

1 Stuart M. Flashman
2 5626 Ocean View Drive
3 Oakland, CA 94618-1533
4 Telephone (510) 652-5373
5 State Bar #148396

6
7
8 Attorney for Petitioner and Plaintiff
9 Friends of Lagoon Valley

10
11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF SOLANO**

13 FRIENDS OF LAGOON VALLEY,

14 Petitioner and Plaintiff,

15 vs.

16 CITY OF VACAVILLE *et al.*,

17 Respondents and Defendants

18 TRIAD COMMUNITIES, L.P. *et al.*,

19 Real Parties in Interest

No. FSC025789 filed: 4/7/05

OPENING BRIEF IN SUPPORT OF
PETITION FOR PEREMPTORY WRIT OF
MANDATE AND COMPLAINT FOR
INJUNCTIVE RELIEF

Date: August 25, 2005

Time: TBD

Dept.: TBD

Judge: Hon. Donald R. Fretz

1 **TABLE OF CONTENTS**

2 **TABLE OF CONTENTS** **ii**

3 **TABLE OF AUTHORITIES** **iii**

4 **INTRODUCTION**..... **1**

5 **DISCUSSION** **5**

6 **I. STANDARD OF REVIEW.** **5**

7 **II. THE CITY’S DETERMINATION THAT THE APPROVALS WERE**

8 **CONSISTENT WITH THE GENERAL PLAN WAS NOT**

9 **SUPPORTED BY SUBSTANTIAL EVIDENCE.**..... **6**

10 A. The Approvals Were Required To Be Consistent With The General Plan.6

11 B. Consistency Requires That The Project Further And Not Obstruct

12 Attainment Of The General Plan’s Objectives, Goals And Policies6

13 C. The Approvals Were Inconsistent With General Plan Policies And With

14 The General Plan Land Use And Circulation Map.....7

15 **III. THE CITY’S DETERMINATION THAT THE APPROVALS WERE**

16 **CONSISTENT WITH THE LOWER LAGOON VALLEY POLICY**

17 **PLAN WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**..... **10**

18 A. The Approvals Were Inconsistent With Numerous Aspects Of The Policy

19 Plan.11

20 **IV. THE APPROVALS VIOLATED BOTH STATE AND CITY**

21 **DENSITY BONUS LAWS.** **13**

22 A. Government Code §65915 And Its Purpose.13

23 B. The 2004 Amendment To §65915.14

24 C. The City Misconstrued §65915.....15

25 D. The City’s Approved Density Bonus Was Not Allowable Under The

26 City’s Own Density Bonus Ordinance.....18

27 **CONCLUSION** **19**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

TABLE OF AUTHORITIES

CASES

Automotive Funding Group, Inc. v. Garamendi (2003)
114 Cal.App.4th 846..... 6

Concerned Citizens of Calaveras County v. Board of Supervisors (“Concerned Citizens”) (1985)
166 Cal.App.3d 90..... 8

DeVita v. County of Napa (1995)
9 Cal.4th 763 6, 14

Families Unafraid to Uphold Rural etc. v. Board of Supervisors(“FUTURE”) (1998)
62 Cal.App.4th 1332..... 6, 7

Hansen v. Department of Social Services (1987)
193 Cal.App.3d 283..... 13

Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001)
91 Cal.App.4th 342..... 7

Tesco Controls, Inc. v. Monterey Mechanical Co. (2004)
122 Cal.App.4th 1467..... 17

Toigo v. Town of Ross (1998) 70 Cal.App.4th
309 5

STATUTES

Code of Civil Procedure
§1094.5 5

Government Code
§65302 9
§65451 10
§65455 10
§65913 13
§65913.5 13
§65915 passim
§65917 13
§66473.5 6
§66474 6

MUNICIPAL ORDINANCES

Vacaville Municipal Code
§14.09.074.04018
§14.09.116.01017

1 §14.09.116.11018
2 §14.11.150.05011

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

INTRODUCTION

This case is about two conflicts. One is a clash between the City of Vacaville’s (hereinafter, “City’s”) political leaders and many of its voters; the other, between the City’s legal responsibilities and the political forces motivating its leaders. As a result of these two conflicts, the City made decisions that violated California’s Planning and Zoning laws, as well as the City’s own municipal code.

The Lower Lagoon Valley (hereinafter, “Valley”) is a valuable agricultural, environmental, scenic, and recreational resource, but, as a large flat area adjoining Interstate Highway 80, it is also an attractive and potentially lucrative location for development. The City’s political leadership wanted to reap what they believed would be the benefits of that development, but they knew that for many of Vacaville’s citizens, perhaps a majority, the Valley’s natural values were equally if not more important. Public opposition to development had already resulted in a referendum on one development plan. How could they approve development without triggering another referendum? The City’s leaders thought they had the answer: approve a new plan, but do it without modifying the City’s general plan or the policy plan for the Valley. If there were no legislative approvals involved, there could be no referendum. There was only one catch. The plan they approved was inconsistent with the general plan and policy plan. The approvals thereby violated both California law and the City’s municipal code. Further, in trying to “patch over” the differences, the City also violated California’s (and Vacaville’s) laws governing density bonuses.

While one might perhaps sympathize with the City’s leaders’ desire for the benefits they thought development would bring, that does not excuse violating laws intended to protect the public planning process. For this reason, the City’s approvals must be rescinded.

STATEMENT OF FACTS

1 The Lower Lagoon Valley is a lush agricultural valley located on the southwest side of
2 the City of Vacaville. (*See, e.g.*, AR 19 4889, 4892.)¹ Much of Valley is currently used for
3 grazing land and a large-scale nursery. (AR 19 4890.) In addition, the Valley contains the
4 Lagoon Valley Regional Park that includes a 106 acre lake and the Pena Adobe historical site.
5 (*Id.*) The Valley is considered a significant regional view resource. (*See*, AR 19 4919-4927.)
6 The area is also a significant wildlife habitat, containing a variety of habitat types supporting a
7 large range of wildlife species, including a number of special status species². (AR 20 5191-
8 5213.) The City's 1980 General Plan designated the Valley for recreational and parkland use.
9 (AR 67 16638.) While it had been, for years, in the county's jurisdiction, in 1986 the City
10 included it in its sphere of influence. (*See generally*, Administrative Record Vol.71-73, pp.
11 17561-18002.)

12 In 1987, a City Council-appointed citizens' committee studied the Valley and
13 recommended, given that public acquisition appeared infeasible, that the City prepare a sensitive
14 development plan for the area, giving priority to retaining the Valley's visual, environmental,
15 and recreational values. (AR 79 19518-19522.) In 1990, pressured by the Bank of America and
16 some property owners within the Valley, the City began considering alternatives for developing
17 the Valley. (AR 67 16638.) While the Bank of America was not a property owner, it expressed
18 interest in developing a major business center in the Valley. (AR 67 16645.) The resulting
19 preliminary project plan also included a major Kaiser Medical Center, as well as a golf course
20 and related residential development at the southeastern end of the Valley. (AR 67 16650.) To
21

22 ¹ All references to the Administrative record will be in the format: AR NN:xxx-xxx, where NN
23 represents the volume number and xxx-xxx, the page numbers. The City and Real Party in
24 Interest Triad Communities, LP have jointly prepared an eighty-one volume administrative
25 record containing almost twenty-thousand pages. Petitioner believes much of the prepared
26 record is superfluous and outside of what is legally called for. Nevertheless, to avoid
27 unnecessary controversy, Petitioner has stipulated to accept all portions of the record as
28 admissible evidence. At such time as the cost of the record becomes a relevant issue, Petitioner
29 reserves the right to object to the size and cost of the record.

30 ² Special status species include species protected under the Federal or state endangered species
acts and species of special concern (i.e., that are considered likely to require protection in the
future).

1 implement this plan, the City proposed to adopt a general plan amendment and a Lower Lagoon
2 Valley Policy Plan (herinafter, “Policy Plan”), essentially a specific plan that would include a
3 detailed development program, including land use descriptions and standards, internal
4 circulation, and utility requirements. (AR 67 16652.)

5 The City prepared an Environmental Impact Report (“EIR”) for the project. (See
6 generally AR vol. 63-70, 77-78.) However, Hines Nurseries, a major landowner in the Valley,
7 filed suit challenging the City’s approvals. (See, AR 40 10013-10086.) Subsequent negotiations
8 led to the City’s agreement to modify its plans and enter into a series of development agreements
9 with Hines Nursery and the Valley’s proposed developers. (AR 62 15504-156760.)
10 Significantly, both original and amended Policy Plans restricted residential development in the
11 Valley to a maximum of 730 units.³ The resulting amended Policy Plan was adopted in 1991.
12 (AR 63 15764-15782.) Shortly after beginning the tentative mapping process, the development
13 effort was abandoned because of changes in the market conditions.⁴ (AR 19 4781.)

14 Very little further happened to the Valley until 2002⁵, when Triad Communities, LP and
15 its associated entities, including Lagoon Valley MPC, LLC, (hereinafter, collectively “Triad”)
16 took over the prior developer’s interests and began preparing a new development plan for the
17 Valley. (*Id. See also*, AR 15 3977, 3979-3981.) The new plan dramatically reduced the amount
18 of commercial office space and eliminated the medical center. Conversely however, it increased
19 the amount of residential and retail commercial uses. (*See generally*, AR 19 4845-4878.) In fact,
20 the new development plan was so different from the previously approved plans that it was felt
21 necessary to prepare a general plan amendment and an entirely new specific plan to replace the
22 1991 policy plan. (AR 19 4845.)

23 ³ The original Policy Plan called for 450 units of executive housing and 280 units of resort
24 housing. The amendment converted all the units to executive housing. (AR 63 15945.)

25 ⁴ The Policy Plan included almost 4 million square feet of office space. (AR 63 15808.) It
26 became apparent that the market would not support that huge an amount of office space that far
from a metropolitan area.

27 ⁵ The City did approve improvements to the Lagoon Valley Park, but these did not involve
28 changes to the General Plan or Policy Plan’s direction for overall development of the Valley.
(See, e.g., AR 15 3964-3975.)

1 The City proceeded to prepare the documentation to approve the new development. (*See*
2 *generally*, AR vol. 11, 16-25, 26-33, 47-56.) In February 2004, the City released a Draft EIR for
3 the general plan amendment/specific plan project (AR vol. 19-24), and in May of 2004, the City
4 released the Final EIR (AR vol. 16-18). In June of 2004, the City certified the Final EIR and
5 approved the general plan amendment (AR 8 2070-2198), and the specific plan, rezonings, and
6 development agreement (AR 8 1932-2059), and filed a notice of determination with the County
7 (AR 15 4036-4039).

8 Within a month, popular resentment to the actions showed itself. San Francisco-based
9 Greenbelt Alliance filed a lawsuit challenging the approvals, and Friends of Lagoon Valley
10 spearheaded a successful referendum petition effort, forcing the City Council to place its
11 approvals for the general plan amendment and specific plan on the ballot for a vote of the people.
12 (*See*, AR 7 1869.) The City and Triad initiated settlement discussions with Greenbelt Alliance,
13 the upshot of which was agreement between them to rescind the approvals for the general plan
14 amendment and specific plan and, instead, approve an alternative plan with less commercial
15 development but more housing than called for by the Policy Plan.⁶ (AR 7 1884-1917.)

16 In settling the lawsuit, the City's leaders thought they had found a way to circumvent the
17 public opposition that had referended the previous approvals. The new project was to be an
18 implementation of planning for the Valley set forth in the 1990 general plan and the 1991 Policy
19 Plan. (AR 7 1886.) While this new alternative plan apparently satisfied Greenbelt Alliance's
20 concerns, it involved major changes from what had been proposed in 1990 and 1991, notably
21 major changes in the land use and circulation plans for the Valley and an increase in the amount
22 of housing from a maximum of 730 units under the 1991 Policy Plan to 1025 units. The City
23 proposed to avoid the apparent inconsistency in the amount of housing by designating a
24

25 _____
26 ⁶ While the settlement with Greenbelt Alliance called for rescinding the general plan
27 amendment, specific plan, and development agreement, it did not call for rescinding certification
28 of the Final EIR. Consequently, not only did that certification remain, it was no longer open to
29 challenge.

1 proportion of the units as elderly and affordable housing and using the density bonus provision
2 of Government Code §65915 to “shoehorn” the additional units into the Policy Plan.

3 Once the settlement agreement had been approved, the City proceeded to rescind its
4 approvals for the general plan amendment, specific plan, and development agreement. (AR 7
5 1804-1862.)⁷ The City then proceeded forward on approving the revised project called for in the
6 settlement agreement. (See generally, AR vol. 1-7.) It prepared an addendum to the Final EIR
7 discussing the new revised project. (AR 16 4039.01 – 4145.) While the addendum was not
8 circulated, it did provoke comments from opponents of the new plan. (*See, e.g.*, AR 3 683-5; 4
9 1148-1149; 40 9950-9955, 9958-10097, 10133-10135; 41 10209-10210.) Nevertheless, on
10 February 22, 2005, the City went ahead and approved both the EIR addendum, the revised plan
11 (now dubbed the “Lower Lagoon Valley Policy Plan Implementation Plan”), and its associated
12 vesting tentative map and planned development permit. (AR 1 53-255.) The aforementioned
13 approvals will be referred to hereinafter collectively as the “Approvals”.) A notice of
14 determination was filed the following day. (AR 15 4036.)

15 DISCUSSION

16 I. STANDARD OF REVIEW.

17 As an action brought under Code of Civil Procedure §1094.5, the normal standard of
18 review includes: 1) whether the City proceeded without, or in excess of its jurisdiction, 2)
19 whether there was a fair trial, and 3) whether there was abuse of discretion. (C.C.P. §1094.5(b))
20 An abuse of discretion occurs if a) the City did not proceed in the manner required by law, b) the
21 decision was not supported by the findings, or c) the findings were not supported by the
22 evidence. (*Id.*)
23
24
25

26 ⁷ Given that the general plan amendment and specific plan were being rescinded, the City also
27 cancelled the special referendum election it had called for a vote on the two measures. (AR 7
1862.)

1 In a challenge, such as this, to a land use decision, the Court generally applies the
2 “substantial evidence” standard. The administrative decision will be upheld if it was supported
3 by substantial evidence in the record. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.)
4 However, that standard applies to the City’s factual determinations. As to matters of law (*i.e.*,
5 statutory interpretation), the Court grants no deference to the City’s determinations, but reviews
6 such legal determinations *de novo*. (*Automotive Funding Group, Inc. v. Garamendi* (2003) 114
7 Cal.App.4th 846, 851.)

8 **II. THE CITY’S DETERMINATION THAT THE APPROVALS WERE**
9 **CONSISTENT WITH THE GENERAL PLAN WAS NOT SUPPORTED BY**
10 **SUBSTANTIAL EVIDENCE.**

11 As required (see below), the City made findings that the Approvals were consistent with
12 the general plan. (AR 1 136-137.) However, as will be shown, these findings were not
13 supported by substantial evidence. In fact, the evidence in the record, including the City’s own
14 EIR and environmental findings, shows that the Approvals were inconsistent with important
15 general plan policies, as well as with the general plan land use and circulation map.

16 A. THE APPROVALS WERE REQUIRED TO BE CONSISTENT WITH THE
17 GENERAL PLAN.

18 The general plan lies at the pinnacle of the City’s land use heirarchy. (*DeVita v. County*
19 *of Napa* (1995) 9 Cal.4th 763, 772-773.) All land use approvals must be found consistent with
20 the City’s general plan. (*Id.*) This requirement is stated explicitly for subdivision maps in
21 Government Code §66473.5 and §66474(a) and (b).⁸

22 B. CONSISTENCY REQUIRES THAT THE PROJECT FURTHER AND NOT
23 OBSTRUCT ATTAINMENT OF THE GENERAL PLAN’S OBJECTIVES,
24 GOALS AND POLICIES

25 In determining that a land use approval is consistent with the general plan, the Courts
26 have held that an exact match-up is not required. Rather, a project is consistent if it furthers the
27 objectives and policies of the General Plan and does not obstruct their attainment. (*Families*

28 ⁸ The consistency requirement is also contained in the Vacaville Municipal Code as Sections
29 14.11.152.05 and 14.09.111.070.

1 *Unafraid to Uphold Rural etc. v. Board of Supervisors*(“*FUTURE*”) (1998) 62 Cal.App.4th
2 1332, 1336.) It has also been noted that:

3 Because policies in a general plan reflect a range of competing interests, the
4 governmental agency must be allowed to weigh and balance the plan's
5 policies when applying them, and it has broad discretion to construe its
6 policies in light of the plan's purposes. [citation] General plans have goals and
7 policies relating to disparate issues, and most projects involve trade-offs
8 among them. Such flexibility does not equate to “inconsistency.” (*FUTURE*,
9 *supra*, 62 Cal.App.4th at p. 1336.)

10 However, this is not to say that it is impossible for a project to be inconsistent with the
11 general plan, nor that the local agency has total discretion to interpret the general plan in any
12 manner it sees fit:

13 We also are of the opinion that cases such as *FUTURE v. Board of*
14 *Supervisors, supra*, 62 Cal.App.4th 1332, do not require an outright conflict
15 between provisions before they can be found to be inconsistent. The proper
16 question is whether development of the Project Area under the Updated
17 Specific Plan is compatible with and will not frustrate the General Plan's goals
18 and policies. If the Updated Specific Plan will frustrate the General Plan's
19 goals and policies, it is inconsistent with the County's General Plan unless it
20 also includes definite affirmative commitments to mitigate the adverse effect
21 or effects. (*Napa Citizens for Honest Government v. Napa County Bd. of*
22 *Supervisors* (2001) 91 Cal.App.4th 342, 379.)

23 A project that interferes with attaining the general plan’s objectives, goals and policies
24 must therefore be held inconsistent with the general plan, even if the local agency has found
25 otherwise.

26 C. THE APPROVALS WERE INCONSISTENT WITH GENERAL PLAN
27 POLICIES AND WITH THE GENERAL PLAN LAND USE AND
28 CIRCULATION MAP.

29 As laid out in the Petition and Complaint (¶¶ 46-49), the Vacaville General Plan contains
30 several policies that, while not specifically directed at the Valley, pertain to it and to the
Approvals. Within the land use element, Land Use Policy 2.2-I 6 prohibits development of such
an intensity or density that it will create substantial water, sewage, or traffic problems or
unacceptable levels of service, unless those impacts can be mitigated. (AR 56 14162.)

1 Likewise here, simply asking that Caltrans make improvements to I-80 and its
2 interchanges while acknowledging that funding for these improvements is not available is,
3 especially in the current time of state financial crisis, and as the EIR admits, no mitigation at all.
4 Consequently, the Approvals violated Policy 2.2-I 6.

5 Similarly, general plan transportation policies 6.1-G 2 and 6.1-G 3 put strict limitations
6 on allowing roadways to reach levels of service (“LOS”) D, E, and F. (AR 56 14255-14256.)
7 Neither the Addendum nor the Specific Plan EIR ever discussed whether the Approvals would
8 result in violating these policies. However, as discussed above, the Addendum did acknowledge
9 that the Approvals would result in significant and unavoidable direct and cumulative traffic
10 impacts. The intent of Policies 6.1-G 2 and 6.1-G 3, as with Policy 2.2-I 6, is to avoid approving
11 development that would result in this kind of significant and unavoidable traffic impact. (*See*,
12 Implementing Policy 6.1-I 1 (AR 56 14256) [referencing the City’s duty to deny approval to
13 development projects resulting in unacceptable levels of service].) Thus, the Approvals would
14 not further these general plan policies, but would in fact obstruct their attainment.¹⁰ Again, for
15 this reason, the Approvals were inconsistent with these policies.

16 Lastly, the General Plan Land Use and Circulation Map¹¹ shows the general layout of
17 land uses and roadways in the Valley. Even a cursory comparison of this map with the Revised
18 Project Site Plan for the Approvals (AR 16 4051) shows the basic inconsistency between the
19 two. While general plan maps are not intended to show detailed parcel-by-parcel boundaries,
20 they do intend to show the general locations of the uses and roadways called for in the plan.
21 (*See*, Government Code §65302.)

22
23 _____
24 ¹⁰ Policy 6.1-G3 allows the City to approve a project resulting in LOS E at a specific interchange
25 or road link upon making certain specific findings. (AR 56 14256.) However, in granting the
26 approvals the City made no such findings. (AR 1 132-138.) It is therefore unnecessary to
27 determine if the evidence in the record could have supported such a finding.

28 ¹¹ While the remainder of the general plan was included in the administrative record, the Land
29 Use and Circulation Map was not. Petitioner asks that the Court take judicial notice of the
30 general plan Land Use and Circulation Map. A copy of the relevant portions of that Map is
submitted with Petitioner’s Request for Judicial Notice.

1 The general plan map shows the southwestern quadrant of the Valley’s developed area as
2 business park (*see also* general plan Policy 2.3-I 14 [AR 56 14167] – Policy Plan to facilitate
3 development of a business park of regional significance), the northern area next to the freeway as
4 a mixture of highway commercial and business park, and the southeastern quadrant as golf
5 course residential. By contrast, the Approvals place residential and golf course uses and a
6 church parcel in areas designated by the general plan for office park use. Indeed, more than half
7 of the area designated by the general plan map for business park use has been shifted to other
8 uses that are inconsistent with the future expansion of the business park.

9 Further, the roadway system for the Approvals is entirely different from that shown on
10 the general plan map. The latter shows two major arterials leading off the freeway: one (Lagoon
11 Valley Boulevard) extending to the southwest through the center of the developed area, the other
12 (a reconfigured Rivera Road) northward around the park area. There are also two collector
13 roads, one serving the office park, the other the golf course residential area. Not surprisingly,
14 given the changed uses, the circulation pattern for the Approvals is also quite different. There is
15 only one arterial – an extension of Lagoon Valley Road along the northern edge of the
16 development, and a system of residential cul-de-sacs has replaced the collectors.

17 One need not argue the relative merits of the Approvals’ layout of land uses and
18 roadways compared to that in the general plan. It is sufficient to note that they are
19 fundamentally different. The Approvals were therefore inconsistent with the general plan’s land
20 use and circulation map.

21 For all these reasons, the Approvals are inconsistent with the general plan, and the City’s
22 findings to the contrary are unsupported and cannot stand.

23 **III. THE CITY’S DETERMINATION THAT THE APPROVALS WERE**
24 **CONSISTENT WITH THE LOWER LAGOON VALLEY POLICY PLAN WAS**
25 **NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

26 As with general plans, California law requires that land use decisions be consistent with
27 the applicable specific plan, if any, for the area in question. (Gov’t Code §65455.) While the
28 Policy Plan may not have been explicitly designated as a specific plan, it clearly functioned as

1 one. (*Compare*, Government Code §65451 [required contents of specific plan] *with* AR 56
2 14167 [specification of required elements for Policy Plan]; *see also* AR 56 14158-14159
3 [explanation of policy plans and specific plans], 14163 [policy 2.2-I 9]; 63 15789-15791 [Policy
4 Plan statement of purpose and relation to general plan].) Consequently, the Approvals were
5 required to be consistent with the Policy Plan.¹²

6 A. THE APPROVALS WERE INCONSISTENT WITH NUMEROUS ASPECTS
7 OF THE POLICY PLAN.

8 Unlike the general plan, the Policy Plan contains numerous specific requirements and
9 details for development of the Valley. Among other things, it includes a detailed land use plan
10 (AR 63 15803) that shows the locations of different uses in the Policy Plan area. These uses are
11 further defined and detailed by a subarea map (AR 63 15805) and an accompanying text defining
12 and detailing the uses to be placed in each of the subareas.¹³ (AR 63 15802, 15806-7.) The
13 Policy Plan also contains a detailed circulation plan (AR 63 15809-15818) which shows the
14 locations and characteristics of the roadways in the plan area, including not only the types of
15 roads and number of lanes, but also general streetscape designs. This, of course, followed the
16 requirements for a policy plan as laid out in the general plan, requiring that it include:

17 ...a diagram showing the distribution of land uses, define permitted and
18 conditionally permitted land uses, major public facilities (including roads,
19 water, sewer and drainage facilities, schools and parks), phasing,
20 infrastructure financing mechanisms and any other elements that may be
needed to ensure an orderly development process with minimal adverse
impacts. (AR 63 14158-9.)

21 Comparing these elements with those of the Approvals, the discrepancies are many and
22 obvious. To begin with, the diagram showing the locations of roadways and land uses for the
23

24 ¹² The City's Municipal Code, §14.11.150.050, explicitly requires that all subdivisions be
25 consistent with any applicable specific or policy plan. Indeed, the City's findings purporting to
support the Approvals include explicit findings that the Approvals are consistent with the Policy
Plan. (AR 1 136-137.)

26 ¹³ The importance of the subareas and their development allocations is highlighted by their
27 involvement in the Hines Nurseries litigation over the Policy Plan and the settlement resulting
from it. (*See* AR 40 10006-10070.)

1 Approvals (AR 16 4051) is discordant with the Policy Plan’s land use and circulation plans.
2 While the Policy Plan, like the general plan, shows Lagoon Valley Boulevard as a central major
3 six-lane arterial running to the southeast from the I-80 Freeway interchange serving the Valley
4 (AR 63 15810, 15811), it has been omitted entirely from the Approvals. Instead, the existing
5 Lagoon Valley Road would be improved to a four-lane east-west arterial that would run along
6 the northern edge of the development. (AR 16 4061.) The remaining circulation system is also
7 totally different. The northern arterial, Rivera Road, has been demoted to a two-lane service road
8 running parallel and next to the Freeway. Finally, the two looped collector roads called for in
9 the Policy Plan (and in the general plan) have been replaced by a fanning network of residential
10 cul-de-sac streets and a secondary looped road around the newly-proposed “business village and
11 town center”. (AR 16 4062.) In short, the circulation system in the Approvals is inconsistent
12 with that in the Policy Plan.

13 The land use plan is also totally different. The “regionally significant” business park has
14 been largely replaced by other dissimilar uses, including a major church parcel, parts of the golf
15 course, and “Village 1” of the residential element.¹⁴ The golf course itself is no longer fully
16 integrated into the residential element, but now winds around through the Valley, with most of
17 the residential development now concentrated on the eastern side of the Valley.

18 In addition, as noted earlier, the Policy Plan capped residential development at 730 units.
19 (AR 63 15807, 15808.) The Approvals call for 1025 units, forty percent above the cap set by the
20 Policy Plan. (AR 16 4044.) The City justified this violation by pointing to Government Code
21 §65915, which allows a “density bonus” for affordable and senior housing. (AR 2 301:1-6.) As
22

23 ¹⁴ What remains has been redesignated as a “business village and town center.” The City has
24 argued (AR 4 887:8-13) that these changes are permissible because the Policy Plan allows
25 “accessory uses” in the business park area, so long as they are consistent with the purpose of the
26 policy plan and will not impair the present or potential uses of adjacent properties. (AR 63
27 15819.) However, the City’s interpretation would have the tail wagging the dog. It is hard to
28 see how the Policy Plan can ever achieve a “regionally significant” business park when more
29 than half of the area intended for that use is instead devoted to a golf course, a church, and
30 residential development. Further, the major medical facility to be placed in subarea 2B has been
totally supplanted by the golf course and clubhouse/recreational complex.

1 will be shown below, however, the Approvals went far beyond what §65915 or the City's own
2 density bonus ordinance allow for and were, by that token as well, improper and inconsistent
3 with the Policy Plan.

4 While it can be argued whether these changes damage or improve the overall
5 development pattern from that in the Policy Plan, there can be little dispute that the Approvals
6 constituted a very different plan from what was set forth in the Policy Plan and were
7 fundamentally inconsistent with it. As such, the City's finding that the Approvals were
8 consistent with the Policy Plan was improper and unsupported by substantial evidence.

9 **IV. THE APPROVALS VIOLATED BOTH STATE AND CITY DENSITY BONUS**
10 **LAWS.**

11 A. GOVERNMENT CODE §65915 AND ITS PURPOSE.

12 Government Code §65915 is one of a series of statutes enacted by the legislature to
13 address the shortage of affordable housing in California. (*See, e.g.*, Government Code
14 §65913(a), *Hansen v. Department of Social Services* (1987) 193 Cal.App.3d 283, 296-297
15 [discussing legislation addressing the shortage of affordable housing].) As originally enacted in
16 1979, it included findings about the need to encourage creation of additional affordable housing
17 in the state. (Stats. 1979, c. 1207, Sect. 1-6.)¹⁵ While subsequent amendments in 1982, 1983,
18 1984, 1989, 1990, 1991, and 2004 have made the statute both broader and more complex, its
19 basic premise remains offering a significant density bonus above the otherwise applicable
20 maximum residential density for housing developments providing a significant portion of
21 affordable units. Its ultimate aim is still to promote affordable housing, especially housing
22 affordable to low income and very low income households, through providing special otherwise-
23 unavailable¹⁶ benefits and incentives.

24
25 _____
26 ¹⁵ The text of those sections is attached hereto as an appendix.

27 ¹⁶ §65917 prohibits offering a density bonus or other incentives that would undermine the intent
28 of the Chapter without an agreement as called for in §65915 or §65913.5 [mass transit guideway
29 development incentives].

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

B. THE 2004 AMENDMENT TO §65915.

During the 2004 session, the legislature enacted Senate Bill 1818 (Hollingsworth). SB 1818 amended §65915 in numerous respects. (*See* Petitioner’s Request for Judicial Notice for the bill’s text and portions of the legislative history of the bill.) The bill became effective January 1, 2005. In pertinent part, the amendments allow density bonuses for a) planned developments containing 10% of units affordable to moderate income households (§65915(b)(4) and b) senior housing developments (§65915(b)(3). For senior housing developments, a 20% density bonus is mandated.¹⁷ (§65915(g)(1).) For moderate income units in a planned development project, the density bonus begins at 5%, and increases in 1% increments for each 1% of units above the 10% minimum, up to a maximum of 35%. (§65915(g)(2).)

Perhaps the most significant new features in the 2004 amendments (at least insofar as this case is concerned) were that it made the bonus proportional to the percentage of affordable units in the development and it placed an absolute cap of 35% on the total density bonus to be awarded under the statute. From the legislative history of the bill, it can be seen that both these changes reflected compromises between the bill’s supporters and opponents.¹⁸ As originally introduced, the bill called for lowering all existing thresholds by one-half, while keeping the density bonus levels as they had been. (*See*, SB 1818, as introduced 2/20/2004.) There followed a series of compromises where the initial bonus was reduced to 20% and incremental increases were added, capped first at 40% with the cap later being reduced to 35%. (*See*, successive bill drafts and analyses in the submitted legislative history for the bill.) Because these compromises were integral to the legislative process, the statute must be construed to strictly adhere to the

23
24
25

¹⁷ The bill changed the requirement from being 50% of the total units to applying to any qualifying senior citizen housing development. Thus, rather than senior housing constituting at least a certain proportion of total units, a senior housing development was to be considered a separate development receiving its own specific density bonus. (*See* Senate Floor Analysis of SB 1818 dated 8/25/04.)

26
27

¹⁸ Supporters included the building industry, trade unions, realtors, and affordable housing advocates. Opponents included the American Planning Association, the League of California Cities, and the California State Association of Counties. (*See* Senate floor analysis of 8/25/04, pages 10-11.)

1 resulting provisions. (*See, e.g., DeVita, supra*, 9 Cal.4th at 795 [it is not the place of the court to
2 recraft the results of legislative compromise].)

3 C. THE CITY MISCONSTRUED §65915.

4 In approving the density bonus associated with the Approvals, the City purported to
5 apply the amended provisions of §65915. (AR 2 301; 3 693.) However, as will be shown, the
6 City’s construction of §65915 was incorrect and overstated the amount of density bonus
7 allowable under the statute for the project being approved.

8 The City identified three elements of the project that it claimed together justified a 40%
9 density bonus: 1) the provision of 75 units of moderate-income level affordable units, 2) the
10 provision of 100 senior age-restricted townhouse units, and 3) the donation of 71 acres of
11 parkland plus other miscellaneous amenities. (*Id.*) In addition, the City pointed to §65915 as
12 justifying the replacement of portions of the office park development specified by the Policy
13 Plan with residential housing. (AR 2 300; 3 692.)

14 In granting the Approvals, the City did not provide a breakdown of how it reached the
15 40% bonus, but presumably it added together the moderate income and senior units (175) and
16 divided that by the total allowable units (730) to reach 24%, and applied that figure to the
17 formula in §65915(g) for low-income units: $20\% + 1.5 * \{ \% \text{ affordable units} - 10\% \}$, or $20\% +$
18 $1.5 * 14\% \{24\% - 10\% \} = 41\%$. However, that is not what §65915(g) calls for. To begin with, a
19 40% density bonus would violate the 35% cap set in subsection (g). In addition, the moderate
20 income units provision that the City apparently applied (§65915(b)(4)) does not apply the
21 density bonus schedule set forth in §65915(g)(1), but that in §65915(g)(2). The latter schedule
22 begins with a 5% density bonus, rather than the 20% bonus of §65915(g)(1), and adds to the
23 bonus at 1% per additional 1% moderate income units, rather than adding 1.5% per additional
24 1% of units as for low income units under §65915(g)(1). Secondly, while the senior housing
25 provision had earlier considered the percent of senior units in the entire development, under the
26 new amendment, senior housing is considered a separate development with its own 20% density
27 bonus. Thus, attempting to add together the 100 units of senior housing and 75 moderate income

1 units was almost literally trying to add apples and oranges. Instead, the 75 units of moderate
2 income housing, amounting to 10% of total allowable units (730) provides a 5% density bonus
3 under §65915(g)(2), i.e., an additional 37 units. The senior housing provided a 20% density
4 bonus *for its own parcel*. Of course this is rather problematic in that the senior housing is placed
5 on a parcel that, according to the general plan and zoning maps, appears to be designated golf
6 course residential (1-2 units per acre). Even with a 20% bonus (i.e., 1.2-2.4 units per acre), it is
7 impossible to fit 100 senior townhouse units onto what appears to be roughly a 14 acre parcel.¹⁹
8 However, the Policy Plan allocates 157 units to the 70 acres of area 4B (AR 63 15806), or 2.24
9 units/acre.²⁰ Applying the 20% bonus to this gives approximately 2.7 units per acre. Thus 100
10 units would need $100/2.7=37$ acres, which perhaps might be barely manageable.²¹ At any rate,
11 even if the density bonus would allow the senior housing to fit on its own parcel, §65915 does
12 not allow a small senior housing component to add a 20% density bonus to the overall
13 development.²²

14 Finally, the City apparently asserts that state law allows additional density bonuses for
15 donation of land or other amenities. (AR 2 301:17-21.) §65915(h) does provide for an
16 additional 15% density increase for the donation of land, but the donated land must be suitable
17 for construction of low or very low income housing, and must allow construction of low/very
18 low income housing units equal to at least 10% of the number of residential units in the
19 development. In this case, the donated land was specifically intended as parkland, so this
20 provision would not apply.

21 The City has also misconstrued two other provisions of §65915. §65915(l)(2) allows a
22 city to include mixed use zoning within the development if the commercial, industrial, or other

23 _____
19 The exact parcel size for the senior housing has not yet been defined. (AR 5 1163.)

24 20 The Policy Plan indicates that future residential densities could go as high as 12 units per acre
25 for some limited portion of the Valley, under PUD zoning. (AR 63 15844.)

26 21 The actual apparent density (100 units/14 acres) is a little more than 7 units per acre.

27 22 Indeed, even the original most liberal draft of SB 1818 only called for dropping the required
28 proportion of senior housing units from 50% to 25% of total units. The 100 units of senior
29 housing would not have qualified for any bonus under that provision.

1 land uses would reduce the cost of the housing development and would not be incompatible with
2 the housing development and other development in the area. The City claims this allowed it to
3 place market-rate residential and other non-business park uses²³ in the area designated for
4 business park use. It should be obvious that this is not the subsection's intent. Rather, the
5 incentive is intended to allow a city to add non-residential uses to the residentially zoned area if
6 those uses will help subsidize and make economically feasible the low-income housing. It
7 certainly was not intended to allow the City to effectively rezone areas from business park to
8 residential and other uses without going through the normal legislative process, and certainly not
9 when the rezoned areas would not even be used for the affordable housing²⁴.

10 Lastly, the amendments added a new subsection (n) allowing cities to grant density
11 bonuses above those provided for in §65915 for qualifying developments or bonuses lower than
12 those provided in the section for developments that did not qualify. The City has asserted that
13 this nullified the limits of subsection (g). (AR 4 879-880.) However, it is a principle of statutory
14 interpretation that a statute should not be construed in a way that renders any words superfluous.
15 (*Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 122 Cal.App.4th 1467, 1479) In this
16 case, the City's interpretation would make the 35% limit under subsection (g) meaningless. The
17 more reasonable interpretation is that subsection (o) allows a city, by ordinance, to provide
18 additional density bonus inducements outside of those provided for in §65915. As will be shown
19 below, while the City does have its own density bonus ordinance, that ordinance did not
20 authorize the bonus the City gave.

21
22
23
24 _____
25 ²³ Those uses specifically include the golf course, the clubhouse and recreational complex, and
26 the 17 acre church parcel.

27 ²⁴ Most of the affordable housing (51 units) is proposed for the mixed-use "town center", with
28 the remaining 24 units scattered through the 176 parcels of Village 1. (AR 6 1369:5-9; 16:4058.)
29 Neither the golf course, nor the clubhouse recreational complex, nor the church parcel has any
30 obvious connection to the affordable housing, nor is it at all obvious how they would contribute
to making the housing affordable.

1 D. THE CITY'S APPROVED DENSITY BONUS WAS NOT ALLOWABLE
2 UNDER THE CITY'S OWN DENSITY BONUS ORDINANCE.

3 In addition to §65915, the City also claimed authorization for the density bonus under
4 Vacaville Municipal Code §14.09.116.010 et seq. (AR 16 4052.) When questioned about the
5 size of the proposed density bonus, City staff opined on the one hand that the combination of
6 moderate income and senior units, plus the land donation and other benefits justified the 40%
7 bonus under state law. (AR 6 1369.) On the other hand, City staff also pointed to the City's
8 own density bonus ordinance as justifying an additional density bonus. As City staff pointed
9 out, §65915(n) specifically allows a City to provide for a bonus beyond what is called for in state
10 law.

11 The City does indeed have its own density bonus ordinance, Municipal Code Chapter
12 14.09.116.²⁵ The criteria for granting a density bonus are given in Section 14.09.116.060. In
13 pertinent part, that section provides that a density bonus of at least 25% over the maximum
14 allowable residential density shall be granted if: a) at least 20% of the project's dwelling units
15 are affordable for lower income households, or b) at least 50% of the total dwelling units are
16 restricted to senior citizen households. As the previous discussion has made clear, neither the
17 senior housing component nor the moderate income housing component came anywhere close to
18 meeting these criteria.²⁶

19 The City asserts that because state law had been amended to lower the thresholds for
20 giving a housing density bonus, those standards supersede those in the local ordinance. (AR 3
21 693.) If that is the case, then the size of the density bonus that can be granted under the City's

22 _____
23 ²⁵ A copy of that chapter is submitted with Petitioner's Request for Judicial Notice.

24 ²⁶ The City's zoning ordinance also contains a density modification provision (Vacaville
25 Municipal Code §14.09.074.040(C)) which allows density increases above the base density for
26 the zoning but with the density range for that zoning, for certain specified public benefits.
27 However, this provision only allows variation within a zoning range and only affects zoning.
28 Unlike §65915 or the City's density bonus ordinance, it does not allow the City to exceed
29 density limits set in the general plan or policy plan. Further, while the City purported to make
30 findings that the density bonus complied with the requirements of §14.09.116.110 (AR 1 137-
138), the City made no findings to support a density increase under §14.09.074.040.

1 ordinance is also superseded by the new provisions of §65915. Consequently, the City's density
2 bonus has the same effect as §65915, and only allows the granting of the density bonus provided
3 under §65915. As already noted, this does not justify the 40% density bonus the City approved.

4 Therefore the City had no authority under its own ordinance or under §65915 to grant the
5 40% density bonus, and that density bonus must be rejected as being an *ultra vires* action by the
6 city.

7 **CONCLUSION**

8 In granting the Approvals for Triad's Lagoon Valley project, the City violated both state
9 planning and zoning law and its own municipal code. However beneficial the City may have felt
10 this project would be, that does not justify its actions. If the City wants to do something different
11 in Lower Lagoon Valley than what the Policy Plan mandates, the proper course is to amend the
12 plan, rescind it, or replace it with something else. Likewise, if the City wants to change what the
13 general plan calls for in the Valley, the proper course is to process a general plan amendment. If
14 the City's plans run afoul of the City's voters, as happened with the 2004 general plan
15 amendment and specific plan, the City needs to figure out how to put together a plan its citizens
16 will approve of. Using ruses and duplicitous interpretations of housing laws to circumvent the
17 public processes mandated by state planning and zoning law is not an acceptable solution.

18 For all the above reasons, the Petition should be granted and the City's Approvals
19 ordered rescinded.

20 Dated: June 28, 2005

21 Respectfully submitted,

22 

23 Stuart M. Flashman
24 Attorney for Petitioner and Plaintiff

Appendix

Text of Stats. 1979, c. 1207, Sect. 1-6.

Sec. 1. The Legislature finds and declares that the present supply of housing in California is less than present demand, and that under present circumstances and law, imbalance between supply and demand is likely to increase in the foreseeable future. This problem is general in nature, and does and will exist in urban, suburban, and rural areas, and with regard to market rate housing and to housing which requires subsidization in order to be affordable to segments of the state's population. This situation creates an absolute present and future shortage of supply in relation to demand, as expressed in terms of housing needs and aspirations, and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all of its residents.

Sec. 2. The Legislature further finds and declares that:

(a) It is a matter of urgent public necessity that the housing supply shortfall in California be eliminated.

(b) It is essential to address and remedy the basic causes of the problem rather than its symptoms, and that these causes include the following:

(1) Insufficient availability of land suitable and capable of being developed for the purpose of housing.

(2) Increases in the time and uncertainty for completion of housing development and construction, largely attributable to processing requirements, which significantly increase the cost of the completed housing and delay its availability to the public.

(3) Increases in costs relating to community objectives and services, placed directly upon new residential construction.

(4) Government statutes, regulations, and policies which are insensitive to housing needs, or which individually or collectively, tend to frustrate and production of housing.

(c) For all these and other reasons, a chaotic housing marketplace now exists in California, in which enough housing cannot be produced in some areas at any price to meet the demand, while in others, costs and uncertainties have combined to make essential new and existing housing stock unattractive to capital investment.

Sec. 3. The Legislature further finds and declares that:

(a) In order to meet California's statutory objectives relative to housing, the state must immediately embark on a comprehensive housing supply development program, and maintain that program until the balance between supply and demand is restored, and thereafter to the extent necessary to avoid future imbalance.

(b) In so doing, the state must and should rely primarily:

(1) On the private sector to produce and otherwise provide and maintain the necessary increase in both market rate units, and nonmarket rate units.

(2) On general purpose local government to guide the manner in which these units should be made available; provided, that such local discretion and powers not be exercised in a manner to frustrate the purposes of this act.

(c) While encouraging the expansion and increased utilization of federal programs, the state must not place primary reliance upon the federal government to eliminate the imbalance of supply and demand. The appropriate role for state government is to:

(1) Assist in the removal of obstacles to the development of new housing units.

(2) Harmonize the activities of all state and local agencies to eliminate counterproductive actions and encourage actions which implement the policies of this act.

(d) The state should structure its relationship with other levels of government, particularly general purpose local government and with the private sector as a three-sided partnership, in which each party has specific rights and responsibilities. The state should maintain its role in this partnership so that local government and the private sector can depend upon its commitment to its responsibilities.

Sec. 4. The Legislature further finds and declares that the purpose of this act is to bring the supply of housing back into balance with demand as rapidly as possible, and within a predictable future period of time.

Sec. 5. The Legislature further finds and declares that the specific objectives of this act are to:

(a) Ensure an adequate supply of housing in those areas where the citizens of this state elect to work and live.

(b) Relieve inflationary pressures on housing costs by restoring a more competitive marketplace for new units, and by extension, resale, and existing rental units.

(c) Minimize counterproductive effects of short term or interim responses to the present supply-demand.

Sec. 6. The Legislature further finds and declares that if the state does not adopt these policies, and engage in a systematic program, as set forth in this act, to carry out its purpose and achieve objectives:

(a) Present trends responsible for the imbalance of supply and demand will not be reversed, and are likely to accelerate the imbalance and its consequences.

(b) The imbalance will become institutionalized as a permanent part of the state's housing situation, rather than being a temporary maladjustment.

(c) The state's statutory housing objectives will become unattainable.

(d) The citizens of this state will be forced to unnecessarily accept further limitations on their personal aspirations, their social and economic mobility, and their physical comfort and well-being.

PROOF OF SERVICE BY OVERNIGHT DELIVERY AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On June 29, 2005, I served the within PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDATE, PETITIONER'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATION OF AUTHENTICITY OF STUART M. FLASHMAN on the parties listed on the attached service list by delivering true copies thereof, enclosed in sealed envelopes with delivery fees thereon fully prepaid, to a Federal Express delivery counter at Emeryville California prior to 5:00 PM for delivery on the following morning, addressed as shown on the attached service list I am familiar with the operations of Federal Express and a package deposited in the above-referenced delivery location prior to 5:00 PM will be delivered on the following morning.

In addition, on the above same day, I served the above same documents by electronic mail ("e-mail") transmission as "pdf" file attachments from my office computer over the internet to the e-mail addresses (if any) listed on the service list.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on June 29, 2005.

Stuart M. Flashman

Gerald Hobrecht, City Attorney
Melinda C.H. Stewart, Asst. City Attorney
City of Vacaville
650 Merchant Street
Vacaville, CA 95688
MStewart@cityofvacaville.com

R. Clark Morrison
Andrew B. Sabey
David C. Levy
Morrison & Foerster, LLP
425 Market Street
San Francisco, California 94105-2482
DLevy@mof.com
ASabey@mof.com

Community Homes Corporation
c/o Jeff Goodrich
336 Bon Air Ctr., Box 335
Greenbrae, CA 94904
endstay@hotmail.com

Hans Van Ligten
Rutan & Tucker, LLP
Two Town Center
611 Anton Blvd, 14th Floor
Costa Mesa, California 92626
hvanligten@rutan.com

Delbert & Dorelle Berg
5790 Rivera Road
Vacaville, CA 95688

Steven Ramich
2625 Aspinwall Court
Fairfield, CA 94533