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No. H046187

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CARMEL VALLEY ASSOCIATON, INC., a California nonprofit corporation,
Petitioner, Respondent, and Cross-Appellant,
v.

COUNTY OF MONTEREY, et al.,
Respondents, Appellants and Cross-Respondents,
RANCHO CANADA VENTURE, LLC, et al.,
Real Parties in Interest, Appellants and Cross-Respondents.

Appeal from the Superior Court of Monterey,

Case No. 17CV000131

Honorable Lydia M. Villarreal

RESPONDENT'S BRIEF AND OPENING BRIEF ON CROSS-APPEAL

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL SIXTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: H046187
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 139718 NAME: William P. Parkin FIRM NAME: WITTWER PARKIN LLP STREET ADDRESS: 335 Spreckels Drive, Suite H CITY: Aptos STATE: CA ZIP CODE: 95003 TELEPHONE NO.: 831-429-4055 FAX NO.: 831-429-4057 E-MAIL ADDRESS: wparkin@wittwerparkin.com ATTORNEY FOR (*name*): Carmel Valley Association, Inc.	SUPERIOR COURT CASE NUMBER: 17CV000131
APPELLANT/ PETITIONER: CARMEL VALLEY ASSOCIATION, INC. RESPONDENT/ REAL PARTY IN INTEREST: COUNTY OF MONTEREY, et al. / RANCHO CANADA VENTURE, LLC, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Carmel Valley Association, Inc.

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 28, 2020

William P. Parkin
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION

This case involves the approval of the Rancho Canada Village Project ("RCV Project") in Carmel Valley which consists of 130 residential lots on a former golf course. (AR 01, 1278, 1349.) On January 12, 2017 Carmel Valley Association ("CVA") filed a Petition for Writ of Mandamus challenging the approval of the RCV Project on the basis that it did not comply with the California Environmental Quality Act ("CEQA"). (CT 1: 2.) CVA's petition alleged that the County of Monterey abused its discretion in certifying an Environmental Impact Report ("EIR") for the RCV Project where the Project Description was inaccurate, and the Alternatives Analysis failed to contain a reasonable range of alternatives. (CT 1: 9-10.) Moreover, the petition alleges that the RCV Project does not comply with the County of Monterey's Affordable Housing Ordinance. [1] (CT 1: 6-7.)

CVA's petition also includes a separate cause of action against the County of Monterey for failing to comply with its 2010 General Plan because the County had a mandatory duty under state law to bring its Affordable Housing Ordinance into conformance with the new affordable housing requirements established under the 2010 General Plan, and it was required to implement a Development Evaluation System ("DES") to evaluate proposed development outside designated growth areas within twelve months of adopting the 2010 General Plan. (CT 1: 6-7.) The RCV

[1] The County uses the term "inclusionary" housing alongside with "affordable" housing. For the sake of consistency and simplification, the term "affordable housing" will be used in this brief.

Project is not in a designated growth area, and the DES would have applied to the RCV Project if it had been promulgated. (AR 08.)

The Superior Court of Monterey County granted the petition for writ of mandamus as to the CEQA claims, the failure of the RCV Project to comply with the Affordable Housing Ordinance as to the distribution of affordable units, and the County's failure to amend its Affordable Housing Ordinance to be consistent with its 2010 General Plan. The trial court found that the County's calculation of the 20% minimum number of affordable housing units was reasonable and denied the petition as to the failure of the County to develop the DES. (CT 6: 1242-1267.)

Real Parties in Interest, Rancho Canada Village, LLC, and R. Alan Williams (collectively, "Real Parties") and the County of Monterey and the Board of Supervisors of the County of Monterey (collectively "County") appealed the trial court's decision. CVA cross-appealed.

The themes prevalent in the Real Parties' Opening Brief are: (1) CVA did not challenge the information, analysis or mitigations in the EIR (Real Parties in Interest, Appellants, and Cross-Respondents' Opening Brief ("AOB"), p. 29); (2) the *County* came up with the 130-unit project as an alternative and that the Real Parties graciously accepted the "alternative" proposal (AOB, pgs. 27-28, 31 fn. 5); and, (3) there are already plenty of low- and very low-income units in Carmel Valley and what is needed instead are Moderate and Workforce income level homes (AOB, pgs. 68-69.) These arguments do not hold water.

First, the analysis in the EIR was inaccurate and skewed because the 130-unit Alternative was not really an alternative, but the intended project. The inclusion of an abandoned 281-unit project made the 130-unit Alternative look reasonable. But, the 281-unit project was never realistic or viable. Indeed, the Real Parties do not own the whole area where the 281-unit project is proposed: "A portion of the project site is on a property not

owned by the Project Applicant, referred to as the 'Stemple Property.'" (AR 1326.)

Because the EIR incorrectly cast the 281-unit project as the "Project," the informational purpose of the EIR was thwarted and the Alternatives Analysis did not correctly analyze alternatives to the true project, the 130-unit Alternative. CEQA "protects not only the environment but also informed self-government." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (quoting *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392).)

Second, the Real Parties' Opening Brief makes it sound as if it were the County planning staff who requested information about, and recommended approval of, the 130-unit Alternative, and that the Real Parties were simply agreeable to the County adopting such an alternative. (AOB, pgs. 27-28, 31 fn. 5.) The reality is much different. The record shows that the 130-unit Alternative is the Real Parties' brainchild, and that this version of the RCV Project was analyzed and promoted in detail by the Real Parties. The 281-unit project was proposed long-ago by a previous landowner, and as discussed *infra*, the Real Parties do not have ownership over the entirety of the area included in the 281-unit project.

Third, the notion that there are plenty of low- and very-low income homes available in Carmel Valley is sheltered reasoning. No one can argue impassively that low- and very-low income units are of such abundance that there is no longer a need for such housing in Carmel Valley.

On appeal the County argues that its inaction to amend its Affordable Housing Ordinance to achieve consistency with the General Plan is not arbitrary and capricious. (Respondents, Appellants, and Cross-Respondents' Opening Brief ("County's Brief") p. 27.) The County takes the position that because Government Code section 65860(c) does not

provide a mandatory deadline by which the consistency must happen, the County's failure to amend the Affordable Housing Ordinance ten years after the General Plan has been adopted is not arbitrary and capricious. (County's Brief, pgs. 20-22.) Ten years is not a "reasonable time" and the County fails to indicate when it will actually make the ordinance consistent with the General Plan's requirement of providing 25% affordable units for new development.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 22, 2004, the Lombardo Land Group and Rancho Community Partners, submitted an application to the County of Monterey for a Combined Development Permit, rezoning, use permit, General Plan Amendment, a Specific Plan[2], and a Vesting Tentative Map for a "proposed mixed-income new neighborhood." (AR 7222-7225.) The application proposed 280 homes, of which 50% would be deed-restricted Affordable and Workforce units. (AR 7224.) The rezoning to allow a golf course to be transformed into a residential subdivision was billed as a way to provide more affordable housing since half of the units would be sold below market. (AR 6501-6506.)

On August 28, 2006, the County filed a Notice of Preparation of a Draft Environmental Impact Report ("DEIR"). (AR 8762). On January 14, 2008, the County filed a Notice of Availability for a DEIR for the "Rancho Canada Village Specific Plan." ("RCV Specific Plan") (AR 214.) The

[2] A "specific plan" implements the provisions of a general plan for a particular area. "After the legislative body has adopted a general plan, the planning agency, may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan." (Gov. Code § 65450.)

2008 DEIR described the RCV Specific Plan for a 281-unit neighborhood that "attempts to meet the need for affordable housing in Carmel Valley." (AR 237.)

Later that year, in September 2008, the County initiated the environmental review process to update the Monterey County General Plan. (AR 9875-11300.) In February 2009, the applicant for the RCV Specific Plan decided to "pull back on the RCV [Specific Plan] until the General Plan and [Carmel Valley Master Plan] have been processed." (AR 11401.) The County of Monterey adopted the 2010 General Plan on October 26, 2010, which went into effect thirty days later on November 26, 2010. (AR 13574, 13682, 21034.) The 2010 General Plan included changes to the Carmel Valley Master Plan ("CVMP"). CVMP Policy CV-1.6 established a residential subdivision cap of 266 new residential lots in Carmel Valley. (AR 103, 11807, 11824.)

Following the adoption of the 2010 General Plan, several lawsuits were filed, including one brought by CVA. (AR 19524.) CVA and the County ultimately reached a settlement, agreeing to reduce the subdivision cap in Carmel Valley to 190 new units. (AR 19964-19983; see also AR 3738.) The Board of Supervisors approved this amendment on February 12, 2013. (AR 14031-14032.) Of the 190-unit cap, 24 units have been reserved for the Delfino property, meaning that the 2010 General Plan and the settlement resulting from its litigation limited new development in the Carmel Valley to 166 units. (AR 13617, 3738.) The 166 residential building cap is memorialized in the 2010 General Plan as the 2013 CVMP CV-1.6. (AR 14031-14032.)

The 2010 General Plan also established a Special Treatment Area for the RCV Project site (CVMP Policy CV-1.27) which allowed residential development at "a density of up to 10 units/acre" and required such development to provide "a minimum of 50% Affordable/Workforce

Housing." (AR 14036.) Notwithstanding this density designation, the Special Treatment Area is still subject to the residential subdivision cap of 190 new lots in Carmel Valley. (AR 14031.)

The 2010 General Plan also raised the minimum affordable housing requirement for all new housing development to 25%.

> LU-2.13 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.) It is undisputed that as of this date the County's Affordable Housing Ordinance has not been updated to require 25% of new housing units be affordable.

The 2010 General Plan also mandated that the County develop a quantitative pass/fail DES within 12 months of adopting the General Plan to assess new development projects outside of priority development areas based on a pass/fail grading system. "This Development Evaluation System shall be established within 12 months of adopting this General Plan." (AR 13578-13579.) The General Plan identifies "Community Areas, Rural Centers and Affordable Housing Overlay districts" as "the top priority for development in the unincorporated areas of the County." (AR 13578.) Because the RCV Project is not located in any of the aforementioned districts, the RCV Project would be subject to the DES. (AR 5260, 13578).

In addition, the Final EIR for the 2010 General Plan explicitly describes how the DES "includes minimum requirements for affordable housing before a project can be considered." (AR 11825). The 2010 General Plan requires development proposals, such as the RCV Project, that are located outside focused growth areas, to be reviewed pursuant to the

DES. (AR 5260: "Once established, the DES would provide a quantitative means of evaluating development proposed in areas of the County not targeted or especially suited for development." (*See also*, AR 11825, 13578.) The County has not yet promulgated the DES, although, as mentioned *supra*, it would have applied to the RCV Project.

On June 17, 2014 the Real Parties' counsel submitted a formal request to the County to consider a 130-unit Alternative which the Real Parties characterized as a reduced density alternative to the 281-unit original proposal. The letter states: "The information below details the 130-unit reduced density project alternative for the Rancho Canada Village (RCV) project, which we have been discussing with you and your staff over the past months." (AR 18768.) Real Parties provided the County with extensive information on the 130-unit Alternative, including proposed maps, property development standards, and a detailed description of the specific project impacts. (AR 18768-18782, 16075-16080.) Nevertheless, Real Parties insisted that the information was "not a resubmittal for a new project." (AR 18770.)

The EIR consultant asked the County "Would you like the new project name to be: Rancho Canada Village Project?" (AR 17129), the Real Parties' legal representative stepped in to "point out the error below" to the County:

> The 130-unit alternative is to be included in the Alternatives Chapter 5. The project description for the 281-unit project in Chapter 2 is not being revised. The part of the application that included the specific plan we discussed removing, since it would facilitate the County's processing, and was not required for the 281-units. Did you already catch this, and notify the EIR consultant? If we need to further discuss this, then I suggest we have a conference call in advance of our meeting on Friday so the EIR consultant has clear direction on the scope of work. (AR 17127).

Real Parties asked the EIR consultant to "provide an equal level of analysis of the 130-unit alternative" and the RCV project. (AR 17142.) The EIR consultant retained by the County assured the Real Parties that he would not call the 130-unit Alternative the Proposed Project. However, the EIR consultant did insist on discussing the 130-unit Alternative in the Project Description Chapter:

> We were asked to provide an equal level of analysis of the 130-unit alternative. In order to do that, we need to present the alternative description in Chapter 2 and we are doing an equal level of analysis in the EIR sections of the 130-unit alternative in Chapter 3. Each Section in Chapter 3 has impact analysis of the Proposed Project and separate impact analysis of the 130-unit alternative. We aren't calling the 130-unit alternative the Proposed Project. The Proposed Project remains the 281-unit original project. (AR 17126.)

On June 1, 2016, the County released the Recirculated DEIR ("RDEIR.") (AR 18541.) The RDEIR no longer envisioned implementation of a Specific Plan. (AR 18541.) The development was no longer proposed to "meet the need for affordable housing in Carmel Valley," as the RCV Project was marketed in 2008. (*Compare* AR 9349 with AR 18541.) The RDEIR discusses the 130-unit Alternative under Chapter Two Project Description portion of the document. (AR 1293.) Of the six alternatives considered, the 130-unit Alternative is not listed as an alternative under Chapter 5 Alternatives Analysis. (AR 1300.) And, the Real Parties do not have control over the whole of the area that constitutes the former 281-unit project. "A portion of the project site is on a property not owned by the Project Applicant, referred to as the 'Stemple Property.' (AR 1326.)

One of the Alternatives in the RDEIR was designed to avoid the Stemple Property. (AR 1326.) The Stemple Property Avoidance

Alternative would "would reduce the area of the development by several acres, would require realignment of the east-west road on the northern side of the development, and would increase the density of the development slightly." (AR 1326, 1856, 1857.) The RDEIR also notes that "The Lombardo Land Group has an access easement … on part of the Stemple Property, but this alternative would not use the Stemple Property for new roadways or residences." (AR 1326, 1856, 1857.) When comparing the Project Description in the 2008 DEIR with the Project Description in the 2016 RDEIR it is clear that the Real Parties never did obtain control over the Stemple Property. (*Compare* AR 270 to AR 1349.)

The analysis for the Stemple Property Avoidance Alternative concluded that "[i]f this alternative were to be advanced, the impact analysis and mitigation recommended for this alternative would be the same as for the Proposed Project and this Recirculated Draft EIR could be used to comply with CEQA for this alternative." (AR 1859.) One would presume that the RDEIR would analyze Alternative 6, the 281-Unit Stemple Property Avoidance Alternative in detail rather than the 130-unit Alternative if the 281-unit proposal was truly being advanced as the true project. The RDEIR also concluded that the 130-unit Alternative was the "environmentally superior alternative." (AR 18537, 18541-18543.)

In November 2016, the County issued its Final Environmental Impact Report which eliminated the East Golf Course alternative due to a change in ownership of adjacent properties. (AR 134, 3803-3806, 3808-3809.) On November 16, 2016, the Planning Commission voted 4-3 recommending approval of the 130-unit Alternative and certification of the Final EIR. (AR 5256-5279.) However, the Planning Commission did not recommend that the Board amend CVMP Policy CV-1.27 to reduce the affordability requirement for the RCV Project from 50% to 20%. (AR 5347-5348.)

On December 13, 2016, the Board approved the 130-unit "Alternative." (AR 5360-5361.) The Board also approved the General Plan amendment to CVMP Policy CV-1.27, reducing the 50% affordable/workforce housing requirement for the Project to 20%, rezoning the property from public/quasi-public to Medium Density Residential for 129 lots, and Low Density Residential for the Alternative's Lot 130. (AR 5361.)

The Board made the following finding concerning affordable housing:

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

In the support of modifying the affordable housing requirement, the Board's evidence simply stated that:

> 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.)

CVA filed a petition for writ of mandate on January 12, 2017, asserting causes of action under both traditional and administrative mandamus. (CT 1: 2-16.) CVA alleged that the County's failure to promulgate the DES within 12 months of adopting the 2010 General Plan and failure to amend its Affordable Housing Ordinance to comport with

General Plan Policy LU-2.13 constituted a failure to proceed in a manner required by law. (CT 1: 2-6.)

CVA also asserted that the County's certification of the EIR for the Project violated CEQA because (1) the Project Description is not accurate, stable and finite since the actual Project is the 130-Unit Alternative and therefore should have been the bona fide subject of environmental review, and (2) the Alternatives Analysis lacks a reasonable range of alternatives. (CT 1: 9-10.)

A hearing on the petition was held on February 2, 2018, the Honorable Lydia M. Villarreal presiding. (CT 5: 1034.) The trial court issued its Intended Decision on April 24, 2018, granting the petition in part. (CT 5: 1035-1071.) After the filing of objections, the trial court issued its final decision on June 7, 2018. (CT 6: 1180-1216.)

The trial court found that the EIR prepared for the RCV Project failed to identify the bona fide project. (CT 6: 1263.) The trial court found that the RCV Project's history demonstrates that the 130-unit Alternative effectively replaced the 281-unit proposal and absent an accurate project description identifying the 130-unit proposal as the true and bona fide project, the EIR "could not fulfill its central function to provide sufficient information to allow the public and decision-makers to 'ascertain the project's environmentally significant effects, assess ways of mitigating them, and consider project alternatives.'" (CT 6:1263, citing *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523 at 533 and *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) The trial court further found that the EIR's alternatives analysis does not satisfy the requirement under CEQA because the County's selection of alternatives was "manifestly unreasonable." (CT 6: 1266.)

Relying in part on Government Code section 65860 which states that an ordinance shall be brought into conformance "within a reasonable time

so that it is consistent with the general plan as amended," the trial court also found that the County's failure to amend its Affordable Housing Ordinance to achieve consistency with the General Plan was arbitrary and capricious. (CT 6: 1256.) Finally, the trial court found that the County's failure to implement the DES within twelve months of adopting the 2010 General Plan was not arbitrary and capricious because it concluded that "the County's decision as to the timing of its implementation of the DES is legislative in character…" and the court could not conclude that "the County's decision to prioritize other legislative tasks is arbitrary and capricious so as to entitle Petitioner to a writ of traditional mandate." (CT 6: 1246.)

Judgment was entered on July 6, 2018. (CT 6: 1225 – 1269.) The County and Real Parties appealed the judgment on August 31, 2018, and CVA cross-appealed on September 14, 2018. (CT 6: 1337, 1341, 1364-1365.)

III. LEGAL ARGUMENT

CVA first addresses the Real Parties' and County's appeals in Sections A and B below, followed by CVA's presentation of its Cross-Appeal in Section C.

A. CVA'S OPPOSITION TO REAL PARTIES' OPENING BRIEF

1. Standard of Review Under CEQA

"In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the court's inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' (Pub.

Resources Code, § 21168.5.) Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Vineyard Area Citizens for Responsible Growth, Inc., v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427.) The Court of Appeal reviews the underlying agency's action: "the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Id.* at 427, citing *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th at 946; *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 132; *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 239.)

CEQA is to be "interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at 564-564).

"[Q]uestions of interpretation or application of the requirements of CEQA are matters of law." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.) "Whether an EIR has omitted essential information is a procedural question subject to de novo review." (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) The County's failure to identify the bona fide project and failure to present a reasonable range of alternatives constitute an omission of "essential information" subject to de novo review.

The California Supreme Court stated recently:

> A claim that an agency failed to act in a manner required by law presents other considerations. Noncompliance with substantive requirements of CEQA *or noncompliance with information disclosure provisions 'which precludes relevant information from being presented to the public agency* … may constitute prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.' (§ 21105, subd. (a).)…[W]hen an agency fails to proceed [as CEQA requires], harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial.

(*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515, emphasis in original, citations omitted.) Citing to this case, the Real Parties argue that "whether issues are procedural or factual 'is not always clear'." (AOB, p. 35.) The problems raised in this case are clearly procedural since it involves the County's failure to identify the bona fide project and failure to disclose a reasonable range of alternatives. These errors constituted a failure to proceed in a manner required by law and prejudicial error.

2. The EIR's Project Description is Not Accurate, Stable or Finite

The CEQA Guidelines require an EIR to set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact. (14 Cal. Code Regs. § 15124.) 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, 193 ("*County of Inyo*").) Only an accurate, stable and finite project description fulfills CEQA's objective to allow affected outsiders and public decision-makers to "balance the proposal's benefits

against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal and weigh other alternatives in the balance." (*Ibid*.) Therefore, the EIR's bona fide subject must be the defined project, rather than another project. (*Id.* at 199-200.)

A project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading. (*Washoe Meadows Community v. Department of Parks and Recreation*, (2017) 17 Cal.App.5th 277, 287 ("*Washoe Meadows*").) "The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo, supra*, 71 Cal.App.3d at 199.)

The trial court agreed with CVA that the Project Description was inaccurate. "Here however, the error is not specifically the way in which the EIR is structured. Rather, the EIR's structure evinces that the Alternative was the actual project under consideration." (CT 6:1263.) The Real Parties argue that there is no evidence supporting the claim that the Real Parties abandoned the 281-unit proposal and the County and the Real Parties should not be penalized for providing more detail than CEQA required and CEQA permits variation in the scheme of development. (AOB, pgs. 38-48.)

i. Despite the Real Parties' argument to the contrary, the 281-unit project was abandoned and the 130-unit Alternative was the bona fide project

As shown *supra*, the 281-unit project was not possible because the Real Parties never gained control of the Stemple Property and the Lombardo Land Group has an access easement on part of that property. (AR 1326, 1856, 1857; *Cf.* AR 270, 1349.) Despite Real Parties' vigorous claim that the 281-unit project was not abandoned, it was an impossibility

unless Real Parties pursued the Stemple Property Avoidance Alternative, which they clearly did not given the energy expended to support the 130-unit "Alternative."

Correspondence in the Administrative Record between the EIR consultant and Real Parties indicates that in 2014 the Real Parties worked closely with the County to repackage the 2008 DEIR and to shift the project description to the 130-unit Alternative:

> We were asked to provide an equal level of analysis of the 130-unit alternative. In order to do that, we need to present the alternative description in Chapter 2 and we are doing an equal level of analysis in the EIR sections of the 130-unit alternative in Chapter 3. Each Section in Chapter 3 has impact analysis of the Proposed Project and separate impact analysis of the 130-unit alternative. We aren't calling the 130-unit alternative the Proposed Project. The Proposed Project remains the 281-unit original project. (AR 17126.)

The Real Parties' counsel submitted a formal letter in June 17, 2014 to the County to request the consideration of the 130-unit "Alternative." The letter states: "The information below details the 130-unit reduced density project alternative for the Rancho Canada Village (RCV) project, which we have been discussing with you and your staff over the past months." (AR 18768.)

The RDEIR that was recirculated in June 2016 no longer envisioned implementation of a Specific Plan, as the 281-unit proposal did in 2008. (AR 18541.) And, the development no longer proposed to "meet the need for affordable housing in Carmel Valley," as the project was marketed in 2008. (Compare AR 9349 with AR 18541.) The County had also provided draft language which indicated an understanding that the 130-unit Alternative was the true subject of the EIR: "The project description will be revised to include the 130-unit Alternative." (AR 17127.) The RDEIR discusses the 130-unit Alternative under Chapter Two Project Description portion of the document. (AR 1293.) Of the six alternatives considered,

the 130-unit Alternative is not listed as an alternative under Chapter 5 Alternatives Analysis. (AR 1300.)

Despite the Real Parties' assertions to the contrary, it became clear that the 130-unit Alternative was the actual Project since the Real Parties had abandoned planning for the Lombardo Land Group's prior proposal. Notably, the Real Parties requested that the Planning Commission recommend approval of the 130-unit Alternative and that "it constitutes the project *applicant's preferred alternative*." (AR 20051, emphasis added.) Indeed, "[a]t both the September 21 [2015] and February 1 [2016] [Carmel Valley Land Use Advisory Committee] meetings the 130-unit Alternative was presented and discussed in detail." (AR 4129.) Similarly, at a March 9, 2016 Housing Advisory Committee meeting, the "discussion focused on the proportion of affordable units that should be required of the 130-unit Alternative." (AR 4130.) And finally, the vesting tentative map that was approved at the Board of Supervisors' hearing on December 13, 2016, was not the original 281-unit vesting tentative map submitted in 2004, but a wholly new map for the new 130-unit Rancho Canada Village Project. (AR 98.) The amount of work done by the Real Parties to advance the "Alternative" clearly exhibited the 130-unit Alternative as the actual project and is evidence that the 281-unit proposal, while not formally rescinded, was effectively defunct.

Both the 130-unit Alternative and the 281-unit Stemple Avoidance Alternative would avoid the project area that the Real Parties do not own. The Real Parties prepared a new map for the 130-unit "Alternative," but never bothered to draw a new map for the 281-unit project that avoided the Stemple property. Instead, the Real Parties simply reused the tentative map and grading and drainage plan prepared in 2005 and revised in 2007 that still fathomed development of the Stemple Property. (AR 1357-1358.) If the Real Parties were earnest in their assertion that the 281-unit proposal

was the actual project and subject of the EIR the Real Parties could have revised the tentative map of the 281-unit proposal to avoid the Stemple property. The fact that they did not do so reflects that they were now pursuing the 130-unit Alternative as the true project under consideration

The trial court correctly determined that the 281-unit was abandoned and the true project under consideration was the 130-unit Alternative. (CT 6: 1263.)

ii. The Real Parties claim that CVA does not challenge the technical aspects of the Project Description is a distraction because CVA's argument is that the EIR failed to identify the bona fide project

Case law establishes that "[t]he problem with an agency's failure to propose a stable project is not confined to the 'informative quality of the EIR's environmental forecasts.'" (*Washoe Meadows Community v. Department of Parks and Recreation*, *supra*, 17 Cal.App.5th at 288.) CVA challenges the Project Description's inaccuracy and failure to identify the bona fide project: the 130-unit "Alternative."

The Real Parties argue that they should not be penalized for providing more detail than CEQA required for the 130-unit Alternative and submit that *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321 ("*South of Market*"), "is directly on point." (AOB, p. 44.) In *South of Market* "the EIR in this case described *one project*—a mixed-use development involving the retention of two historic buildings, the demolition of all other buildings on site, and the construction of four new buildings and active ground floor space—with two options for different allocations of residential and office units." (*Id.* at 333-34, emphasis added.) The Real Parties argue that the Project Description in this case should similarly be found accurate: "Indeed, the EIR provides all

the required technical information 'for both options.'" (AOB, p. 47.) However, *South of Market* is a very different case. In *South of Market*,

> the record reveals the EIR in this case *described one project*—a mixed-use development involving the retention of two historic buildings, the demolition of all other buildings on the site, and the construction of four new buildings and active ground floor space—with two options for different allocations of residential and office units. The analysis was not curtailed, misleading, or inconsistent. If anything, it carefully articulated two possible variations and fully disclosed the maximum possible scope of the project. The project description here enhanced, rather than obscured, the information available to the public. (*South of Market*, *supra*, 33 Cal.App.5th at 333-334.)

What is clear is that the options included two different allocations of the uses within the buildings. However, what is most notable is that in *South of Market*, "The DEIR described nine alternatives to the proposed project, rejecting five of them as infeasible," and concluded that a building preservation alternative was the environmentally superior alternative. (*Ibid*. at 328.) In other words, the court's ruling viewed the variations in uses of the buildings was just two options for one project, and that the alternatives were compared to this one project. The true "project" here was designated as the environmentally superior alternative which defeats the purpose of an alternatives analysis and makes the actual "project" *a fait accompli*.

> Since the purpose of an alternatives analysis is to allow the decision maker *to determine whether there is an environmentally superior alternative that will meet most of the project's objectives*, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts.

(*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089, emphasis added.)

Here, the EIR conflates the actual project with the environmentally superior alternative. By doing so the EIR created a "curtailed, enigmatic or unstable project description" which "draws a red herring across the path of public input." (*County of Inyo*, *supra*, 71 Cal.App.3d at 198.) And the *South of Market* court concluded that "A project description that gives conflicting signals to decision makers and the public about the nature of the project is fundamentally inadequate and misleading." (*South of Market, supra*, 33 Cal.App.5th at 332, citing *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655–656.)

iii. The RDEIR's inaccurate Project Description created an obstacle to informed public participation

The decision to leave the 281-unit project in the RDEIR when the 130-unit Alternative was the true subject of evaluation created "an obstacle to informed public participation." (*Washoe Meadows*, *supra*, 17 Cal.App.5th at 289.) The Real Parties complain that the "County and RCV should not be penalized for providing more detail than CEQA required for the 130-unit Alternative[.]" (AOB, p. 44.) This is a distraction. Like in *Washoe Meadows*, by holding up the 281-unit and 130-unit both under "Project Description," the RDEIR improperly proceeded "without the designation of a stable project." *Ibid.*

In *Washoe Meadows*, the DEIR for a river restoration and golf course restoration project "did not identify a proposed project, but described five very different alternative projects" which were "'*analyzed at a comparable level of detail* in the environmental document.'" (*Washoe Meadows Community v. Department of Parks and Recreation*, *supra*, 17 Cal.App.5th at 281, 283, emphasis added.) "In support of its argument that the DEIR was not misleading, the Department and the Commission point to

that document's thorough analysis of the environmental effects of alternative 2, a version of which was ultimately approved as the project." (*Id.* at 288.) But the court noted that "This court is among the many others which have recognized that a project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading." (*Id*. at 287.)

"Inconsistences in a project's description…*impairs the public's right and ability to participate in the environmental review process*." (*Washoe Meadows Community v. Department of Parks and Recreation*, *supra*, 17 Cal.App.5th at 288, emphasis added.) Therefore, the court in *Washoe Meadows* found that by presenting "five very different alternative projects in the DEIR without the designation of a stable project," the DEIR created "an obstacle to informed public participation" and failed to satisfy CEQA requirements. (*Id.* at 289, 290.) The Project Description in this case is similarly flawed because it fails to identify the bona fide project, the 130-unit "alternative," and therefore created "an obstacle to informed public participation." (*Ibid.*)

In *Stopthemillenniumhollywood.com v. City of Los Angeles*, the "draft EIR [presented] different conceptual scenarios that Millennium or future developers may follow for the development of this site." (*Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 18 ("*Stopthemillennium*").) Comments on the environmental review for *Stopthemillennium* "included criticisms received after the issuance of the draft EIR from members of the public – many of whom complained that the draft EIR's project description made it impossible for them to participate meaningfully in the CEQA process." (*Stopthemillennium*, *supra*, 39 Cal.App.5th at 11.) As a result, the court concluded "These concepts and development scenarios – none of which

may ultimately be constructed – [did] not meet the requirement of a stable or finite proposed project." (*Id*. at 18.)

Like the Final EIR in *Stopthemillennium*, the Final EIR here notes that "A number of comments assert that the RDEIR is confusing and that the definition of and distinction between the Proposed Project and the project alternatives, particularly the 130-Unit Alternative, is unclear." (AR 3605.) As in *Stopthemillennium*, the RDEIR reiterates the same flawed logic and attempts to justify that it "analyzes the potential environmental impacts of both the Proposed Project and the 130-Unit Alternative at an equal level of detail" to "[ensure] that the potential environmental impacts of the 130-Unit Alternative are fully analyzed and disclosed in accordance with CEQA so that the County can approve either the Proposed Project or the 130-Unit Alternative after certification of the Final EIR." (AR 3605.) Such tactics "do not meet the requirement of a stable or finite proposed project." (*Stopthemillennium*, *supra*, 39 Cal.App.5th at 18.)

These recent cases put to rest the Real Parties' argument that providing more detail than is required in the Project Description results in a legally adequate Project Description. (AOB, p. 44.) "CEQA's purposes go beyond an evaluation of theoretical environmental impacts. If an EIR fails to include relevant information and precludes informed decisionmaking and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred." (*Stopthemillennium*, *supra*, 39 Cal.App.5th at 18.)

"The defined project and not some different project must be the EIR's bona fide subject." *County of Inyo, supra*, 71 Cal.App.3d at 199. As the trial court found here:

> The Project's history demonstrates that the 'Alternative' effectively replaced the Project as the true project under consideration, and that consequently, the existing Project Description is inaccurate. Absent an accurate project description, the EIR could not fulfill its central

function to provide sufficient information to allow the public and decision-makers to "ascertain the project's environmentally significant effects, assess ways of mitigating them, and consider project alternatives. (*Sierra Club, supra,* 163 Cal.App.4th at 533; *County of Inyo, supra*, 71 Cal.App.3d at 192-93.)" (CT 6:1263.)

iv. The trial court did not create a new substantive requirement that a Project be "practically feasible"

The Real Parties' assertion that the trial court went beyond the scope of review by inquiring into the "practical feasibility" of the RCV Project and the subjective "will" of the Board misapprehends the facts and the trial court's decision. (AOB, pgs. 49-50.) The trial court's discussion regarding feasibility was properly applied to the inadequacy of the alternatives analysis and it was not, as the Real Parties incorrectly state, related to the Project Description: "But the mere fact that the three relevant alternatives were legally feasible does not mean they were *practically* feasible." (CT 6: 1265, emphasis in original.) Curiously, the Real Parties argue that "the evidence does not support that the County lacked the 'will' to amend the General Plan." (AOB, p. 53.) But in fact the County did lack the will because it refused to amend the residential cap for the RCV Project and expressly stated in its findings approving the 130-unit Project: "From a policy standpoint, the Proposed Project is not acceptable because it does not comply with the CVMP unit cap." (AR 135.)

3. The EIR's Alternatives Analysis Does Not Comply with CEQA Requirements

"The core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at 565.) CEQA requires an EIR to "describe a range of reasonable alternatives to the project, or to the location of the project, which would

feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (14 Cal. Code Regs. § 15126.6 (a).) This determination is "subject to a rule of reason." (*Laurel Heights Improvement Assn. v. Regents of California, supra,* 47 Cal.3d at 407.)

The requirement to adopt feasible alternatives is found prominently in CEQA in three sections. Public Resources Code Section 21002 states:

> The legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects... .

Public Resources Code Section 21002.1(b) states that "[e]ach public agency *shall* mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Public Resources Code Section 21002.1(b), emphasis added.) Finally, Public Resources Code Section 21081 encapsulates these mandates as follows:

> Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:
>
> (a) The public agency makes one or more of the following findings with respect to each significant effect:
> (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

i. The Alternatives Analysis was not undertaken in comparison to the true project

As explained above and as the trial court agreed, the 130-Unit Alternative was "the true project under consideration." (CT 6: 1264.) Therefore, "the [alternatives] analysis was fatally skewed because it was undertaken in comparison to the Project, not the Alternative." (CT 6: 1264.) Instead of identifying alternatives to the 130-unit Alternative, as discussed above, the RDEIR identifies the 130-unit Alternative as the environmentally superior *alternative*. (AR 134.) This wholly defeats the point of an Alternatives Analysis, which is to identify alternatives to the *project*, and identify the environmentally superior alternative of the alternatives. (14 Cal. Code Regs. § 15126.6.(e)(2).)

Most of the alternatives in the RDEIR are variations of the 281-unit Project. Alternative 1 is the required No Project Alternative.[3] (AR 1843.)

[3] CEQA requires the analysis of the No Project Alternative. "The specific alternative of 'no project' shall also be evaluated along with its impact. The purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (14 Cal. Code Regs. § 15126.6(e)(1).)

Alternative 2, the East Golf Course Alternative, is an alternative layout of the 281-unit project, but was later found to be not viable due to change in ownership of the property. (AR 1847, 1849, 134.) Alternative 5 is the Proposed Project (meaning the 281-unit project) with different access. (AR 1854.) And Alternative 6, is the 281-Unit Stemple Property Avoidance Alternative, which would avoid the use of property not owned by the Real Parties as discussed *supra*. (AR 1856.) The remaining two alternatives were Alternative 3, the Medium Density Alternative (186 residential units) (AR 1849), and Alternative 4, the Low Density Alternative (40 units) (AR 1852). All of these alternatives were compared to the 281-unit project, not to the true project, the 130-unit "Alternative." (AR 1859-1861.) Comparing the alternatives to a proposal that is not the actual project constitutes a failure to proceed in a manner required by law. (14 Cal. Code Regs. § 15126.6.(e)(2).)

This is more than an academic exercise. The RDEIR concluded that there were several significant and unavoidable impacts. (AR 1837-1838.) The Board of Supervisors adopted a Statement of Overriding Considerations. (AR 18-19.) Here, the RDEIR identified the 130-unit Alternative as the environmentally superior alternative. (AR 134.) By conflating what is the Project with the environmentally superior alternative, the RDEIR avoided the requirement that it consider alternatives that offer advantages *over the Project*. (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at 566; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350-1351.) If EIRs can simply identify the actual project as the environmentally superior alternative, the core requirement that agencies consider alternatives that offer environmental advantages over the project would be eviscerated. This also compounds problems with making a Statement of Overriding Considerations.

Only when the alternatives are infeasible may the City adopt a Statement of Overriding Considerations finding that the benefits of the project outweigh the significant effects on the environment. The Supreme Court stated that CEQA requires agencies to adopt feasible alternatives when there are unavoidable impacts of a proposed project.

> A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible. (Pub. Resources Code, § 21081, subd. (b).)

(*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368-369 [emphasis added]; see also *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98, 108, fn.18.) The RDEIR's circular reasoning guts these requirements and allows an agency to skip to a Statement of Overriding Considerations when there has not been any actual consideration of alternatives to what the true project is: the 130-unit "Alternative."

ii. The Alternatives Analysis fails to examine a reasonable range alternatives

"In determining the nature and scope of alternatives to be examined in an EIR, the Legislature has decreed that local agencies shall be guided by the doctrine of 'feasibility'." (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at 565.) "The determination of whether to include an alternative during the scoping process is based on whether the alternative is *potentially* feasible." (*South County Citizens for Smart Growth v. County of Nevada*, (2013) 221 Cal.App.4th 316, 327, italics in original.)

Within the context of CEQA, "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account, economic, environmental, legal, social, and technological factors." (14 Cal. Code Regs. § 15364) Further, "among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdiction boundaries…and whether the proponent can reasonably acquire, control, or otherwise have access to the alternative site." (14 Cal. Code Regs. § 15126.6 (f)(1).)

CVMP Policy CV-1.6 as amended, establishes a 190-lot cap, 24 units have been reserved for the Delfino property, meaning that the unit cap is 166 in Carmel Valley. (AR 13617, 3738, 14031-14032.) The RDEIR makes clear that the 2010 General Plan, of which CVMP Policy CV-1.6 is part, applies to the RCV Project: "the County [had] determined that the project [was] subject to the current 2010 General Plan and 2013 CVMP land use plans and not the previous plans." (AR 1314.) However, the County failed to make the necessary changes to the Alternatives Analysis to satisfy a reasonable range of alternatives.

Excluding the No Project Alternative, four of the five alternatives exceed the CVMP's unit cap; the FEIR, the County's findings, and Appellant acknowledge that the approval of any of these three alternatives would require a General Plan amendment. (AR 135-136, 3523, 3738.)

The alternatives which exceeded the 166-unit residential cap are infeasible under CEQA's definition because an alternative which exceeds the residential cap is unlikely to be accomplished "in a successful manner within a reasonable period of time, taking into account…legal…factors." (14 Cal. Code Regs. § 15364.). While amendment of the General Plan to

raise the residential cap is technically within the power of the County it is still unlikely that an alternative that requires amendment of the General Plan is capable of being accomplished "in a successful manner within a reasonable period of time." *Ibid.* This is especially true because the cap was imposed as a condition of settlement following litigation concerning the 2010 General Plan. That is to say, the alternatives that exceed the cap are not "potentially feasible" under CEQA's definition.

In response to comments regarding the Project and other alternatives' inconsistences with the CVMP, the FEIR states "the 130-Unit Alternative is consistent with the CVMP policy CV-1.6, and as such, could not result in a Material Default with the settlement agreement." (AR 3684.) The direct inference is that alternatives that exceed the cap under Policy CV-1.6 would result in a Material Default with the settlement agreement.

CEQA requires that an EIR provide "enough of a variation to allow informed decision making. [Citation.]" (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151.) The options before the County essentially left it to decide between a likely legal battle or the 130-unit Alternative; this is hardly an "informed" choice. Apart from the No-Project Alternative, only Alternative 4 (the Low Density Alternative) would satisfy the CVMP's unit cap. (AR 1322-1323, 1325.) Although CEQA requires an EIR to explore a "no project" alternatives (14 Cal. Code Regs., § 15126(e)), that "alternative" is not a true alternative because, by definition, it would meet "*almost none* of the project's objectives." (*Watsonville Pilots Assn. v. City of Watsonville, supra,* 183 Cal.App.4th 1059, 1090, italics in original.) Consequently, the EIR effectively examined only one single feasible alternative. The trial court correctly concluded "the County's selection of alternatives was 'manifestly unreasonable,' in violation of CEQA." (CT 6: 1266.)

4. The County Failed to Bridge the Analytical Gap and No Evidence Supports Its Finding of Unusual or Unforeseen Circumstances

i. Standard of review for County ordinances

Interpretation of a statute is a question for the Court to resolve. "The final interpretation of a statute is a question of law and rests with the courts." (*Department of Water & Power v. Energy Resources Conservation & Development Com.* (1991) 2 Cal.App.4th 206, 220.) "The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7 (internal quotation omitted).)

Review of the Project's compliance with County ordinances is also a question for the Court to resolve. An agency exercises its quasi-judicial power when it interprets and applies local ordinances to a particular set of facts. "Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219 (citation omitted).) The Court exercises its independent judgment when reviewing agency interpretation of local ordinance: "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." (*Ibid*. (citation omitted).) "The interpretation of both

statutes and ordinances is ultimately a judicial function." (*Ibid.* (internal quotations omitted).)

ii. The Project Failed to Comply with the County's Affordable Housing Ordinance

There are three separate affordability policies set forth in the 2010 General Plan. 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 on the site "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.)

The Board of Supervisors amended the 2010 General Plan and reduced the affordable housing requirement for the RCV Project from 50% to 20%. (AR 102.) The County applied the existing Affordable Housing Ordinance to the Project.[4] (AR 143, 3091.)

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[4] To make matters worse, the Real Parties are only constructing 25 affordable units when they should be required to construct 26. (AR 108.) County Planning Staff concluded as follows:

> Regarding the required amount and type of inclusionary housing, the Inclusionary Ordinance (18.40.070A) states, "To satisfy its inclusionary requirements 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" A straight reading of that language means that if 130 units (the word "new" is not in the Ordinance) are

Pursuant to Monterey County Code section 18.40.110.A, the 20% requirement for affordable housing must contain an allocation of affordable units as follows: 8% of the total units for moderate-income households, 6% for low-income households, and an additional 6% for very low-income households. (CT 1: 166.) The Board not only amended the General Plan to exempt the Project from all applicable policies pertaining to affordable housing, it also waived the requirement that the Real Parties provide low and very low-income housing, instead approving the Real Parties' preference to construct moderate-income housing only. (AR 143.)

The Monterey County Code provides that if "as a result of *unusual or unforeseen circumstances*, it would not be appropriate to apply, or would otherwise 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." (CT 1: 214, emphasis added (Monterey County Code § 18.40.050.B.2); AR 143.)

Real Parties contend that one-page letters received from two banks and statements of one of the Supervisors constitute substantial evidence of

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> approved then at least 20% of that number, or a minimum of 26 units, would need to be Inclusionary.

(AR 19539.) "As currently proposed, 25 Moderate Income units out of 130 total units does not comply with the Inclusionary Ordinance." (AR 19539.) Even the RDEIR recognizes that "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.) The Affordable Housing Ordinance makes clear that the 20% is calculated for "the total number of units approved for the residential development." (CT 1:215 (Monterey County Code § 18.40.070, subd. A).)

"unusual and unforeseen circumstances" that allow the Project to divert from the required distribution of affordable units. (AOB, p. 63.)

While the Affordable Housing Ordinance does not call its "unusual circumstances" provision a "variance," it functions as one because it exempts developments from the standard requirements of the ordinance. "[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.) 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 ("*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; see Gov. Code § 65906).

The County improperly granted special privileges to exempt the Real Parties from standard range of affordable units contrary to what is required of other applicants.

iii. The bank letters do not constitute substantial evidence

The Board's evidence of an "unusual circumstance" is that:

> 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.)

As shown *supra*, the 281-unit project was effectively abandoned. Thus, characterizing a 130-unit project as a "reduction in units" fails to constitute substantial evidence in support of an "unusual circumstance." The Real Party relies on two letters from local banks, both of which state that bank financing would not be available if the 130-unit Alternative complied with the Affordable Housing Ordinance's requirements. (AR 20413-20414.) These letters lack sufficient foundation to constitute substantial evidence in support of exempting the RCV Project from the affordable housing requirements.

As noted by the trial court, "1) neither letter explains in sufficient detail how the 'unforeseen circumstances' rendered it economically infeasible for Real parties to comply with the Inclusionary Housing Ordinance; and 2) the record does not document any of the assumptions upon which the relevant opinions are based." (CT 6:1257.)

The first letter from Monterey County Bank, dated December 7, 2016, mere days before the Board approved the RCV Project (AR 20413), is a two-paragraph letter from the President, CEO and Chairman of the bank. The letter is peculiar because it is from the highest officer in the bank, not a loan officer that may have actually evaluated a loan and security for the loan. It appears that this is nothing more than a casual inquiry about a loan. There is no evidence that details were submitted to the bank by the Real Parties, or that the bank actually reviewed the matter with an intention of considering a loan. The letter states that:

> the loss in revenue generated by an increase in the percentage or allocation of inclusionary housing renders your project economically infeasible to enable us to offer you bank financing. These requested changes to the inclusionary housing would result in insufficient cash flow and profit necessary to support bank financing. (AR 20413.)

The referenced "loss in revenue," "insufficient cash flow," and "profit necessary" are not tied to any specific calculations or numbers. Moreover, the letter does not provide the Project's revenue nor the supposed loss of revenue that would result from complying with the Affordable Housing Ordinance. Thus, the letter does not provide a line of logic or reasoning explaining how it found the Project to be "economically infeasible."

The 1st Capital Bank letter dated December 12, 2016, one day before the Board approval of the Project, is no different. (AR 01, 20414.) Not only is the timing uncanny, but this letter is also curious because it too is not from a loan officer, but is from the Director of Client Relations. The letter merely states that "bank financing from 1st Capital Bank will be problematic" as a result of "discussions" between unnamed parties, and that the project "would not qualify (sic) bank financing in this case." (AR 20414.) The letter then concludes that "if inclusionary housing were to include 20% affordability at the moderate income level, Rancho Canada Venture LLC may be considered to quality (sic) for loan financing." (AR 20414.) As with the Monterey County Bank letter, 1st Capital Bank letter is not substantial evidence and fails to provide any analysis for its conclusion.

"We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the *raw evidence* and the ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at 515, emphasis added.) The two-paragraph bank letters do not bridge the analytical gap between the raw evidence and the ultimate decision by the Board to allow the Real Parties to deviate from the required allocation of affordable units based on unusual or unforeseen circumstances.

iv. The statement of Supervisor Phillips does not constitute substantial evidence

Real Parties assert that "county supervisors are treated as experts on planning, and their remarks during administrative proceedings are substantial evidence" in reliance on *Oro Fino Gold Mining Corporation v. County of Eldorado* (1990) 225 Cal.App.3d 872, 883 ("*Oro Fino Gold*"). (AOB, p. 67.) This assertion is out of context since *Oro Fino Gold* concerned the issue of "substantial evidence" in a wholly different procedural context: "Since the preparation of an EIR is the key to environmental protection under CEQA-indeed constituting the very heart of the CEQA scheme-accomplishment of CEQA's high objectives requires the preparation of an EIR 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*Oro Fino Gold* (1990) 225 Cal.App.3d 872 at 880, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 304.) The "fair argument" standard under CEQA is inapplicable here.

Further, Supervisor Phillips bases his support for the RCV Project's exemption from the Affordable Housing Ordinance on a "consider[ation of] all the circumstances and the change and the lawsuit" in addition to "the area's existent affordable housing including the Pacific Meadow and more." (AR 5484.) Supervisor Phillips' broad statements constitute his opinion on why the project should be exempt from the requirements set forth in the Affordable Housing Ordinance, but his opinion does not rise to the level of substantial evidence of unusual or unforeseen circumstances to support modification of the requirement of the range of affordable housing. The trial court properly determined: "Absent evidentiary support, [The Supervisors'] comment does not constitute substantial evidence." (CT 6:

1258.) Moreover, Supervisor Phillips comments were not relied on by the Board as evidence.

Finally, the Real Parties also suggest that there is substantial evidence because purportedly a HAC member stated that "there is a shortage of moderate level units in Carmel Valley" and that "development of affordable housing at the very low, and low levels had achieved target number for Carmel Valley, and it was the moderate level where there was a deficit…" (AR 19534, 20056.) (AOB, p. 68.) However, this argument refers to an email from the Real Parties' own counsel at the time and cannot be correctly characterized as substantial evidence that the Board relied upon to make its unusual or unforeseen circumstances finding. (AR 19534.)

B. CVA'S OPPOSITION TO COUNTY'S OPENING BRIEF

1. Standard of Review

Code of Civil Procedure section 1085 allows CVA to petition for a writ of mandate to compel performance of an act required by law. "A traditional writ of mandate under Code of Civil Procedure section 1085 is a way to compel a public entity to perform a legal, typically ministerial, duty." (*Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 204.) The California Supreme Court has explained that:

> A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgement or opinion concerning such act's propriety, when a given state of facts exists. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

Therefore, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of

conduct becomes mandatory and eliminates any element of discretion." (*Great Western Savings & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.)

> The standard of review of matters pursuant to 1085 is as follows: The trial court's inquiry in a traditional mandamus proceeding is limited to whether the local agency's action was arbitrary, capricious, or entirely without evidentiary support, and whether it failed to conform to procedures required by law. (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.)

> Further, "[a]lthough the traditional formulation articulated in the mandate cases [citations] does not specifically include 'unlawful or contrary to established public policy," it cannot be doubted the mandate cases would authorize judicial intervention' where the challenged action was 'shown to be unlawful or indisputably contrary to established public policy.'" (*Ibid.* citing *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 386.)

"The reviewing court exercises 'independent judgment' in determining whether the agency action was 'consistent with applicable law.' (*Ibid.* citing *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.)

The County's Opening Brief muddles the standard of review. On the one hand, the County argues that the review of the consistency of the Affordable Housing Ordinance with the 2010 General Plan is subject to de novo review and that the amendment of the Affordable Housing Ordinance is a matter of statutory construction. (County's Brief, pgs. 13-15.) However, after reciting the standard of review, the County then argues that the trial court correctly relies on the arbitrary and capricious standard, but that it does not correctly apply it. (County's Brief, p. 15.) However, if the arbitrary and capricious standard is utilized, review is not de novo. Instead, deference is given to the trial court's determination.

> In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. (*Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700, emphasis added.)

Pursuant to statute, the County was required to amend its zoning ordinance within a "reasonable time." (Gov. Code § 65860(c).) The failure to do so for what is now a decade constitutes an abuse of discretion for failure to proceed in a manner required by law. Whether the arbitrary and capricious standard with deference to the trial court, or application of a de novo standard for the appellate court, is applied, the result is the same: the County failed to amend its Affordable Housing Ordinance within a "reasonable time."

2. Failure to Amend the Affordable Housing Ordinance Within the Last Decade to Achieve Consistency with the 2010 General Plan violated the Government Code

The 2010 General Plan Policy LU-2.13 provides as follows:

> 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. The Affordable Housing Ordinance shall include the following minimum requirements:
>
> a) 6% of the units affordable to very low-income households
> b) 6% of the units affordable to low-income households
> c) 8% of the units affordable to moderate-income households
> d) 5% of the units affordable to Workforce I income households

(AR 13707- 13708.)

The County's current Affordable Housing Ordinance, County Code 18.40.070(A) is inconsistent with General Plan Policy LU-2.13 and still only requires "(20) percent of the total number of units approved for the residential development" be designated affordable. (CT 1: 164.) Policy LU-2.13 does not change the spread of percentages for very low low-income, low-income and moderate housing, but adds that five percent of a project's housing be set aside for Workforce I housing[5]. (*Compare*, AR 13708 to CT 1: 166.)

Government Code section 65860(c) mandates that the County make the Affordable Housing Ordinance consistent with the General Plan within a "reasonable time:"

> 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.

State law mandates that the County's ordinances be consistent with the 2010 General Plan. "A zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541 ("*Lesher*").)

The County does not argue that section 65860(c) does not apply to it. Instead, it argues that while the statute applies, the failure to amend the Affordable Housing Ordinance does not violate the statute's mandate that

[5] The County's 2015-2023 Housing Element defines Workforce I units "as housing affordable to households with incomes up to 150 percent AMI (area median income)." (CT 3: 462.)

the Affordable Housing Ordinance be amended "within a reasonable time." (County's Brief, p. 20.)

Relying on *Elysian Heights Residents Ass'n v. City of L.A.* ("*Elysian Heights*") (1986) 182 Cal.App.3d 21, 29, the County first argues that the use of the word "reasonable" in Government Code Section 65860(c) is to "*provide time* to the legislative body." (County's Brief, p. 20.)) *Elysian Heights* does not stand for the proposition that "reasonable time" is limitless time. Nor did *Elysian Heights* offer any guidance regarding the definition of what a "reasonable time" is because that case concerned whether "building permits be scrutinized for [general] plan consistency." *Elysian Heights, supra,* 182 Cal.App.3d at 29. While the County argues that "there is no mandatory deadline for amending underlying ordinances to achieve consistency with a general plan" (County's Brief, p. 20), the County never takes the affirmative position that seven years, and now ten, is a "reasonable time" to amend the ordinance to achieve consistency with the General Plan.

Notably, *Elysian Heights* does refer to a separate, and related, superior court matter where, like here, the City of Los Angeles was ordered to make its zoning ordinance consistent with its General Plan: "the superior court… issued a writ of mandate requiring the City to bring its zoning ordinances into conformity with the general plan" even as it denied an injunction against the issuance of building permits. (*Elysian Heights, supra,* 182 Cal.App.3d at 26.) Even the *Elysian Heights* court recognized that the City must make its ordinances consistent with the General Plan, and did not allow an infinite delay.

At the time this case was before the trial court, the Affordable Housing Ordinance had not been amended in more than *seven* years after the adoption of the 2010 General Plan. Now it has been a *decade,* and the County, by its continued determination to abrogate the trial court's decision

on appeal, is an attempt to further delay the amendment. A decade is well beyond a "reasonable time" no matter how loose or liberal an interpretation is applied to the statute and no matter the standard of review.

The trial court correctly found that:

> the County's delay of over seven years in implementing a simple amendment to its Inclusionary Housing Ordinance was arbitrary and capricious. (See Gov. Code, § 65860, subd. (c) [the County must amend an inconsistent zoning ordinance to conform to its general plan 'within a reasonable time'].)" (CT 6: 1250.)

i. The County relies on traditional mandamus cases that are inapposite

The County argues that the decision of when to amend the Affordable Housing Ordinance is within its legislative discretion and that the trial court "usurp[ed] the legislative role of the Board of Supervisors." (County's Brief, p. 15.) Nothing in the relief sought and obtained by CVA with respect to the Affordable Housing Ordinance usurps the legislative role of the Board of Supervisors. The Board of Supervisors already made the decision in its General Plan to amend the Affordable Housing Ordinance with Policy LU-2.13. (AR 13583.)

The cases the County relies on to make its case are inapposite as they concern matters where a petitioner was seeking to compel or rescind a rezoning for a particular property where there is no statutory mandate to do so, as opposed to a mandatory requirement to make zoning consistent with a general plan. (*See* County's discussion of *Tandy v. City of Oakland* (1962) 208 Cal.App.2d 609, 611-612 ("*Tandy*"); *Hilton v. Board of Supervisors* (1970) 7 Cal.App.3d 708, 716-717 ("*Hilton*"); *Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 943 ("*Toso*") (County's Brief, pgs. 22-23.))

In *Tandy* the plaintiffs requested a writ of mandate "to compel the city council to rezone their property," as desired by the plaintiffs. *Tandy*, *supra*, 208 Cal.App.2d at 611-612. The *Tandy* court explained that

> the complaint simply asks the court to issue the writ to compel the city council of the defendant city to perform a legislative act, namely, to pass an ordinance according to plaintiffs' plan, rezoning their property from "C" multiple dwelling to "E" commercial. It is elementary that the courts have no such power. (*Ibid.*)

Tandy is entirely distinguishable because the facts of that case concerned plaintiffs that were privately interested in having their property rezoned from multiple dwelling units to commercial when there was no mandatory duty for the city to adopt such a rezoning.

The County's reliance on *Hilton* is equally unavailing because the court found no basis, statutory or otherwise, that would compel rescission of a zoning amendment for particular properties. (*Hilton, supra,* 7 Cal.App.3d 708 at 716-717.)

Likewise, *Toso* (1980) 101 Cal.App.3d 934 is dissimilar from the case at bar because *Toso* concerned the propriety of an agency's decision to deny a rezoning to allow the property owner to build a resort hotel. In *Toso,* the court of appeal held that the trial court "erred in ordering the city council to rezone the Wilcox property to permit a resort hotel." (*Toso, supra,* 101 Cal.App.3d at 934.) There was no statute or other law that mandated the City to rezone a property for a landowner's benefit. The County's reliance on *Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1312 is inapplicable because it concerns "spot-zoning," which is irrelevant here.

Unlike the procedural postures of *Tandy*, *Hilton*, and *Toso*, CVA does not seek to compel the County to enact a zoning ordinance to rezone property based on CVA's preferred result or without legal basis. Rather,

Petitioner is enforcing a statutory mandate that the Affordable Housing Ordinance must be amended to achieve consistency with the County's own 2010 General Plan within a reasonable time.

Notably, despite finding that the agency did not abuse its discretion in denying an application for rezoning of a property, the *Tandy* court did hold that "municipal discretion will not be interfered with by the courts except for clear abuse of the discretion or excess of power…" (*Tandy, supra,* 208 Cal.App.2d at 612.) This is consistent with the provision that "[a]lthough mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation]." (*California Public Records Research, Inc. v. County of Alameda* (2019) 37 Cal.App.5th 800, 806.)

The County does not have unfettered discretion. The County's position that the timing of the amendments to the Affordable Housing Ordinance is entirely within the discretion of the legislative body is incorrect. (County's Brief, p. 20.) The County imposed a 25% affordable housing requirement in the 2010 General Plan and it cannot simply avoid amending its ordinance to be consistent with the General Plan under the guise of legislative discretion.

ii. Despite the County's protestations to the contrary, achieving consistency with the 2010 General Plan is a simple matter of changing the percentage from 20 to 25%

It was not lost upon the trial court that the General Plan's provision to increase the Affordable Housing Ordinance's percentage of affordable units from 20% to 25% is a quantitative and discrete change in numerical percentage which required "a simple amendment." The trial court found that in this context, the seven year delay in taking action to achieve

consistency with the General Plan constituted an abuse of discretion. (CT 6: 1249.)

The County responds that it "had many rational, legitimate reasons to take time to evaluate how to implement the General Plan affordable housing policies, including Policy LU-2.13." (County's Brief, p. 20.) The County defends its inaction by pointing to how:

> Staff and the HAC also identified issues that had arisen in implementing the existing Inclusionary Housing Ordinance, including the adequacy of in-lieu fees (AR 17712), foreclosures on existing inclusionary units (AR 17692), and the term of affordability being "in perpetuity" (AR 17693.) Staff and the HAC reasonably chose to address these issues with a comprehensive approach. (AR 17705-17712.) (County's Brief, p. 24.)

While the County argues it should be afforded deference in its "comprehensive approach" to revising its affordable housing policies, this argument is tantamount to admitting that the County is arbitrarily prioritizing discretionary affordability policies over mandatory ones. Bringing its Affordable Housing Ordinance into consistency with the County's General Plan is required by Government Code Section 65860(c). The County has a mandatory duty to comport its Affordable Housing Ordinance to the 25% specified in General Plan Policy LU-2.13. Nothing prevented the County from simply amending the mandatory percentages of affordable housing while separately considering other changes the County wants to make in its discretion. To countenance such a result would give agencies the ability to delay required amendments beyond a reasonable time as long as they conflate such changes into broader desired amendments that are not mandatory.

The trial court rightly found the County's inaction arbitrary and capricious in light of the Government Code's requirement to achieve

consistency "within a reasonable time" and the California Supreme Court's admonishment that a zoning ordinance that "was originally consistent but has become inconsistent *must be brought* into conformity with the general plan. [Citation.]" (*Lesher*, *supra*, 52 Cal.3d at 541, emphasis added.)

iii. The County never raised legal obstacles posed by decided and pending cases in the trial court, and these defenses are waived on appeal

The County, for the first time, also argues that other litigation impacted the County's ability to amend its Affordable Housing Ordinance: "There was also legal uncertainty regarding the authority of local government to require affordable housing as part of new development…" (County's Brief, p. 24) The County refers to *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 ("*Palmer/Sixth Street Properties*") and *California Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435 ("*California Building Industry Ass'n*") as two cases that "cause substantial legal uncertainty as to the validity of the County's existing Inclusionary Housing Ordinance, and were among the reasons for staff not pursuing a simple amendment to the County's Inclusionary Housing Ordinance." (County's Brief, p. 26.)

The County never argued that these cases impacted the County's timeline to amend its Affordable Housing Ordinance in the trial court proceedings and should be estopped from raising these issues on appeal, (*Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) Independently, the argument lacks merit because the County applied the current Affordable Housing Ordinance to the RCV Project and there was no indication in any staff report or the Board's findings regarding the legality of its Affordable Housing Ordinance. (AR 143, 3091.)

The County's citations to the Administrative Record yield one reference from a Housing Advisory Committee agenda report: "Given a very recent legal decision in regard to Inclusionary Housing, it is recommended that a workshop be agendized for the October quarterly meeting." (AR 17712.) Apart from this one unspecific reference in the Housing Advisory Committee's report, the County wholly fails to demonstrate any basis for the argument that the *Palmer/Sixth Street Properties* and *California Building Industry Ass'n* litigation impaired the County's ability to render its Affordable Housing Ordinance consistent with General Plan Policy LU-2.13.

In addition, *Palmer/Sixth Street Properties* was published in July 22, 2009, one year prior to the County's adoption of the 2010 General Plan and Policy LU-2.13, and did not concern the propriety of a local agency's requirement to construct affordable housing for new, for-sale residential development. *Palmer/Sixth Street Properties* concerned the intersection of Costa-Hawkins Act with a local agency's rent control law. The court there found that the City of Los Angeles' rent control ordinance imposed "rent restriction that conflict with and are inimical to the Costa-Hawkins Act..." (*Palmer/Sixth Street Properties*, *supra*, 175 Cal.App.4th at 1411.) Thus, this only impacted rental housing, not the building of new housing for sale. This has since been resolved by statute in 2017 as admitted by the County. (County's Brief, p. 25.)

Similarly, the County's argument that *California Building Industry Ass'n* impacted the County's ability to raise the residential allocation from 20 – 25% is unavailing. (County's Brief, p. 25.) The County's Affordable Housing Ordinance has been in effect since at least 2003 and has gone unchallenged. (CT 1: 164.) And the fact that there was a case pending in the Supreme Court does not mean that an agency should not comply with its mandatory duties pending resolution of the case in which the high court

ultimately found that San Jose's affordable housing ordinance was legal. (*California Building Industry Ass'n, supra*, 61 Cal.4th at 443.) More importantly, *California Building Industry Ass'n* was decided in 2015. Therefore, assuming *arguendo* that the County's argument concerning the pending litigation has merit, the County could have amended its Affordable Housing Ordinance starting from 2015.

iv. CVA's claim regarding the County's failure to amend its Affordable Housing Ordinance is independent from CVA's challenge to the approval of the RCV Project, and any argument to the contrary raised by the County is waived

The County also argues that "the approval of the Rancho Canada subdivision project did not provide a legal basis for the court to order County to amend its Inclusionary Housing Ordinance." (County's Brief, p. 21.) The County should be estopped from raising this issue on appeal since the County never raises it as an affirmative defense in the trial court proceedings. (*Redevelopment Agency of the City of Berkeley v. City of Berkeley, supra,* 80 Cal.App.3d at 167.) Moreover, the trial court's determination under Code of Civil Procedure Section 1085 that the County's failure to amend its Affordable Housing Ordinance to achieve consistency with General Plan Policy LU-2.13 constituted an abuse of discretion was independent from the trial court's decision concerning the validity of the EIR and the RCV Project.

The County argues that "Policy LU 2.13 does not apply to the Rancho Canada project. As part of the project approvals, the Board adopted an amendment to another General Plan policy, Policy CV 1.27, which governs the project site specifically." (County's Brief, p. 21.) As the trial court's decision discussed, Petitioner sought by writ of traditional

mandate under Code of Civil Procedure section 1085 that "the County must be compelled to amend its Inclusionary Housing Ordinance to conform to the 2010 General Plan." (CT 6: 1238.) The trial court's decision did not require the County to conform the RCV Project approval to General Plan Policy LU-2.13 and the 25% affordable housing requirement.

Finally, it is noteworthy that the Board of Supervisors changed the project site's affordable housing requirement from 50% to 20%. (AR 102.) CVA asserts that the Board of Supervisors might have only lowered the affordable housing requirement to 25% if the County was indeed applying 25%, required by Policy LU-2.13, to other projects in the County. Moreover, the County applied the existing Affordable Housing Ordinance, which requires only 20% affordability, to the RCV Project. (AR 3091.) It would have been far more difficult for the Board of Supervisors to allow the Real Parties to provide only 20% affordable units if the County was in fact requiring 25% affordable units, pursuant to Policy LU-2.13, from all other applicants.

C. CVA'S OPENING BRIEF ON CROSS-APPEAL

1. Standard of Review

"Mandamus has long been recognized as the appropriate means by which to challenge a government official's refusal to implement a duly enacted legislative measure." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58; *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1231.) "Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." (*Great Western Savings & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.) "Mandamus does not lie to compel a public agency to exercise

discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner. [Citations.]" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700-701.

The applicable standard of review for CVA's cross-appeal concerning the County's failure to implement the DES under section 1085 of the Code of Civil Procedure is also discussed *infra* in Section(B)(1).

2. The County's Failure to Amend the DES Within Twelve Months of the 2010 General Plan Taking Effect is a Failure to Comply with the General Plan's Express Provisions

General Plan Policy LU-1.19 mandates that the DES "*shall* be established *within 12 months* of adopting this [2010] General Plan," (AR 13579, emphasis added.) The 2010 General Plan was adopted on October 26, 2010 and became effective thirty days later on November 26, 2010. (AR 13682, 21034.) The DES has not yet been established a decade later.

The County did not afford itself any discretion in the timing of implementation of the Development Evaluation System (DES). The County chose to obligate itself to the priority of developing the DES within 12 months of adopting the General Plan.

Like its arguments for the Affordable Housing Ordinance, the County took the position below that "the County's prioritization of the General Plan implementation tasks has not been arbitrary, capricious, or procedurally unfair." (CT 1: 192.) The County argues 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." (CT 1: 191.) However, the County explicitly promised its citizens to prioritize the DES.

Policy LU-1.19 provides several guideposts to assist the County in developing the DES:

> Community Areas, Rural Centers and Affordable Housing Overlay districts are 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. 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, resource and infrastructure, and the overall quality of the development. Evaluation criteria shall include but are not limited to:
>
> a. Site Suitability
> b. Infrastructure
> c. Resource Management
> d. Proximity to a City, Community Area, or Rural Center
> e. Mix/Balance of uses including Affordable Housing consistent with County Affordable/Workforce Housing Incentive Program adopted pursuant to the Monterey County Housing Element
> f. Environmental Impacts and Potential Mitigation
> g. Proximity to multiple modes of transportation
> h. Jobs-Housing balance within the community and between the community and surrounding areas
> i. Minimum passing score

(AR 13578-13579.)

The trial court wrongly concluded that the County's decision to defer implementation of the DES is not arbitrary or capricious. (CT 6: 1246.) While it is true that the specific details of the DES are subject to a certain amount of County discretion, the timing of implementation is not: "This Development Evaluation System shall be established *within 12*

months of adopting this General Plan." (AR 13579, emphasis added.) The timing of when to establish the DES is mandatory.

> Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by law to do so) and to exercise it under a proper interpretation of the applicable law. [Citations.] (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.)

CVA is not seeking to control an exercise of discretion, i.e., compel the County to create a particular DES. CVA is seeking to compel the County to establish the DES under the mandatory timeline of General Plan Policy LU-1.19 that it self-imposed.

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*, *supra*, 52 Cal.3d at 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." (*Ibid.* (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. (*Id.* at 570, emphasis added.) "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*, (2005)131 Cal.App.4th 777, 782.)

While the County presented "that the final development of the DES will be a priority in 2017" (CT 1: 192), to this day the County has not established the DES. The RCV Project is not located in a designated growth area, and the DES would have applied to the RCV Project if it had been promulgated. (AR 08.) Without mandamus issuing to compel the County to act, the County would not be held accountable to its own deadlines and may never establish the DES as required. It is well within the purview of the court to issue mandamus to compel the County to establish the DES.

3. Without Mandamus Issuing Compelling the County to Implement the DES the County Will Continue to Take the Position that a Formal DES is Unnecessary

The County also argues that a formal DES is unnecessary because the County has substituted an alternative procedure in its place: "It should be noted, as discussed fully below, 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 in approving all applicable projects, including the [Rancho Canada Village] Project in question." (CT 1: 192.)

The County's assertion that is has applied the DES criteria to this RCV Project is counterfactual since the DES has not been created. The findings made by the Board of Supervisors demonstrate that the application of the DES to the Project is purely hypothetical: "it is determined that the project would pass the DES, *if* a pass/fail scoring system were in place." (AR 106, emphasis added.) The County's finding admits that its determination is contingent on a system that has not been established. The County's findings here were erroneous as a matter of law because the County analyzed the Project against a DES that does not exist.

The trial court was nonetheless satisfied with this substitute process as "ensuring the intent of the Policy has been observed." (CT 6: 1246.) This substitute process wholly fails to ensure the intent of Policy LU-1.19 is preserved because this substitute process admits there is in fact no process at all: "*if* a pass/fail scoring system were in place." (AR 106, emphasis added.) Adding insult to injury, the DES's evaluation criteria is required to include a "Mix/Balance of uses including Affordable Housing consistent with County Affordable/Workforce Housing Incentive Program adopted pursuant to the Monterey County Housing Element." (AR 13578-13579.) But the RCV Project failed this criterion due to the fact that the Project does not include a mix of affordable housing; it only includes moderate income housing as discussed *supra*, and it fails to include a minimum of 25% affordable units, as required under Policy LU-2.13.

IV. CONCLUSION

For the foregoing reasons, CVA respectfully requests that this court affirm the trial court's judgment as to the issues raised in the Real Parties' and County's appeal. Furthermore, CVA respectfully requests that this court reverse the trial court's judgment concerning the issue of the DES.

February 28, 2020

WITTWER PARKIN LLP

/s/ WPP

_____

By: William P. Parkin
Attorneys for
Carmel Valley Association, Inc.

Certificate of Word Count

[Cal. Rules of Court, Rule 8.204(c)]

Consistent with rule 8.204(c) of the California Rules of Court, based upon the word count function of Microsoft Word, I certify that this RESPONDENT'S BRIEF AND OPENING BRIEF ON CROSS-APPEAL, contains 15,586 words.

Dated: February 28, 2020

/s/ WPP

_____

By: William P. Parkin

PROOF OF SERVICE

I am over the age of 18, and not a party to this action. My business address is 335 Spreckels Drive, Suite H, Aptos, California 95003, located in Santa Cruz County.

On February 28, 2020, I caused the following document(s) entitled:

1. **RESPONDENT'S BRIEF AND OPENING BRIEF ON CROSS-APPEAL**

to be served on the party(ies) or its (their) attorney(s) of record in this action listed below by the following means:

[X] (**BY FIRST CLASS MAIL**) by placing a true copy thereof, enclosed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and placed for collection and mailing following ordinary business.

[X] (**BY ELECTRONC SERVICE**) by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below, via the Court's electronic filing service provider.

SEE ATTACHED SERVICE LIST

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 28, 2020

A. McCarroll

Ashley McCarroll

SERVICE LIST

Wendy S. Strimling, Esq. William Litt, Esq. Office of Monterey County Counsel 168 W. Alisal Street, Third Floor Salinas, CA 93901-2653 strimlingw@co.monterey.ca.us McKeeCJ@co.monterey.ca.us	Attorneys for Defendant and Appellant COUNTY OF MONTEREY ***VIA TRUEFILING***
James G. Moose, Esq. Nathan O. George, Esq. Remy, Moose, Manley, LLP 555 Capitol Mall, Suite 800 Sacramento, CA 95814 jmoose@rmmenvirolaw.com ngeorge@rmmenvirolaw.com	Attorneys for Real Parties in Interest, Appellants and Cross-Respondents, RANCHO CANADA VENTURE, LLC ***VIA TRUEFILING***
Joel Franklin, Esq. LAW OFFICES OF JOEL FRANKLIN 225 Crossroads Boulevard, Suite 407 Carmel, CA 93923-8674 Joel@JfranklinLaw.net	***VIA TRUEFILING***
The Honorable Lydia Villarreal Monterey County Superior Court 1200 Aguajito Road Monterey, CA 93940	***VIA U.S. MAIL***
OFFICE OF THE CLERK CALIFORNIA COURT OF APPEAL SIXTH APPELLATE DISTRICT 333 West Santa Clara Street, Suite 1060 San Jose, CA 95113	**Electronically Submitted** **(per Rule 8.70)**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 28, 2020

A. McCarroll

Ashley McCarroll