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ENCINITAS RESIDENTS FOR
RESPONSIBLE DEVELOPMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – NORTH COUNTY DIVISION

ENCINITAS RESIDENTS FOR RESPONSIBLE DEVELOPMENT, an unincorporated association,

Petitioner and Plaintiff,

v.

CITY OF ENCINITAS; and DOES ONE through FIFTEEN, inclusive,

Respondent and Defendant.

ENCINITAS BLVD APARTMENTS 6.95, LP, and DOES SIXTEEN through THIRTY inclusive,

Real Parties in Interest.

Case No.: 37-2022-00003664-CU-WM-NC

[Action filed January 28, 2022]

PLAINTIFFS' TRIAL BRIEF

I/C Judge: Hon. Robert P. Dahlquist
Dept.: N-29
Trial Date: June 29, 2023
Time: 1:30 p.m.

Petitioner and plaintiff Encinitas Residents for Responsible Development ("ERRD") trial brief in support of its *Second Amended Petition* ("SAP") that challenges multiple procedural and substantive anomalies and violations that resulted from respondent and defendant City of Encinitas ("City") and the real party in interest Applicant Encinitas Blvd Apartments 6.95 ("Applicant").[1]

[1] Referred to interchangeably throughout the administrative record and this briefing as "Applicant" "real party" "Encinitas Blvd Apartments 6.95" "EBA" or as "Applicant" or the "Applicant Project," name of the real party's leading and principal partner, Randy Goodson, applicant.

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I.

INTRODUCTION

This case represents a challenge to City's processing and approval of two primary applications and decisions regarding (1) a development application (Design Review Permit No. DR-003487-2019 ("DRP") and (2) a legal parcel lot line reconfiguration ("Lot Consolidation") for the construction of a 250-unit apartment development at 2220, 2228 & 2230 Encinitas Boulevard, APNs: 259-231-28, 30, 31 & 32 ("Project").

First, the June 8, 2022 reopening and reconsideration of the DRP is legally infirm because City had no authority or jurisdiction to "reconsider" the November 10, 2021 City Council denial of a DRP appeal and rejection of the Project. The Planning Commission denied and rejected the DRP on August 19, 2021 (AR 7738-7739) and City Council affirmed Planning Commission's denial on November 10, 2021 (AR 6-13). The City Council's subsequent decision to "bring back" and "reconsider" (only) the appeal of the Applicant on June 8, 2022 (AR 4-29) is both a violation of law and denied ERRD a right to also have its appeal reheard, including additional evidence of impacts to public health and safety that became available between the November 10, 2021 denial and subsequent June 8, 2022 City Council hearing. (*See* AR Supp.AR 1711-1712)

Second, the City Council's November 10, 2021 final approval and granting of the subject Lot Consolidation, made by denying ERRD's appeal of the August 19, 2021 Planning Commission approval (AR 1-5), is legally infirm because it did not consolidate (via lot line adjustment)[2] the entirety of the existing four (4) legal parcels that comprise the Project site. Instead, City accepted the Applicant's argument that a small 40-foot wide vacated road portion of APN 259-231-28, that the Applicant defined as "Lot 2" (of 4 lots), was a historical and stand-alone legal parcel under state and local subdivision laws. The Applicant's arguments, adopted

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[2] The terms "Lot Consolidation," "merger," "boundary adjustment,' and "lot line adjustment" are used interchangeably to connotate and describe the November 10, 2021 action to consolidate lots as a possible exception from a subdivision under the state Subdivision Map Act.

by City, that the Lot 2-B road portion (1) had been legally described in a recent and prior deed, and (2) was surrounded by other legal parcels, offend law and doctrine about what is a *legal parcel* under state subdivision laws and City's own regulatory "Determination of Legal Parcel," updated Nov. 27, 2011 (hereinafter, "City Parcel Policy"). (AR 2794-2795) Because Lot 2-B was not a preexisting legal parcel, and because there is no authority for City's Lot Consolidation to sever or subdivide Lot 2-B from the existing legal parcel, City's action resulted in an impermissible subdivision and must be set aside.

Last, but not the least of significance, City abdicated and abused its discretion during its review, consideration, and decisions regarding public health and safety because it falsely claimed it did not have evidence, it falsely rejected the efficacy of existing substantial evidence, and, when City finally confirmed the existence of the evidence (via its own adopted first and second "Fitch Report"), it refused to consider the evidence presented to it – instead only reopening the November 10, 2021 decision and appeal hearing in favor of the Applicant.

II.

STATEMENT OF FACTS APPLICABLE TO ALL CLAIMS

On January 31, 2020 Applicant filed a preliminary application for the project. (AR 12417-12435) City acted on the preliminary application by issuing a February 28, 2020 response letter. (AR 12436-12440) After further submittals by the applicant, on May 22, 2020 City deemed the preliminary application complete.

After several rounds of additional submissions, City deemed the project application complete (AR 12436-12440), and on or about May 14, 2021, City issued a letter of completeness to the Applicant detailing a number of issues, including that the Hillside Zone Overlay was applicable to the Project because 10% or more of the Project site contained slopes steeper than 25%. (AR 19010)

On June 1, 2021, the Applicant responded proposing (among other issues) to sever a portion of the Project site, a portion of the Applicant's Lot 2 that it named "Lot 2-B." (AR 19070-19072). The June 1, 2021 response letter also confirmed that Applicant had sought a

continuance of the original June 17, 2021 hearing date of the City Planning Commission based on changes to the Project by the Applicant. (AR 19070-19072)

The Project was first considered by the Planning Commission on July 15, 2021, and due to the substantial evidence - particularly the threat to public safety from impacts to the evacuation times from wildfire, the Planning Commission continued the hearing to August 19, 2021. (AR 12022:9 to 12023:14)

The Project was later considered and finally decided before the Planning Commission on August 19, 2021 with (1) the Planning Commission denying the DRP for the Project and (2) approving the Lot Consolidation. (AR 7738-7739, 7740-7742)

Applicant appealed the Planning Commission denial of the DRP. (AR 431) ERRD appealed the approval of the Lot Consolidation (AR 434-435) and additionally appealed the DRP approval because the Planning Commission had not denied on all applicable grounds. (AR 435-441; *see also* AR 19584_01 to 19584_11)

At the initial October 13, 2021 appeal hearing of the City Council (AR 23-28), public testimony was heard, including further presentation of specific impacts to health and safety, including from wildfire evacuation dangers caused by the Project. (*E.g.* Supp. AR 1564-1566, 1579-1582, 1638-1644.) The City Council deliberation was extensive and caused the hearing to be continued to November 10, 2021. (AR 12270-12290)

At the continued November 10, 2021 appeal hearings of ERRD and the Applicant, public testimony was again heard and with deliberation and decision of the City Council resulting in (1) a denial of ERRD's Lot Consolidation appeal (Res. No. 2021-95, AR 1-5), (2) denial of the DRP appeal of ERRD (id.), and (3) denial of the DRP appeal of the Applicant (Res. No. 2021-93, AR 6-13). The practical and legal results of the final November 10, 2021 administrative appeal decisions were that (1) the Lot Consolidation action was approved, and (2) the DRP was denied. ("Nov. 10, 2021 Final Actions")

As a result of the final administrative appellate decisions of the City Council, both ERRD and the Applicant filed lawsuits challenging the City Council decisions: Applicant filed Case No. 37-2022-0003566-CU-WM-NC, and ERRD filed Case No. 37-2022-00003664-CU-

WM-NC. During the pendency of the above lawsuits City reached a private agreement with one or more interested parties to "reconsider" and "redecide" the "Nov. 10, 2021 Final Actions" pursuant to a private "Settlement Agreement." (AR 89-128 [Settlement Agreement].)

City noticed a June 8, 2022 "Public hearing to consider an amended Design Review Permit and Density Bonus" for the Project. (AR 30_07) While there is no mention in the notice, City was reopening the Applicant's appeal in order to reconsider it after City's November 10, 2021 final administrative decision. This was later revealed in the Agenda for the reconsideration of the Applicant's appeal. (AR 33 [Item 10C].) The City Council did not offer or include an opportunity or right for a reconsideration of the ERRD appeal.

At the hearing on June 8, 2022, City opened and heard the agendized item and matter whether to reconsider Resolution 2012-93 without taking public testimony. (Supp. AR 1690:9-20) City then opened public comment to take action to approve the Applicant's appeal via Res. No. 2022-70. (Supp. AR 4-29)

After City's June 8, 2022 reconsideration to approve the Project, the Applicant dismissed its lawsuit against City on June 22, 2022 (Case No. 37-2022-0003566-CU-WM-NC (ROA 17) and ERRD amended its lawsuit September 7, 2022 (ROA 21) to update and allege additional legal infirmities arising therefrom.

III.

STANDARD OF REVIEW

The standard of review for all of the claims and issues in this litigation is to be made pursuant to Code of Civil Procedure § 1094.5.

Review of claims and issues regarding whether City *abused its discretion* is reviewed by this Court either under the **independent review standard** or under the **substantial evidence standard**. (Code Civ. Proc. § 1094.5, subd. (c) ["independent judgment" "whether findings are not supported by the weight of the evidence," as opposed to whether "findings are not supported by substantial evidence in the light of the whole record."].)

> Code of Civil Procedure section 1094.5 was designed to leave the reviewing court with the ability and task to establish what standard applies to particular claims. (*Frink v. Prod*, (1982) 31 Cal.3d 166, 173 ["section 1094.5 does not reflect a legislative direction to apply substantial evidence review, but in the absence of

limitation reflects legislative intent to leave to the courts the determination of the appropriate standard of review [independent review or substantial evidence review."].)

1. The Questions of Law Raised by ERRD in this Case are Reviewed *De Novo* Under the Independent Review Standard

Questions of whether City proceeded in a manner required by law are legal questions that are reviewed by this Court *de novo* under the independent review standard. (*Host International, Inc. v. City of Oakland*, (2021) 70 Cal.App.5th 695, 699 ["To the extent [petitioner's] contentions raise questions of law, we review those questions de novo."]; *Tafti v. Cnty. of Tulare*, (2011) 198 Cal.App.4th 891, 896 [substantial evidence standard **does not** apply to resolution of questions of law where the facts are undisputed.].)

Procedural violations are treated as questions of law, including claims involving whether the local agency's process does not meet the "fair trial" standard of Code of Civil Procedure section 1094.5, subdivision (b). (*TWC Storage, LLC v. State Water Res. Control Bd.*, (2010) 185 Cal.App.4th 291, 296 ["We exercise independent review on the question of whether the [respondent agency] provided [petitioner] with a fair hearing."]; *Rosenblit v. Superior Ct.*, (1991) 231 Cal.App.3d 1434, 1442 [a fair hearing finding is a conclusion of law, not a finding of fact, and requires a *de novo* review of the administrative record].)

2. A *De Novo* Independent Review Standard Applies to the Multiple Causes of Action and Claims Brought by ERRD

I. Claims Arising from City's "Reconsideration" of the Applicant's Appeal

The Fourth and Sixth Causes of Action (SAP ¶¶ 57-61, 85-91) allege that City lacked authority to reconsider final decision of Applicant's appeal and seek a writ of mandamus along with declaratory and injunctive relief. The Encinitas Municipal Code "EMC" defines the decision of City Council on appeal from a lower body as a "final action." (EMC § 1.12.010; subd. C; EMC § 1.12.040, subd. C) The legal question before this Court is whether City lacked the authority to "reopen" or "reconsider" the final decision of the Applicant's, consistent with the holding in *Heap v. City of Los Angeles*. (1936) 6 Cal.2d 405, 407-408; *Talmo v. Civ. Serv. Com.*, (1991) 231 Cal.App.3d 210, 218.) (*See* Section I.A, *post*.)

The Fifth Cause of Action (SAP ¶ 76-84) alleges that City deprived ERRD of its appellant rights by deciding to only reopen and reconsider real party Appellant's appeal and failing to adequately consider evidence provided by ERRD between City Council's November 10, 2022 final action and June 8, 2023 action to "reopen" and reconsider the DRP and Project. This Court's review of whether City's reconsideration process was procedurally unfair to ERRD is a question of law and therefore subject to *de novo* review. (*See* Section I.B, *post*.)

II. Claims Arising from City's Lot Consolidation Action

The First and Third Causes of Action (SAP ¶¶ 46-56, 62-69) allege that City violated the Subdivision Map Act (SMA) and Encinitas Municipal Code in granting the Lot Consolidation for the Project site. ERRD seeks a writ of mandamus along declaratory and injunctive relief. The resolution of this claim requires interpretation of the requirements of the SMA and EMC, and what is a legal parcel under those laws. This claim presents questions of law that are reviewed *de novo*. (Section II, *post*.)

III. Claims Arising from Fire Hazard Health and Safety Risks

The Seventh and Eighth Causes of Action (SAP ¶¶ 92-104) allege that City had a duty to consider the impacts to public health and safety from the wildfire danger and delayed evacuation times and seeks writ of mandamus along with declaratory and injunctive relief. This Court should consider it a question of law whether the City Council has a separate duty to consider the adverse impact to health and safety from wildfire. ERRD alleges that the City Council failed to acknowledge its duty and therefore did not consider the evidence that ERRD presented, in particular, evidence material to wildfire and evacuation times between November 10, 2021 and June 8, 2022. (Section III.B, *post*.)

3. A *Substantial Evidence* Standard Applies to Whether City's Findings Are Supported by Factual Evidence in the Administrative Record

Separate from the legal questions discussed above, ERRD alleges that there is no substantial evidence to support findings made by City in denying ERRD's appeal of the Lot Consolidation and City's action to approve the Project. This is based on the requirements set forth by the California Supreme Court in *Topanga Association for a Scenic Community v.*

County of Los Angeles (*Topanga*), (1974) 11 Cal.3d 506. (Id. at pp. 513-514.) *Topanga* requires City to make findings and have supporting evidence that are reasonably traceable and "connected" so as to enable this Court to make review of the basis for City's actions. Substantial evidence must support the administrative agency's findings and those findings must support the agency's decision. (Id. at p. 514) An inquiry into the absence of credible evidence applies here because "Lot 2-B" was never a legal parcel based on subdivision law and City's policy of what constitutes an existing and already divided legal parcel.

ERRD further alleges that the substantial evidence standard of review applies to ERRD's presentation of evidence that demonstrates an adverse impact to public health and safety, e.g., from the Project degrading evacuation times during wildfire emergencies.

Only the above two particular claims and issues are subject to the substantial evidence standard of review for this Court's consideration and determination in this overall lawsuit.

IV.

LEGAL ARGUMENT

I. THE JUNE 8, 2022 DECISION OF CITY TO "REOPEN" AND "RECONSIDER" THE APPLICANT'S APPEAL IS BOTH A VIOLATION OF LAW AND PROCEDURE AND WAS PREJUDICIAL TO ERRD

The City Council's November 10, 2021 action and denial of the DRP and Planning Commission appeals – made via Resolution No. 2021-93 (AR 6-13) – was a final administrative decision. (EMC §§ 1.12.01, subd. C, 1.12.040, subd. C.) There is no provision in the EMC, or any authority, identified by City, that would permit City to "reconsider," reopen, or otherwise rehear the City Council's final administrative action and decision.

City's decision to reopen (only) real party Applicant's appeal was a violation of well-established caselaw and violates fundamental doctrines of fairness and due process.

ERRD requests this Court to grant a judgment in favor of ERRD, along with peremptory writ of mandate, ordering City to rescind its June 8, 2022 action and decision to reopen, reconsider and decide the appeal of real party Applicant. City's reconsideration was an abuse of discretion pursuant to Code of Civil Procedure section 1094.5. (*Id*. ["The inquiry in such a case

shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction]; *Department of Parks & Recreation v. State Personnel Bd.*, (1991) 233 Cal. App. 3d 813, 824 ["An administrative agency may not validly act in excess of, or in violation of, the powers conferred upon it."]; *BMW of N. Am., Inc. v. New Motor Vehicle Bd.*, (1984) 162 Cal.App.3d 980, 994 [Any act in excess of an administrative bodies authority is void.].)

A. CITY LACKED AUTHORITY TO RECONSIDER THE FINAL DETERMINATION OF REAL PARTY'S APPEAL

The long-standing continuing and controlling authority – regarding the lack of an agency's jurisdiction to reconsider an administrative final decision – is set forth in the ruling and explanation made by the California Supreme Court in *Heap v. City of Los Angeles*. (*See discussion in Talmo v. Civ. Serv. Com.*, (1991) 231 Cal.App.3d 210, 218.) The problems and restrictions, arising from reconsidering final decisions in administrative appeals without express legislated authority, was explained in *Heap*:

> If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure.

(*Heap v. City of Los Angeles*, (1936) 6 Cal.2d 405, 407-408.)

The problems with reconsidering and re-adjudicating the Applicant's appeal are present here: (a) there are no defined procedures to reconsider Applicant's appeal; (b) there is no public, applicant, appellant, or decision-maker disclosure or advisory what authority City can and could reconsider; and (c) whether City can eliminate, sever, and parse-out other appellant's rights, as City did with ERRD's interrelated and concurrent appeal. For example, the issues and considerations that ERRD made in the related Resolution No. Resolution 2021-93 and appeal are equally relevant to any new or amended Project or plan for development. ERRD was denied these rights.

The Planning Commission's August 19, 2021 denial of the Project was subject to the appeal provisions of EMC section 1.12.010 et seq., which sets forth the scope of appeals. (Id.) Under EMC section 1.12.010, subdivision A, the Planning Commission's denial of the Project was a "determination" subject to appeal to the City Council. (Id.) City Council is the superior authority and its decision on a determination of a subordinate board, committee, commission, or department is a "final action." (EMC § 1.12.010, subdivisions B and C.) Further, pursuant to EMC § 1.12.040, subdivision C:

> Applying City standards to the information presented at the public hearing, the City Council **shall make a final determination** affirming, overruling, or modifying the subordinate entity's determination; and may direct that such action be taken as the City Council deems necessary.

(Id., bold added.)

Resolution No. 2021-93 (AR 6-13) was a *final determination* of the City Council denying real party's appeal. As a final administrative decision, there is no provision in the EMC, or any authority claimed or cited by City that would permit City to reconsider, reopen, or rehear the City Council's decision on the Applicant's appeal. (Supp. AR 4 [Item 10C, Staff Report and Proposed Resolution No. 2022-70 for "reconsideration."])

The consideration and denial of the development permits for the Project was undoubtedly an "administrative action." (*Cf. Mola Dev. Corp. v. City of Seal Beach*, (1997) 57 Cal.App.4th 405, 410; *see also Cook v. Civ. Serv. Commission of City & County of San Francisco*, (1911) 160 Cal. 598, 600 [municipal agency without power to set aside its previous final action].) California cases have held that City's final administrative decision cannot be reopened or reconsidered absent the specific provision of authority to do so. (*Heap v. City of Los Angeles, supra*, 6 Cal.2d at p. 407; *City of Fillmore v. Bd. of Equalization* (*City of Filmore*), (2011) 194 Cal.App.4th 716, 733-734.) This is because "[a]n administrative agency has no inherent authority to reconsider a final administrative decision." (*City of Filmore, supra*, 194 Cal.App.4th 716 at p. 732; *see also Olive Proration Program Comm. for Olive Proration Zone No. 1 v. Agric. Prorate Commission* ("*Olive Proration*"), (1941) 17 Cal.2d 204, 209 ["all administrative action must be grounded in statutory authority."].)

City's decision to reopen the Applicant's appeal was a violation of the procedural requirements of the EMC and was a fundamentally unfair process. EMC section 23.08.040 subdivisions B and C require that an application involving Design Review must first be presented to the Planning Commission for a determination. This provides community members and groups such as ERRD with the opportunity to provide comments to the Planning Commission, sway the Planning Commission, and appeal the determination made by the Planning Commission. The City Council would *only* consider that application (or amended application) after review and decision of the Planning Commission *before* the City Council could or would take action. (EMC § 23.08.040, subd. B.)

The process of appeal is also controlled by EMC Chapter 1.12 and City cannot act outside of that procedure. Here, the EMC is clear that no further action of any kind is contemplated after a final administrative decision of City Council (EMC § 1.12.010, subd. B), and there is no statutory authority permitting City Council to take action to reconsider its final decision. (*Olive Proration, supra*, 17 Cal.2d at p. 209.)

B. ERRD WAS PREJUDICED AND DID NOT RECEIVE A FAIR HEARING

City's reopening of its final administrative decision was "unsafe and impracticable." (*Heap v. City of Los Angeles supra*, 6 Cal.2d at pp. 407-408.) As part of this patently unfair process, the City Council bound itself per the terms of a settlement agreement with Applicant in San Diego Superior Case No. 37-2022-00003566-CU-WM-NC ("Settlement Agreement") that would only be effective if City Council approved the Project on terms agreeable to Applicant. (AR 91 [Section 5.b].)[3] At the June 8, 2022 City Council hearing, multiple council members cited the requirements of the Settlement Agreement in their reconsideration of the Applicant's appeal. (Supp. AR 1760:16 to 1761:1-5; Supp. AR 1767:17 to 1769:25; Supp. AR 1770:3-25.) The purpose of public comment and participation is for members of the public to be able to address, argue, and sway the council members before they made a decision. However, the City Councilmembers comments clearly indicated that they believed their hands

[3] Otherwise, the lawsuit brought by Applicant, which had been stayed, would continue.

were tied and approval was required because of the Settlement Agreement with the Applicant. (Supp. AR 1760:16 to 1761:1-5; Supp. AR 1767:17 to 1769:25; Supp. AR 1770:3-25.)

Because of the Settlement Agreement, the City Council's approval of the project on reconsideration was inevitable. Such an agreement is unlawful as against public policy and an ultra vires act. (*Trancas Prop. Owners Assn. v. City of Malibu*, (2006) 138 Cal.App.4th 172, 181; *Avco Community Devs., Inc. v. S. Coast Regulatory Commission*, (1976) 17 Cal.3d 785, 800 [government may not contract away its rights in advance of future exercise of police power].)

Additionally, City did not take public comment before voting on the first part of its reconsideration of the Applicant Appeal. (Supp. AR 1690:9-20.) This prevented members of the public from commenting on the ability of City Council to take this action *prior* to the councilmember's vote. (*E.g.* Supp. AR 1710:23 to 1711:24.)

Despite re-opening and reconsidering the November 10, 2021 final administrative decision, the City Council would not meaningfully consider evidence presented by ERRD leading up to and developed during the time before the June 8, 2022 hearing. (Supp. AR 1638-1644 [evidence submitted related to fire safety and evacuation]; *see* Supp. AR 1759-14 [City staff claiming that no more information has been provided related to fire safety].)

Further, because City invoked an improper procedural action to reopen and reconsider part of its final action, ERRD was substantially prejudiced by the failure of City Council to also reconsider ERRD's appeals that had been denied on November 10, 2021. City did not reopen or reconsider the ERRD appeal, or any of the issues that it raised. "A petition for a writ of mandate is an appropriate remedy for compelling an administrative agency to provide a fair hearing where one has been refused." (*Beck Dev. Co. v. S. Pac. Trans. Co.*, (1996) 44 Cal.App.4th 1160, 1192.)

ERRD was not provided a reconsideration hearing, despite the fact that it was an appellant on the same Project and item reopened by City Council for the Applicant. ERRD was not afforded the benefits of being an appellant and having its appeal issues and decision re-heard. (Supp. AR 1690:1-6.) A reconsideration of ERRD's appeal was relevant because – just as City and the Applicant were updating and amending facts and circumstances for the

Project (AR 38-39), new information and evidence became available and finalized based on other related city administrative action and study related to fire hazard risks affecting the project area. (*See* AR Supp.AR 1711-1712 and more fully explained in Section III.A, *post*.)

Code of Civil Procedure section 1094.5, subdivision (b) requires that there is "a fair trial." (Id.) ERRD and the public were required to be afforded a "reasonable opportunity" to be heard. (*Rodriguez v. Department of Real Est.*, (1996) 51 Cal.App.4th 1289, 1297.) City did not provide a fair hearing because it (1) failed to meaningfully consider evidence between November 10, 2021 and June 8, 2022; (2) approved the reopening of the Applicant's ppeal prior to public comment; (3) determined to approve the Project based on considerations of the Settlement Agreement; and (4) failed to additionally reconsider ERRD's appeal.

II. CITY'S LOT CONSOLIDATION ACTION IS AN UNLAWFUL SUBDIVISION AND MUST BE SET ASIDE BECAUSE LOT 2-B IS NOT A PRIOR EXISTING LEGAL PARCEL AND CITY'S ACTION SEVERS AND CREATES LOT 2-B AS AN UNDERSIZED PARCEL

The legality of City's Lot Consolidation action hinges on whether the small road vacation land area of Lot 2-B is an *existing legal parcel* as defined by state law and local subdivision ordinances, and whether City's action has created a condition that does not comply with zoning and development regulations, or results in the severance or subdivision of a remnant and orphaned parcel of land.

A. STATEMENT OF FACTS REGARDING EVIDENCE WHETHER LOT 2-B IS A LEGAL PARCEL AND CITY'S SEVERANCE OF LOT 2-B FROM APN 259-231-28

The Project site involves four government-recognized legal parcels (APNs 259-231-28, -30, -31, -32) that the Applicant proposed, and applied for, to be merged into a single lot for the Project. (AR 12430) Staff concurred that the lot merger application was to consolidate four legal parcels specifying these four APNs. (AR 9451 [July 15, 2021 staff report]; AR 11487 [August 19, 2021 staff report] and AR 9474, AR 11509 [draft resolution for lot consolidation].)

The applicant initially submitted evidence of the legal parcels via a land title survey. (AR 12806-12811) On June 19, 2020, the Applicant's counsel wrote acknowledging City's

position that the title survey was inadequate because it was not reviewed or approved by the County Planning Commission or Board of Supervisors for the land areas described and contained in the four legal parcels involved and proposed for the Project. (AR 2770-2795) In the same document, the Applicant argued that APN 259-231-28 was comprised of 2 separate legal lots, a majority Parcel 2-A (described in 1973 Parcel Map 1268) and a small 40' x 144' Remnant Parcel 2-B. (AR 2773-2774; AR 26762)[4]

Later in the application process, in a letter dated June 1, 2021, Applicant's counsel proposed removing the smaller portion of APN 259-231-28 (labeled "Lot 2" by the Applicant) from the project description. (AR 19070-19073) By removing so called "Lot 2-B" – the Applicant reduced the overall slope for the Project to below 10% to avoid application of the Encinitas Hillside Overlay Zone. (AR 19071-19072; AR 11873-11874 [accord by staff at Planning Commission]; AR 8455 [July 8, 2021 diagram now showing "not a part"])

The July 15, 2021 Planning Commission Agenda Report and draft resolution for the Lot Consolidation did not mention Applicant's June 1, 2021 letter or any issue of Lot 2-B.

Before the July 15, 2021 Planning Commission hearing, ERRD prepared and submitted substantial written and oral objections to the Planning Commission that the Lot Consolidation action was legally infirm because it created an illegal orphan lot (Lot 2-B). (AR 9696-9802 [July 15, 2021 Comment Letter w/attachments].) At the July 15, 2021 Planning Commission hearing, city staff asserted Lot 2-B was "an existing legal lot" (AR 11873), but did not reference or provided any documentary support for that assertion, and staff continued to only reference the four identified legal parcels. (AR 9451 [July 15, 2021 staff report].)

At the continued August 19, 2021 Planning Commission hearing, upon questioning from commissioners, city staff presented several additional reasons why Lot 2-B was considered a separate legal parcel, including: (1) the legal descriptions were not "tied together"; (2) land from

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[4] Actual certified surveys of the west and eastern sides of the vacated road, B Street, show the dimensions of Lot 2-B as 134.23' x 40' – not the 144' length described, and attempted to be severed, by Applicant's recently created legal description. (AR 26835 [PM 8911 (1979)]; AR 26757 [ROS 23766].)

a vacated street becomes a separate parcel; and (3) the Lot 2-A and Lot 2-B portions of Lot 2 had been separately conveyed (bought and sold) separate from each other. (AR 12080, lines 1-24 [transcript].) The resolution adopted with the final Lot Consolidation findings continued to assert that City's action was to merge the four existing legal parcels based on their APN designations. (AR 11487 [August 19, 2021 staff report]; AR 9474, AR 11509 [draft resolution for lot consolidation]; AR 1-5 [city council denial of ERRD appeal, adopting Planning Commission decision and Resolution No. PC 2021-95].) The findings made and required by Planning Commission include that City's action must not "Create a condition, which does not comply with zoning and development regulation." (AR 7740) The City Council affirmed this same finding with regard to the *Project site* (AR 2), but neither administrative body made or supported this required findings with respect to the remainder parcel *Lot 2-B.*

In conjunction with ERRD's appeal to the City Council, ERRD requested that City provide documentary evidence to substantiate staff's oral claims made to the Planning Commission. (AR 26728-26731; AR 26732-26867.) In an October 6, 2021 response by City staff to ERRD's Public Records' Act request, City could not identify documents to support claims at the August 19, 2021 Planning Commission.[5] (AR 26730 [response silent or deferring stating that the Applicant should provide the information].)

The staff report for the City Council hearing introduced, for the first time, that the Applicant's June 16, 2020 letter justifies Lot 2-B as being an existing legal parcel. (AR 2770-2795) At the City Council appeal hearing, staff confirmed its reliance that "the applicant provided documentation pursuant to the City's determination of legal parcel policy, which I included in the staff report, that demonstrated pursuant to that policy that Lot 2B is a legal lot." (AR 12134 [transcript]) Prior to and at the City Council appeal hearing, ERRD submitted written comment (AR 2947-2952) and provided testimony (AR 12156-12158) why such

[5] Once again, staff assertions were: (1) the legal descriptions were not "tied together"; (2) land from a vacated street becomes a separate parcel; and (3) the Lot 2-A and Lot 2-B portions of Lot 2 had been separately conveyed (bought and sold) separate from each other. (AR 12080, lines 1-24 [transcript].)

justification was an incorrect interpretation of City policy and that there continued to be no documentary evidence that Lot 2-B was a separate and independent historical legal parcel, that, in any event, did not qualify under City Parcel Policy (AR 2794-2795).

The City Council denied ERRD's appeal via Resolution No. 2021-95 affirming the Planning Commission's August 19, 2021 approval of the Lot Consolidation. The resolution continued to refer to the four existing legal lots being consolidated by their APNs, and continued to find only that the resulting merged Project lots were conforming. (AR 2 [finding A].) The final Resolution did not make a finding whether City's action created a condition where a lot (Lot 2-B) was or was not nonconforming. (Id.)

B. LOT 2-B DOES NOT QUALIFY UNDER CITY'S ORDINANCES AND POLICIES AS A LEGAL LOT SUCH THAT CITY CAN SEVER IT

The parties substantially agree that if Lot 2-B was not a stand-alone preexisting legal parcel - under state subdivision laws and local ordinances – then City's Lot Consolidation fails and must be set aside by this Court. As the Applicant and its attorneys will likely do – in order to show and prove whether Lot 2-B was an existing legal parcel at the time the application was made for the subject Lot Consolidation action – in this section of the brief ERRD sets forth the **state and local laws**, and applies the **history and facts of Lot 2-B** to those laws.

1. The Subdivision Map Act and Supporting Provisions of the EMC are Controlling Over the Lot Consolidation

Lot consolidation and line adjustments are exceptions to the requirements of the SMA. (Government Code 66412, subd. (d).) A statutory exception does not except anything not expressly stated. (*In re Goddard*, (1937) 24 Cal.App.2d 132, 139-140 [a statutory exception is a strictly construed limitation on the general scope of a statute, and such a limitation cannot be implied unless it is expressly stated in the statute].)

Government Code section 66412, subd. (d) provides that a lot consolidation not subject to the requirements of the SMA may occur where:

> A lot line adjustment between four or fewer existing adjoining parcels, where the land taken from one parcel is added to an adjoining parcel, and where a greater number of parcels than originally existed is not thereby created, if the lot line adjustment is approved by the local agency, or advisory agency.

However, Government Code section 66412, subd. (d) does not permit an exception for a lot line adjustment that splits a parcel and creates a new unconsolidated parcel. Furthermore, the withholding or severance of a portion of land as part of a consolidation or subdivision action – that creates a remnant or "remainder" parcel – is not permitted under Government Code section 66424.6.

Most relevant here, EMC section 24.70.010, subdivision A requires that "**All lots prior to adjustment proposed to be included in a lot line adjustment or merger shall be lots lawfully created under the provisions of the state Subdivision Map Act and local ordinances adopted pursuant thereto**."

As discussed herein, Lot 2-B has never been an existing legal parcel and the arguments and referenced evidence presented by the Applicant's attorney (AR 2772-2795), that were wholly adopted and relied and adopted by City, do not support the existence of Lot 2-B being an existing legal parcel. The Applicant's and City's reliance on Policy A-9 to prove that Lot 2-B became a legal parcel, because it is surrounded by legal parcels, fails because the Policy and EMC section 30.76.080 do not authorize undersized surrounded and pigeon-holed lots, such as Lot 2-B, to become legal parcels.

2. There is no Substantial Evidence to Support Unsubstantiated City Staff Testimony that Lot 2-B is a Legal Parcel

There is no substantial evidence to support a finding that Lot 2-B was ever its own stand-alone legal parcel, and there is no evidence of law to support that a new legal parcel was or could be created by the Lot Line Adjustment made via Resolution No. PC 2021-31. At the August 19, 2021 Planning Commission hearing, staff's arguments were not substantiated or supported by evidence. (AR 12080, lines 1-24)

First, the assertion that the legal descriptions of Lot 2-B and 2-A were not "tied together" is directly rebutted by the January 10, 2020 Title Report for the properties in the Project site which describes APN 259-231-28 (project "Lot 2") without differentiating separate 2-A and 2-B parcels. (AR 12722, 12727) The Title Report further contains a unified legal description for Parcel 2. (AR 26860) Applicant's June 26, 2006 conveyance alters the legal description by

inserting a "Parcel 2-A" and "Parcel 2-B" in an otherwise identical legal description for Parcel 2. (AR 26840) But even then, the June 26, 2006 conveyance for Lot 2-A and 2-B were *tied* together by a single conveyance and legal description. (Id.) Lastly, an official 1979 subdivision map in Parcel Map 8911 show that when the west westerly 40-foot portion of B Street was vacated, it was tied to the adjacent Parcel 1 of said map. (AR 26825 [1.22 ac.].) The Applicant's own surveys show that the east half of vacated B Street became tied to APN 259-231-28 (E.g. AR 26757 [ROS 23766]), and there has been no other segregation or subdivision of Lot 2-B other than the Applicant's recent self-created surveys, legal descriptions, and deed.

Second, staff's assertion that Lot 2-B was created via a street vacation misstates the effect of an agency's vacation of a street. The law in this state is that each half of a vacated public street automatically becomes attached and merged with the adjacent lot. (Cal. Streets & Hwys. Code § 8351.) Here, there is no evidence that the vacation of a street affecting Lot 2-B was deeded or ordered to be differently conveyed. Further, as described above, Lot 2-B is described and contained in Parcel 2 (AR 12722, 12727, 26860) This is consistent with the general rule under Cal. Streets & Hwys. Code § 8351, and this is true even though the Applicant might describe a vacated street portion in metes and bounds, or show it as surveyed and/or dimensioned box on a map.

Third, there is no evidence of a separate conveyance of Lot 2-B. The June 26, 2006 Grant Deed conveys so-called "Parcel 2-A" and "Parcel 2-B" together under the same APN 259-231-28. (AR 26840) Staff failed to identify any evidence of a separate conveyance of only Lot 2-B. (AR 26732-26867) Further, in an October 6, 2021 response by City staff to ERRD's Public Records' Act request, City could not identify documents to support any separate deed conveyance claim at the August 19, 2021 Planning Commission. (AR 26730 [City's response to the California Public Records Act is absent of evidence other that stating that the Applicant should provide the information].) Additionally, the selling or ability to sell a piece of land, or making a "legal lot" or "legal parcel," even a parcel that is on a tax roll, may not be a legal parcel. (*Cf. Fishback v. County of Ventura*, (2005)133 Cal.App.4th 896, 904 [a unit of land

defined as a unit or shown on the last tax roll "does not mean the unit shown on the last preceding tax roll is a legal parcel."].)

3. Lot 2-B Fails to Meet the Requirements of City's Parcel Policy to Qualify as a Legal Parcel; City Impermissibly Relied on Inapplicable Argument and Inapplicable Justification Presented by the Applicant

Lot 2-B cannot qualify as a legal lot because it cannot meet the requirements for an undersized legal parcel pursuant to City Parcel Policy section D. Section D of the Policy requires undersized lots must meet the additional requirements of EMC section 30.76.080 (interpreted by City in Policy Section D). (AR 2795) Compliance with EMC section 30.76.080 can only be met if the lot in question was either created pursuant to City Parcel Policy sections A.1-A.7, or there is evidence of a recorded conveyance that meets the requirements of City Parcel Policy section D.2. (AR 2795) City Parcel Policy Section D does not permit an undersized parcel to be considered a legal parcel pursuant to the City Parcel Policy A.9. (AR 2795)

a. Lot 2-B was Not Created by Any of the Recognized Subdivision or Parcel Creation Mechanisms Contained in City Parcel Policy sections A.1-A.7

At the hearings on this matter, neither Applicant nor City provided evidence that Lot 2-B was created in compliance with any of the stated legal parcel policies set forth in City Parcel Policy sections A.1 through A.7. Set forth in full, City Parcel Policy sections A.1-A.7 contain:

1. A lot shown on a Final Map. (Major Subdivision Map)
2. A lot or parcel shown on a Record of Survey approved by the Board of Supervisors or the Planning Commission of the County of San Diego.
3. A parcel shown on a Parcel Map or Certificate of Compliance recorded in lieu of a Parcel Map.
4. A parcel described in a recorded Certificate of Compliance.
5. A parcel shown on an approved Division of Land Plat.
6. A parcel shown on a Lot Legalization Plat. (Used as evidence of legal parcel prior to Certificate of Compliance).

7. A parcel shown on an approved Boundary Adjustment Plat.

(AR 2794 [§ A].)

Because Applicant and City could not provide evidence that Lot 2-B was created in compliance with any of the policy sections A.1 through A.7, Applicant and City instead have solely decided to rely **on City Parcel Policy section A.9**:

> "The evidence demonstrating the existence of all lots surrounding Lot 2-B is satisfies [sic.] City Policy A.9: 'a parcel which is completely surrounded by lots already determined to have been legally created.'"

(AR 2774, underlining added)

However, policy section A.9 is inapplicable to Lot 2-B because the adopted ordinance has a specific requirement that undersized lots do not qualify under Section A-9. (EMC § 30.76.080) It is unambiguous and clear on its face that Section A.9 was specifically omitted from the EMC list of conditions that may qualify or allow an undersized lot to become a legal parcel.

"It is a settled principle of statutory construction that, 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.'" (*Banerjee v. Superior Ct.*, (2021) 69 Cal.App.5th 1093, 1114 quoting *Wildlife Alive v. Chickering*, (1976) 18 Cal.3d 190, 195.) This Court should not presume that undersized lot, Lot 2-B, may qualify as a legal lot pursuant to City Parcel Policy section A.9, when the statutory EMC code and ordinance directed by the policy was specifically omitted by City in its City Parcel Policy. If City had intended for section A.9 to be included in City Parcel Policy section D – to permit undersized lots to be considered legal lots – it would have done so.

b. Lot 2-B Cannot Qualify as a Legal Parcel Because There is no Evidence of a Recorded Conveyance that Meets the Requirements of City Parcel Policy § D.2

Separately, Lot 2-B does not qualify as a legal parcel because there is no evidence of a recorded Grant Deed or other bonafide conveyance document that was both (1) recorded prior to the date that the RR-2 Zone was first applied to Lot 2-B, and (2) was recorded prior to March

4, 1972. (AR 2795 [City Parcel Policy § D].)[6]

The only conveyance in the administrative record is a June 26, 2006 grant deed that does not comply with City Parcel Policy section D (AR 26761-26763), and that 2006 deed is essentially a deed of an owner conveying to itself – from Olivenhain Town Center 5.6 LLC to Olivenhain Town Center 5.6 LP). Not coincidentally, the LP entity later merged and became the Applicant on August 6, 2019. (AR 26755) Furthermore, the January 10, 2020 Title Report for the properties in the Project site describes APN 259-231-28 (project "Lot 2") (AR 12722, 12727), but makes no mention of a portion or interest in a separate "Parcel 2-B." (AR 12719-12735) Without any evidence of compliance with Policy section D.2, and consistent with long-standing Subdivision Map Act doctrine, Lot 2-B does not and cannot become a legal parcel by mere title or owner conveyance. (*Lakeview Meadows Ranch v. County of Santa Clara*, (1994) 27 Cal.App.4th 593, 599.)

c. City's Determination that Lot 2-B is a Legal Parcel Because it is Surrounded by Legal Lots is Inconsistent With and Violates City's Lot Merger and Subdivision Rules

As a matter of law, City cannot rely on the Applicant's June 19, 2020 *Evidence Supporting Legal Lot Determinations* (AR 2772-2795) to find that Lot 2-B is a legal parcel because it is surrounded by legal parcels. The undisputed evidence shows that Lot 2-B is an "undersized lot," with EMC section 30.16.010 setting the minimum size requirement for the subject residential zone. Applicable to Lot 2-B, the RR-2 Zone minimum lot size is 21,500 sq. feet and the R-30 Overlay Zone minimum lot size is 30,000 sq. feet. (EMC §30.16.010, subd. A.1 and A.3.) Lot 2-B is 5,369.2 square feet in size based on surveyed measurements of 40' x 134.23' (AR 26835 AR 26757) and is clearly an undersized lot.

Under City Parcel Policy section D lot merger rules, undersized lots – whether surrounded or not – must meet the requirements of EMC section 30.76.080. (AR 2795) Compliance with EMC section 30.76.080 can only be met if the lot in question was either created pursuant to City Parcel Policy sections A.1-A.7, or was a separate conveyance made and in

[6] Applicant did not request a zoning variance that would have eliminated the need for a conveyance deed to be recorded prior to the implementation of the RR-2 Zone for Lot 2-B.

existence prior to 1972.

For all the above reasons, Lot 2-B cannot be, and is not, a separate legal parcel.

4 Lot 2-B was not an Existing Separate Legal Parcel; Therefore, the Lot Consolidation Creates a Non-Conforming Condition by Excising and Severance of Lot 2-B

City could not rely on Applicant's purported evidence that Lot 2-B was a legal lot because the undisputed fact of Lot 2-B being an undersized lot is conclusive that it does not qualify as a legal parcel under City's Parcel Policy. (City Parcel Policy § D.1.)

Further, a mere *partial legal description* taken from a deed conveyance in 2006 did not create or legalize to make Lot 2-B a legal parcel. (City Parcel Policy § D.2.) City's arguments and conclusory statements are not supported or connected with any facts or evidence. Therefore, City has abused its discretion in determining that Lot 2-B is a legal parcel. (*Topanga Neighborhood Assn. v. County of Los Angeles*, (1974) 11 Cal.3d 506, 514.) Further, City ignored the restrictions of City Parcel Policy sections B and D, as well as EMC section 30.76.080. City's failure to apply its own Municipal Code and written policies is an abuse of discretion.

The effect of Lot 2-B not being an existing legal parcel is that the Lot Consolidation, by covering Lot 2-B from Parcel 2, and leaving it as a remainder parcel, creates a non-conforming parcel that is not a legal parcel under the SMA and EMC. This precludes City from making a required finding that the Lot Consolidation does not "Create a condition, which does not comply with zoning and development regulation." (AR 2; EMC § 24.70.010, subd. A [all parcels resulting from the Lot Consolidation shall comply with minimum City requirements for lot size, dimensions . . .].)

EMC § 24.70.010, subd. A further requires that "All lots prior to adjustment proposed to be included in a lot line adjustment or merger shall be lots lawfully created under the provisions of the state Subdivision Map Act and local ordinances adopted pursuant thereto." Here, Lot 2-B is not an existing prior legal parcel, nor is it a resulting legal lot. On its face, the Lot Consolidation creates a condition that does not comply with zoning and development regulations.

The Applicant's and City's lot consolidation creates or results in a severed and subdivided parcel of land and Lot 2-B does not fall within the exception of Government Code section 66412, subdivision (d), nor can City or the Applicant create "remainder parcels" pursuant to Government Code section 66424.6. Therefore, the action taken for the current Project and Lot Consolidation must comply with the procedures and substantive rules for subdivisions and parcel maps pursuant to Government Code section 66424 and the EMC.

III. CITY ADBDICATED ITS DUTY OF PUBLIC SAFETY BY IGNORING FIRE AND EVACUATION CONSIDERATIONS; AT THE TIME OF THE PROJECT'S REHEARING (RECONSIDERATION) CITY REFUSED TO CONSIDER ERRD'S APPEAL ALONG WITH ITS NEW EVIDENCE

A. STATEMENT OF FACTS REGARDING WILDFIRE EVACUATION CONDITIONS CONPRIOMISED BY THE PROJECT

From the inception of the Project, members of the public in the surrounding communities have raised the issue of fire safety and the impact of the Project on public health and safety. At the time of the Citizen Participation meetings for the Project, held on July 23, 2020 and September 25, 2020 (AR 9816 and 9819), fire safety and wildfire evacuation were a top concern for nearby residents. (*E.g.* AR 19773, 20051, 20061, 20075, 20078, 20081, 20085, 20098, 20103, 20109, 20113, 20116, 20126, 20131 et al.) The concerns of these citizens were warranted; they live in very high fire hazard severity zones (AR 465, 9793), the Project is adjacent to those fire zones (AR 1541, 1634), and those residents will share an evacuation route with the Project. (AR 9458, 11494)

The public continued to voice their concerns of the Project's impacts to the Planning Commission. (*E.g.* AR 8496, 8499, 84500-84502 et al.) ERRD provided substantial evidence of the impacts to public health and safety in its July 15, 2021 Comment Letter to Planning Commission. (AR 9696-9698 [discussion]; AR 9726-9748 [Exhibit 7 expert report about Evacuation Route Effectiveness, J. Charles Weber, Certified Fire Protection Specialist].)

ERRD's expert J. Charles Weber testified at the July 15, 2021 Planning Commission hearing. (AR 11933-11936) Mr. Weber's testimony described his review of the traffic study for the Project and found that it:

> doesn't address emergency evacuations factors for either Encinitas Boulevard or Rancho Santa Fe Road that will feed evacuation traffic on to Encinitas Boulevard. No evacuation time data is shown on the project study, no mitigations are proposed for resolving evacuation traffic flow on Encinitas Boulevard.

(AR 11935:10-19)

Mr. Weber's study and investigation of the increased evacuation times caused by the Project led to the chilling conclusion that "the residents trying to evacuate the flame front on Rancho Santa Fe Road we'll be overrun by the fire before the best-case evacuation time of four and a half hours is reached." (AR 11935:5-9) The result of people being overrun by a wildfire is depicted in images of burned out cars in Mr. Weber's March 10, 2021 Olivenhain-Encinitas Fire Evacuation Plan Analysis Report (March 10, 2021 Weber Report). (AR 553) Mr. Weber analyzed potential speeds of wildfire at 7.6 mph or 2.228 100-yard field football fields a minute. (AR 484) Mr. Weber's report demonstrates a very real danger to the lives of Encinitas residents during wildfire evacuations around and adjacent through the primary Project and community intersection of Encinitas Boulevard and Rancho Santa Fe Road. (*See* AR 481-482)

The Planning Commission also heard from a longtime resident Denny Neville (AR 11936-11938) who was "a retired deputy Fire Chief from the Rancho Santa Fe Fire Department with 39 years of fire service history" and had "first-hand experience in large brush and wildland fires impacting entire neighborhoods up and down the state [California]." (AR 1196:13-24) Mr. Neville supported Mr. Weber's conclusion, "As Mr. Weber explained in his report, that by introducing in an access point for these fleeing citizens at the top of the bottle stopper actually delays those further down the bottle." (AR 11937:7-11)

The Planning Commission Agenda Reports (July 15, 2021 and August 19, 2021) gave considerations of fire impacts short shrift avoiding the issue of the impact to the Olivenhain residents. (AR 9458, 11494)

During the August 19, 2021 hearing, the Planning Commissioners asked a number of pointed questions to then Encinitas Fire Chief, Mike Stein. First, Chief Stein confirmed that vacant lots are not included in current fire evacuation plans. (AR 12092:12-25) Chief Stein also confirmed that a fire evacuation plan update was currently in process. (AR 12089:22-25) Notably, in response to a Planning Commissioner's question about what impact the Project would have on wildfire evacuation times, Chief Stein replied that he could not answer that question. (AR 12093:2-12)

ERRD appealed the Planning Commission decision, requesting that the vitally important issue of public health and safety were addressed. (AR 435, 439, 440) The importance of these issues was underscored in Rancho Santa Fe Fire Chief, Fred Cox's October 4, 2021 letter to Chief Stein. (AR 2884) Chief Cox states that he read Mr. Weber's reports and had several concerns regarding excessive evacuation times. (Id.) Chief Cox understood that if there is a tangible risk to wildfire evacuation times, it needs to be properly addressed and mitigated so further danger is not imposed on existing community members.

At the October 13, 2021 City Council hearing, staff repeated misinformed information that ERRD did not submit any evidence to support its claim of specific adverse impacts on public safety due to wildfire evacuation. (AR 12135:12-25) Staff also asserted that there were not written standards, policies, or conditions to protect the citizens of Encinitas from wildfire. (Id.) Chief Stein admitted that there was both an evacuation plan and an operational plan for the Olivenhain community, as well as a mutual threat zone agreement with CalFire, but denied that there were any set standards for evacuation times. (AR 12142:5-16)

City Council members raised concerns and acknowledged the substantial evidence of adverse impacts to public safety from wildfire (AR 12283:1 to 12284:9) as well as acknowledging that the City Council Agenda Report did not have an evaluation of that substantial evidence. (AR 12284:10 to 12285:11) The City Council continued the October 13, 2021 hearing in order to further evaluate the impact to public safety from wildfire evacuation. (AR 12285-12290) City Council also directed staff to address the following two items: (1) Status of public road easement along Rancho Santa Fe Road; and (2) Expand staff's analysis

and response to ERRD Fire Evacuation Analysis prepared by J. Charles Weber. (AR 4543) Staff concluded that the findings of the Weber report were "not applicable since the project is not within the Very High Fire Severity zone and the project is not subject to CEQA review due to its By-Right status." (AR 4545-4546) City staff's conclusion is clear that the Project's impact on wildfire evacuation or surrounding communities and emergency response times to Olivenhain were not considered. City Council's denial of the Project occurred after substantial discussion and testimony on the impact to public safety from wildfire. (AR 12415)

In the lead up to the June 8, 2022 reconsideration hearing, new information and analysis became available and was provided to City by ERRD. (Supp. AR 1564-1566 [June 2, 2022 Letter raising public safety issues from Rancho Santa Fe Association] Supp. AR 1579-1582 [Updated Impact Summary of Applicant-Encinitas Apartments Project on The Olivenhain Evacuation Route, J. Charles Weber, CFPS #3414] Supp. AR 1638-1644 [Daniel Vaughn submittal].) City received a report on January 19, 2022 from Fitch and Associates (AR 8769-8963) and a second report on February 16, 2022. These reports, which City commissioned, substantially affirmed the findings of Mr. Weber. (*See* AR 8813)

City Staff alleged that "No evidence has been identified to demonstrate that the granting of the requested concessions would have an adverse impact to health, safety or the physical environment that cannot be feasibly mitigated." (Supp. AR 55 [June 8, 2022 City Council Agenda Report].) ERRD provided public comment describing the evidence that had been submitted since November 10, 2021. (Supp.AR 1711-1712.) It was only in response to the limited time for public comment that City Council, upon the advice of its outside counsel, to add in an amended finding of no impact to public health and safety without review or consideration of evidence submitted and City Council adopted new finding without discussion or consideration of evidence. (Supp. AR 1761-1762)

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B. CITY'S PUBLIC REVIEW AND APPROVAL OF LAND USE AND DEVELOPMENT DECISIONS REQUIRES CONSIDERATION OF PUBLIC SAFETY; CITY CANNOT ELIMINATE OR AVOID ITS DUTY UNDER THE GUISE OF STATE HOUSING POLICY

City's failure to consider and resolve the public safety problems created by the Project is an abuse of discretion pursuant to Code of Civil Procedure section 1094.5, subdivision (b).

1. City has Legal Duties and Responsibilities with Regards to Evaluating and Protecting Public Health and Safety

City's police powers are granted pursuant to California Const., art. XI, sec. 7 "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Id.) City is entitled to exercise its police powers that are not inconsistent or in conflict with general law. (*In re Lowenthal*, (1928) 92 Cal.App.200, 202–203.)

In this case, the State Legislature specifically reserved the power of City to deny affordable housing developments where it would endanger the health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. (Gov. Code § 65589.5, subd. (d)(2); *cf.* 65583, subd. (g)(2).) Additionally, City may deny the Project if it conflicts with state or federal law and there is no feasible method to comply without rendering the development unaffordable or financially infeasible. (Gov. Code § 65589.5, subd. (d)(3).)

Notwithstanding the intent of the State Legislature to increase affordable housing, these housing laws are not superior or preemptive over other state law requirements to protect the public safety from wildfire dangers. (*E.g.* Gov. Code, Title 5, Division 1, Part 1 "Powers and Duties Common to Cities and Counties," CHAPTER 6.8. "Moderate, High, and Very High Fire Hazard Severity Zones".)

In fact, the State Legislature has made specific findings to protect public safety in moderate, high, and very high fire hazard severity zones as set forth in Government Code section 51175:

> The Legislature hereby finds and declares as follows:
>
> (a) Wildfires are extremely costly, not only to property owners and residents, but also to local agencies. Wildfires pose a serious threat to the preservation of the public peace, health, or safety. The wildfire front is not the only source of risk since embers, or firebrands, travel far beyond the area impacted by the front and pose a risk of ignition to a structure or fuel on a site for a longer time. Since fires ignore civil boundaries, it is necessary that cities, counties, special districts, state agencies, and federal agencies work together to bring raging fires under control. Preventive measures are therefore needed to ensure the preservation of the public peace, health, or safety.
>
> (b) The prevention of wildland fires is not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution, but is instead, a matter of statewide concern. It is the intent of the Legislature that this chapter apply to all local agencies, including, but not limited to, charter cities, charter counties, and charter cities and counties. This subdivision shall not limit the authority of a local agency to impose more restrictive fire and public safety requirements, as otherwise authorized by law.
>
> (c) It is not the intent of the Legislature in enacting this chapter to limit or restrict the authority of a local agency to impose more restrictive fire and public safety requirements, as otherwise authorized by law.

Government Code section 51176 recognizes City's duty to "identify measures that will retard the rate of spread, and reduce the potential intensity, of uncontrolled fires that threaten to destroy resources, life, or property, and to **require** that those measures be taken." (Id., bold added.)

City also has the duty to deny a project or impose conditions when necessary to avoid a danger to the health and safety of the residents of the subdivision or community. Government Code section 66498.1, subdivision (c)(1) authorizes City to condition the approval of a permit when the (1) the failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both; and (2) the condition or denial is required in order to comply with state or federal law.

Because City's decision and action for the Lot Consolidation results in a subdivision (Section II.B, *ante*), to approve the current Project here City has a duty to review and make findings pursuant to Government Code section 66474 regarding health and safety issues and has the affirmative duty to address all of the matters covered by said law. (*Spring Valley Lake Assn. v. City of Victorville*, (2016) 248 Cal.App.4th 91, 106.)

More specifically, Government Code section 66474.02 was specially enacted to require the legislative body of a local agency to make specific findings before approving a tentative or parcel map for an area located in a state responsibility area or a very high fire hazard severity zone. (Id.) The legislative body must find that the subdivision is consistent with regulations adopted by the State Board of Forestry and Fire Protection or local ordinances that meet or exceed state regulations, and that structural fire protection and suppression services will be available for the subdivision through certain entities. (Id.) City has failed to comply with this affirmative duty in an action that included a lot consolidation/severance approval that is subject to the Subdivision Map Act.

2. Substantial Evidence Demonstrates a Specific Adverse Impact of Increased Danger to Public Safety, e.g., from Wildfire

ERRD provided substantial evidence of the specific adverse impact of the Project on public safety of City residents who reside in the Very High Fire Hazard Severity Zones. (AR 462-641 [Weber, Evacuation Plan]; AR 9696-9698 [ERRD Comment Letter, dated July 15, 2021]; AR 9726-9748 [Weber, Evacuation Route Effectiveness]; AR 11933-11936 [Weber Testimony]; AR 11936-11938 [Testimony of Denny Neville, retired Deputy Fire Chief of Rancho Santa Fe]; Supp. AR 1564-1566 [Letter of Rancho Santa Fe Association]; Supp. AR 1579-1582 [Weber Updated Impact Summary of Evacuation Route]; Supp. AR 1638-1644 [ERRD submittal for City reconsideration hearing].) A summary of this evidence is (1) wildfire is an existing threat to the Project's surrounding neighborhoods and communities; (2) and the proposed Project will adversely impact wildfire evacuation and emergency response times.

More specifically, Mr. Weber's "Updated Impact Summary of Applicant-Encinitas Apartments Project on The Olivenhain Evacuation Route" ("Weber Updated Analysis") analyzed the final project reconsidered by City Council on June 8, 2022. (AR 1579 [update for total 250-unit Project].) Weber's Updated Analysis found substantial impacts to public safety from wildfire danger and unacceptable increases in evacuation times caused by the Project. (AR 1579 [best case scenario 4.1 hrs. evacuation time and worst-case scenario 11.4 hrs. evacuation time].) Mr. Weber summarized his findings as:

1. The Project will add an estimated 575 new vehicles onto currently congested roadway corridors used for evacuation purposes

2. The original evacuation analysis, without sufficient information available at the time of development, did not take into consideration the impact of vehicles concurrently evacuating from the Rancho Santa Fe community would have on the established Olivenhain evacuation route.

3. The Rancho Santa Fe evacuation traffic load adds 580 vehicles (conservative estimate) onto the established evacuation route.

4. The addition of 575 vehicles (Applicant Apartments) to the existing community evacuation route is a 14.8% increase in traffic loading

5. The addition of 580 vehicles evacuating from Rancho Santa Fe creates an additional 14.8% increase in traffic loading.

6. The synergistic impacts of adding Applicant Apartment and Rancho Santa Fe evacuation traffic to the established evacuate route increases traffic loading by 29.6%

(AR 1581)

Mr. Weber's conclusion was that "evacuation routes that are subject to being overrun by flame fronts caused by foreseeable wildfire events . . ." (AR 1582) Most significantly, the report commissioned by City from Fitch and Associates, entitled "Olivenhain Community Evacuation Analysis and Recommendations" (AR 8769), supports Mr. Weber's conclusion. (*See* AR 8813 [admitting that "*All scenarios result in fire that impinges on residences within the first hour*"], italics in original.)

City abused its discretion by refusing to consider and address Project impacts to fire hazard and evacuation safety. The absence of a specific objective evacuation time standard does not excuse City's duty to avoid permitting and accepting substandard adverse fire evacuation times caused by the Project without any meaningful review, consideration, and imposition of conditions to mitigate or eliminate the same.

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V.

CONCLUSION

For the above reasons, petitioner and plaintiff Encinitas Residents for Responsible Development respectfully requests this Court to grant the mandamus, declaratory, and injunctive relief requested in the Prayer of the *Second Amended Complaint* and as specifically proven in the further responsive briefing and the argument and decision after the trial and hearing on this matter.

Respectfully submitted,

Dated: March 30, 2023

CRAIG A. SHERMAN, APC

Craig A. Sherman, Counsel for
ENCINITAS RESIDENTS FOR
RESPONSIBLE DEVELOPMENT

PROOF OF SERVICE

Encinitas Residents for Responsible Development v. City of Encinitas
San Diego Superior Court, Case No. 37-2022-03664-CU-WM-NC

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA; and I served the below-named person(s) the following document(s):

PLAINTIFFS' TRIAL BRIEF

on March 30, 2023 on the following person(s) addressed as follows:

Delores Bastian Dalton, Esq. Barbara E. Kautz, Esq. GOLDFARB & LIPMAN LLP 1300 Clay Street, Eleventh Floor Oakland, CA 94612 ddalton@goldfarblipman.com bkautz@goldfarblipman.com **Attorneys for Respondent/Defendant City of Encinitas**	Jeffrey A. Chine Timothy M. Hutter Rebecca H. Williams ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP One America Plaza 600 West Broadway, 27th Floor San Diego, California 92101-0903 jchine@allenmatkins.com thutter@allenmatkins.com bwilliams@allenmatkins.com **Attorneys for Real Party in Interest Encinitas Blvd Apartments 6.95, LP**

in the following manner:

☒ **BY ELECTRONIC SERVICE VIA ONE LEGAL:** I caused a true and correct copy of the document(s) to be served through One Legal at www.onelegal.com addressed to the parties shown herein appearing on the above-titled case. The service transmission was reported as complete and a copy of One Legal's Receipt/Confirmation Page will be maintained with the original document in this office.

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

Executed on March 30, 2023, at San Diego, California.

Paul Best