this lawsuit. The Petitioner has fully exhausted all available administrative remedies.

"The primary purpose of the [exhaustion] doctrine is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial review." *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 748. "The [exhaustion] doctrine's purpose is fully served when parties raise all issues before the administrative body with ultimate or final responsibility to approve or disapprove the project, even if those issues were not raised before subsidiary bodies in earlier hearings." *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594. "The petitioner may allege as a ground of noncompliance any objection that was presented

by any person or entity during the administrative proceedings." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.

The County admits that Petitioner raised the issue of the County's failure to implement its General Plan during the administrative proceedings over the Project, but states that "the issue was not raised in a manner that gave the County notice of and an opportunity to act on the issue." (Respondent's Opposition, pg. 6: 17-20). The County could not have been unclear about the Petitioner's objections. The County's Opposition Brief even cites to Petitioner's letters submitted to the Planning Commission and Board of Supervisors. (*See* Respondent's Opposition, pg. 6: 20).

Petitioner sent a letter to the Planning Commission outlining the County's non-compliance with the General Plan. The letter states, *inter alia*, "According to the Staff Report, the DES is not in place. The language of the General Plan is mandatory, not permissive, and the County has failed to implement such required Development Evaluation System within the timeframe set forth in the 2010 General Plan." (AR 20102). The letter also states: "Just as the County has failed to institute the DES within one year of the 2010 General Plan implementation, the County has also failed to update its Inclusionary Housing/Affordable Housing Ordinance to reflect the increase in percentage of affordable units to 25% as set forth in the 2010 General Plan." (AR 20105).

These issues were also presented to the Board of Supervisors in writing: "The General Plan went into effect in 2010. To date, the County has not created a Development Evaluation System with which to analyze new developments. The County is out of compliance with its General Plan and is mandated to create the Development Evaluation System." (AR 20333). The letter also states:

> The County has neither amended its existing Inclusionary Housing Ordinance nor implemented an Affordable Housing Ordinance which complies with LU-2.13.... The County is out of compliance with its General Plan in this regard and must promulgate new regulations mandating a minimum of 25% of new housing units to be affordable before considering this project.

(AR 20333). Contrary to the County's characterizations, the Petitioner raised the particular issues regarding the County's non-compliance with the General Plan to both the Planning

Commission and the Board of Supervisors. These issues were not "generalized arguments" as the County characterizes them, (Respondent's Opposition, pg. 6: 21-22) but specific assertions pertaining to non-compliance with Policies LU-1.19 and LU-2.13 of the General Plan that are now the subject of this lawsuit.

In addition, the County argues that counsel for the Petitioner "only generally mentions the County's alleged failure to adopt the DES and update is Inclusionary Housing Ordinance" at the Board of Supervisors hearing. (Respondent's Opposition, pg. 6:23-26). But the evidence demonstrates that Petitioner's counsel raised the specific issues as to the County's non-compliance with the inclusionary housing and DES requirement under the General Plan at the Board of Supervisors' hearing:

> Then your General Plan Policy [LU-2.13] requires 25 percent housing. Why? Because it says you will update your inclusionary housing ordinance to include very low income, low income, and moderate income, and workforce housing. And you were supposed to amend your ordinance pursuant to that General Plan to increase your inclusionary housing ordinance requirement to 25 percent. Your existing inclusionary housing ordinance, which doesn't comply with the 2010 General Plan, requires 20 percent.

(AR 5422: 15-22).

> You're not in compliance with your General Plan right now, you haven't developed a development evaluation system which you were supposed to do within one year of the adoption of the General Plan, and that would evaluate projects like this one pursuant to all the General Plan requirements in your General Plan. And you don't have that checklist. The staff has never developed it, you've never adopt it. So you're out of compliance with that. And this project wasn't evaluated pursuant to that development evaluation system.

(AR 5435: 9-19).

Finally, the County argues "the petitioner must also obtain a final decision on the merits at the highest available administrative level before seeking judicial review." (Respondent's Opposition, pg. 7: 1-3). The County's reliance on *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577 (*Tahoe Vista*) is misplaced. First, in *Tahoe Vista*, the petitioner was required to appeal a lower body's action. No such appeal was required here for the Project, and no appeal of the County's failure to comply with mandatory duties to comply with its General Plan is available. "Whether a party has exhausted its administrative remedies 'in a given case will depend upon the procedures applicable to the public agency in question.'"

1 *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th
2 1165, 1211 (quoting *City of Sacramento v. State Water Resources Control Bd.* (1992) 2
3 Cal.App.4th 960, 969) ("*Azusa*"). In *Azusa*, opponents of a waste dumping project petitioned
4 the State Water Resources Control Board to review the regional board's finding that the project
5 was exempt from CEQA. *Id.* at 1212. The State Board declined to act and the opponents
6 sought a writ of mandamus. *Id.* The appellate court determined that the petitioner exhausted
7 the administrative remedy available to it under the Water Code, the fact that the State Board
8 declined to act did not bar the petitioner from seeking judicial relief. *Id.*

9 Second, the plaintiffs in *Tahoe Vista* did not specify they were appealing the Planning
10 Commission's approval of the negative declaration to the Board of Supervisors and the Court
11 held: "Such a failure to raise an issue in an administrative approval after raising the issue in the
12 first public or administrative hearing constitutes a failure to exhaust administrative remedies and
13 prevents the issue from being raised in a subsequent judicial action." *Tahoe Vista, supra,* 81
14 Cal.App.4th at 592. By contrast, the Petitioner raised all the issues that are the subject of this
15 lawsuit in front of both the Planning Commission and the Board of Supervisors. The Board of
16 Supervisors had every opportunity to consider the issues that Petitioner raised. The Board could
17 have mandated compliance with the provisions of the General Plan before considering the
18 Project, but it did not. The exhaustion "doctrine's purpose is fully served when parties raise all
19 issues before the administrative body with ultimate or final responsibility to approve or
20 disapprove the project…." *Tahoe Vista, supra,* 81 Cal.App.4th at 594. Here, the Petitioner has
21 fully served the exhaustion doctrine's purpose through raising the issue concerning the County's
22 non-compliance with the General Plan during all administrative hearings.

23 The County also argues that it is unfair for the Petitioner to raise the issue of the
24 County's failure to implement the DES in this lawsuit when "the Board of Supervisors has not
25 had an opportunity to consider reprioritization of these General Plan implementation projects."
26 (Respondent's Opposition, pg. 7: 11-13). First, the County itself established the mandatory
27 duty to implement the DES when it adopted the General Plan on October 26, 2010. The County
28 has had every opportunity to establish the DES from October 26, 2010 to the present. Second,

the Petitioner raised the issue of non-compliance with the General Plan in writing and at the hearing for the Project. The Board of Supervisors had every ability to proceed with implementation of the DES and evaluate the Project under the DES prior to approving the Project. The fact that the County chose not to has no bearing on Petitioner's diligence in fully exhausting its administrative remedies.

E. The County's Failure to Implement the Mandatory Terms of the General Plan Constitutes a Failure to Proceed in a Manner Required by Law

1) The Petitioner is Not Asking the Court to Set an Agenda for the County, but to Direct the County to Comply with Mandatory Terms of Its General Plan

The County relies on *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723, 728 to argue that the "court should not interfere with the County's prioritization of its numerous mandatory General Plan implementation measures absent a showing that the decision is arbitrary, capricious, wholly lacking in evidentiary support, or fails to conform to the procedures required by law." (Respondent's Opposition, pg. 8: 2-5). However, the issue in *Mountain Defense League* concerned a challenge to an amendment to the general plan and is not applicable here. The County discusses impediments to establish the DES.[4] But, Petitioner is not asking the Court to interfere with the County's discretionary agenda. Rather, the Petitioner is asking the Court to compel the County to abide by the mandatory terms of its General Plan: "The Development Evaluation System shall be established within 12 months of adopting this General Plan." (AR 13579).

The 2010 General Plan EIR states the importance of the DES: "This system includes ***minimum requirements for affordable housing before a project can be considered***. The evaluation system [] includes eight specific criteria and will establish a minimum passing score." (AR 11825) (emphasis added). The EIR for the 2010 General Plan makes clear that the

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[4] The Respondents attempt to rehabilitate themselves through seeking inclusion of a July 18, 2017 Board Report as a supplement to the Administrative Record. But, the Petitioner objects to the inclusion of this Board Report because it was not in existence at the time the Board of Supervisors made their decision about the Rancho Canada Village Project on December 13, 2016. (*See* Petitioner's Objections to Respondents' Supplemental Record)

DES establishes both the "minimum requirements for affordable housing before a project can be considered," as well as an "evaluation system" that includes specific criteria "and will establish a minimum passing score." Projects subject to DES require a minimum of 35% affordable/Workforce housing. (AR 13579).

The County chose a clear mandate to develop the DES within one year of adopting the General Plan when it adopted the General Plan in 2010. Now, in 2017, the County submits that "over the past three years County staff has worked on developing the system and has received input from various stakeholders." (Respondent's Opposition, pg. 9: 3-4). But, the critical fact remains that (1) the County is delinquent in developing a pass-fail DES system as required under the General Plan and, (2) the County cannot approve the Project without the DES, and (3) the County's approval of the Project, without evaluation of the DES, proves the Petitioner's point that without a writ of mandate, the County will not comply with its mandatory duties. The County's inaction in performing its mandatory duty constitutes a failure to conform to the procedures required under the General Plan.

The County advocates for the position that "the County's prioritization of the General Plan implementation tasks has not been arbitrary, capricious, or procedurally unfair." (Respondents' Opposition, pg. 9: 14-15). However, the argument misses the point. The County self-imposed a deadline of creating the DES within a year, and its failure to do so does not implicate any discretionary prioritization of implementation tasks. Establishing the DES within a year of adoption of the General Plan is a clear, mandatory provision of the General Plan. The County then takes its position one step further by arguing that "regardless of whether a formal pass/fail DES has been adopted by the County, the County applied the DES criteria required by General Plan Policy LU-1.19." (Respondent's Opposition, pg. 9: 22-24). This argument is without merit and demonstrates that absent a writ of mandate, the County is unlikely to develop a DES because the County takes the position that it is appropriate to approve developments even without one. Not only has the County done so in the case at bar, the County also admits that it has previously approved projects that are subject to the DES by simply utilizing another method: "the County has previously applied the DES evaluation criteria to other projects

pending finalization of the DES." (AR 106). Without a writ of mandate, the County will not be compelled to ensure that the DES is adopted swiftly.

2) The General Plan Also Mandates Consistent Application of an Affordable Housing Ordinance Requiring 25% of New Housing Units Be Affordable

Policy LU-2.13 of the 2010 General Plan states: "The County shall assure consistent application of an Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583). The County argues that "the amount of time the County has taken to amend its Inclusionary Housing Ordinance is reasonable and has not been arbitrary, capricious, or procedurally unfair." (Respondent's Opposition, pgs. 10-11: 27-28, 1). However, the evidence provided by the County proves that the County's failure to amend the Affordable Housing Ordinance to require 25% of new housing units be affordable is in fact unreasonable.

The Government Code provides:

> In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended ***within a reasonable time*** so that it is consistent with the general plan as amended.

Gov. Code § 65860(c) (emphasis added). The County does not dispute the applicability of this statute to the County's failure to amend its Affordable Housing Ordinance. Instead, the County's sole response is that "the amount of time that the County has taken to amend its Inclusionary Housing Ordinance is reasonable." (Respondent's Opposition, pg. 10: 27-28). In other words, six years, and counting, is not unreasonable. But the evidence that the County relies on to support its position cuts to the County's unreasonableness.

The County asserts that it "has diligently been moving forward with amending its Inclusionary Housing Ordinance." (Respondent's Opposition, pg. 10: 7-8). In support of its position, the County cites to one Housing Advisory Committee meeting on January 27, 2016, where the issue of updating the Affordable Housing Ordinance was discussed. (Respondent's Opposition, pg. 10: 6-9, 16-19). In essence, the County admits that prior to January 27, 2016, and in the five intervening years after adoption of the 2010 General Plan, the County had not

considered moving forward with amending its Affordable Housing Ordinance for consistency with the General Plan. This demonstrates unreasonableness.

The County further states that "amendments required to the Inclusionary Housing Ordinance were also discussed in the County's 2015-2023 Housing Element (Housing Element) that was adopted on January 26, 2016." (Respondent's Opposition, pg. 10: 17-18). However, the 2015-2023 Housing Element[5] does not even discuss Policy LU-2.13 of the General Plan and patently misidentifies the percentage of affordable housing units required. Citing to the outdated Affordable Housing Ordinance, the 2015-2023 Housing Element states: "The County also assures consistent application of an Inclusionary Housing Ordinance…. which requires that ***20 percent of units/lots*** in new residential developments be affordable to very low, low, and moderate income households." (AR 20914) (emphasis added). Even this relatively new Housing Element gets the percentage of affordable units wrong, citing 20% instead of the required 25% affordable new units pursuant to Policy LU-2.13.

The Housing Element is an element of the General Plan. Gov. Code § 65302(c). The "Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Gov. Code § 65300.5. "The keystone of regional planning is consistency – between the general plan, its internal elements, subordinate ordinances, and all derivative land use decisions." *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at 572; *see also*, *Resource Defense Fund v. County of Santa Cruz*, *supra*, 133 Cal.App.3d at 806; *deBottari v. City Council*, *supra*, 171 Cal.App.3d at 1210-1213. Further, "a project must be compatible with the objectives and policies of the general plan and a project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." *Endangered Habitats League, Inc. v. County of Orange*, *supra*, 131 Cal.App.4th at 782 (citing *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336, disapproved on other grounds in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206). This internal inconsistency between the

[5] Petitioner has stated its objection to inclusion of the Housing Element as a supplement to the Administrative Record but does not ask it to be stricken. (*See* Petitioner's Opposition to Respondent's Supplemental Administrative Record).

Housing Element and the Land Use Element of the General Plan renders impossible a project's ability to be consistent with the General Plan as a whole. In addition, the Housing Element wholly demonstrates the County's lack of diligence in moving forward with updating its Affordable Housing Ordinance such that even the Housing Element, adopted on January 26, 2016 cites to the outdated Affordable Housing Ordinance.

Finally, no explanation is provided as to why the County did not seek to make the Affordable Housing Ordinance consistent with the General Plan when it had the opportunity to do so on April 26, 2011. The 2010 General Plan was adopted on October 26, 2010. (AR 13574). The County argues that the last time the Affordable Housing Ordinance was on April 26, 2011. (AR 17705) (Respondent's Opposition, pg. 10:11). And yet the County does not explain why the 2011 amendment failed to accord the Ordinance's affordability requirements with the General Plan's mandate that 25% affordable units are required for new development. Contrary to the County's assertion that the "County has diligently been moving forward with amending its Inclusionary Housing Ordinance" (Respondent's Opposition, pg. 10: 7-8), the evidence presented by the County demonstrates that the County has taken an unreasonable amount of time to conform its Affordable Housing Ordinance to the General Plan, and that it only considered its responsibility once on January 27, 2016, five years after the General Plan was adopted. Without a writ of mandate, the County will continue to be dilatory in updating its Affordable Housing Ordinance.

F. Contrary to the County's Assertions, as a Matter of Law, the Project Cannot Be Found to be Consistent with LU-1.19 Because the DES is Currently Non-Existent and Therefore There is Nothing to Measure Consistency Against

Having admitted that the County has not yet established the DES, the County nonetheless argues that (1) there is a valid question if LU-1.19 even applies to the Project and, (2) the Project is consistent with LU-1.19 because the County considered, applied the requirements and policy outlined in LU-1.19, and reasonably found that the Project is consistent with the DES criteria. (Respondent's Opposition, pg. 16: 8-15). As will be demonstrated below, Policy LU-1.19 applies to this Project and the Project cannot be said to be consistent

with LU-1.19 because LU-1.19 requires implementation of a pass-fail DES system, which has not yet been established.

1) LU-1.19 Applies to the Project

Policy LU-1.19 states:

> Community Areas, Rural Centers and Affordable Housing Overlay districts are the top priority for development in the unincorporated areas of the County. ***Outside of those areas***, a Development Evaluation System shall be established to provide a systematic, consistent, predictable, and quantitative method for decision-makers to evaluate developments of five or more lots or units and developments of equivalent or greater traffic, water, or wastewater intensity.

(AR 13578) (emphasis added). The County argues that "there is a valid question if LU-1.19 even applies to the Project site given that the site was targeted for development in the General Plan and is largely an infill project." (Respondent's Opposition, pg. 16: 8-9). First, it is a stretch to characterize the site as being "targeted for development in the General Plan." Policy CV-1.27 pertaining to the Rancho Canada Special Treatment Area states: "Residential development ***may*** be allowed..." (AR 13621). More importantly, the unambiguous language of Policy LU-1.19 expressly states:

> Community Areas, Rural Centers and Affordable Housing Overlay districts are the the top priority for development in the unincorporated areas of the County. ***Outside of these areas, a Development Evaluation System shall be established to provide a systematic, consistent, predictable, and quantitative method for decision-makers to evaluate developments of five or more lots or units*** and developments of equivalent or greater traffic, water, or wastewater intensity.

(AR 13578) (emphasis added). While the County argues that LU-1.19 may possibly not apply to the Project, the language of LU-1.19 specifically provides that a DES shall be established to evaluate developments of five or more lots outside of Community Areas, Rural Centers, and Affordable Housing Overlay districts. The Project is not within one of the aforementioned districts and thus the DES applies. Furthermore, the County ultimately assumed that Policy LU-1.19 does apply to Special Treatment Areas: "Assuming that Policy LU-1.19 does apply to Special Treatment Areas, the Board finds that the project passes the DES criteria." (AR 106).

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2) The County's Finding that the Project Complies with LU-1.19 Cannot Be Established as a Matter of Law Because LU-1.19 Requires Submitting the Project to the DES Pass-Fail System and the DES Itself Has Not Been Established

The County has not established a DES. (*See* AR 3860 ("the DES is not yet in place")). Having admitted that the DES has not been established, the County argues that the Project is nonetheless consistent with the DES criteria. (Respondent's Opposition, pg. 12: 15). "Therefore, the fact that the County has not adopted a DES does not preclude consideration of the Project. (AR 106)." (Respondent's Opposition, pgs. 12-13: 28, 1-3). The County essentially argues that failure to submit the Project to the DES is acceptable because the County has substituted the quantitative DES pass/fail system with its own qualitative evaluation system. This position is untenable, contravenes the clear requirement set forth in LU-1.19, and demonstrates that the County has been acting in a procedurally unfair manner, contrary to law. The County states that it has also utilized this process before in lieu of the mandatory DES: "the County has previously applied the DES evaluation criteria to other projects pending finalization of the DES. (AR 106).

Policy LU-1.19 sets forth nine minimum evaluation criteria for the DES. (AR 13579). The DES would quantitatively evaluate development, producing a pass-fail score for proposed development projects based on criteria, including, ***but not limited to*** the nine criteria set forth under LU-1.19. "Evaluation criteria shall include but are not limited to…." (AR 13579 (emphasis added)). Policy LU-1.19 specifically maintains that a "Development Evaluation System shall be established to provide a systematic, consistent, predictable, and ***quantitative method*** for decision-makers to evaluate developments of five or more lots or units…" (AR 13578) (emphasis added). Policy LU-1.19 establishes that "The system shall be a ***pass-fail system*** and shall include a mechanism to ***quantitatively evaluate*** development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the ***overall quality of the development***." (AR 13579) (emphasis added). The Policy requires evaluating development proposals, such as the Project, pursuant to a pass-fail DES system, which considers evaluation criteria such as the nine currently set forth in LU-1.19.

The County turns this process on its head, arguing that even without the DES system in place, the County is still able to make findings that the Project satisfies the DES criteria. The County argues that: "The Board's findings properly include an evaluation of the Project in accordance with Policy LU-1.19, and reason 'based on the specific facts associated with this application it is determined that the project would pass the DES, if a pass-fail scoring system were in place.'" (Respondent's Opposition, pg. 13: 4-6). The County also states that the Board "considered and applied the requirements and policy outlined in LU-1.19 and reasonably found based on the evidence that the Project is consistent with the DES criteria." (Respondent's Opposition, pg. 16: 13-15).

The County's assertion that the Board "determined that the project would pass the DES, if a pass-fail scoring system were in place," is conditional, hypothetical, and baseless since the DES has not been created. To determine that a project would pass the DES without having a DES in place is the definition of arbitrary and capricious, to use the standard of review the County proffers. Second, the County's argument that the Board "considered and applied the requirements and policy outlined in LU-1.19" is wrong as a matter of law. Policy LU-1.19 mandates that the DES "***shall be a pass-fail system*** and ***shall include a mechanism to quantitatively*** evaluate development…." (AR 13579) (emphasis added). The requirements outlined in LU-1.19 are to evaluate projects pursuant to the DES, and the DES must be a pass-fail system.

In *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-1342 ("*Families Unafraid*") (disapproved on other grounds in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206), the court distinguishes between General Plan provisions which "afford officials 'some discretion'" and land use policies that are mandatory. The General Plan policy at issue in *Families Unafraid* was "mandatory and anything but amorphous: (LDR 'shall be further restricted to those lands contiguous to Community Regions and Rural Centers'…)." *Id.* at 1342. The court found that the Board of Supervisors improperly approved a hybrid land use designation for the Cinnabar property: "It is readily apparent that the LDR designation for Cinnabar is inconsistent with the

Draft General Plan policies…governing contiguous development and rural separation, and cannot be 'saved' by the platted lands to the northeast." *Id.* at 1341. The court rejected the argument forwarded by the County that the project need not be in perfect conformity with the General Plan because the court stated that the project's "inconsistency with this fundamental mandatory and specific land use policy is clear—this is not an issue of conflicting evidence." *Id.* at 1342.

Here, the same reasoning applies. The County has not subjected the Project to the fundamental, mandatory pass-fail quantitative analysis, because such a system does not yet exist. Yet the County seeks an end-run around the DES by arguing that addressing the Policy LU-1.19 criteria alone is sufficient. (Respondent's Opposition, pg. 13: 16). Policy LU-1.19 requires analyzing projects under a quantitative pass-fail system to determine the "overall quality of the development." (AR 13579). The fact that the Board of Supervisors lifted the nine criteria set forth in LU-1.19 out of context and discussed the Project generally alongside such criteria is not tantamount to scoring the Project pursuant to the DES. LU-1.19's procedural mandates require evaluating the Project under a pass-fail system, not making qualitative findings based on the Board's whim.

Having admitted that the DES is not in place, the County's conclusion that the Project is nonetheless consistent with LU-1.19 is wrong as a matter of law. LU-1.19 does not authorize the County to substitute the DES pass-fail, quantitative system, with a general qualitative discussion of the Project and the DES criteria. Furthermore, the County fails to mention that the criteria are the minimum set forth under LU-1.19 and the DES, once established, may encompass other criteria not currently considered. The County's conclusion that the Project complies with the as-yet developed DES criteria is nonsensical since the range of criteria that will ultimately be utilized for the DES has not yet been established.

G. The County's Approval Does Not Comply with the County's Inclusionary Housing Ordinance

The County argues that the Petitioner's interpretation of the County's Inclusionary

Housing Ordinance is incorrect. (Respondent's Opposition, pg. 19: 24-27). Relying on *Save our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 141 and *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 373, the County argues that the "County's determination of conformance with its ordinance are entitled to deference and should be upheld." (Respondent's Opposition, pg. 19: 12-14). But *Save Our Peninsula Committee* does not stand for such a proposition. The court in *Save Our Peninsula Committee* states: "we must presume and expect that the County will comply with its own ordinances." 87 Cal.App.4th 99, 141. Similarly, the court in *Eureka Citizens* discusses a local governmental agency's determination of consistency with its general plan, but the case does not concern a local agency's interpretation of its ordinances. *Eureka Citizens, supra,* 147 Cal.App.4th 357, 373.

The Court should exercise its independent judgment when reviewing the County's interpretation of the Inclusionary Housing Ordinance. "The interpretation of both statutes and ***ordinance*** is ultimately a judicial function." *MHC Operating Limited Partnership v. City of San Jose*, *supra*, 106 Cal.App.4th at 219 (emphasis added). The Court exercises its independent judgment when reviewing agency interpretation of local ordinances: "To the extent that the administrative decision rests on the [County's] interpretation or application of the ***Ordinance***, a question of law is presented for our independent review." *Id.* (emphasis added).

The outdated County Code establishes that 20% of approved development units must be inclusionary units: "To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the total number of units approved for the residential development." (P's RJN, Edh. A, Section 18.40.070). The Petitioner argues that the Project approval violates the County's Affordable Housing Ordinance because it provides less than 20% affordable units: "Of the 130-units approved, the Project only includes 25 ***moderate*** income units, or 19% of the total units approved." (Opening Brief, pg. 21: 15-16).

1) The County's Approval of a General Plan Amendment for the Project Proves that the Project Fails to Comply with Any Affordable Housing Policies and Required an Exception

Not content with abrogating the 50% affordable housing requirement for the Project site, the 35 % required under LU-1.19, or the standard 25% affordable housing requirement applicable to all other Projects in the County under LU-2.13, the County and Real Parties also attempt to water down the 20% affordable housing requirement in the outdated ordinance. As discussed in Petitioner's Opening Brief, three separate affordable housing policies are applicable to this Project and the Project fails to comply with any of them.[6] The County admits that a General Plan amendment was necessary to allow for approval of the Project which modified and reduced the "minimum affordable/workforce housing requirement from 50% to 20%." (Respondent's Opposition, pg. 18: 20-22).

In the County's resolution, the County found that "it is plausible that had the 130-unit Alternative been a likely or foreseeable option at the time the Special Treatment Area designation was adopted, the requirement for a minimum of 50% affordable/workforce housing would not have been included in the 2010 General Plan. (AR 110)." (Respondent's Opposition, pg. 18: 24-27). The County's post hoc rationalization is not compelling. If the County believed that 50% affordable/workforce housing would have been impossible, the County could have amended this provision along with its amendment to establish the 190-unit cap in 2012. Its failure to do so does not warrant such a post hoc rationalization and provides no compelling justification to reduce the affordable housing requirement for this Project.

2) The County Staff Conveyed that 26 Units is Required to Comply with the Affordable Housing Requirement

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[6] Policy LU-1.19 establishes that projects subject to the DES, such as this Project, "shall incorporate the following minimum affordable unit requirements: "35% affordable/Workforce housing." (AR 13579. Policy CV-1.27, specific to the Rancho Canada Village site, states that new development "shall provide a minimum of 50% Affordable/Workforce Housing." (AR 13621). Policy LU-2.13 establishes a countywide minimum affordable housing requirement of 25%: "The County shall assure consistent application of an Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583).

As stated in its Opening Brief, County Planning Staff has unequivocally conveyed that the 20% of affordable units for the Project is 26 units, and 25 units does not satisfy the Affordable Housing Ordinance:

- "It's clear that the 130-unit Alternative does not meet the Inclusionary Ordinance's 20% requirement." (AR 19527, *See* Opening Brief, pg. 21: 18-19).
- The lead planner for the Project emphasized: "A straight reading of [Section 18.30.070A of the Inclusionary Ordinance] means that if 130 units (the word 'new' is not in the Ordinance) are approved then at least 20% of that number, or a minimum of 26 units, would need to be Inclusionary." (AR 19539, *See* Opening Brief, pg. 22: 1-3).
- The County Planning Staff concluded: "As currently proposed, 25 Moderate Income units out of 130 total units does not comply with the Inclusionary Ordinance." (AR 19539, *See* Opening Brief, pg. 22: 5-7).

In addition, as stated in Petitioner's Opening Brief, the DEIR for the Project recognizes that it is the Applicant who is requesting credit for four existing lots "20% of 130 would be 26 units; the Applicant proposed to build 25 units onsite and requests to receive credit for four existing lots such that the required number of units is 25. (AR 3090) (Opening Brief, pg. 22: 7-10). The County does not address the DEIR's admission that 20% of 130 units is 26 units. Instead, the County responds that Petitioner "ignores other portions of the administrative record showing that the staff's evaluation changed with further research." (Respondent's Opposition, pg. 20: 6-7). The County fails to provide any evidence of "further research."

The County cites to staff's final report to the Board of Supervisors to support its position. But the final Board Report does not include further research, nor does it advocate or conclude that the 20% should be based on 125 and not 130 units as the County now argues. The Board Report merely presents the two scenarios, 20% based on 125 units and 20% based on 130 units:

> The Project site consists of five existing parcels that would allow one residential unit per lot. Policy CV-1.27 includes language that "excludes the first unit on an existing lot of record." As such, the 130-unit Alternative would have a net increase of 125 units. With an interpretation that the terms "lots" and "units" are synonymous, a minimum of 25 inclusionary units would be required for 125 additional lots. . . . ***If 20% is based on 130 units, the applicant would be required to provide 26 affordable units.***

(AR 5038) (emphasis added). This staff report does not conclude that 25 units would satisfy the Affordable Housing Ordinance, it also expressly recognizes that 20% based on 130 units would be 26 affordable units. In addition, the County takes CV-1.27 out of context to serve its purpose. CV-1.27 states: "Prior to beginning new residential development (excluding the first unit on an existing lot of record), projects must address environmental resource constraints (e.g.; water, traffic, flooding)." (AR 13621). The County lifts this provision from the General Plan and applies it to the County's Affordable Housing Ordinance to suggest that 20% affordable units should be based on new lots. But, CV-1.27 is clearly concerned with addressing environmental resource constraints and not affordability requirements. The County offers no reasoning as to why Policy CV-1.27, pertaining to the requirement to address environmental resource constraints, should be imported to interpret the requirements of the County's Affordable Housing Ordinance.

3) The Redevelopment and Housing Memorandum's Statement that 25 Units Would Satisfy the Affordable Housing Ordinance is Conclusory, and Provides No Analysis as to Methodology Used

Next, the County relies on a November 9, 2016 memorandum from the Redevelopment and Housing Analyst to explain the County's methodology. "This memorandum explains the County's methodology to calculate the County's 20% inclusionary housing requirement. (AR 20007-20009)." (Respondent's Opposition, pg. 20: 10-12). But this memorandum provides no methodology, only conclusory remarks: "According to Section 18.40.110.A of the Ordinance the project is required to provide 25 Inclusionary Units (20% X 125 new residential lots)." (AR 20007). This Memorandum does not contain methodology or explain why the 20% is based on 125 lots and not the 130 approved lots. To the extent the County argues that this Memorandum correctly interpreted the Affordable Housing Ordinance, the County's reliance is misplaced. This Memorandum offers no analysis or methodology, only conclusions.

4) The County Relies Not on the County Staff's Analysis but on Real Party's Analysis, and Alternatively Offers a Novel Theory for Why 25 Units Satisfies the Affordable Housing Ordinance

The County states the that "twenty (20) percent of the total number of units approved for the residential development" only pertains to new units. (Respondents' Opposition Brief, 20: 21-24). The County's interpretation is contrary to the County staff's and instead aligned with Real Party's argument:

> As explained in [Redevelopment and Housing Memorandum] the base requirement for calculating the inclusionary housing compliance requirement for the 130-unit Alternative is 125 total units. (AR 20009). It is not 130 units as Petitioner advocates. This is because the Project site comprises of five existing lots of record, for which a single-family home is already allowed, and thus these five existing lots of record are subtracted from the 130-units described in the 130-unit Alternative.

(Respondent's Opposition, pg. 20: 13-18). This reasoning was previously attempted by the Real Party: "Thus, the calculation is based on 124 new units (130 minutes the 5 existing PQP, and minus the existing unit on Lot 130)." (AR 19540). However, the County planning staff had already rejected the Real Party's proposed interpretation: "A straight reading of that language means that if 130 units (the word 'new' is not in the Ordinance) are approved then at least 20% of that number, ***or a minimum of 26 units,*** would need to be Inclusionary." (AR 19539) (emphasis added). While the County argues that Petitioner "ignores the portions of the administrative record showing that the staff's evaluation changed with further research," (Respondent's Opposition, pg. 20: 5-7), the County fails to show that its changed conclusion was the result of further research.

Finally, the County switches to the County Code's definition of "residential development" to justify approval of 25 and not 26 affordable units. But neither the Board of Supervisors nor the Redevelopment and Housing Analyst Memorandum relied on County Code's definition of "residential development" for their analysis. (*See* AR 109 - 110, 143 5038, 20007 - 20009). For the first time in its Opposition Brief, the County now argues that the County Code's definition of "residential development" renders 25 units sufficient to satisfy the Affordable Housing Ordinance.

The County argues that Monterey County Code Section 18.40.040Y, defines "residential development" to mean projects that create "new or additional dwelling units and/or lots." (Respondent's Opposition, pg. 20: 25-26). The full definition of "residential development" is as

follows:

> "Residential development" means any project requiring any subdivision of land, use permit, discretionary permit or building permit, or combination thereof, for which an application or applications are submitted to the County and which would by construction or alteration of structures create three or more new or additional dwelling units and/or lots.

(County's RJN, Exh. A, Section 18.40.040Y). The County Code provision requiring 20% affordable units reads:

> To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater ***than twenty (20) percent of the total number of units approved*** for the residential development.

(P's RJN, Exh. A, Section 18.40.070) (emphasis added). The County's affordable units requirement provides that "a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the ***total number of units approved*** for the residential development." (P's RJN, Exh. A, Section 18.40.070) (emphasis added). The County's reliance on the definition of "residential development" to argue that affordable housing requirements "be based on new units and new lots" (Respondent's Opposition, pg. 20: 24) imports unnecessary confusion to the clear language of Section 18.40.070 and is without merit. The County's interpretation should be rejected.

5) The County's Approval of 25 Moderate Income Units with No Provision of Low and Very Low Units is Unwarranted Because No Unusual Circumstance Exists

The County argues that approval of 25 moderate income units and no provision of low and very low units is valid due to the Board's finding of unusual circumstances. "[U]nusual circumstances exist making it appropriate to modify the requirements of the Inclusionary Ordinance so that 20% Moderate-income housing, as proposed by the Alternative, is allowed in-lieu of the 8% Moderate-income, 6% Low-income, and 6% Very Low-income." (AR 143). The only evidence provided in support of the finding that unusual circumstances exist is: "The applicant has stated that due to the significant reduction in units proposed between the Project and the Alternative it is not financially feasible to comply with the Inclusionary Ordinance's

requirements, particularly related to providing low and very low-income units." (AR 143). Under this logic, the Affordable Housing Ordinance is doomed as any project developer can claim economic harm as an unusual circumstance.

The Affordable Housing Ordinance states that residential developments which meet the following criteria will not be required to comply with the ordinance:

> that as a result of unusual or unforeseen circumstances, it would not be appropriate to apply, or would be appropriate to modify, the requirements of this Chapter, provided that the Appropriate Authority who makes the determination to approve or disapprove an exemption or modification makes written findings, based on substantial evidence, supporting that determination.

(Respondent's RJN, Exh. A, Section 18.40.050(B)(2)). The County cites two letters provided by Monterey County Bank and 1st Capital Bank to show that "provision of low and very low affordable housing at the 130-unit reduced density alternative was not economically feasible (AR 20412- 20413)." (Respondent's Opposition, pg. 21: 18-21). However, it is unclear what these letters are responding to and the nature of the request. Furthermore, it is also unclear if the Real Parties currently have bank financing for this Project. In addition, the Board resolution makes no reference to these letters in finding that an unusual circumstance warrants exemption of Affordable Housing requirements. (AR 143). Finally, difficulty obtaining bank financing is not an "unusual or unforeseen circumstance," because the affordable unit requirements were present in the existing County Code at the time the Real Parties proposed the 130-unit alternative.

Exempting the Real Parties from the requirements of the Affordable Housing Ordinance is analogous to the granting of a variance from the terms of a zoning ordinance. First, the County never disputes that the Affordable Housing Ordinance is a zoning ordinance since it regulates the use of land especially with respect to buildings, structures, and residences. Gov. Code § 65860(c) (*See* Opening Brief, pg. 18: 9-10). While the Affordable Housing Ordinance does not call its unusual circumstances provision a "variance," it functions as one because it exempts qualifying developments from the standard requirements of the Affordable Housing Ordinance.

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"[D]espite the applicability of the substantial evidence rule and the deference due to the administrative findings and decision, judicial review of zoning variances must not be perfunctory or mechanically superficial." *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 923-924. In the context of granting of a variance "courts must meaningfully review grants of variances in order to protect the interests of those who hold property nearby the parcel for which a variance is sought." *Topanga Assoc. for Scenic Cmty. v. County of L.A.* (1974) 11 Cal.3d 506, 517-518 ("*Topanga*"). In *Topanga*, the court found that for the particular parcel in question, "[s]ince there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, we conclude that the variance granted amounts to the kind of 'special privilege' explicitly prohibited by Government Code section 65907." *Id.* at 522.

By analogy, exempting the Project from the requirements of the Affordable Housing Ordinance is unwarranted. While the applicant asserts difficulty in obtaining bank financing, even if this were true, it is not an unusual or unforeseen circumstance that justifies allowing the applicant to proceed with only moderate income units and no low and very low-income units.

H. The Project Description Changed from 2008 to 2015 and the 281-Unit Project was No Longer the Consideration of the EIR

1) The Real Parties Argue that the Project Description Satisfies the Technical Requirements of the CEQA Guidelines But Fail to Address Evidence in the Record Demonstrating that the 281-Unit Project was No Longer Being Pursued

The Real Parties' position is that "[t]he format of an EIR project description is not subject to any particular requirements other than the technical requirements in 14 Cal Code Regs Section 15124 for such matters as the project location and boundaries and accompanying maps." (Real Parties' Opposition, pg. 7: 20-23). Notably, while the Real Parties take the position that the EIR satisfies the technical requirements of CEQA Guidelines Section 15124, nowhere in their Opposition do the Real Parties state that by 2016, when the DEIR was recirculated, the 281-unit Project is still the actual proposed project.

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In addition, the Real Parties never address the following issues in their Opposition Brief:

- The fact that in February 2009, one of the Real Parties, decided to "pull back on the RCV until the General Plan and [Carmel Valley Master Plan] have been processed." (AR 11401) (Opening Brief, pg. 10: 22-23).

- Petitioner's argument that it was the Real Parties who advocated for the 130-unit project to be framed as an "alternative." (Opening Brief, pg. 24: 10-11).

- The fact that the biological resources consultant also understood that "alternative project plans are now being submitted to Monterey County for review." (AR 15163) (Opening Brief, pgs. 27-28: 27-28, 1-2).

- The fact that the 2016 Rancho Canada DEIR discusses the 130-unit proposal in the Project Description. (AR 15191). (Opening Brief, pg. 28: 2-3).

- The County itself had provided language which indicated an understanding that the 130-unit proposal was part of the revised project description: "The project description will be revised to include the 130-unit Alternative." (AR 17127). (Opening Brief, pg. 28: 4-5).

2) The Real Parties Never Successfully Refute Petitioner's Argument that the Recirculated DEIR Unlawfully Straddles Both the 281-Units and the 130-Units

The Real Parties argue that "the RCV EIR in this case accurately described the RCV Project *consistently* through the RCV EIR." (Real Parties Opposition, pg. 8: 14-15). In support of their argument, Real Parties cites to three examples in the record where the 281-unit project is discussed: AR 1315, 1352, and 1840. (Real Parties' Opposition, pg. 8: 15-19). But the Real Parties miss the heart of the Petitioner's argument. The Petitioner does not argue that the Recirculated DEIR never referred to a 281-unit project. Petitioner's argument is that by 2015, the Recirculated DEIR straddles both the 281-unit and 130-unit, whereas, in 2008, the 130-unit was not part of the Project Description. The Real Parties assert that the Recirculated EIR "does not interchangeably describe the RCV Project." (Real Parties' Opposition, pg. 8: 9). However, a comparison of the 2008 and 2016 Project Description reveals that the Project Description had substantially changed because the 2016 Project Description encompasses both the 281-unit and the 130-unit. The 2008 Project Description for the Rancho Canada Village Specific Plan is as follows:

> The proposed project application consists of a Combined Development Permit for the creation of a new, 281-unit, sustainable mixed-use residential neighborhood. The elements of the design proposal include a mix of "Smart Growth" and "Traditional" neighborhood principles that involve the incorporation of established shopping facilities, schools, open space, and churches. Additionally, the development proposal attempts to meet the need for affordable housing in Carmel Valley. Fifty percent of the homes (140 units) are proposed to be deed-restricted as affordable and workforce units (per the pricing and eligibility requirements of Monterey County's Housing Ordinance).

(AR 9349). The 2016 Project Description for the Rancho Canada Project is as follows:

> As proposed, the Project is a 281-unit residential development consisting of a mix of single-family residences (141 units) and townhomes and condominiums (140 units) clustered on approximately 40 acres of the northwestern portion of the Project site; the remainder of the site is proposed for parkland, open space, habitat and common area usage.
>
> Among the alternatives considered in the Re-circulated Draft Environmental Impact Report (RDEIR), is a lower density, 130-unit Alternative, consisting primarily of single-family attached and detached residential lots and 12 condominium units. The 130-unit Alternative occupies the same general, approximately 40-acre area of the West Course, except that the Alternative also includes a 4.3 acre parcel, located approximately one-half mile northeast of the main Project site, which is presently developed with maintenance facilities. Implementation of the Alternative would require the same type of approvals as the Project, except that the Alternative would not require the importation of offsite fill material.

(AR 18541). The two Project Descriptions, separated by eight years, are vastly different. It is clear that by 2016, the real project being considered is the 130-unit Alternative, and the 281-unit project had been abandoned.

3) The Real Parties Never Successfully Refute Petition's Argument that the 130-Unit Project is the Actual Project

In an effort to counter Petitioner's argument that the 130-unit proposal is the actual Project, the Real Parties defend preparation of the preliminary grading and drainage plan as a response to the Petitioner's comment letter from 2008, which the County itself never even responded to. (Real Parties Opposition Brief, pg. 9: 3-6). "This preliminary grading and drainage plan was prepared to show how the 130-Unit Alternative can reduce impacts compared to the RCV Project by eliminating the use of offsite fill and responds to Petitioner's own request for such an alternative to be analyzed in the EIR." (Real Parties' Opposition, pg. 3-6).

However, the record demonstrates that the preliminary drainage information prepared for the 130-unit Project is not a response to the Petitioner's letter from nine years ago, as the Real Parties assert, but was presented to show that an 84 inch pipe would be constructed, and reimbursed by the County, as part of the 130-Unit Project:

> Please find attached the 130-Unit Project Alternative grading plan, which plan now shows the 84" DA27 pipe for the County. Can you forward this map to the EIR consultant. As marked on the plans, no runoff from the 130-unit RCV project alternative is going through this 84" pipe…. The County's reimbursement to RCV for the cost/construction of the 84" pipe is something that can be dealt with outside of the EIR, however, I think it is important that the EIR explain the existing conditions and make clear that 84" pipe is not mitigation for the RCV project alternative.

(AR 17802). This information demonstrates that the Real Parties and the County were actively pursuing the 130-unit Project, and developing grading and drainage plans for the 130-unit Project.

In response to Consultant's inquiry: "Would you like the new project name to be: Rancho Canada Village Project?" (AR 17129), the Real Parties argue that "a name change was appropriate because the Specific Plan component of the project application was withdrawn to enable a more orderly processing of the RCV Project. (AR 000214)." (Real Parties' Opposition Brief, p. 9: 15-18). But, page 214 of the Administrative Record cited to by Real Parties does not support the Real Parties' proposition that "the Specific Plan component of the project application was withdrawn to enable a more orderly processing" of the Project. Page 214 is the cover page for the Rancho Canada Village Specific Plan Draft EIR prepared in 2008.

The fact remains that, in 2008, the Project was the Rancho Canada Village Specific Plan. By 2016, the Rancho Canada Village Specific Plan had been abandoned because the Project itself had shifted. In an effort to evade the environmental review process for the new Project, the Real Parties and the County worked together to repurpose the 2008 EIR for the Rancho Canada Village Project. This is why the Recirculated EIR contains awkward language where the Proposed Project and the 130-Unit Alternative are often jointly discussed. ("Project Location: The Proposed Project and the 130-Unit Alternative would be located at the mouth of Carmel Valley along Carmel Valley Road." (AR 1314); "Project Background: This Recirculated

Draft EIR uses the current land use plans and evaluates the consistency of the Proposed Project and the 130-Unit Alternative with the 2010 General Plan and the 2013 CVMP. (AR 1314)). In addition, the County also jointly discusses the 281-Unit and 130-Unit Alternative under the same "Project Description" heading. (*See* Notice of Availability Re-Circulated Draft EIR (AR 18541)).

The Real Parties dismiss their preparation of a wholly new vesting tentative map as "simply the revised vesting map to be presented to the Board following the Planning Commission's recommendation for approval of the 130-Unit Alternative (AR20266-20267; 20268-20270)." (Real Parties' Opposition, pg. 9: 20-22). However, even at the Planning Commission hearing, it was never the 281-unit proposal that was considered, but rather the 130-unit Project. The agenda for the November 16, 2016 Planning Commission hearing states provides: "Public hearing to consider making a recommendation to the Board of Supervisors to…. Approve the Rancho Canada Village Subdivision project (PLN 040061, 130-unit alternative), including: 1. Approve the vesting Tentative Subdivision Map for the 130-unit Alternative." (AR 4099). In addition, the Planning Commission findings also referred to the Vesting Tentative Map for the 130-unit Project and not the 281-unit proposal:

> The proposed project, referred to as the 130-unit Alternative (Alternative) in the FEIR, is a 130-unit residential subdivision consisting of 118 single-family residential parcels and 12 condominium lots…The revised Vesting Tentative Map divides approximately 81.7 acres into 118 single-family residential parcels; one condominium parcel with 12 condominium lots/units; and seven (7) parcels for roadway, open space and common area purposes serving the residential subdivision.

(AR 4123).

The County also misunderstands Petitioner's position that 281-units is impossible under the General Plan. The County argues that the Petitioner and County's 2012 "Settlement Agreement…did not and could not under California law, take away the County's discretion to consider the proposed project." (Respondent's Opposition, pg. 18: 2-3). The County argues that "[t]here was no legal basis under the Settlement Agreement, as purported by Petitioner, rendering the proposed project 'impossible.'" (Respondent's Opposition, pg. 18: 7-8). But Petitioner is not arguing that the Settlement Agreement removed the County's land use

authority or police power. Petitioner is arguing that because the County established a building cap of 190-units in the General Plan, it would be impossible to develop a 281-unit project under the current General Plan. The County attempts to misdirect Petitioner's argument, but Petitioner never advocates for restricting the County's land use authority or police power. (Opening Brief, pg. 8).

4) The Real Parties Never Contest Testimony Cited to by Petitioner Stating that the Applicant Publicly Identified the 130-unit Alternative as the Proposed Project

Instead of addressing the issues stated by the public with regard to the unclear Project Description, Real Parties avoid and wholly dismiss the public testimony, stating that the "self-serving letters do not support Petitioner's case." (Real Parties' Opposition, pg. 10: 23). But, the letters do support Petitioner's case. They support Petitioner's argument that the Rancho Canada project description is unstable and shifting. For example, LandWatch of Monterey County stated: "It is unclear what the proposed project is. While the RDEIR identifies the 281-unit project as the proposed project, at the Carmel Valley Land Use Advisory Committee hearing the applicant publicly identified the 130-unit alternative as the proposed project." (AR 18641). Indeed, the Real Parties never contest that the applicant "publicly identified the 130-unit alternative as the proposed project." Another public comment urged the County to "(1) reject the current form of the EIR that muddles 2 projects together under differing General Plans and (2) require the applicant to prepare an EIR that directly and solely addresses the smaller revised project under the County's current General Plan." (AR 19463). These examples of public testimony demonstrate that CEQA's procedural mandates were not scrupulously followed, and the "incessant shifts among different projects do vitiate the [county's] EIR process as a vehicle for intelligent public participation." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185,197. The testimony provided by LandWatch of Monterey County demonstrates that the applicant publicly identified the 130-unit proposal as the proposed project, not the defunct 281-unit proposal.

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5) The Petition Circulated by Residents in the Flood Plain Demonstrate Support for the Project's Purported Flood Control Benefits but Such Benefits are Speculative and Not Mandatory

The Real Parties argue that "strong public participation that culminated in an overwhelming support of the 130-Unit Alternative by the local community." (Real Parties' Opposition, pg. 11: 24-28). The petition that Real Parties refer to was created and gathered by residents who live in the 100-year flood plain at the mouth of Carmel Valley and Mission Fields. (AR 2172). The cover letter for the petition stated: "The people who live and own property in the flood plain like the 130-Unit Alternative because it provides some flood control." (AR 2172). The petition itself states: "Plus the project includes a minimum of $1,600,000 for flood control infrastructure paid by the developer." (AR 20180). The Real Parties point to a letter submitted by the Chair of County Service Area #50 to demonstrate that there was strong public support for this Project. This letter demonstrates that CSA #50 was invested in the Project due to the purported flood control benefits that the Project would provide. The Chair of CSA#50, relying on a letter prepared by Balance Hydrologics, Inc., consultants for the Real Parties, went on to discuss that:

> Even more, the plan includes a raised emergency access road, that according to Balance Hydrologics, Inc., which has done extensive analysis related to CSA #50 flood control needs and other projects in our Lower Carmel River area, would actually divert potential flows from the Carmel hills to the river, and would reduce the budget of future CSA #50 projects by an estimated $1.6 million. This would be a tremendous benefit to CSA #50 and its residential business properties, significantly reducing the budget of work to be done. Especially for this reason, we would welcome the project, and urge that it be approved to move forward.

(AR 20245-20246). While the Real Parties argue that "local support included a petition signed by over 400 members of the public urging the County Board of Supervisors to approve the 130-Unit Alternative due to the [sic] reduction in impacts related to water, traffic, noise, and land use compared to the RCV Project, and its positive flood control benefits and enhancement of the riparian corridor," (Respondent's Opposition, pg. 11: 25-28), it is clear that members of CSA#50 signed the petition to support the Project based on the estimated "cost savings is on the order of $1.6 million" to CSA#50 provided by the Real Parties' consultant. (AR 18484).

In addition, such cost savings are speculative. Real Parties' proposal to "provide a raised emergency access road that would essentially fill the gap in the area from west of Rancho Canada to the Val Verde tie back levee," is not a condition of approval for the Project and thus there is no guarantee that the Real Parties will provide such an emergency access road. (*See* AR 28 - 92). And, as Petitioner noted in its Opening Brief, the tie back levee that the Real Parties refer to does not exist. In a letter from Real Parties' legal representative to the County, the Real Parties' legal representative stated: "The tie back levee is being explored by the County in cooperation with the project applicant to identify a regional flood control solution. The tie back levee is not needed to mitigate any impacts stemming from the Rancho Canada Village project." (AR 16048). The flood control benefit that would supposedly flow to CSA #50 is clearly hypothetical and not a condition of approval. Support from CSA #50 for this Project is based on a speculative flood control benefit.

In a footnote, the Real Parties state that "[c]ontrary to Petitioner's assertions…the raising of the Rio Road emergency access road would remove properties along Val Verde Drive from the 100-year flood risk from the Carmel River." (Real Parties' Opposition, pg. 12: fn 7). Real Parties misconstrue Petitioner's argument. Petitioner does not weigh in on whether raising of Rio Road emergency access road would provide flood control benefits, if the emergency access road were ever to happen. Rather, Petitioner is pointing out that the whole premise that the Project would result in flood control benefit to CSA #50 is speculative because Val Verde tie back levee does not exist. ("The tie back levee is a mere speculation that is part of the County's wider efforts to identify a regional flood control solution considered in a wholly separate process." (Opening Brief, pg. 27: 10-11)). In their Opposition Brief, the Real Parties never dispute that the Vale Verde tie back levee does not exist. Further, Real Parties never dispute that the very first time the Project Applicant's proposal to "raise the Rio Road emergency access road" was mentioned in the environmental documents was in the Final EIR.

I. Neither the County nor the Real Parties Provide an Explanation for Why the 130-Unit Alternative Was Analyzed to the Same Level of Detail as the 281-Unit Project

The Real Parties also argue that "throughout the EIR, the 130-Unit Alternative is described as just that—an alternative. Nowhere in the RCV EIR is the 130-Unit Alternative described as the proposed project." (Real Parties' Opposition, pg. 8: 20-21). The Real Parties state that "The simple fact is that the County chose to include a detailed analysis of the 130-Unit Alternative in the EIR." (Real Parties' Opposition, pg. 8: 22-23). Real Parties do not offer any reasoning as to why the County chose to include a detailed analysis of the 130-Unit alternative if the 281-unit proposal was still seriously being considered. The Recirculated DEIR plainly states that "The 130-unit Alternative is described in Chapter 2, *Project Description,* and analyzed in Chapter 3, *Environmental Analysis*, at a level of detail equal to that for the Proposed Project." (AR 1321). And, as demonstrated above, the 130-unit "alternative" was presented front and center in the Project Description in the Notice of Availability for the Recirculated DEIR. (AR 18541). While the Real Parties and the County went to great lengths to characterize the 130-unit project as an "alternative," the record abundantly demonstrates that by 2016, the actual project pursued by the Real Parties is the 130-unit Project, and not the defunct 281-unit Project. This demonstrates that the County wanted it both ways, for the 130-Unit Project to be both the environmentally superior alternative and the Project itself.

The Real Parties state that "Petitioner feigns confusion over the detailed nature of this alternative analysis for no other purpose than to try to frustrate the development of real parties in interest's property." (Real Parties' Opposition, pg. 8: 25-26). However, the Petitioner does not feign confusion, the Petitioner is arguing that the confused nature of the Project Description "draws a red herring across the path of public input," *County of Inyo*, *supra*, 71 Cal.App.3d at 197 and that the County and Real Parties' effort to straddle both the 281-unit and the 130-unit Project also resulted in a faulty alternatives analysis.

J. The Petitioner Never Argues that the Alternatives are Infeasible By Reason of the 2012 Settlement Agreement Between the County and the Petitioner and Most of the Alternatives Presented by the FEIR are Infeasible Under CEQA

Finally, the Real Parties dispute that the EIR failed to provide reasonable range of "potentially feasible alternatives that will foster informed decisionmaking and public

participation." 14 Cal. Code Regs. § 15126.6(a). The Real Parties never take the position that the range of alternatives considered in the EIR is a reasonable range. (*See* Real Parties' Opposition, pgs. 12 - 13). Instead, Real Parties again argue that "the Settlement Agreement did not take away the Board's discretion or otherwise restrict the County's land use authority, or police power in any way with respect to future legislative, administrative or other actions by the County." (Real Parties' Opposition, pg. 12: 18-21). The Real Parties also misquote Petitioner. Petitioner does not state that the subdivision cap of 190-units "was ensured by the terms of the County's Settlement Agreement." (Real Parties' Opposition, pg. 12: 17-18). But the Petitioner never argues that the Settlement Agreement removed the County's land use authority. In addition, Real Parties' line of argument concerning the Settlement Agreement does not address Petitioner's contention that the EIR failed to provide a reasonable range of potentially feasible alternatives under CEQA.

Petitioner's argument concerning feasibility is based on the CEQA Guidelines and not on the Settlement Agreement. The CEQA Guidelines define feasible as: "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." 14 Cal. Code Regs. § 15364. The 2010 General Plan, as amended, establishes a 190-unit building cap in the Carmel Valley. Twenty-four units have already been reserved for the Delfino property. (AR 13167). Under the current General Plan, the most units an alternative project could consist of is 166-units. Alternatives 2, 5, and 6 of the 2016 recirculated DEIR propose project consisting of 281 units and Alternative 3 proposes a 186-unit project. (AR 1847 - 1856). These four alternatives all exceed the available units allowable in the Carmel Valley under the current General Plan.

Consideration of these alternative would require amending the General Plan to raise the building cap, and so these alternatives are infeasible because it is not "capable of being accomplished in a successful manner within a reasonable period of time…" 14 Cal. Code Regs. § 15364. " 'The core of an EIR is the mitigation and alternatives sections'…. The purpose of an EIR is *not* to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated." *Watsonville Pilots Assn. v. City of*

1 *Watsonville* (2010) 183 Cal.App.4th 1059, 1089 (quoting *Citizens of Goleta Valley v. Board of*
2 *Supervisors*, *supra*, 52 Cal.3d at 552). A natural corollary to this reasoning is that alternatives
3 must first be feasible before they can meet the project's objectives. The Project's proposal of
4 mostly infeasible alternatives analysis results in a legally insufficient EIR.
5
6 **K. Conclusion**
7 For the foregoing reasons, the Petitioner requests the Court grant the petition for writ of
8 mandate.
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11 Dated: September 1, 2017 WITTWER PARKIN LLP
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14 By: Pearl Kan
15 Attorneys for Petitioner
CARMEL VALLEY ASSOCIATION, INC.
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