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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION**

NORTH COUNTY ADVOCATES, a non-profit corporation;

Plaintiff,

vs.

CITY OF CARLSBAD, a public body corporate and politic, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 37-2019-00042954-CU-MC-NC

**PLAINTIFF'S POST-TRIAL BRIEF**

Date: N/A
Time: N/A
Judge: Hon. Robert P. Dahlquist
Dept.: N-29

Complaint Filed: August 14, 2019

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## INTRODUCTION

Through this litigation, Plaintiff North County Advocates seeks to protect the rights of City voters who adopted Proposition E and the 1986 Growth Management Plan, ensuring Defendant City of Carlsbad complies with its requirements. Proposition E, which was passed by the electorate of the City of Carlsbad in 1986, required amendments to the Public Facilities and Land Use Elements of the City's General Plan. In significant part, Proposition E provided: "The City Council or the Planning Commission shall not find that all necessary public facilities will be available concurrent with need as required by the Public Facilities Element and the City's 1986 growth management plan unless the provision of such facilities is guaranteed. In guaranteeing that the facilities will be provided emphasis shall be given to ensuring good traffic circulation, schools, parks, libraries, open space and recreational amenities. Public facilities may be added. The City Council shall not materially reduce public facilities without making corresponding reductions in residential densities."

There has been no voter-adopted amendment to Proposition E, and it remains the law in Carlsbad. Yet, over the past couple of decades, the City has worked intently to rid Proposition E's requirements of any meaning, undercutting it in multiple nefarious ways. The five-day trial in this case demonstrated that the City has been and continues to act in contravention of Proposition E and the 1986 Growth Management Plan. The evidence also demonstrated that the City will grasp at any straw it can to evade actually complying with Proposition E.

When pressed at trial as to why the City has not provided residents and staff with clear direction as to how Proposition E amended the General Plan, counsel argued doing so was not necessary, despite the fact that key aspects of Proposition E are not being followed and even senior City staff are unaware of its specific requirements. When pressed that the City is not complying with the GMP performance standard for circulation, counsel argued the standards had been amended yet then objected when Plaintiff introduced evidence that even the amended performance standards were not being followed. When pressed further as to whether he could state that the City was in compliance with the GMP performance standard for open space, the most the City Planning Manager could say was that he had not considered that issue, despite Proposition E's requirement that reports are provided demonstrating compliance with its provisions and despite its separate requirement that

any deficiencies must be promptly reported and addressed. And the evidence showed that by any measure of compliance with the GMP performance standard for parks there are significant shortages, the best the City could present was that it "plans" to develop a park in only one of the four quadrants at some uncertain point in the future.

The evidence at trial clearly demonstrated: (1) the City is not following the requirements and ensuring compliance with the 1986 GMP as promised to the voters; (2) the City is not following through and ensuring compliance with the Local Facility Management Plans it previously adopted and approved for each Zone; (3) the City is not timely and accurately reporting its actions in relation to the GMP performance standards; and (4) the City is attempting to work around various requirements of the GMP without going to the voters and asking for their approval to amend such requirements.

Accordingly, Plaintiff requests this Court issue declaratory relief clarifying the actions required of the City to comply with Proposition E and the GMP, including:

1. Affirming Proposition E requires the City to clearly post and otherwise make available the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City resident,
2. Affirming Proposition E requires the City to clearly notify employees of the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
3. Affirming Proposition E prohibits the City from taking actions that would materially reduce public facilities unless in compliance with Proposition E.
4. Affirming Proposition E requires the annual reporting of compliance with Proposition E requirements, including accurate reporting on compliance and/or non-compliance with the applicable performance standards for open space, circulation and parks in each Zone or Quadrant.
5. Affirming Proposition E requires the City to promptly and accurately bring to the City Council's attention any deficits in the public facilities required by Proposition E

Plaintiff also requests the Court enjoin the City from violating the GMP and ensure timely and accurate reporting of its actions, including:

1. Requiring the City to clearly post and otherwise make available the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
2. Requiring the City to clearly notify employees of the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
3. Prohibiting the City from taking actions that would materially reduce public facilities unless in compliance with Proposition E.
4. Requiring the annual reporting of compliance and/or non-compliance with the applicable performance standards for open space, circulation and parks in each Zone or Quadrant.
5. Requiring the City to promptly and accurately bring to the City Council's attention any deficits in the public facilities as required by Proposition E.

## STATEMENT OF FACTS

### I. City Voters Adopted Proposition E, Requiring Compliance with the 1986 GMP

On July 1, 1986, the Carlsbad City Council adopted Ordinance No. 9808, which added Chapter 21.90, the Growth Management Ordinance, to the City's Municipal Code. Ex. 79. The City Council explained: "one of the primary purposes of Ordinance 9808 was to prevent growth unless adequate public facilities and services to serve the growth is provided when they are needed in a phased and logical way." Ex. 82 at 1.

On September 23, 1986, the Carlsbad City Council adopted several resolutions regarding the Growth Management Plan ("GMP"), including the following:

- Resolution No. 8796, which decreed the "Public Facility and Service Performance Standards as contained on attached Exhibit 'A' are hereby adopted and shall be used in the implementation of Ordinance No. 9808 – The Carlsbad Growth Management Ordinance." Ex. 82 at 2.

- Resolution No. 8797, which decreed: "the Citywide Facilities and Improvements Plan as contained on attached Exhibit 'A' is hereby adopted and shall be used in implementation of Ordinance No. 9808 – The Carlsbad Growth Management Ordinance." Ex. 83 at 1.
- And Resolution No. 8798, which decreed: "the Guidelines for the Preparation of the Local Facility Management Plans which are incorporated in the Citywide Facilities and Improvements Plan are hereby adopted and shall be used in implementation of Ordinance No. 9808 – The Carlsbad Growth Management Ordinance." Ex. 59 at 8.

During the November 4, 1986 election, Proposition E, a citywide initiative, was placed before Carlsbad voters. Ex. 1. Kip McBane, a former City Planning Commissioner and Carlsbad resident at the time of the election, explained at trial: "There was a lot of diversion of funds that had been collected for years to encourage new development and not serve the existing residents." May 8, 2023 Transcript at 4:12 – 15. He also noted: "There was concern about how we were going to provide that infrastructure." *Id.* at 5:8 – 9. Mr. McBane explained that two initiatives were presented for the November 1986 ballot, a citizen's initiative known as Proposition G and an initiative proposed by the City known as Proposition E, noting that "both of them enshrined the concept that any changes would require a vote of the people." *Id.* at 7:2 – 5. The ballot argument in favor of Proposition E explained, in part: "PROPOSITION E provides that NO DEVELOPMENT SHALL BE APPROVED <u>without</u> all facilities being required up front." Ex. 1 at 16 (emphasis in original).

The ballot described Proposition E as follows:

> Shall an ordinance be adopted to provide as a part of the 1986 growth management plan that 1) NO DEVELOPMENT SHALL BE APPROVED by the City of Carlsbad unless it is guaranteed that concurrent with need all necessary public facilities be provided as required by said plan with emphasis on ensuring good traffic circulation, schools, parks, libraries, open space and recreational amenities; and 2) the City Council shall not approve residential development which would increase the number of dwelling units beyond the limit in said ordinance WITHOUT AN AFFIRMATIVE VOTE OF THE CITIZENS. The City may add additional public facilities. The City shall not reduce public facilities without corresponding reduction in the residential dwelling unit limit.

Ex. 1 at 1. In adopting Proposition E, the voters ordained:

> The City Council or the Planning Commission shall not find that all necessary public facilities will be available concurrent with need as required by the Public Facilities Element and the City's 1986 growth management plan unless the provision of such

> facilities is guaranteed. In guaranteeing that the facilities will be provided emphasis shall be given to ensuring good traffic circulation, schools, parks, libraries, open space and recreational amenities. Public facilities may be added. The City Council shall not materially reduce public facilities without making corresponding reductions in residential densities.

*Id.*

The performance standards adopted in 1986 as part of the GMP addressed 11 different types of public facilities. Ex. 82 at 3. Relevant to this litigation are three such standards – open space, parks, and circulation:

- The performance standard for open space requires: "Fifteen percent of the total land area in the zone exclusive of environmentally constrained non-developable land must be set aside for permanent open space and must be available concurrent with development."
- The performance standard for parks requires: "Three acres of community park or special use park per 1,000 population within the Park District, must be scheduled for construction within a five year period."
- The performance standard for circulation requires: "No road segment or intersection in the zone nor any road segment or intersection out of the zone which is impacted by development in the zone shall be projected to exceed a service level C during off-peak hours, nor service level D during peak hours. Impacted means 20% or more of the traffic generated by the local facility management zone will use the road segment or intersection."

*Id.*

The September 23, 1986 CFIP explained:

> The Citywide Facilities and Improvement Plan will implement the City's General Plan and Zoning Ordinance by ensuring that development does not occur unless adequate public facilities and services exist or will be provided concurrent with new development. The preparation of the Citywide Plan is the first phase in the implementation process of the City's Growth Management Ordinance which was adopted by Ordinance No. 9810 on July 1, 1986 by the Carlsbad City Council. Once the Citywide Plan is adopted, a Local Facility Management Plan will be required for each of the 25 local zones into which the City has been divided. This must be done before any additional development is allowed in any one of the zones. Then, when individual development projects are considered, a public facilities adequacy analysis will be provided as part of the report on the project to ensure that it is consistent with both the Citywide and Local Zone Plan.

Ex. 83 at 7. Following the passage of Proposition E, the City Council adopted Local Facility Management Plans for each of the 25 zones. As the 1986 CFIP explained, each LFMP "must be consistent with all aspects of the Citywide Facilities Improvements Plan and shall implement the [CFIP] within the Zone. It must ensure that each public facility and improvement meets the adopted performance standard prior to allowing any development." Ex. 83 at 9.

## II. The City Has Taken Many Actions Inconsistent with Proposition E and the 1986 GMP

As the evidence showed, the City has taken many actions that allowed development to occur in portions of the City without ensuring compliance with the GMP performance standards. The City has also violated its own plans, failed to accurately report existing conditions, and attempted to work around its own violations and problems by claiming it can implement changes to key GMP requirements.

Regarding open space, the City has consistently claimed it is compliance with the GMP performance standard. However, even a cursory review of the City's annual reporting shows that to be remarkably inaccurate. In an August 31, 2018, 10-page letter, Petitioner alerted the City it was vastly off in its characterization of open space performance standard compliance. Ex. 108. Petitioner's letter explained, for example, that what the City labels in its annual reporting as "Category 1" open space consists of "environmentally constrained non-developable lands" as defined by the open space performance standard. *Id.* at 3 – 8. The letter explained that in 20 of the 25 Zones within the City, open space fell short of the requirement, in some cases by a significant amount. *Id.* Similarly, Petitioner's August 2018 letter noted that the City has failed to ensure parks facilities are "available concurrently with the need created by new developments," as required by the GMP. *Id.* at 8 – 9.

On October 3, 2018, the City provided a three-page response to Petitioner's August 2018 letter. In it, the City asserted it was "relying on the final adopted [CFIP] which was approved by the City Council on September 23, 1986." Ex. 130 at 1. The letter claimed the City was in compliance with both the open space and parks performance standards. It concluded: "While we understand that North County Advocates may disagree with this position, this represents the city's final opinion on the applicability of the performance standards for growth management as related to open space and parks." *Id.* at 2.

Similarly, the City is also violating requirements for circulation. Indeed, the City's Growth Management Plan Monitoring Reports acknowledge Levels of Service of E and F along El Camino Real,

College Boulevard, Melrose Drive, and Cannon Road. Ex. 244 at 29. And in July of 2019, City staff acknowledged the city was using a "new methodology," and reported that using this new methodology, the City was failing to meet the GMP circulation standard along eight street segments. Ex. 73 at 2.

## ARGUMENT

### I. This Litigation Seeks to Enforce the Rights of Voters

#### A. The Voters' Rights are Revered

The California Constitution defines an initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509 (citing Cal. Const., Art. II, §8). Voters have the authority of the local legislative body. *Legislature of the State of California v. Deukmejian* (1983) 34 Cal.3d 658, 675.

In *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, the California Supreme Court explained:

> The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people," the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

*Id.* at 591 (citations and footnotes omitted); *see also Rossi v. Brown* (1999) 9 Cal.4th 688,695. In *Toulumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4$^{th}$ 1029, the California Supreme Court observed:

> Voter initiatives have been compared to a "legislative battering ram" because they "may be used to tear through the exasperating tangle of the traditional legislative procedures and strike directly toward the desired end." In light of the initiative power's significance in our democracy, courts have a duty "to jealously guard this right of the people" and must preserve the use of an initiative if doubts can be reasonably resolved in its favor.

*Id.* at 1035 (emphasis and citations omitted).

"Once an initiative measure has been approved by the requisite vote of electors in an election, … the measure becomes a duly enacted constitutional amendment or statute." *San Francisco*

*Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 516 (quoting *Perry v. Brown* (2011) 52 Cal.4th 1116, 1147). The City does not have the authority to amend Proposition E's requirements; only the voters have that authority. *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509.

The California Supreme Court has recognized: "The initiative and referendum are not rights 'granted the people, but ... power[s] reserved by them.'" *Rossi v. Brown* (1995) 9 Cal.4th 688, 695 (quoting *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (*Association Home Builders*).). The California Supreme Court explained:

> because the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when current government officials have declined to adopt (and often have publicly opposed) the measure in question, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, always undertake such a defense with vigor or with the objectives and interests of those voters paramount in mind.

*Perry v. Brown* (2011) 5 Cal.4th 1116, 1125.

Additionally, "an initiative statute may be amended or repealed only by another voter initiative, 'unless the initiative statute permits amendment or repeal without the electors' approval.'" *County of San Diego v. Commission of State Mandates* (2018) 6 Cal.5th 196, 211 (quoting Cal. Const. Art. 2, § 10(c)). The purpose of this limit is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." *Id*. (citation omitted). Due to the significance of the initiative power reserved by the people, it is "the duty of the courts to jealousy guard this right of the people." *Association Home Builders*, *supra*, 18 Cal.3d at 591 (citation omitted).

In approving Proposition E, the voters of Carlsbad amended the General Plan and zoning map, and directed the City Council to adopt amendments to the municipal code to implement requirements of Proposition E. Proposition E does not permit the wholesale amendment or repeal of the 1986 GMP without the approval of the electorate, including the standards for required public facilities. Yet, the City is now avoiding its obligations pursuant to Proposition E and the GMP.

In its trial brief for Phase I of the trial, the City argued: "NCA's fundamental legal theory underpinning the majority of this case is erroneous; i.e. that Performance Standards were somehow

incorporated by reference into Proposition E. The Supreme Court has expressly rejected this legal theory, and it directly conflicts with the express language [of] the CFIP." Defendant's Opening Bifurcated Trial Brief at 9 n.3 (quoting *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 209 – 10, 214). But the California Supreme Court's decision in *County of San Diego* supports Plaintiff's position. There, the Court correctly noted "the California Constitution provides that an initiative status may be amended or repealed only by another voter initiative, 'unless the initiative statute permits amendment or repeal without the electors' approval.' The evident purpose of limiting the Legislature's power to amend an initiative statute is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." *County of San Diego*, 6 Cal.5th at 211 (quoting *Shaw v. People ex rel. Chang* (2009) 175 Cal.App.4th 577, 597) (internal quotation marks omitted). Turning to the question of "'what the people have done' and what qualifies as 'undoing'" (*id.*), the Supreme Court ruled: "where a statutory provision was only technically reenacted as part of other changes made by a voter initiative and the Legislature has retained the power to amend the provision through the ordinary legislative process, the provision cannot be fairly considered 'expressly included in … a ballot measure' within the meaning of Government Code section 17556, subdivision (f)." *Id.* at 214; *see also People v. Superior Court* (2019) 42 Cal.App.5th 270, 288 – 89 ("we reiterate a bedrock principle underpinning the rule limiting legislative amendments to voter initiatives: '[T]he voters should get what they enacted, not more and not less'") (citation omitted).

B. Courts Have Protected Voters' Rights Even Where the Agency Alleged a Conflict with Other Laws

In *Yost v. Thomas* (1984) 36 Cal.3d 561, the California Supreme Court ruled that a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city's adopted Local Coastal Program. *Id.* at 574. The court noted while the California Coastal Act does require a city to act in a manner consistent with its Land Use Plan ("LUP"), it "does not provide blanket immunity from the voter's referendum power." *Id.* at 565. And it reasoned: "if down the road the people exercise their referendum power in such a way as to frustrate any feasible implementation of

the LUP, some way out of the impasse will have to be found. At this point, however, the system is not being put to so severe a test." *Id.* at 574.

And in *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, the California Supreme Court ruled a referendum could proceed despite the fact that it would clearly result in inconsistencies with the city's adopted general plan. The city had amended its general plan to change a land use designation for a particular property from "Industrial" to "Commercial." *Id.* at 1076. Subsequently, the city changed the zoning for the site to "CG-General Commercial" in order to make it consistent with the general plan designation. *Id.* at 1077. After sufficient signatures were gathered for a referendum on the zoning change, the city refused to process the referendum, reasoning that to do so would create inconsistencies with the general plan designation. *Id.* The Supreme Court disagreed, noting that a "referendum challenging an amendment to the zoning ordinance does not result in the final imposition of an invalid zoning designation …, at least where a county or city can use other means to bring consistency to the zoning ordinance and the general plan." *Id.* at 1081. It remanded the matter to the trial court "to determine whether existing alternative zoning designations would be viable for the property postreferendum, and if not, what would prevent the City from creating a new zoning designation that would be consistent with both the general plan and a successful referendum." *Id.* at 1090.

## II. The City is Violating Proposition E and the GMP

The evidence presented at trial demonstrated that City has been and continues to act in contravention of Proposition E and the GMP in several respects. Counsel repeatedly argued that the City has "authority" to amend the GMP as it sees fit: "MR. DEROSIERS: So I think we broadly agree with plaintiff that in 1986 what would have been considered the Growth Management Plan includes all those exhibits [referencing Exhibits 79, 82, 83 and 59]. The piece that the City would add to that is that the Growth Management Plan has been amended and can be amended by the City Council. City Council has solely that authority. That authority predated Proposition E." May 8, 2023 Transcript at 44:18 – 24.

This argument evinces the City's arrogance and disdain for the rights of the voters. Proposition E specifically provided that the City Council or Planning Commission "shall not find all

necessary public facilities will be available concurrent with need as required by the Public Facilities Element and the City's 1986 growth management plan unless the provision of such facilities is guaranteed." Ex. 1 at 2 (emphasis added). Whether the City Council had certain authority prior to the adoption of Proposition E is irrelevant – only the voters have the authority to amend Proposition E's requirements. *Marblehead*, 226 Cal.App.3d at 1509. "[A]n initiative statute may be amended or repealed only by another voter initiative, 'unless the initiative statute permits amendment or repeal without the electors' approval.'" *County of San Diego v. Commission of State Mandates* (2018) 6 Cal.5th 196, 211 (quoting Cal. Const. Art. 2, § 10(c)). The purpose of this limit is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." *Id.* (citation omitted). Yet that is precisely what the City has done and continues to do here.

At trial, counsel asked about certain provisions that discuss possible amendments that can be adopted by the City Council. April 26, 2023 Transcript at 8:15 – 9:24. But the fact that the City Council has certain amendment authority does not give it authority to amend Proposition E's requirements. Indeed, Proposition E itself required: "The City Council shall adopt amendments to Chapter 21.90 of the Carlsbad Municipal Code (Growth Management) as necessary to implement the General Plan Amendment of Section A and the Map of Section B." Ex. 1 at 3 (emphases added). In other words, Proposition E itself commanded the City Council to adopt those amendments necessary to implement its terms. But Proposition E also provided: "Public facilities may be added. The City Council shall not materially reduce public facilities without making corresponding reductions in residential densities." Ex. 1 at 2 (emphasis added). Adopting amendments to entirely wipe out (what the City euphemistically calls "exempt") requirements for numerous roadways and intersections is not implementing Proposition E – it is materially reducing public facilities.

**A. The City is Not Ensuring Concurrent Availability of Open Space**

The 1986 performance standard for open space requires: "Fifteen percent of the total land area in the zone exclusive of environmentally constrained non-developable land must be set aside for permanent open space and must be available concurrent with development." Ex. 82 at 3. At trial, the City did not claim this standard had been amended, at least for many zones, though it did claim Zones

1 through 10 and 16 were "exempt." *See* Respondent City of Carlsbad's Trial Brief at 22:20 ("Zones 1-10 and 16 were exempted from the open space standard"). However, at trial, Eric Lardy, the Division Manager of the City's Planning Division, acknowledged that it was "not accurate" to say these zones were "exempt from the Growth Management Plan." April 27, 2023 Transcript at 66:15 – 18.

However, even the LFMPs adopted for these zones require a certain amount of open space and, at least in several cases, the City has failed to ensure that open space remains. For example, at trial Mr. Lardy was presented with the LFMP for Zone 3, Exhibit 173. Mr. Lardy acknowledged that this LFMP included Condition No. 3, which provides: "The City of Carlsbad shall monitor all facilities in Zone 3, pursuant to Subsections 21.90.130 (C), (D) and (E) of the Carlsbad Municipal Code." April 27, 2023 Transcript at 25:14 – 20; Exhibit 173 at 27. And Condition No. 4 of the LFMP provided that "all development in Zone 3 shall be in conformance with the Citywide Facilities and Improvement Plan, as adopted by City Council Resolution 8797." *Id.* at 28:25 – 29:11.

And when presented with language from the Growth Management Ordinance of the Municipal Code, Mr. Lardy acknowledged that it was the obligation of his department to "monitor activity in each zone through development entitlement applications and review them against the standards and requirements of the zones." *Id.* at 28:12 – 14. The LFMP for Zone 3 provided that "Zone 3 has 98.6 acres of land, which are designated as open space in the land use element of the General Plan." *Id.* at 30:14 – 19; Exhibit 173 at 112. Yet the 2021/2022 Open Space Status Report prepared by the City of Carlsbad, Exhibit 52, lists only 59 acres of open space in Zone 3. *Id.* at 30:24 – 31:15; Exhibit 52. When asked to explain the discrepancy between the 98.6 acres of open space called for in the LFMP for Zone 3 and the 59 acres of open space identified in the annual report, Mr. Lardy could not explain it. *Id.* at 31:20 – 24. But he did admit that he was not aware of any time when the City Manager had reported to the City Council that there were any deficiencies of open space in any zones. *Id.* at 32:18 – 33:8. And, of course, the City's reporting for the last several years has indicated that each zone is in compliance with the requirements. Ex. 244 at 36 – 37.

In reality, the evidence at trial showed that the City is far short of the required open space in several Zones. As the table in Petitioner's August, 2018 letter explains, 20 of the 25 Zones are

deficient, in some cases by large amounts. Ex. 108 at 5. "Category 1" open space is a category from the Open Space Element of the General Plan that includes "plants and animal habitat, nature preserves, beaches and bluffs, wetland and riparian areas, canyons and hillsides and water features such as lagoons and streams." Exhibit 9 at 5.

Additionally, even looking at the LFMPs that were adopted by the City Council for each of the Zones, there are some Zones that are considerably short of the acres of open space required by those plans. The City has claimed it needs to do no more in these Zones despite the fact that several are significantly short of the open space required. For example, Mr. Lardy was presented with the LFMP for Zone 21, Exhibit 209. Mr. Lardy acknowledged that the LFMP provides: "Performance standard open space consists of developed open space areas within existing and approved projects and unconstrained, developed open space throughout the remainder of the zone." April 27, 2023 Transcript at 43:4 – 17; Exhibit 209 at 110. It also provides: "Unconstrained, undeveloped open space is land that will remain as permanent open space and is free of environmental constraints." *Id.* at 43:18 – 24; Exhibit 209 at 110.

The LFMP for Zone 21 identifies 85.98 acres of constrained open space (combining the "full" constrained acreage of 70.90 and the "partial" constrained acreage of 15.08, the latter of which is one half of the 30.15 acres of slopes between 25% to 40%). Exhibit 209 at 32. Mr. Lardy acknowledged that the LFMP's were to identify the constrained land, as this one did, and "then there was additional land, the 15 percent, that was unconstrained land but that was to be set aside as open space for each zone …." April 27, 2023 Transcript at 43:25 – 44:2. And with the Zone 21 LFMP, the unconstrained/developable land was identified at 162.21 acres and, therefore, 15 percent of that is 24.3 acres to be set aside as "Zone 21 buildout performance standard requirement for open space." *Id.* at 44:9 – 20; Exhibit 209 at 110. Therefore, the combination of the 85.98 acres of constrained open space and the 24.3 acres of performance standard land would provide a total of 110.28 acres of open space. Yet the annual open space report shows only 108.5 acres of "Category 1" open space in Zone 21. Ex. 52 at 1.

Deficiencies can be seen by reviewing LFMP's for other zones. For example:

- The LFMP for Zone 12 shows a combination of 76.1 constrained acres (58.9 + 17.2) (Ex. 189 at 39) and 83.42 acres of performance standard land (Ex. 189 at 148) for a total of 159.52 acres. Yet the annual open space report shows only 137.7 acres of open space in Zone 12. Ex. 52 at 1.
- The LFMP for Zone 20 shows a combination of 200.18 constrained acres (133.95 + 66.23) (Ex. 208 at 31) and 87.04 acres of performance standard land (Ex. 189 at 103) for a total of 287.22 acres. Yet the annual open space report shows only 258.6 acres of open space in Zone 20. Ex. 52 at 1.
- The LFMP for Zone 22 shows a combination of 232.4 constrained acres (227.5 + 4.9) (Ex. 210 at 43) and 28.14 acres of performance standard land (Ex. 210 at 119) for a total of 260.54 acres. Yet the annual open space report shows only 74.2 acres of open space in Zone 22. Ex. 52 at 1.

Furthermore, the GMP workplan adopted by the City Council in 1986 requires, among other things: "Each local facilities management plan will be reviewed annually by the City to ensure that all performance standards are being met. If they are not, development will be stopped." Ex. 79 at 22. Likewise, Ordinance 9808, the Growth Control Ordinance, also requires annual reporting. Ex. 79 at 15. Remarkably, none of the recent annual reports prepared by City staff have provided any information on whether the City is ensuring that "[f]ifteen percent of the total land area in the zone exclusive of environmentally constrained non-developable land [has been] set aside for permanent open space and [] available concurrent with development."

At trial, counsel argued that the City Council has discretion to determine the "content of the annual report." Ex. 79 at 15. There are two problems with this argument. First, the language upon which counsel relies does not say that the City can completely ignore its GMP obligations. In fact, that same section of the GMP Ordinance requires the Planning Director to "monitor the development activity for each local facilities management zone and shall prepare an annual report to the City Council consisting of maps, graphs, charts, tables and text and which includes a developmental activity analysis, a facility revenue/expenditure analysis and recommendation for any amendments to

the facilities management plan." *Id.* As the evidence at trial demonstrated, the City has not come close to meeting these requirements.

Second, the City presented no evidence that the City Council had actually voted to amend the "contents" of any reporting not to include important information about GMP compliance (and it would not have had authority to do so, even if it had). As Mr. Lardy acknowledged, "The report is presented to the city council, and they receive that and could provide additional direction if they had different requests." April 27, 2023 Transcript at 69:25 – 28. Despite his role in charge of compiling and presenting the annual reports, Mr. Lardy was not aware of the City Council ever providing formal direction as to the contents of the annual reporting. *Id.* at 70:5 – 11.

**B. The City is Not Ensuring Concurrent Availability of Circulation Facilities**

The 1986 performance standard for circulation requires: "No road segment or intersection in the zone nor any road segment or intersection out of the zone which is impacted by development in the zone shall be projected to exceed a service level C during off-peak hours, nor service level D during peak hours. Impacted means 20% or more of the traffic generated by the local facility management zone will use the road segment or intersection." Ex. 82 at 3. The City did not even attempt to claim its circulation facilities are in compliance with this standard. Nor could it have, since its own staff acknowledged numerous street segments that were not meeting the performance standard. *See e.g.*, Ex. 72 at 11.

Rather, the City claimed that in 2015 the City Council adopted amendments that "eliminated 'the use of intersection LOS analysis'" and "also gave the City Council authority to 'exempt' certain street facilities …." Opening Bifurcated Trial Brief at 10:18 – 20. Of course, this legal position – i.e., that the City Council can "give itself authority" to "exempt" facilities from the performance standards the electorate voted must be complied with prior to voting to approve a discretionary project – goes directly against the voter's will. Claiming the City can change the standards whenever they become too difficult to meet completely ignores the voters' intentions. Among other things, Proposition E provided: "The City Council shall not materially reduce public facilities without making corresponding reductions in residential densities." Ex. 1 at 2. This would have been meaningless if the voters felt the City Council could indeed vote to "materially reduce public facilities" merely by exempting such facilities from the requirements.

Notably, Tom Frank, the City's Transportation Director, acknowledged that seeing Proposition E's language at trial was "the first time that I've read it verbatim." April 23, 2023 Transcript at 29:3 – 17. He made a similar admission regarding the performance standards adopted by the City via Resolution 8796. *Id.* at 30:1 – 10. And he admitted that as the City's Transportation Director, he is not focused on complying with the 1986 circulation performance standard. *Id.* at 32:15 – 25.

But even if the City Council did have some authority to amend certain performance standards, none of the records the City relies upon show that the new standard does not consider impacts to intersections. For example, the City has claimed the City Council adopted new standards when it adopted a new General Plan Mobility Element in 2015. Defendant City of Carlsbad's Reply to Plaintiff North County Advocate's Trial Brief at 14:11-12 ("portions of [the 2017-18 monitoring report] make it abundantly clear that this 'new' methodology was adopted in 2015"). However, the Mobility Element adopted in 2015 specifically calls for evaluation of "vehicles based on their freedom to maneuver, and overall delay experienced at intersections." Ex. 8 at 16. Yet in its reporting to the City Council and elsewhere, the City has claimed it "eliminated the use of intersection LOS analysis and now evaluates vehicle LOS using only street segment LOS analysis." Ex. 72 at 10 (emphasis added); *see also* Ex. 46 at 21 (annual report with same language). When pressed about this language, Tom Frank, the City's Transportation Director, walked back from this language, asserting it "just wasn't clearly explained" and claiming the City does "evaluations of intersections per the HCM evaluation methodology." April 26, 2023 Transcript at 51:10 – 12 & 21 – 23.

Dr. Steve Linke, who served on the City's Traffic Commission for several years, explained: "since 1989 when they first started monitoring, they've always did both segments and intersections, and the intersections are really the more the critical aspect of it." April 25, 2023 Transcript at 40:21 – 25 (emphasis added). Dr. Linke noted that he had spoken with City staff about the need to monitor intersections, explaining he told them: "the new performance standards explicitly described both intersection and street segments, that we should be monitoring and making exemption decisions based on that type of analysis." *Id.* at 42:13 – 18. Yet despite the clear insufficiencies in its analysis and despite the fact that its "new" standard calls for intersection analysis, the City has refused to include intersection analysis in its decision-making. *Id.* at 114:10 – 115:26.

The 2020/2021 annual report explained that the "new" standard also "calls for the use of MMLOS ("multi-modal level of service") methodology to provide a metric for evaluating bicycle, pedestrian and transit modes of travel." Ex. 244 at 25. A prior annual report had explained: "Staff intends to reevaluate the methodologies and make refinements to the MMLOS tool, in coordination with the Traffic and Mobility Commission. Ex. 47 at 25. Dr. Linke explained that as a member of the City's Traffic and Mobility Commission, he "made a motion to work with staff to develop that MMLOS tool in a reasonable way." April 25, 2023 Transcript at 24:11 – 19. He explained his concerns about the "tool," including that it "could be modified by staff whenever they want to. There's no public review. There's no – it didn't go to the City Council." *Id.* at 26:17 – 25. Ultimately, Dr. Linke said staff explained they "never intended to monitor level of service for these three modes of travel," claiming they could not "condition developments to make improvements because," they argued, they were "all preexisting deficiencies." *Id.* at 27:15 – 22.[1]

**C. The City is Not Ensuring Concurrent Availability of Parks**

The 1986 performance standard for parks requires: "Three acres of community park or special use park per 1,000 population within the Park District, must be scheduled for construction within a five year period." The City does not claim to be in compliance with this standard; instead, it insists the City Council has changed the standard and issues interpretations of the requirements. As noted *supra*, claiming it can "move the goal posts," or even eliminate them entirely, goes against the voters' rights.

The evidence at trial shows that the City is currently not in compliance with the parks standard in three of the four quadrants. Ex. 244 at 17. The City's Parks and Recreation Director, Kyle Lancaster, acknowledged these deficits. April 25, 2023 Transcript at 148:27 – 149:16.

But even if the City Council has some authority to amend and/or interpret the performance standard, it has gone well past that point. In its annual reporting, the City claims the phrase

[1] Counsel argued that evidence regarding the City's compliance with the MMLOS standard "is irrelevant to the allegations in the Complaint" in that Plaintiff had alleged violations of the 1986 performance standard for circulation. April 25, 2023 Transcript at 30:14 – 31:18. As Plaintiff's counsel explained, while Plaintiff challenges the authority of the City to amend the GMP without a vote of its residents, "to the extent the City has responded … that they have amended those standards with these new 2015 performance standards," the question of compliance with such "new" standards is relevant to this litigation. *Id.* at 31:21 – 34:9.

“scheduled for construction” was defined in the 1986 CFIP to mean “the improvements have been designed, a site has been selected, and a financing plan for construction of the facility has been approved.” Ex. 244 at 17 n.9. This is incorrect – there is no such definition in the 1986 CFIP. *See e.g.*, Ex. 83 at 21 & 39. Mr. Lancaster acknowledged there was no such language in the CFIP. April 25, 2023 Transcript at 150:28 – 151:22.

Counsel argued that such a definition was found in a City Council resolution adopted in 2017. *See* Ex. 3 at 37. But again, assuming the City Council had the authority to amend the standard, such a definition is inconsistent with the clear language of Proposition E, which required “that all necessary public facilities will be available concurrent with need.” Ex. 1 at 2. Yet three of the four quadrants currently have park acreage insufficient to meet the performance standard.

The City’s annual reporting claims the City Council has approved plans and “appropriated” funds for the Veterans Memorial Park Project. Ex. 244 at 17 – 19. But this park is located in the northwest quadrant. April 25, 2023 Transcript at 152:25 – 153:3. Ironically, that is the only quadrant that currently has sufficient existing park acreage. Ex. 244 at 17. The annual reporting states “Veteran’s Memorial Park is proposed to be constructed prior to buildout.” *Id.* at 19. Mr. Lancaster testified that “buildout” is generally in the “2030 range.” April 25, 2023 Transcript at 166:8 – 12. And he stated that if all goes well, the earliest Veterans Memorial Park would be open would be in the summer of 2025. April 25, 2023 Transcript at 164:25 – 165:15. Regardless of the particulars, even by the City’s own evidence, such a timeframe certainly is not providing parks that are “available concurrent with need.”

## III. This Court Should Grant Declaratory and Injunctive Relief

“The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.” *Californians for Native Salmon and Steelhead Ass’n v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1427. “Declaratory relief is appropriate to obtain judicial clarification of the parties’ rights and obligations under applicable law. *Id.* (citing *Hoyt v. Board of Civil Service Commrs.* (1942) 21 Cal.2d 399, 400-401.) “Because it is a cumulative remedy … it is often sought, as it was here, in conjunction with requests for injunctive relief or mandamus.” *East Bay Mun. Utility Dist. v. Dept. of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1113, 1121 (*EBMUD*). Here, there is an actual controversy regarding the rights and duties of the City regarding the GMP and Proposition E.

## CONCLUSION

As the evidence at trial demonstrated, the City is violating Proposition E and the 1986 GMP. Accordingly, Plaintiff requests this Court issue declaratory relief clarifying the actions required of the City to comply with Proposition E and the GMP, including:

1. Affirming Proposition E requires the City to clearly post and otherwise make available the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City resident,
2. Affirming Proposition E requires the City to clearly notify employees of the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
3. Affirming Proposition E prohibits the City from taking actions that would materially reduce public facilities unless in compliance with Proposition E.
4. Affirming Proposition E requires the annual reporting of compliance with Proposition E requirements, including accurate reporting on compliance and/or non-compliance with the applicable performance standards for open space, circulation and parks in each Zone or Quadrant.
5. Affirming Proposition E requires the City to promptly and accurately bring to the City Council's attention any deficits in the public facilities required by Proposition E

Plaintiff also requests the Court enjoin the City from violating the GMP and ensure timely and accurate reporting of its actions, including:

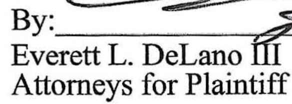
1. Requiring the City to clearly post and otherwise make available the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
2. Requiring the City to clearly notify employees of the mandated language of Proposition E identifying how it amended the General Plan and explaining that it can only be amended by a vote of City residents.
3. Prohibiting the City from taking actions that would materially reduce public facilities unless in compliance with Proposition E.

4. Requiring the annual reporting of compliance and/or non-compliance with the applicable performance standards for open space, circulation and parks in each Zone or Quadrant.
5. Requiring the City to promptly and accurately bring to the City Council's attention any deficits in the public facilities as required by Proposition E.

Respectfully Submitted,

**DELANO & DELANO**

DATE: July 17, 2023

By: 

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