William P. Parkin, SBN 139718
Yuchih Pearl Kan, SBN 294563
WITTWER PARKIN LLP
147 S. River Street, Suite 221
Santa Cruz, CA 95060
Telephone: (831) 429-4055
Facsimile: (831) 429-4057
wparkin@wittwerparkin.com
pkan@wittwerparkin.com

Attorneys for Petitioner,
Carmel Valley Association, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

Carmel Valley Association, Inc., a California nonprofit corporation, Petitioner, vs. County of Monterey, Board of Supervisors of the County of Monterey, and DOES 1 THROUGH 15, Respondents, Rancho Canada Venture, LLC, Carmel Development Company, R. Alan Williams, and DOES 16 THROUGH 30, Real Parties in Interest.	Case No. 17CV000131 **PETITIONER'S OPENING BRIEF** **[CEQA CASE]** Date: October 6, 2017 Time: 9:00 a.m. Dept.: 1 Judge: Honorable Lydia M. Villareal Action Filed: January 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Regulations

I. INTRODUCTION

This case challenges the approval of the Rancho Canada Village Project (Project), but also includes claims solely against the County of Monterey (County) for its failure to perform mandatory duties. First, the Petition for Writ of Mandamus seeks a writ directing the County to comply with its 2010 General Plan. The County has failed to develop a Development Evaluation System (DES) within twelve months of the County's adoption of the 2010 General Plan. Furthermore, the County has failed to update its Affordable Housing Ordinance[1] to reflect changes mandated by the 2010 General Plan. Regardless of the Project's approval, the County was required to develop the DES and update its Affordable Housing Ordinance consistent with the General Plan's mandatory provisions.

Second, the Project was required to be evaluated pursuant to the DES, and fails to comply with the existing Affordable Housing Ordinance. Moreover, the environmental review for the Project fundamentally lacks clarity, and meaningful evaluation and analysis, because the Project definition is inconsistent, unstable and indefinite. This has led to confusion over the Project's description and has skewed the alternatives analysis. The Environmental Impact Report (EIR) for the Project was fundamentally inadequate, thwarted the informational goals of CEQA, and precluded intelligent public engagement. Thus, the County has failed to proceed in a manner required by law in approving the Project and certifying the EIR.

In 2004, a developer proposed to create a new "sustainable mixed-use residential neighborhood" pursuant to a proposed Rancho Canada Village Specific Plan.[2] (AR[3] 237). The Specific Plan proposed creating 281 new units, of which 50%, or 140-units, would be deed

---

[1] The County uses the term "Inclusionary" synonymously with "Affordable." For the sake of consistency, the term Affordable Housing will be used in this brief.

[2] A "specific plan" implements the provisions of 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. State law also provides that "No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." Gov. Code § 65454.

[3] "AR" refers to the Administrative Record on file with the Court.

restricted as affordable housing. (AR 237). Integral to this concept was the idea that "the development proposal attempts to meet the need for affordable housing in Carmel Valley." (AR 237). While the application was deemed complete by 2005, it was not until 2008 that a Draft Environmental Impact Report (DEIR) for this project was circulated to the public. (AR 8136, 9349). Over fifty comment letters, were submitted regarding the DEIR, including one from the Carmel Valley Association (Petitioner) (AR 9645), but the County never responded to the comments because a Final EIR was never prepared for the Specific Plan. (AR 1314). During this time, the County was also in the process of amending its 1982 General Plan. In September 2008, the County released a Draft EIR for a new General Plan. (*See* AR 9875). The record indicates that the project applicant had put the 281-unit project on hold pending the outcome of the new General Plan. (AR 11401, 1314).

The revised Monterey County General Plan went into effect on October 26, 2010. (AR 13574). Among other changes in the General Plan, there were changes to the Carmel Valley Master Plan (CVMP).[4] Policy CV-1.6, established a new development building cap of 190 units for all of Carmel Valley.[5] (AR 13616). CV-1.27 also required that residential development at the Rancho Canada Village site area "shall provide a minimum of 50% Affordable/Workforce Housing." (AR 13621).

Further, the 2010 General Plan's Land Use Element[6] raised the minimum affordable housing requirement for all new housing development across the County of Monterey to 25% and committed the County to amending its Affordable Housing Ordinance: "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 13707-13708). Finally, the General Plan mandated that the County develop a Development

---

[4] The CVMP is a section of the 2010 General Plan that applies specifically to the Carmel Valley. The policies of the CVMP are labeled as "CV."

[5] While the General Plan states the building cap is 200 units, under the terms of a settlement agreement with the County, the cap is in fact 190 units. (AR 19982).

[6] Policies of the Land Use Element of the 2010 General Plan are labeled as "LU."

Evaluation System (DES) to assess new development projects proposed outside of priority development areas based on a pass-fail grading system. (AR 13578 - 13579). The General Plan/LU-1.19 defines "Community Areas, Rural Centers and Affordable Housing Overlay districts" as "the top priority for development in the unincorporated areas of the County." (AR 13578). Because the Project is not located in any of the aforementioned districts, the Project is 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).

While the General Plan required the County develop a DES ***within 12 months*** of the County adopting the 2010 General Plan, the DES has not yet been developed. (AR 5041, 5260). The General Plan requires that development proposals, such as the 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). Since the DES has not been developed, the Project has not been reviewed for compliance with the DES.

In 2014, ten years after the 281-unit project was initially submitted to the County and after the County adopted a new General Plan, another developer, Rancho Canada Venture, LLC and R. Alan Williams (Real Parties), expressed interest in developing a project at the Rancho Canada Village site. (AR 18768). The Real Parties, on their own initiative, requested the County to process a newly conceived 130-unit project. (AR 18768).

The Real Parties, the County, and the EIR consultant worked in tandem to repurpose the DEIR prepared for the now abandoned 281-unit project. (*See* AR 17141 – 17326). However, the County's attempt to reuse this now defunct and outdated EIR was convoluted and inadequate to meet the requirements under CEQA. As discussed *infra*, the project description for the 2016 DEIR is unstable, shifting, and confusing since it identifies both the 281-unit and the 130-unit proposals as equally being the proposed project. (*See*, *e.g.*, AR 1314 ("Project Overview – Project Location: The Proposed Project and the 130-Unit alternative would be located at the

mouth of Carmel Valley….")). Not only is it clear that the Real Parties abandoned the 281-unit project, the 281-unit project is patently infeasible because of the 190-unit building cap for Carmel Valley as set forth in CV-1.6. (AR 13616, 19982). Nonetheless, the 281-unit project remained in the EIR document as part of the project description. (AR 1314)

CEQA requires "an accurate, stable and finite project description" to create "an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* ("*County of Inyo*") (1977) 71 Cal.App.3d 185, 199. The 2016 DEIR violates this requirement. The 2016 DEIR straddles both the 281-unit and the 130-unit proposals as the "Project." (AR 1315 – 1317). Once the County adopted the 2010 General Plan, it was clear that the 281-unit proposal was infeasible due to the 190-unit building cap established for the Carmel Valley pursuant to the new General Plan Policy CV-1.6 and the settlement agreement between the County and the Carmel Valley Association. (AR 13616, 19982). Thus, the true Project as the 130-unit proposal. Indeed, the Real Parties understood the true Project was the 130-unit proposal because they provided analysis to the 130-unit proposal "at a level of detail equal to that for the Proposed Project." (AR 1321). And, as early as June 2014, the Real Parties provided the County with a preliminary grading and drainage plan for the 130-unit project. (AR 15043). In addition, both the Planning Commission and the Board of Supervisors considered the vesting tentative map for the 130-unit project, not the 281-unit project. (AR 26, 98).

The failure to provide an accurate, stable and finite project description skews the alternatives analysis in the EIR because the legally required alternatives analysis was only provided for the 281-unit version of the project. (AR 1839 - 1856). "An EIR shall 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). The California Supreme Court has stated that the alternatives and mitigation sections are "the core" of an EIR. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029; *Preservation Action Council v. City of San Jose*

(2006) 41 Cal.App.4th 1336, 1350.

Leaving the 281-unit project in the DEIR analysis unduly confuses the scope and objectives of the project and establishes a false baseline against which the Project alternatives discussed in the EIR are measured. Cynically, the EIR also identifies the 130-unit project as the environmentally superior ***alternative***. (AR 134). This wholly defeats and misses the point of an alternatives analysis, which is to identify reasonable alternatives to the ***project***, and identify the environmentally superior alternative. 14 Cal. Code Regs. § 15126.6(e)(2). The alternatives section of an EIR requires analysis of alternatives to the project itself. The 130-unit project cannot be the environmentally superior alternative as a matter of law because it is the actual proposed project. The Recirculated DEIR also contained the same 281-unit project alternatives that were presented in 2008. (*Compare* AR 601 – 618 and AR 1839 – 1856). Furthermore, the 2016 DEIR does not provide alternatives to the 130-unit project. (AR 1839 – 1856).

Lastly, the 2016 Final DEIR proposes meretricious flood control measures as part of the project description that are currently speculative and further obfuscate what the true project is. (AR 3738: "The Project Applicant proposes to raise the Rio Road emergency access road. The raised road would essentially fill in the gap in the area from west of the Project Site to the Val Verde tie back levee."). However, there is no tie back levee. The tie back levee is a speculative possibility discussed in a Stormwater Management and Flood Control Report that is part of the County's separate efforts to identify a regional flood control solution. (AR 16192). The Real Parties themselves acknowledge that there is no tie back levee: "The tie back levee is being explored by the County in cooperation with the project applicant to identify a regional flood control solution." (AR 16048). As the Real Parties recognize, the tie back levee is only a "possible development." (AR 16049).

For these reasons, the petition for writ should be granted.

II. STATEMENT OF FACTS

On April 22, 2004, the Lombardo Land Group submitted a development project application to the County of Monterey. (AR 7222 - 7225). The application was for a Combined

Development Permit, rezoning, use permit, General Plan Amendment, a Specific Plan, and a Vesting Tentative Map for a "a proposed mixed-income new neighborhood." (AR 7222, 7224). The application proposed 280 homes, of which 50% would be deed-restricted Affordable and Workforce units. (AR 7224). On August 10, 2005, the County of Monterey deemed the development application complete and informed the applicant that the County was proceeding with the preparation of an EIR for the Rancho Canada Village Development Project. (AR 8136). The General Plan in effect at that time was the 1982 Monterey County General Plan. (AR 105: "Since the 1982 Monterey County General Plan that was in effect at the time the Project was deemed complete in August 2005…").

On August 28, 2006, the County filed a Notice of Preparation of a DEIR for the Project. (AR 8762). On January 14, 2008, a Notice of Availability for the DEIR for was filed. (AR 9349). The project identified in the 2008 DEIR was the "Rancho Canada Village Specific Plan." (AR 214). Consistent with the project application submitted in 2004, the 2008 DEIR described the Project as a development of a Specific Plan for a 281-unit neighborhood that "attempts to meet the need for affordable housing in Carmel Valley." (AR 237).

When the DEIR for the 281-unit project was released in 2008, more than fifty public comment letters were submitted. (AR 20051). The Petitioner submitted a 67-page comment letter in response to the DEIR. (AR 9644 -9714). A Final EIR was never issued for the Specific Plan, and the County never responded to these comments. (AR 3093). In September 2008, the County released a separate DEIR for its revision and update to the Monterey County General Plan. (AR 9875 – 11300). In February 2009, Alan Williams, one of the Real Parties, decided to "pull back on the RCV until the General Plan and [Carmel Valley Master Plan] have been processed." (AR 11401).

The County of Monterey adopted a new General Plan that went into effect on October 26, 2010. (AR 13574). The 2010 General Plan included substantial revisions to development standards and affordable housing requirements for the County, including specific affordable housing provisions for the newly designated Rancho Canada Village Special Treatment Area. (See AR 13578 – 13579, 13583, 13616 – 13617, 13621). Indeed, prior to the Board of

Supervisors' approval of the General Plan amendment which reduced the affordable housing required for the Project from 50% to 20%, General Plan Policy CV-127 specifically required 50% of development to be affordable in Rancho Canada Village. (AR 13621). In addition, CV-1.6 limited the creation of new residential subdivisions in all of Carmel Valley to 190 new units with a preference for projects including at least 50% affordable housing units. (AR 13616, 19982). The 2010 General Plan also made clear that, of the 190-unit cap, 24 had already been reserved for the Delfino property. (AR 13617). In light of the units already designated for the Delfino property, pursuant to the General Plan, any new development project in the Carmel Valley could only have a maximum of 166 units. Thus, the 281-unit project is infeasible under the 2010 General Plan. The County has stated: "the Project is subject to the 2010 General Plan." (AR 6).

During the EIR process for the General Plan update, the Real Parties were fully aware of the impending changes, and there was a conscious decision to not move forward with the Rancho Canada Village Specific Plan project pending the 2010 updates to the General Plan. (AR 11401).

On June 27, 2014, Real Parties' counsel sent a letter to the County identifying a new "project alternative for the Rancho Canada Village (RCV) Project." (AR 18768 – 18771). While 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).

The EIR consultant retained by the County assured the Real Parties that he would not call the 130-unit alternative the Proposed Project:

> 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 worked closely with the County to repackage the 2008 DEIR and to shift the project description of the DEIR to the 130-unit project, while attempting to keep the old 281-unit project description intact. (AR 17126 – 17129).

On June 1, 2016, the County released a "Recirculated" DEIR. (AR 18541). As an initial matter, the project no longer envisioned implementation of a Specific Plan. (AR 18541). In addition, the development was 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). Perhaps most notably, the Recirculated DEIR confusingly discusses the 130-unit in the project description in tandem with the 281-unit project. (AR 18541).

The County made clear that the 2010 General Plan applies to 2016 Project. (AR 19527). Instead of officially abandoning the infeasible 281-unit project, which was subject to the 1982 General Plan, the County, influenced by the Real Parties, decided to repackage the DEIR prepared eight years ago and to recirculate it in 2016 as encompassing both the defunct and abandoned 281-unit project and the new 130-unit project. (AR 18585).

On September 14, 2016, the Planning Commission held a public hearing to consider the 130-unit Project, ***not the now-obsolete 281-unit proposal***, to certify the EIR, and to amend the 2010 General Plan provisions pertaining to General Plan Policy CV-1.27. (AR 95). The Planning Commission failed to approve a motion recommending approval of the General Plan amendment for the Project. (AR 96). A "Draft Final Environmental Impact Report" was released in November 2016, before the Final EIR was issued, also in November 2016. (AR 2784, 3327) Notably, instead of moving forward with the outdated 281-unit proposal, the Real Parties prepared a vesting tentative map for the 130-unit Project prior to the Board of Supervisors' hearing concerning Rancho Canada Village. (AR 20268 - 20269). On December

13, 2016, the Board of Supervisors' certified the Final EIR for the Project, adopted a Statement of Overriding Considerations, amended General Plan Policy CV-1.27, and approved the vesting tentative subdivision map for the 130-unit project. (AR 98).

The Petitioner filed a petition for writ of mandate on January 12, 2017.

III. LEGAL ARGUMENT

A. Standard of Review

Under a traditional mandamus proceeding for failure to execute a mandatory duty, abuse of discretion includes a failure to proceed in a manner required by law. 8 Witkin Cal. Proc. (5th ed. 2008), *Extraordinary Writs*, § 95. "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. Here, the County had a mandatory duty to promulgate the DES within twelve months of adopting the General Plan, as set forth in General Plan Policy LU-1.19. (AR 13579). Policy LU-1.19 also requires the County to use the DES to evaluate development proposals, such as the Project. (AR 13578). The County also has a mandatory duty to update its affordable housing ordinance pursuant to General Plan Policy 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). The County committed itself to these provisions when it adopted the 2010 General Plan and yet has not complied with these mandatory duties. Therefore, the County's action fails to conform to the procedures set forth in its own General Plan. This constitutes a failure to proceed in a manner required by law.

The County maintains that the Project complies with the County's Affordable Housing Ordinance. 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* (2004) 106 Cal.App.4th 204, 219. Further, 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." *Id.* "The interpretation of both statutes and ordinances is ultimately a judicial function." *Id.* "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 Court should independently review the County's interpretation and application of the Affordable Housing Ordinance to the Project.

In the context of the CEQA action, 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 563-564. "[T]he inquiry shall extend only to whether there was a prejudicial abuse of discretion." Pub. Resources Code § 21168.5. "[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (citing Pub. Res. Code § 21168.5). "[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.

The Petitioner alleges that the County has violated CEQA's procedural mandates by failing to provide a stable and finite project description. This abuse in process in turn skews the entire alternatives analysis. The court determines "de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements. *Banning Ranch Conservancy v. City of Newport Beach*, *supra*, 2 Cal.5th at 935 (citing *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at 564. "Whether an EIR has omitted essential information is a procedural question subject to de novo review." *Id*. (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). Here, the petition challenges the County's certification of an EIR that omitted essential information as to the actual nature of the project subject to environmental review. This constitutes a procedural violation, and the Court examines de novo whether the County failed to proceed in a manner required by law.

B. The County Is Long Overdue in Meeting Its Responsibilities in Enacting Measures that Apply to a Multitude of Developments in the County, Including the Project

1) The County is in violation of the Mandatory Terms of the 2010 General Plan because It Has Not yet Established a Development Evaluation System

The County is noncompliant with its General Plan because it has not yet created the DES. The 2010 Monterey County 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 General Plan became effective on October 26, 2010. (AR 13579). Almost seven years after the 2010 General Plan was adopted, the County has still not promulgated the DES. (AR 3860 ("the DES is not yet in place")). The EIR prepared for the 2010 General Plan discusses the importance of the DES: "This system includes minimum requirements for affordable housing before a project can be considered. The evaluation system will [sic] includes eight specific criteria and will establish a minimum passing score." (AR 11825). The 2010 General Plan EIR concludes:

> by imposing an evaluation system for development outside these focused growth areas [Community Areas, Rural Centers, and Affordable Housing Overlay districts] with minimum affordability requirements as well as other stringent criteria, and by requiring that new growth be adjacent to existing growth that has adequate services, growth outside focused growth areas would be extremely unlikely to exceed DEIR assumptions.

(AR 11825 - 11826). The EIR for the 2010 General Plan explicitly recognized the importance of the DES to manage growth outside of "focused growth areas," such as Community Areas and Rural Centers, and to maintain the integrity of growth assumptions set forth in the environmental review process on which the 2010 General Plan is based. The County itself admits that the DES

still has not yet been established, while also recognizing its importance to County planning:

> Once established (the DES is not yet in place), the DES would provide a quantitative means of evaluating development proposed in areas of the County not especially targeted or suited for future development. Essentially, the objective of the DES is to discourage or prevent "leap frog" development not proximate to urbanized or community areas where public services and facilities already exist. (AR 3860).

The DES is critical to ensuring that development accounts for traffic, water and wastewater, and is compatible with the policies of the General Plan. General Plan Policy LU-1.19 states:

> Community Areas, Rural Centers and Affordable Housing Overlay districts are the top priority for development in the unincorporated areas of the County. Outside of those areas, a Development Evaluation System shall be established to provide a systematic, consistent, predictable, and quantitative method for decision-makers to evaluate developments of five or more lots or units and developments of equivalent or greater traffic, water, or wastewater intensity. The system shall be a pass-fail system and shall include a mechanism to quantitatively evaluate development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the overall quality of the development.

(AR 13578 – 13579). In addition, LU-1.19 requires a development proposal falling outside of "focused growth areas," such as the Project, to demonstrate minimum affordable housing requirements before such development proposals are even considered: "Residential developments shall incorporate the following minimum requirements…. outside of a Community Area or Rural Center: 35% affordable/Workforce housing (25% inclusionary; 10% Workforce) for projects of five or more units to be considered." (AR 13579). This is entirely consistent with the analysis set forth in the Final EIR for the 2010 General Plan which explicitly describes how the DES "includes minimum requirements for affordable housing before a project can be considered." (AR 11825).

Because the County has not developed the DES, projects outside Community Areas, Rural Centers and Affordable Housing Overlay districts cannot be considered and approved without the required evaluation safeguard provided by the DES. The County's failure to develop and implement the DES wholly defeats the General Plan's policy of evaluating projects in a pass/fail method to ensure reasonable development outside of "focused growth areas." (AR 3860, 11825, 13578 – 13579). Therefore, the Petitioner requests that the Court issue a writ of

mandate directing the County to comply with the General Plan's mandated creation of the DES, which is six years overdue.

2) The County's Affordable Housing Ordinance Is Inconsistent with the 2010 General Plan's Affordability Mandates

The 2010 General Plan Land Use Policy 2.13 states:

> The County shall assure consistent application of an Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and workforce income households. 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 13853 – AR 13584). Nearly seven years after the 2010 General Plan was approved, the County's Affordable Housing Ordinance has not been updated to reflect these new requirements. The current ordinance falls legally short of the General Plan mandates contained in Policy LU-2.13.

The County's current Affordable Housing Ordinance provides: "To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the total number of units approved for the residential development." (Petitioner's First Request for Judicial Notice "P RJN" Exh. A, Section 18.40.070). In addition, the County's current Affordable Housing Ordinance requires provision of a range of affordable units, these requirements are the same for both rental and for-sale units:

> eight percent of the total units in the residential development shall be set aside for moderate income households, six percent of the total units in the development shall be set aside for low income households, and an additional six percent of the total units in the development shall be set aside for very low income households.

(P's RJN, Exh. B, Section 18.40.110(A)).

As stated above, the 2010 General Plan requires "consistent application of an Affordable

Housing Ordinance that requires 25% of new housing be affordable to very low, low, moderate, and workforce income households." (AR 13853). Therefore, the County's current Affordable Housing Ordinance, which requires only 20% affordable units for new development, is inconsistent with the 2010 General Plan's requirements.

State planning and zoning law provides:

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

Gov. Code § 65860(c). The County's Affordable Housing Ordinance is a zoning ordinance since it regulates the use of land especially with respect to buildings, structures, and residences. Gov. Code § 65850. The County's Affordable Housing Ordinance is facially inconsistent with the 2010 Monterey County General Plan since it only requires 20% of the total number of new units be affordable instead of 25%. Under the Government Code, the County has a mandatory duty to amend its zoning ordinances, which includes the Affordable Housing Ordinance, to reflect the requirements unequivocally set forth under the 2010 General Plan "within a reasonable time." Gov. Code § 65860(c). The County has failed to amend the Affordable Housing Ordinance to make it consistent with the General Plan in a reasonable amount of time since it has been nearly ***seven years*** since the County adopted the 2010 General Plan.

Because the County has not amended its Affordable Housing Ordinance to be consistent with the 2010 General Plan within a reasonable time of the plan's adoption, the Petitioner requests that the Court issue a writ of mandate directing the County to comply with the General Plan's mandatory duty to amend its affordable housing ordinance.

C. The Project Fails to Comply with the General Plan Because the County Failed to Score the Project Against a DES, which is a Mandatory Process Under the General Plan

As discussed *supra*, the County is currently in violation of its own General Plan because it has not yet established the DES for developments located outside of Community Areas or

Rural Centers. The County may not even consider, let alone, approve projects that are subject to the DES without having first established such the DES. (AR 11825, 13579). This is critical since developments inside Community Areas and Rural Centers are a "top priority for development," with developments outside these areas receiving a "pass-fail" grade based on the DES in recognition that these areas are "not especially targeted or suited for future development." (AR 3860, 13578 – 13579). The Project is a development not located in a Community Area, Rural Center, or Affordable Housing Overlay district and is subject to the DES. (AR 8).

The Project received no evaluation under this critical pass-fail system. Indeed, the critical nature of the DES is emphasized by the fact that the General Plan states explicitly that the DES shall be developed "within 12 months" of the approval of the General Plan. (AR 13579). Accordingly, the Project does not comply with General Plan Policy LU-1.19. A "'project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. [Citation.]'" *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 782 (citing *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994). Further, "a project must be compatible with the objectives and policies of the general plan and a project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." *Id*. (citing *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336).

D. The Project Was Exempted from the General Plan's Requirements for Affordable Housing Applicable to Other Developers, and the Project Does Not Even Comply with the Current Affordable Housing Ordinance

The Project does not comply with any General Plan policies related to affordability. The County admitted this: "The 130-unit Alternative is not consistent with any [General Plan] policies related to affordability." (AR 19528).

There are three separate affordability policies set forth in the General Plan. As discussed

supra, Policy LU-1.19 establishes that project 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 its General Plan, approving a special exemption from all General Plan affordability requirements, specifically for the Project. (AR 102).

As stated *supra*, the General Plan caps new development at 190-units for the Carmel Valley. (AR 13616, 19982). 24 of these units "are reserved for consideration of the Delfino property." (AR 13617). The Project will absorb another 130 units, leaving only 36 units remaining under the development cap. This Project offers one of the last remaining opportunities to develop affordable housing in the Carmel Valley pursuant to the development cap. Indeed, prior to the Board of Supervisors' approval of the General Plan amendment which reduced the affordable housing required for the Project from 50% to 20%, the General Plan specifically required 50% of development to be affordable in Rancho Canada Village. (AR 13621). Several comments submitted in response to the Recirculated DEIR raise specific questions about compliance with applicable affordability policies and the current Affordable Housing Ordinance. (AR 3006, 3032, 3091). The Recirculated DEIR also states: "The Project Applicant has been asked to produce evidence supporting the claim that 50% affordability is not feasible for the 130-Unit Alternative but to date no evidence has been provided." (AR 3092).

In a pattern of providing a false comparison to the defunct 281-unit project, the Real Parties attempt to argue that while a 50% affordability requirement would be possible under a 281-unit scenario, it would not be possible with 130-units: "The higher density allowed under the CV 1.27 Special Treatment is the only economically feasible manner in which 50% affordable/workforce housing can be provided." (AR 20053). However, the Real Parties never

provided evidence in support of its assertion that the Real Parties could provide 50% affordable/workforce housing only if there were 281-units. (AR 3092). In addition, 281-units is impossible under the General Plan. Thus, the 50% affordability requirement was contemplated for something less than 166 units (190-unit cap, minus 24 units for the Delfino property, equals 166). On account of the Real Parties' bald and unsupported assertion that they cannot provide 50% affordable housing as required for the Rancho Canada Village area, the County eviscerated all of the affordability requirements set forth in the General Plan that are applicable to this Project. (AR 6 - 7).

While the Board of Supervisors exonerated the Real Parties from complying with the General Plan's affordability requirements, it did still mandate that the Project meet the 20% affordable housing requirement that synchronizes with the existing Affordable Housing Ordinance. The County's current Affordable Housing Ordinance provides: "To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the total number of units approved for the residential development." (P's RJN, Exh. A Section 18.40.070). Of the 130-units approved, the Project only includes 25 ***moderate income*** units, or 19% of the total units approved (25/130=.1923). (AR 5036). The County admits that the Project does not comply with the ordinance: "It's clear that the 130-unit Alternative does not meet the Inclusionary Ordinance's 20% requirement." (AR 19527). The Real Parties' legal representative forwarded the position that 25 units would satisfy the 20% affordable unit requirements required under the County's Affordable Housing Ordinance. (AR 19540). The justification she provided is that "Lot 130 should also not be included in the calculation of the affordable housing requirement because Lot 130 already has an existing residence. Thus, the calculation is based on 124 new units (130 minus the 5 existing PQP, and minus the existing unit on Lot 130)." (AR 19540). County Planning Staff made clear that this analysis did not jive:

> 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 approved then at least 20% of that number, or a minimum of 26 units, would need to be Inclusionary. The minimum 20% Inclusionary requirement breaks down as (18.40.110A) 8% Moderate, 6% Low and 6% Very Low Income.

(AR 19539). The County Planning Staff concluded: "As currently proposed, 25 Moderate Income units out of 130 total units does not comply with the Inclusionary Ordinance." (AR 19539).

Even the DEIR 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). Nonetheless, the County still approved the Project with only 25 moderate income units in violation of the Affordable Housing Ordinance. (AR 109: "Under the proposed General Plan amendment, 20% of the units would be deed restricted to be affordable to moderate income households…"). The County ordinance makes clear that the 20% is calculated for "the total number of units approved for the residential development." (P's RJN, Exh. A, Section 18.40.070). The Affordable Housing Ordinance calculates affordability requirements based on "units approved" not existing or new lots.

In addition, the Affordable Housing Ordinance requires a range of affordable units. This mandatory range is the same regardless of whether the units are rental or for sale:

> [E]ight percent of the total units in the development shall be set aside for moderate income households, six percent of the total units in the development shall be set aside for low-income households and an additional six percent of the total units in the development shall be set aside for very low income households.

(P's RJN, Exh. B Section 18.40.110(B)). Of the units the Project is setting aside as affordable units, 100% of these units are moderate-income units, to the exclusion of low-income and very low-income residents. (AR 109). This fails to comply with the County's existing Affordable Housing Ordinance, as the County planning staff itself recognized. (AR 19527). Therefore, in approving the Project, the County failed to proceed in a manner required by law. Nothing in the General Plan amendment for the Project exonerates the Real Parties from developing the 20% affordable housing in accordance with the existing Affordable Housing Ordinance. In the Staff

Report prepared for the Planning Commission, the County recognized that 25 units did not comply with the County's affordable housing requirements: "The Alternative seeks approval of 130 total units, 20% of which is 26; therefore, a minimum of 26 affordable, or inclusionary, units would be required, not 25." (AR 3859).

E. The EIR for the Project Failed to Comply with CEQA

1) The County Failed to Provide an Accurate, Stable and Finite Project Description as Required by CEQA

The EIR violates CEQA's prohibition against providing a shifting project description. The seminal California Supreme Court case concerning an EIR's project description held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." *County of Inyo*, *supra*, 71 Cal.App.3d at 199. In *County of Inyo*, the City of Los Angeles unlawfully presented a project description that attempted to minimize the project's impacts. *Id*. at 193. While the City of Los Angeles was required to analyze increased pumping for water export, it downplayed the amount of water that would be exported by obscuring the project description in a manner that failed to adequately communicate the project's true impacts. *Id.* at 195.

In the case at bar, the County of Monterey has prepared an EIR that similarly obfuscates what constitutes the actual project. Here, the County unlawfully presented a dual project description in an attempt to bootstrap an entirely new project into an obsolete 2008 DEIR. In addition, the County sought to create the appearance that in choosing the 130-unit project, the County was selecting the "environmentally superior alternative." (AR 134: "The 130 unit Alternative which the Board is approving is the environmentally superior alternative identified by the EIR."). But this is completely contrary to the CEQA process regarding alternatives – the 130-unit proposal *is* the proposed project and therefore cannot be presented as an environmentally superior alternative to a dead project. The County's blending of the project description with the proposed alternatives violates the requirement that a lead agency provide a

stable and finite project description. *County of Inyo*, *supra*, 71 Cal.App.3d at 199.

From 2008 to 2016 the County shifted its project description from a Specific Plan containing a 281-unit project for which the express objective was to provide affordable housing to meet the needs of the Carmel Valley, to a largely market-rate project with 130 units that does not meet the affordable housing requirements of the General Plan or even the existing Affordable Housing Ordinance. (AR 4). The County released a Recirculated DEIR eight (8) years after the first DEIR was circulated. (AR 1314). The recirculated DEIR improperly presents the project description as encompassing both a 281 and 130-unit proposal. (AR 1314). This in turn created confusion and misunderstanding. The public could not assess the contours of the true Project and project alternatives. The Real Parties advocated for the 130-unit project to be framed as an "alternative." (AR 17127, 17251, 18768). However, even the County understood the 130-unit project to be a wholly new project, and the real project under consideration. (AR 17127, 17129).

Under the 2010 Monterey County General Plan, the 281-unit project is not viable. With encouragement from the Real Party, the County recirculated a DEIR that erroneously discussed both the 281-unit and the 130-unit options as being the proposed project. (AR 1314). However, it was clear that the 130-unit proposal was the actual project and the 281-unit project was no longer relevant. A new grading and drainage plan was submitted for the 130-unit proposal. (AR 17802, 17804). At the November 16, 2016 Planning Commission hearing, the draft Resolution itself contemplated not the 281-unit project but the 130-unit project:

> Resolution by the Monterey County Planning Commission making recommendation to Board of Supervisors to:
>
> 1) Certify the Rancho Canada Village Environmental Impact Report;
> 2) Adopt CEQA Findings and a Statement of Overriding Considerations;
> 3) Amend Policy CV-1.27 of the 2010 General Plan/Carmel Valley Master Plan reducing the proportion of affordability housing required from 50% to 20%;
> 4) Rezone site from Public/Quasi-Public to Medium-Density Residential;
> 5) Approving the Vesting Tentative Subdivision Map for the 130-unit Alternative

(AR 4123). Similarly, 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 record demonstrates in abundant detail that once the 130-unit proposal was conceived in 2014, it became the true consideration in relation to the Rancho Canada Village Project, "At 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 4130). 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).

a) The County Changed the Project Description from 2008 to 2016

In 2008, the County circulated a Project Description for the Rancho Canada Village Specific Plan as follows:

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

(AR 237). The 2008 Project Description went on to describe the Project as including "A Specific Plan" and "Development of Public Facilities and Installation of Infrastructure." (AR 9349). In 2008, the economic goals of the Project were to "Create Affordable and Workforce housing that remains affordable for as long as possible," and to "Create a mixed-income community with a range of housing opportunities across the economic spectrum." (AR 236).

The social goals of the 2008 Project were to "Create a diverse, mixed-income community with a full spectrum of life cycle housing opportunities" and to "provide 50% Workforce and Affordable Housing units to serve the housing needs of people employed within the boundaries of the local Carmel Valley and Monterey Peninsula area." (AR 237). The Project Description provides that "Fifty percent of the homes (140 units) are proposed to be deed-restricted as affordable and workforce units (per the pricing and eligibility requirements of Monterey County's Housing Ordinance." (AR 237). By 2016, these goals had disappeared, and the project

description had completely shifted.

The County "recirculated" the 2008 DEIR on June 1, 2016, more than eight years after the first DEIR was circulated. (AR 18541). The Project no longer included a Specific Plan. (AR 18541). In addition, the Project no longer proposed to "meet the need for affordable housing in Carmel Valley" as was the express objective in 2008. (AR 237). Instead, the 2016 Project Description is as follows:

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

(AR 18541). As demonstrated above, the 130-unit alternative is recognized and described in the project description itself. The 130-unit proposal is analyzed within Chapter 2 of the Recirculated DEIR, as the proposed project. (*See* AR 1293: "Chapter 2 Project Description…130-Unit Alternative," 1348). Chapter 2 of the Recirculated DEIR, pertaining to Project Description, contains an extensive analysis of the 130-unit proposal equal to the 281-unit and not afforded to any of the other alternatives. (AR 1365 – 1375). Although it was presented as an "alternative" in the Project Description, tellingly, the 130-unit proposal is not analyzed in the alternatives section of the Recirculated DEIR. The Alternatives Analysis of the Recirculated DEIR does not discuss the 130-unit as an alternative, instead admitting that the "130-Unit Alternative is described in Chapter 2, *Project Description*, and analyzed in Chapter 3, *Environmental Analysis*, at a level of detail equal to that for the Proposed Project. (AR 1843 – 1865). The County tries to have it both ways, describing the 130-unit proposal as the new project and yet maintains that the

130-unit proposal is the "environmentally superior alternative." This results in an end-run around the alternatives analysis for the Project. Not only had the project objectives changed from 2008 to 2016, the project description itself had shifted. The Recirculated DEIR is fatally flawed because it straddles both the 281-unit Project and a new 130-unit Project as the project. *County of Inyo*, *supra*, 71 Cal.App.3d at 199.

> Notably, the 2016 Final EIR also added a wholly new element to the project description:
>
> Under the 130-Unit Alternative, the Project Applicant proposes to raise the Rio Road emergency access road. The raised road would essentially fill in the gap in the area from the west of the Project Site to the Val Verde tie back levee. This would directly address the large potential flood flow path down Rio Road from the river, and provide a flood control benefit to the surrounding area. (AR 3738).

As discussed *supra*, there is no tie back levee. The tie back levee is a mere speculation that is part of the County's wider efforts to identify a regional flood control solution considered in a wholly separate process. (AR 16192: "Proposed perimeter protection projects for CSA-50 Sub-Area 3 (Val Verde Drive) Tie-Back Protection 280 LF new floodwall, 1,650 LF earthwork to raise Val Verde Drive, 2,600 LF new DA-27 channel"). As the Real Parties themselves acknowledge, the tie back levee, "is being explored by the County in cooperation with the project applicant to identify a regional flood control solution." (AR 16048). The Real Parties also acknowledge that it the tie back levee is only a "possible development." (AR 16049). This purported "flood control benefit" is predicated on a speculative tie back levee. This creates the misleading impression that such a benefit is part of the project, when in reality it is purely speculative and unenforceable. As demonstrated, the pattern of continuous shifting project descriptions prevents the EIR from being "a document of accountability." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights*").

b) The Actual Project Contemplated by the DEIR Is the 130-Unit Project

When the County revisited its 2008 DEIR in or around 2014, the EIR consultants themselves understood the 130-unit project to be a wholly new project: "Would you like the new project name to be: Rancho Canada Village Project?" (AR 17129). The biological resources

consultant also understood that "alternative project plans are now being submitted to Monterey County for review." (AR 15163). The 2016 Rancho Canada Administrative DEIR discusses the 130-unit proposal in the Project Description. (AR 15191). The County had provided draft language which indicated an understanding that the 130-unit proposal was part of the revised project description: "The project description will be revised to include the 130-unit Alternative." (AR 17127). A new grading and drainage plan was submitted for the 130-unit proposal. (AR 17802, 17084). Monterey County issued a memo to the Housing Advisory Committee in February 24, 2016 stating that the applicant "proposes two residential subdivision scenarios for the West Course of the Rancho Canada Gold Club…..One proposal (Project) is a 281-unit residential subdivision consisting of a mix of single-family residences…. The alternative proposal (Alternative) is a lower-density, 130-unit subdivision consisting primarily of single-family attached and detached lots…." (AR 17813). "An environmental impact report (EIR) analyzing both subdivision scenarios will be prepared for the project." (AR 17813). As noted, at the November 16, 2016 Planning Commission hearing, a wholly new tentative map for the 130-unit project was considered. (AR 4122). The County's rendering of the project description resulted in the public understanding that the 130-unit project was the new project being proposed. And yet, the project description still clung to the fiction that the abandoned 281-unit project was still being considered.

c) The Record Demonstrates that the Public Was Confused by the Indefinite Project Description

In *County of Inyo*, the court noted, "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input. Among the public comments in the final EIR were many objections and expressions of uncertainty aroused by the department's homemade project description." *County of Inyo* at 197. The Supreme Court further admonished: "The incessant shifts among different project descriptions do vitiate the city's EIR process as a vehicle for intelligent public participation." *Id*. By contrast, "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject

environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.

In the case at bar, multiple expressions of uncertainty were voiced regarding the EIR's shifting project description:

- "The applicant has stated, as has the County, that the applicant has essentially abandoned its original project and instead the applicant is proceeding with its preferred alternative, the 130-unit Alternative Project. But the 130-unit alternative is inconsistent with the applicant's own goals. For example, the 130-alternative does not include low and very low housing. Thus, the 130-alternative does not comply with the claimed Economic Goal to 'Create a mixed-income community with a range of housing opportunities across the economic spectrum.'" (AR 2874).

- The Open Monterey Project submitted comments stating: "The environmental analysis is inadequate due to the incomplete project description, incomplete and inaccurate baselines…" (AR 3010).

- A private citizen submitted comments understanding the Proposed Project to be the 130 unit alternative: "I believe the proposed project – even at the 130-unit alternative size – will so substantially negatively impact Carmel Valley residents because of traffic and transportation impacts…" (AR 3053).

- LandWatch of Monterey County also submitted comments detailing the confusing project description: "It is unclear what the proposed project is. While the RDEIR identifies the 281-unit project as the proposed project, at the Carmel Valley Land Use Advisory Committee hearing the applicant publicly identified the 130-unit alternative as the proposed project. Additionally, the 130-unit project is addressed separately from the other project alternatives and detailed environmental analyses are focused on this alternative alone. As noted on RDEIR p. 5-5, the 130-Unit Alternative is described in Chapter 2 and analyzed in Chapter 3 at a level of detail equal to that for the Proposed Project." (AR 18641).

- Another public comment submitted stated: "For the sake of a clearly defined project and a proper environmental review, we instead urge the County to (1) reject the current form of the EIR that muddles 2 projects together under differing General Plan and (2) require the applicant to prepare an EIR that directly and solely addresses the smaller revised project under the County's current General Plan." (AR 19463).

As demonstrated by the comments provided, the project description was shifting and

unclear. Because the project description was unstable, the public was not properly informed as to the true objective and scope of the project. The County presented both a 281-unit proposal that provides 50% affordable housing as well as a 130-unit proposal that does not provide even the minimum affordable housing required under County Code as the "project." Further, the County attempted to cast the 130-unit project also as "the environmentally superior alternative." (AR 134). This improper process deprived the public of a meaningful assessment of the true project and violates the procedural protections afforded under CEQA for public engagement and participation.

2) The DEIR's Alternatives Analysis Is Fatally Flawed

a) The Final EIR Erroneously Identifies the 130-unit Project as the Environmentally Superior Alternative When It Is the Project Itself

The environmentally superior alternative identified in an EIR needs to be a potential *alternative* to the project, not the project, itself. *See* 14 Cal. Code Regs. § 15126.6. The whole point of the alternatives analysis is to "describe a range of reasonable alternatives to the project." 14 Cal. Code Regs. § 15126.6(a). The EIR fails to provide an adequate alternatives analysis because the Final EIR identified the 130-unit project as "the environmentally superior alternative." (AR 134, 1328). However, this is circular reasoning. It is uninformative to present the proposed project as the environmentally superior alternative. CEQA Guidelines provide that the "EIR should include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." 14 Cal. Code Regs. § 15126.6(d). The EIR must also identify the environmentally superior alternative. 14 Cal. Code Regs. § 15126.6(e)(2). The EIR fails to do so because it simply compared the proposed project with itself and artificially designated the project as the environmentally superior project. Thus, the County failed to proceed in a manner required by law.

b) The Unstable and Shifting Project Description Unlawfully Skews the Alternatives Analysis

In addition, without a stable Project Description, it is impossible to adequately identify

feasible alternatives, as required by CEQA. The recirculated DEIR describes the project as being both a 281-unit and a 130-unit development. (AR 1314). But the alternatives analyzed by the recirculated DEIR are only alternatives to the abandoned 281-unit project, and not the actual 130-unit project. (AR 1843 – 1856). The EIR confuses and obfuscates the true nature of the proposed project, inconsistently mixing and matching analyses for the two projects. This precludes meaningful assessment of the alternatives presented, because there can be no meaningful evaluation and comparison of the alternatives with a wildly unstable proposed project.

"The core of an EIR is the mitigation and alternatives sections." *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at 564. "The Legislature has declared it the policy of the State to 'consider alternatives to proposed actions affecting the environment.'" *Id*. at 565 (citing Pub. Resources Code § 21001(g); *Laurel Heights Improvement Assn. v. Regents of University of California*, *supra*, 47 Cal.3d at 400). "The purpose of an environmental impact report is to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Pub. Resources Code § 21002.1(a). "The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." Pub. Resources Code § 21061.

The purpose of an EIR's discussion of alternatives is to identify ways to reduce or avoid significant environmental effects of the proposed project. *Laurel Heights Improvement Ass'n*, *supra*, 47 Cal.3d at 403. The Supreme Court of California has stated:

> [A]n EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal; and (2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved.

Citizens of Goleta Valley v. Board of Supervisors, *supra*, 52 Cal.3d at 566 (internal citations

omitted).

It follows that where a proposed project is unstable or wrongly identified, as occurred in the Recirculated DEIR, the alternatives analysis will also be erroneous. The 2008 DEIR contained six alternatives (AR 604 – 618). Three of the six alternatives also proposed 281-units, but with different site configurations. (AR 604 – 618). In 2016, the Recirculated EIR contained the same six alternatives. (AR 1843 – 1856). However, the alternatives section to the Recirculated EIR also included a confusing additional paragraph stating: "The 130-Unit Alternative is described in Chapter 2, *Project Description*, and analyzed in Chapter 3, *Environmental Analysis*, at a level of detail equal to that for the Proposed Project." (AR 1843). The 130-Unit project is simultaneously cast as an "alternative" and the proposed project itself.

In 2016, even though the Project now contemplates a 130-unit proposal, Alternatives 2, 5, and 6 still only discuss alternative site locations for a 281-unit project. (AR 1847, 1854 – 1856). It is improper to predicate the alternatives analysis on an essentially abandoned 281-unit project instead of the actual 130-unit project now championed. The result is a faulty alternatives analysis that fails to offer a reasonable range of alternatives to the 130-unit project, as required under law. *See Citizens of Goleta Valley*, *supra*, 52 Cal.3d at 566.

It is clear that the Recirculated DEIR recognized the 130-Unit as the proposed project, indeed it stated in writing that the 130-Unit project is analyzed "at a level of detail equal to that for the Proposed Project." (AR 1843). It follows that the alternatives analysis for the DEIR must focus on alternatives to the 130-unit Project. But the Recirculated DEIR does not frame any alternatives in the context of the 130-unit Project, because it still analyzes only alternatives to the abandoned 281-unit project. (AR 1843 – 1856). Moreover, under the 2010 General Plan, the alternatives contemplating 281-units are not feasible because of the building cap. CEQA mandates that the lead agency consider a range of feasible alternatives. This was not fulfilled in the Recirculated DEIR and constitutes a failure to proceed in a manner required by law.

c) The Recirculated DEIR Presented a Majority of Infeasible Alternatives, Which is Contrary to Law

The County evaluated the Project for consistency with the 2010 General Plan. (AR 6:

"The Project is subject to the 2010 General Plan"). As discussed above, the 2010 Monterey County General Plan includes the Carmel Valley Master Plan (CVMP). (AR 13616). The CVMP established a building cap in the Carmel Valley. (AR 13616). "The establishment of the 190-unit cap under CVMP Policy CV-1.6 is a guiding policy in terms of land use, development, and traffic control throughout Carmel Valley. (AR 5035). The General Plan makes clear that of the new residential units allowed in the Carmel Valley, 24 have already been reserved for the Delfino property. (AR 13167). At most, a feasible alternative could propose is 166-units.

An EIR must examine a range of alternatives that are "potentially feasible alternatives that will foster informed decisionmaking and public participation." 14 Cal. Code Regs. § 15126.6(a). The CEQA Guidelines define feasible as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." 14 Cal. Code Regs. § 15364.

> The purpose of an EIR is not to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated. 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.

Alternatives 2, 5, and 6 of the 2016 recirculated DEIR propose projects consisting of 281 units and Alternative 3 proposes a 186-unit project. (AR 1847 – 1856). These four alternatives are all facially infeasible because it would not be possible to accomplish these alternative projects in a successful manner within a reasonable period of time, specifically taking into account the development cap established under the General Plan and ensured by the terms of the County's settlement agreement. The County failed to proceed in a manner required by law because the EIR did not examine a range of potentially feasible alternatives.

IV. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of mandamus be

issued directing the Respondents to expeditiously comply with the 2010 General Plan by promulgating the DES, and by amending its Affordable Housing Ordinance to be consistent with the General Plan's 25% affordability requirement. The Petitioner also requests that a writ of mandamus be issued directing the Respondents to rescind the Project approvals because of the Project's failure to comply with the General Plan, the Affordable Housing Ordinance, and CEQA.

Dated: July 7, 2017

WITTWER PARKIN LLP

By: Pearl Kan
Attorneys for
CARMEL VALLEY ASSOCIATION, INC.