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FOOTHILL COMMUNITIES COALITION

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

FOOTHILL COMMUNITIES COALITION, an unincorporated association

Petitioner,

v.

COUNTY OF ORANGE, ORANGE COUNTY BOARD OF SUPERVISORS, DOES 1 through 10, inclusive,

Respondents,

ROMAN CATHOLIC DIOCESE OF ORANGE, KISCO SENIOR LIVING, LLC, and DOES 11 through 25, inclusive,

Real Parties in Interest.

Case No. 30-2011-00467132-CU-WM-CXC

Judge Ronald L. Bauer

VERIFIED PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY RELIEF
[Pub. Resources Code § 21168 and Code of Civ. Pro. § 1094.5]

[NOTE TO COURT CLERK: THIS ACTION IS BROUGHT PURSUANT TO THE CALIFORNIA ENVIRONMENT QUALITY ACT ("CEQA") AND THEREFORE IS TO BE ASSIGNED TO A JUDGE DESIGNATED IN ACCORDANCE WITH PUBLIC RESOURCES CODE SECTION 21167.1(b)]

INTRODUCTION

In this action petitioner FOOTHILL COMMUNITIES COALITION (the "Coalition" or "Petitioner") challenges specific violations of law by respondents COUNTY OF ORANGE (the "County") and ORANGE COUNTY BOARD OF SUPERVISORS ("Board") (County and Board are collectively referred to herein as "Respondents"), as follows:

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1. Petitioner challenges the decision of respondent Board, as the elected legislative body for respondent County, to approve the application submitted by real parties in interest Roman Catholic Diocese of Orange ("RCDO") and Kisco Senior Living, LLC ("Kisco") to develop "The Springs at Bethsaida", a 153-dwelling unit senior living community consisting of one two-story main building with a central courtyard and basement common area/parking level and 19 bungalows (the "Project") on multiple parcels totaling 7.25 acres and generally located at 11901 Newport Avenue (the "Parcels") in the unincorporated community of North Tustin. (RCDO and Kisco are collectively referred to herein as "RPIs.")

2. Petitioner contends that County's preparation of an environmental impact report ("EIR") [State Clearinghouse No. 2009-071081] for the Project, and the Board's certification of the EIR, violate specific provisions of the California Environmental Quality Act (Pub. Resources Code §§ 21000 *et seq.*: "CEQA") and the Guidelines for Implementation of CEQA (Tit. 14, Cal. Code Regs., §§ 15000 *et seq.*: the "CEQA Guidelines"), a statutory and regulatory framework commonly referred to as "the Holy Grail of California's environmental laws."

3. Petitioner is challenging the Project because (among other things), over the objections of hundreds of community residents, Respondents chose to ignore the County's own controlling land use documents applicable to the residential single family-zoned Parcels which bar a high-density multi-family facility like the Project from being developed upon them; instead, Respondents rushed the Project through the CEQA process, cutting numerous corners along the way such as by adding hundreds of pages of new information to the EIR and then failing to recirculate that information for public review as the CEQA Guidelines mandate.

4. Petitioner contends that, by refusing to properly prepare, circulate and certify a legally adequate EIR that (i) tiered off of the prior program EIR that was prepared and certified for the North Tustin Specific Plan; (ii) included an accurate and stable Project description; (iii) was internally consistent; (iv) fully disclosed and analyzed all of the potential impacts that will result from the Project; and (v) fairly and objectively assessed feasible and environmentally superior alternatives to the Project, Respondents disregarded or treated as a mere formality the specific procedural and substantive requirements of CEQA and the CEQA Guidelines.

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5. Petitioner also contends that Respondents' approval of the Project violates specific requirements of California's Planning and Zoning Law (Gov. Code §§ 65000 *et seq.*: "PZL") and Subdivision Map Act (Gov. Code §§ 66410 *et seq.*: "SMA") because (among other things) the notices Respondents issued for the Project were legally inadequate; the Project is inconsistent with the County's General Plan and the NTSP; the Project results in the premature and unnecessary development of agricultural lands for urban uses; the Project violates the PZL's uniformity statute; and the Board's approval of the Project's approval presumed future lot line adjustments to the Parcels would also be issued contrary to law.

6. Petitioner requests that this Court vacate and set aside the Project approvals and the EIR's certification by issuing a writ of mandate under Code of Civil Procedure section 1094.5, directing Respondents to vacate and set aside their approval of the Project and certification of the EIR for the Project.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to sections 187, 410.10, and 1094.5 of the Code of Civil Procedure, and section 21168 of the Public Resources Code.

8. Venue for this action properly lies in the Orange County Superior Court because Respondents and the Parcels are located in Orange County.

PARTIES AND BENEFICIAL INTEREST

9. Petitioner is an unincorporated umbrella organization composed of and supported by grassroots community groups and others devoted to the preservation of the environment. The three grassroots community groups – Foothill Communities Association, Inc., Citizens for Unincorporated Orange County, and Neighbors United – were organized for the purpose of (among other things) representing the interests of the public in assuring compliance with the State's environmental and land use laws. Petitioner's members reside within the unincorporated Orange County communities in and around North Tustin and/or own real property within that area. On behalf of Petitioner's members, their respective constituents, and other Orange County residents, Petitioner challenges the certification of EIR and approval of the Project by Respondents.

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10. Petitioner has associational standing to bring this action and is a party beneficially interested in the issuance of the requested writ of mandate and injunctive and declaratory relief (i) because in accordance with Public Resources Code section 21177(c), Petitioner is an organization formed after the approval of the Project to maintain an action against Respondents under CEQA, and (ii) because certain members of Petitioner–including individuals who are members of the three grassroots community groups comprising Petitioner–complied with subdivisions (a) and (b) of Public Resources Code section 21177 and exhausted their administrative remedies by timely commenting on and objecting to the contents and adequacy of the EIR and the Project both orally and in writing.

11. Unless this Court grants the requested writ of mandate, the impacts resulting from Respondents' decision to certify the EIR and approve the Project will extend to areas in which numerous citizens represented by Petitioner live and will directly and adversely affect their health and living environment. Consequently, Petitioner is directly and beneficially interested in the issuance of the requested writ of mandate.

12. Respondent County is a public body, corporate and politic, organized and existing under and by virtue of the laws of the State of California and is responsible for regulating and controlling land use in all areas within unincorporated areas of the County, including (but not limited to) implementing and complying with the provisions of CEQA, the CEQA Guidelines, the PZL, and the SMA.

13. Respondent Board is the duly constituted legislative body for County. As such, Board is the governing body of County, and is responsible for carrying out County's statutorily mandated duties, including (but not limited to) the formulation and implementation of land use plans in the County and the preparation and certification of EIRs for those plans.

14. Petitioner is informed and believes and on that basis alleges that real party in interest RCDO is a religious entity. RCDO is identified in the staff reports, agendas, and other materials produced by and/or presented to Respondents as the owner of Parcels and an applicant for the Project's approvals.

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15. Petitioner is informed and believes and on that basis alleges that real party in interest Kisco is a Delaware limited liability company. Kisco is identified in the staff reports, agendas, and other materials presented to Respondents as RCDO's agent and an applicant for the Project's approvals.

16. Since Respondents did not publicly identify any other persons or entities as recipients of the approvals that are the subject of this action, Petitioner believes it has complied with subdivision (a) of Public Resources Code section 21167.6.5.

17. Petitioner is ignorant of the true names and capacities of the respondents named herein as DOES 1 through 10, and the real parties in interest named herein as DOES 11 through 25, inclusive, and therefore sues those respondents and real parties in interest by such fictitious names. Petitioner will amend this petition to allege the true names and capacities of those Doe parties when ascertained. Petitioner is informed and believes, and on that basis alleges, that each of the parties designated herein as a Doe is responsible in some manner for the events and actions referred to herein.

18. Petitioner is informed and believes, and on that basis alleges, that at all relevant times the County, the Board, RCDO, Kisco and the Doe respondents and/or real parties in interest were and are the agents of each other, authorized to do the acts herein alleged, each of which was ratified by the others.

19. The true names and capacities, whether individual, corporate, or otherwise of Does 1 through 25 are unknown to Petitioner who therefore sues Does 1 through 25 by such fictitious names. Petitioner will amend this petition to allege the true names and capacities of the Doe respondents when the same becomes known to it. Reference to "County", "Board" or "Respondent" herein shall mean the named respondents and Does 1 through 10, and reference to "RCDO," "Kisco," or "RPIs" shall mean the named real party in interest Does 11 through 25.

20. Petitioner is informed and believes and on that basis alleges that Respondents, RPIs and each of the Does proximately caused the acts, omissions to act, and/or injuries herein alleged.

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ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

21. On August 8, 1956, a family gifted the largest parcel of the Parcels to RCDO; at that time RCDO planned to develop the gifted parcel as a church and school as permitted under the County's zoning. However, after Respondents granted RCDO the entitlements needed to develop these uses, extensive litigation followed, and the church and school were built at another location.

22. For decades the unincorporated community of North Tustin has been the scene of numerous contentious land use disputes. Back in the 1970s, the community was in a constant state of agitation owing to the fact that developers were targeting its undeveloped residentially zoned properties for more profitable commercial development. As a result, the County's Planning Department spent an inordinate amount of time processing individual zone change request that increasingly provoked the ire of the community's residents. Both the County and the community's residents agreed that a solution was needed to address the constant piecemeal assaults on their low density residential neighborhood.

23. That solution came in June of 1981, when the Board approved Resolution No. 81-933, authorizing the preparation of a specific plan for the North Tustin community in the general vicinity of 17th Street and Newport Avenue. Thereafter, the North Tustin Specific Plan Advisory Committee was formed and met 20 times to identify and provide comment on issues to be addressed in the specific plan. However, when efforts to draft a plan acceptable to all factions failed, public meeting before the County's Planning Commission were conducted at which all of the land use alternatives under consideration were presented.

24. Following much study, public participation and dozens of meetings in which large land owners and single family home owners participated, on September 29, 1982, the Board, via the adoption of Ordinance No. 3348, approved the North Tustin Specific Plan ("NTSP") as the controlling land use planning document for approximately 450 acres in North Tustin which replaced all pre-existing land use regulation in the North Tustin community, allowed a few zone changes to nonresidential use, but overall reaffirmed the County's commitment to maintaining the remainder (about 94%) of the 450 acres for medium-low density residential development.

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25. In connection with its approval of the NTSP, the Board also approved a resolution certifying the program EIR [State Clearinghouse No. 82070201] for the NTSP.

26. On April 14, 1986, the Board approved, via the adoption of Ordinance No. 3586, an amendment to the NTSP.

27. As the largest chunk of undeveloped land within the NTSP area, the Parcels were closely studied in 1982 and 1986, and the NTSP concluded that, given the fact that they were surrounded by medium-low density residential neighborhoods, they were ineligible for consolidation incentives and density increases and "continued medium-low density appears most appropriate and compatible" as zoning for the Parcels.

28. Although RCDO had participated in the creation of the NTSP and had not challenged the retention of the medium-low density residential zoning for RCDO's portion of the Parcels, subsequent events apparently induced RCDO to start thinking like the 1970s developers did and look for some way to profit from its property. In 2006, RCDO retained the developer Kisco to assist in the design and implementation of an independent and assisted living senior community on the Parcels.

29. On July 20, 2009, the County issued a "Notice of Preparation" publicizing its intent to prepare a draft EIR for the Project. The Notice of Preparation described the Parcels as "an undeveloped parcel [singular] which fronts Newport Avenue" and was circulated for a period of 30 days starting on or about July 22, 2009 and ending on or about August 20, 2009.

30. In May 2010, the County released for a 45-day public review period the draft EIR for the Project.

31. According to the draft EIR's "Project Description" section, "the 7.25-acre project site is an undeveloped parcel [singular] which fronts Newport Avenue within the North Tustin Specific Plan (NTSP)," was owned by RCDO since 1956, and "was directly referenced in the NTSP [] and the document considered a church use by the Diocese of Orange as being compatible, so long as the church was sensitive to surrounding residential land uses."

32. The draft EIR's "Executive Summary" and "Environmental Setting" sections acknowledged that the Parcels were "currently being used for agricultural purposes."

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33. After discovering that it had omitted an entire section of the draft EIR, on or about July 13, 2010, the County released for a 45-day public review period Section 5-14 ["Global Climate Change"] of the draft EIR.

34. On January 12, 2011, the County's Planning Commission conducted a public hearing on the Project, at which Kisco made a presentation of the Project and many persons spoke in opposition to the Project's approval.

35. At the close of the January 12, 2011 public hearing, the County's Planning Commission recommended that the Board approve the Project.

36. Thereafter, on March 15, 2011, the Board conducted a public hearing on the Project at which time many persons again spoke in opposition to the Project. Counsel for the Foothill Communities Association submitted a comment letter to the Board urging the Board to not approve the Project entitlements or certify the EIR. A copy of that letter is attached hereto as Exhibit 1 and is incorporated herein by reference.

37. After receiving hours of testimony, and in complete disregard of overwhelming evidence demonstrating that the EIR and the Project did not comply with State law, the Board moved to approve the Project and, by a vote 4 to 1, certified the EIR and approved the Project.

38. On March 17, 2011, the County filed a Notice of Determination of the Board's certification of the final EIR for the Project.

FIRST CAUSE OF ACTION
(AGAINST RESPONDENT)
PETITION FOR WRIT OF MANDATE

39. Petitioner realleges paragraphs 1 through 38.

A. VIOLATION OF CEQA AND THE CEQA GUIDELINES

40. Respondents are, and at all times relevant herein have been, charged by law with the performance of all duties of a "lead agency" arising under CEQA and the CEQA Guidelines, including (but not limited to) the preparation, circulation and certification of a legally adequate EIR for the Project.

41. CEQA applies to all "governmental agencies at all levels" and requires public agencies to prepare an EIR whenever the approval of a project may cause significant adverse

1 effects or impacts on the environment. Respondents' decision to approve the Project was a
2 project approval causing significant adverse environmental impacts.
3 42. CEQA requires lead agencies to review the environmental impacts of all projects.
4 Under Public Resources Code Section 21065, a project is any discretionary public "activity
5 which may cause either a direct physical change in the environment, or a reasonably foreseeable
6 indirect physical change in the environment." Respondents' decision to approve the Project was
7 a discretionary decision by Respondents that will result in "reasonably foreseeable" adverse
8 environmental impacts.
9 43. A "significant effect on the environment" means a substantial, or potentially
10 substantial, adverse change in any of the physical conditions within the area affected by the
11 project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic
12 or aesthetic significance. By causing an EIR to be prepared for the Project, Respondents
13 conceded the Project's potential impact to the community required the preparation of an EIR.
14 44. In order for an EIR to be legally adequate, it must comport with certain
15 requirements set forth in CEQA and the CEQA Guidelines.
16 45. By way of example and without limitation, CEQA and the CEQA Guidelines
17 require that an EIR include an accurate and stable description of the Project and a discussion of
18 alternatives to the Project, including (but not limited to) the "no project" alternative and
19 alternative methods of accomplishing some, but perhaps not all, of the proposed Project's
20 objectives. However, Respondents did not proceed in the manner required by law in that they
21 produced an EIR that was internally inconsistent, significantly changed the Project description,
22 and failed to provide an EIR that adequately discussed a reasonable range of alternatives to the
23 proposed Project, thereby eliminating a meaningful basis for comparing the adverse environ-
24 mental impacts of the proposed Project to environmentally superior alternatives.
25 46. Respondents further did not proceed in the manner required by law in that they
26 produced an EIR that was biased in favor of the proposed Project's approval and therefore failed
27 to constitute the full disclosure document intended to objectively inform decision-makers and
28 the public of the Project's true impacts, mitigation measures, and alternatives.

47. Respondents' certification that the EIR satisfied the requirements of CEQA and the CEQA Guidelines constitutes an abuse of discretion in that Respondents failed to proceed in the manner required by law and their decision is not supported by substantial evidence, as set forth in detail in Exhibit 1 hereto, and summarized here as follows:

a. Respondents rushed the CEQA process, which resulted in errors and omissions that prejudiced members of the public who hold a privileged position in the CEQA process and a fatally flawed final EIR;

b. Respondents failed to prepare an adequate EIR by not committing to an accurate, stable, and finite Project description throughout the CEQA process;

c. Respondents failed to prepare an EIR that was internally consistent, resulting in confusion to the public;

d. Respondents belatedly released over 400 pages to the EIR, including a new traffic study, a new Project Alternative Analysis, and a new Water Quality Management Plan yet failed to recirculate all of this significant new information for public review and comment as required by CEQA Guidelines section 15088.5;

e. After creating "Senior Residential Housing" ("SRH") as a completely new land use designation not found in the County's General Plan, Respondents failed to prepare an adequate EIR identifying and discussing the potential impacts of creating a designation that, like here, could be applied to parcels throughout the unincorporated areas of the County;

f. Respondents prepared a "project EIR" for the Project that failed not only to properly tier off of the previously certified "program EIR" for the NTSP but did not even acknowledge that EIR's existence and conclusions;

g. Respondents prepared an EIR that improperly rejected an entirely feasible alternative location for the Project for religious reasons instead of economic, legal, social, technological or similar non-religious reasons;

h. Respondents prepared an EIR that improperly presupposed that future discretionary approvals either have been or will be granted by the County;

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i. Respondents prepared an EIR with a defective Air Quality analysis; and

j. Respondents prepared an EIR that utilized the wrong baseline for its Traffic analysis.

48. CEQA and the CEQA Guidelines require Respondents to address comments and suggestions raised during the EIR review process and to prepare a good faith, reasoned analysis in response to all significant issues raised. Respondents did not proceed in the manner required by law in that they failed to adequately and accurately provide good faith, reasoned responses to comments made during the CEQA public review process, including (but not limited to) inadequate responses to comments raised concerning the Project's environmental impacts and feasible mitigation measures and alternatives.

49. CEQA and the CEQA Guidelines require that the lead agency make certain written findings and that the findings must be supported by substantial evidence in the record. Respondents did not proceed in the manner required by law in that they failed to adopt findings that are supported by substantial evidence.

50. Respondents did not proceed in the manner required by law in that they failed to adopt findings that adequately discussed all significant Project impacts, failed to make adequate specific findings with regard to the feasibility of each mitigation measure and each alternative identified in the EIR, failed to adopt all feasible mitigation measures and/or feasible and environmentally superior alternative to the Project, and failed to adequately identify considerations which would make infeasible or override those mitigation measures and/or alternatives.

51. CEQA and the CEQA Guidelines require that Respondents analyze a reasonable range of alternatives to avoid significant environmental impacts. Respondents failed to prepare an adequate EIR by not analyzing a reasonable range of alternatives to the Project, including feasible alternatives that are environmentally superior and, unlike the Project, would have been consistent with the County's General Plan.

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B. VIOLATIONS OF THE PZL

52. Respondents are, and at all times relevant herein have been, charged by law with the performance of all duties arising under the PZL, including (but not limited to) giving legally adequate notices to the public, maintaining a valid and internally consistent General Plan and specific plans, and not creating conflicts and inconsistencies between and within those plans.

53. Under Government Code section 65090, Respondents were required to publish, in a newspaper of general circulation, a notice of the public hearing at which the Council considered and approved the Project. By law such notice must disclose the planning commission's recommendation as to the Project. (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877.)

54. The notice of the public hearing at which the Board approved the Project did not (among other things) include the County Planning Commission's recommendation to the Board. The notice was therefore legally defective.

55. Respondents' approval of the Project based on a defective notice of public hearing constitutes a violation of Government Code section 65090.

56. Petitioner, its members, and other members of the public have been harmed as a result of Respondents' violation of Government Code section 65090 because they have been denied the benefits and protections provided by compliance with this statute.

57. The County's General Plan is its basic land use planning document.

58. State law requires a county's general plan to include a comprehensive long-term plan for the physical development of that county as well as any land outside its boundaries that the county determines relates to its land use planning.

59. Government Code section 65302 mandates that every general plan contain and address seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety.

60. The Legislature intends that every general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies, goals, objectives and standards.

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61. State law requires counties to periodically review and revise, as necessary their general plans. However, Government Code section 65588(b) expressly requires the housing element of a general plan to be reviewed and revised not less than every five years.

62. The County lies within the regional jurisdiction of the Southern California Association of Governments ("SCAG").

63. Government Code section 65588(e)(1) required all local governments within SCAG's regional jurisdiction to revise their general plan housing elements by June 30, 2006. However, on September 22, 2004, the Governor signed Assembly Bill 2158 (Lowenthal), adding Government Code section 65584.02, which (among other things) permitted SCAG to request that the June 30, 2006, deadline for those local governments within its jurisdiction to adopt and submit their housing element updates to the California Department of Housing and Community Development ("HCD") be extended. Thereafter, Mark Pisano, SCAG's Executive Director, sent a letter to HCD requesting that the deadline for those local governments within its jurisdiction to adopt and submit their housing element updates to HCD be extended to July 1, 2008.

64. By letter dated July 6, 2005, HCD's Deputy Director, Cathy E. Creswell wrote Mr. Pisano to announce that HCD had agreed to extend to July 1, 2008, the deadline for local governments within SCAG's jurisdiction to adopt and submit their housing element updates.

65. If one of the seven mandatory elements is missing, or if a relevant element is inadequate, then a county cannot take any action under the PZL that is required to be consistent with the general plan.

66. In approving the Project, the Board found it to be consistent with the General Plan. However, this was illegal because at the time the Board approved the Project, the County's General Plan lacked an HCD-approved housing element for the current "fourth revision" period. If HCD finds a housing element substantially complies with state housing element law, then there is a rebuttable presumption that the housing element is legally valid. (Gov. Code § 65589.3.) Conversely, if HCD determines that a housing element does not comply with state housing element law, then no presumption of validity exists as to that housing element.

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67. In approving the Project, Respondents created a new land use district that does not exist in the County's General Plan; consequently, approval of the Project is inconsistent with the General Plan and constitutes a violation of the PZL.

68. Subdivision (c) of Government Code section 65589.5 states (in pertinent part) that

> "The Legislature also recognizes that premature and unnecessary development of agricultural lands for urban uses continues to have adverse effects on the availability of those lands for food and fiber production and on the economy of the state. Furthermore, it is the policy of the state that development should be guided away from prime agricultural lands . . . ."

69. The Parcels have been and presently are under agricultural cultivation.; however. Respondents' approval of the Project will result in their premature and unnecessary development for an extremely intensive urban use in violation of subdivision (c) the Housing Accountability Act.

70. Alternatively and additionally, Respondents' approval of the Project constitutes illegal "spot zoning" by permitting a use that is entirely inconsistent with the NTSP and existing uses surrounding the Parcels.

71. Alternatively and additionally, Respondents' approval of the Project violated the PZL for the reasons set forth in Exhibit 1.

C. VIOLATION OF THE SMA

72. Respondents are, and at all times relevant herein has been, charged by law with the performance of all duties arising under the SMA.

73. Pursuant to section 66412 of the SMA, the SMA applies to lot line adjustments of more than four parcels.

74. Although Project documentation the County provided to the public was unclear, the Project site is comprised of more than four legal parcels.

75. During the public hearings on the Project, County Counsel affirmed that the Parcels could be administratively merged into a single parcel. However, the pre-commitment to carry out such a merger violates the SMA because either (i) it will not be done under the

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SMA, or (ii) it will be done under the SMA, in which case the required public hearing for that action will simply be a sham.

76. In approving the Project, Respondents were legally obligated to make the finding described in Government Code section 66473.5 and to support the finding with sufficient evidence in the record.

77. Respondents failed to make the finding described in Government Code section 66473.5. Alternatively, Respondents made that finding but failed to support it with sufficient evidence in the record.

78. Petitioner, its members, and other members of the public have been harmed as a result of Respondents' violations of Government Code section 66473.5 because they have been denied the benefits and protections provided by compliance with this statute.

D. VIOLATION OF THE CALIFORNIA CONSTITUTION

79. With regard to the California Constitution, its Establishment Clause (Art. I, Sec. 4) is even more restrictive than the United States Constitution's in that it includes an additional "no preference" provision: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Article XVI, Section 5 of the California Constitution further prohibits any government involvement that promotes religion.

80. In rejecting an alternative location for the Project, the Board found that "it would not fulfill a faith-based mission of the Diocese of Orange County in Tustin." Such a basis for rejecting the alternative location violated Article I, Section 4 and/or Article XVI, Section 5 of the California Constitution.

E. INCOMPATIBILITY OF THE PROJECT WITH THE NTSP

81. Respondents' approval of the Project violated the NTSP and created conflicts with it for the reasons set forth in Exhibit 1.

F. PROPRIETY OF RELIEF

82. The decision of Respondents to certify the EIR and approve the Project constitutes a final decision as contemplated in Code of Civil Procedure section 1094.5 and an "approval" as defined in CEQA Guidelines section 15352..

83. Respondents have the legal duty in making their determinations to comply with the applicable laws and regulations governing such acts. In particular, Respondents have the legal and nondiscretionary duty to act in accordance with the requirements of CEQA, the CEQA Guidelines, the PZL, the SMA, the California Constitution, and other applicable laws and regulations.

84. Respondents acted arbitrarily, capriciously, irrationally, and unreasonably, and without any or an adequate evidentiary basis in failing or refusing to comply with the requirements of CEQA, the CEQA Guidelines, the PZL, the SMA, the California Constitution, and other applicable laws and regulations.

85. At all times material hereto, Respondents had, and continue to have, the ability to comply with their legal duties and obligations. Respondents have failed and refused to perform those duties and obligations notwithstanding the substantial evidence presented by Petitioner and others that such failures and refusals are contrary to law and regulations and will have adverse consequences on Petitioner, its members, and those residing in the surrounding community.

86. In acting and failing to act in the manner described above, Respondents have prejudicially abused their discretion by certifying a legally inadequate EIR and approving the Project, in violation of Code of Civil Procedure section 1094.5 *et seq.*

87. Petitioner has exhausted all available administrative remedies against Respondent's decision to certify the EIR and approve the Project. There is no provision known to Petitioner for any further administrative remedial action from the decision of Respondents to certify the EIR and approve the Project.

88. Petitioner is beneficially interested in issuance of the writ of mandate as prayed for hereafter and has no plain, speedy, or adequate remedy at law other than the relief sought in this petition. If the Court does not grant the relief prayed for herein, Petitioner will suffer irreparable injury for which it has no adequate remedy at law, there will be a waste, and the failure to enjoin further conduct may tend to render the judgment in this action ineffectual.

89. Petitioner has commenced this action not more than 30 days after the notice authorized by Public Resources Code section 21152 was filed, as required by Public Resources

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Code Section 21167, and within the period of time otherwise prescribed for the commencement of this action in Government Code sections 65009 and 66499.37.

90. Petitioner complied with the requirements of Public Resources Code section 21167.5 by sending, via the United States Postal Service, written notice of this action to Respondent. A copy of the written notice provided to Respondents is attached hereto as Exhibit 2 and is incorporated therein by reference.

91. Petitioner will cause a conformed copy of this *Verified Petition for Writ of Mandate; Complaint for Declaratory Relief* to be served on the Attorney General in accordance with Public Resources Code section 21167.7 and Code of Civil Procedure section 388.

SECOND CAUSE OF ACTION
(AGAINST RESPONDENTS)
DECLARATORY RELIEF

92. Petitioner realleges paragraphs 1 through 91.

93. There is a present actual, justiciable controversy between Petitioner and Respondents regarding Respondents' pre-commitment to merge the Parcels at some point in the future and do so either (i) without complying with the SMA, or (ii) pursuant to SMA, in which case the required public hearing for that action would be a sham.

94. Accordingly, Petitioner seeks a judicial determination regarding whether Respondents' pre-commitment to merge the Parcels at some point in the future constitutes a violation of the SMA or any other laws, and/or deprives the public of due process.

95. In addition, there is a present actual, justiciable controversy between Petitioner and Respondents regarding the Board rejecting the alternative location for the Project for religious reasons.

96. Accordingly, Petitioner also seeks a judicial determination regarding whether the Board's rejection of the alternative location for the Project for religious reasons violates the California Constitution or any other laws.

PRAYER

WHEREFORE, Petitioner prays for the following relief against Respondents and RPIs and any and all other parties who may oppose Petitioner in this proceeding:

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1. On the first cause of action, for a temporary restraining order and preliminary and permanent injunctions setting aside and rescinding Respondents' certification of the EIR and approval of the Project and further prohibiting RPIs from implementing the Project; or, alternatively, for a judgment determining and declaring the Respondents failed to fully comply with CEQA, the CEQA Guidelines, the PZL, and/or SMA and granting a peremptory writ of mandate commanding Respondents to set aside their certification of the EIR and approval of the Project, and ordering Respondents to take no further steps toward implementing the Project unless and until they fully comply with CEQA, the CEQA Guidelines, the PZL, and/or SMA;

2. On the second cause of action, that this Court declare whether or not (i) Respondents' pre-commitment to merge the Parcels at some point in the future constitutes a violation of the SMA or any other laws, and/or deprives the public of due process, and (ii) the Board's rejection of the alternative location for the Project for religious reasons violates the California Constitution or any other laws;

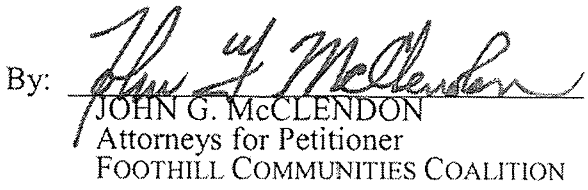
3. For reasonable attorneys' fees in addition to any other relief granted;

4. For cost of suit incurred herein and for reasonable litigation expenses; and

5. For such other and further relief as the Court may deem just, equitable, or proper.

Dated: April 14, 2011

LEIBOLD MCCLENDON & MANN, P.C.

By: 

JOHN G. McCLENDON
Attorneys for Petitioner
FOOTHILL COMMUNITIES COALITION

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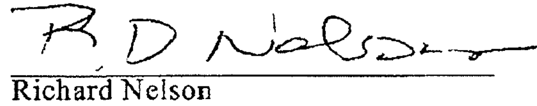
VERIFICATION

State of California, County of Orange

I am the President of FOOTHILL COMMUNITIES ASSOCIATION, INC., the main entity comprising the Petitioner in this action and am authorized to make this verification on Petitioner's behalf, and I make this verification for that reason. I have read the foregoing *Verified Petition for Writ of Mandate; Complaint for Declaratory Relief* and know its contents. The matters stated in it and not otherwise supported by references to the record, exhibits, or other documents pertaining to the Project are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

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

Executed this 14th day of April, 2011, in North Tustin, California.



Richard Nelson

EXHIBIT 1

Jackson | DeMarco | Tidus
Peckenpaugh
A LAW CORPORATION

March 11, 2011

Direct Dial: 949.851.7607
Email: gpowers@jdtplaw.com
Reply to: Irvine Office
File No: 6631-97451

VIA HAND DELIVERY

Orange County Board of Supervisors
County of Orange
c/o: Channery Leng
300 N. Flower Street
Santa Ana, CA 92703

Re: Springs at Bethsaida Project

Dear Honorable Chairman and Supervisors:

This law firm represents the Foothill Communities Association (the "Association"). As you know, the Association is strongly opposed to the proposed Springs at Bethsaida Senior Living Project ("Project"), located at 11901 Newport Avenue, within the unincorporated area of North Tustin in the County of Orange.

We have reviewed the environmental impact report ("EIR") for the Project, and it is fatally flawed on both procedural and substantive grounds. In addition, we believe that the adoption of the proposed amendment to the North Tustin Specific Plan (the "NTSP Amendment") would result in a specific plan that contains serious internal inconsistencies and violates local, state, and federal laws, and the United States and California Constitutions.

In addition, we believe the attempt to rush this Project through the environmental review process under the California Environmental Quality Act ("CEQA") has been unfair to the Association, its residents, and the public in and around the North Tustin Specific Plan ("NTSP") area in general. It has resulted in an environmental review process that is completely devoid of meaningful public review and informed decision making, both of which go to the very heart of CEQA. Furthermore, the EIR serves more as an advocacy piece for the applicant than it does an unbiased and neutral environmental review document. In the responses to comments, County staff now admits that it created an entirely new zoning designation, "Senior Residential Housing," after the close of public comments on the Notice of Preparation ("NOP") for the EIR. Even more inappropriate is the fact that the entire NTSP is being amended to accommodate this new land use designation without noticing all residents within the NTSP.

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So not only is this project being fast-tracked and given special consideration and advocacy status by County planning staff, but it is being done without proper notice and an opportunity to be heard by the residents most impacted by this project and its precedential new zoning.

We urge the Board of Supervisors to strongly consider the concerns expressed in this letter, along with the comments from Environmental Impact Sciences on behalf of the Association, and to reject the EIR and deny the Project. We request that this letter and the Environmental Impact Sciences letter, along with copies of the 1982 NTSP, the 1982 Program EIR ("PEIR") for the NTSP, and the 1986 NTSP, be included in the administrative record.

II. The Adoption of the NTSP Amendment Will Result in an Internally Inconsistent and Fatally Flawed NTSP.

a. The NTSP was Adopted by Ordinance and is a Regulatory Document with the Force of Law, and is not "Just a Guideline."

It has come to the attention of the Association through meetings with County staff and others that it is believed by some that the NTSP was adopted by Resolution, and is therefore simply a "guideline." ***This is incorrect***.

Specific Plans can be adopted either by resolution or ordinance. (Gov. Code, § 65453, subd. (a).) This allows cities and counties to choose whether their specific plans will be policy-oriented (if adopted by resolution), or regulatory (if adopted by ordinance). ("*Specific Plans in the Golden State*," Governor's Office of Planning and Research, p. 9.)

The NTSP was originally approved and adopted by the Orange County Board of Supervisors via Ordinance No. 3348 on September 29, 1982. The 1986 amendment to the NTSP was approved and adopted by the Board of Supervisors on April 14, 1986, via Ordinance No. 3586. A copy of page III-ii of the NTSP (Figure 17), showing that the NTSP was adopted by Ordinance, in both 1982 and in 1986, is attached to this letter as **Exhibit "A."** Therefore, the NTSP is not simply a "guideline" for development in the NTSP area; rather, as a regulatory document, it has the force of law issued by executive authority of government.

To this effect, the NTSP ***expressly prohibits*** density increases north of 17th Street, except for detailed review parcels developed according to applicable consolidation incentive requirements. (NTSP, p. II-1-72.) ***The NTSP cannot accommodate this Project without creating a brand new "hybrid" land use designation that can be applied anywhere in the entire NTSP. Specific plan-wide changes should not be driven by a single project. If NTSP-wide changes are desired by the County, then the NTSP should be examined on its own merits, and amended if such a study warrants it. The changes to the NTSP proposed by this Project outright contradict the law as adopted by the Board of Supervisors in 1982 and 1986***.

b. Adoption of the EIR and NTSP Amendment Will Result in a Specific Plan that is Internally Inconsistent and Flawed.

(1) The Project Site is not Eligible for any Density Increase.

As stated previously, the NTSP prohibits density increases north of 17th Street, except for detailed review parcels developed according to applicable consolidation incentive requirements. (NTSP, p. II-1-72.) Extending medium-high density beyond existing designations is only allowed "when parcel consolidation or the planned development process can be used..." (*Id.*) What is more, only certain designated detailed review parcels in the NTSP are eligible for consolidation incentives, and thus density increases. (*Id.*)

The Project site was studied closely in the 1982 and 1986 NTSP, and was labeled "Detailed Review Parcel 2." Upon conclusion of the study, ***it was not designated as a parcel that is eligible for consolidation incentives***. (NTSP, Figure 33.) This is because "its location to the north of 17th Street and adjacent to stable medium-low density residential neighborhoods" makes it "most appropriate and compatible" with continued medium-low density use. (NTSP, p. II-1-66.) Consequently, because the property on which the Project is proposed to be located is not eligible for consolidation incentives, it is not eligible for any increase in density per p. II-1-72 of the NTSP. Regardless, the applicant is now requesting that the maximum allowable density at the Project site be increased by ***over 600%***.

The NTSP wisely rejected increased density at the Project site, citing "(1) neighborhood intrusion by traffic; (2) visual intrusion by direct line of sight from ground or second story levels; (3) contrast in the character of buildings and on site uses; and (4) nuisance effects such as glare and noise." (NTSP, p. II-1-28.) In addition, the NTSP correctly found the following regarding the Project site:

> "Because of its location to the north of 17th Street and adjacent to stable medium-low density residential neighborhoods, continued medium-low density appears most appropriate and compatible."

(NTSP, p. II-1-66.)

The NTSP goes on to state, in pertinent part:

> "The RSF [Residential Single Family] District is intended to create, ***preserve***, and enhance neighborhoods where permanent, ***one household***, residential units are predominant. The ***detached*** dwellings and large private yards of RSF areas allow for maximum privacy where desired..."

(Emphasis added.)

Moreover, the Program EIR for the NTSP found:

> "The North Tustin Specific Plan to be developed, would determine the ***best uses*** for the Community and define changes ***where appropriate*** so that future development would be encouraged ***and would be compatible with the character of the surrounding community***."

(NTSP PEIR, Executive Summary [emphasis added].)

Adoption of the NTSP Amendment in its current form will result in an internally inconsistent NTSP because the NTSP went to great lengths to study the Project site. The NTSP specifically found that the Project site is not suitable or eligible for any density increase. ***Nevertheless, the proposed NTSP Amendment does not address, discuss, or even attempt to strike out or amend all of the portions in the NTSP regarding the Project site's unsuitability for any density increase***. ***Inclusion of the proposed NTSP Amendment will therefore result in a severely inconsistent specific plan.*** The Project applicant is asking the County to shoehorn the NTSP Amendment into the NTSP, and ignore the substantive internal inconsistencies that will result. The FCA can only ask the natural question: with all this straining to make the project "fit" and the rush to do so in violation of a thorough CEQA analysis, is the Applicant getting special consideration because of its status in the community even in violation of clear legal expectations created by Ordinance over the last two decades?

(2) The Project is Really a Multi-Family Project.

The Project applicant is trying to justify the inclusion of the inconsistent SRH designation into the NTSP by saying that it is "consistent" with the single family zoning in the area. But Chapter 3 of the NTSP provides for district regulations in the NTSP area. RSF (Residential Single Family) is described as "neighborhoods where permanent, ***one household***, residential uses are predominant." (NTSP, p. III-4 [emphasis added].) The RSF designation is also described as "Single family detached dwelling, ***one (1) per building site***, or single-family mobile home per building site." (*Id* [emphasis added].)

The senior "campus" (EIR, p. 5.1-3) facility contemplated by the applicant meets neither of these criteria. Instead, the applicant and the EIR attempt to use smoke and mirrors by stating that the proposed SRH designation is consistent with single family residents because it is "residential in character." (EIR, p. 5.1-4.) The EIR also states that the newly-proposed SRH designation is consistent with the General Plan because it allows for density up to 18 dwelling units per acre, and the General Plan Suburban Residential designation allows for up to 18 units per acre. (*Id.*) The EIR ignores the fact that the Project site, ***and on all four sides of the Project site***, the current zoning only allows for single family residential with a density of 2-3.5 units per acre.

The EIR's dismal attempt to establish "consistency" between the proposed SRH designation and the surrounding areas is, at best, a desperate stretch. Although the Suburban Residential land use designation in the County's General Plan allows for townhomes, condominiums, and other clustered arrangements, these housing product types are subdivided and are ***individually owned units***. The proposed Project, on the other hand, is more akin to a multi-family project because it allows for multiple tenants within a large single building that is surrounded by "bungalows" also housing multiple tenants, ***but these buildings are not subdivided for individual ownership***. This can only be classified as multi-family.

We also point out that the Urban Residential designation under the County's General Plan does allow for more "intensive" residential uses, including apartments. But this is not the case within the Suburban Residential land use designation. The old adage applies here: If it looks like a duck (large buildings with subterranean parking like a multi-family project), and if it walks like a duck (requires property to be re-zoned due to inconsistencies with single family residential zone), and if it quacks like a duck (multiple tenants with shared walls but no individual ownership like a multi-family project), it must be a duck (a multi-family project).

Even more telling, the EIR admits that the Project is a multi-family project. On page 5.1-17, the EIR states:

> "Permitting higher density on the project site allows for the development of a ***multi-family*** residential senior living community."

The Association respectfully requests that the Board of Supervisors not be fooled, and to see the Project for what it really is – a multi-family residential project with quasi-commercial aspects. Although the Project applicant wants to say that the new SRH designation is "consistent" with the single family designation, it falls squarely in the Residential Multiple Family (RMF) designation, which is described in the NTSP as "***two or more dwelling units on the same building site***." (NTSP, p. III-7 (emphasis added).)

(3) The Proposed Facility is Prohibited by law and Incompatible with the NTSP.

In the Residential Single Family zone, community care facilities serving 6 or fewer persons are considered a principal permitted use. (NTSP, p. III-4.) Community care facilities serving 7 to 12 persons are allowed in the RSF zone only under a use permit. (*Id.*) Nowhere in the NTSP does it say that community care facilities with more than 12 persons are allowed ***under any circumstances*** in the single-family zone. Although "planned developments" are allowed with Planning Commission approval, the Project site is not in a PD district. Per the NTSP, "all uses not permitted above are prohibited." (NTSP, p. III-5.) Therefore community care facilities

serving more than 12 persons are outright prohibited in single-family zones. (NTSP, pp. III-5 and III-7 through III-9.)

By adding the proposed NTSP Amendment to the NTSP without addressing any of these inconsistencies, a severely flawed specific plan will result. The proposed NTSP Amendment included in the EIR only contains the newly proposed land use designation. (EIR, Appendix L.) It does not strike out or amend any of the other contradictory language in the NTSP which will remain even if the NTSP Amendment is added to the NTSP. Good land use planning should not involve the intentional creation of an internally inconsistent and confusing document. Therefore, the NTSP Amendment should be rejected.

c. A General Plan Amendment is Required for the Creation of a New Land Use Designation.

The creation of a new land use designation (SRH) triggers the need to amend the General Plan (not just the NTSP). The NTSP, and any amendments to the NTSP, must be consistent with the general plan. The new SRH land use designation is not mentioned anywhere in the General Plan, or in the existing NTSP.

Even the County's own documents support the Association's position that a general plan amendment is needed as the result of the new SRH designation. See, for instance, the third paragraph on p. II-1-95 of the 1986 NTSP. It states, in pertinent part, "The land use designations of the Specific Land Use Plan refine the portions of Community Profiles 42 and 43 which cover the specific plan area in two ways ... ***However, since the Specific Plan does not propose to change the general land use classifications of the LUE (land use element of the general plan), a General Plan Amendment will not be required***." (Emphasis added.) But here, it does. So the converse is true: if the NTSP changes the land use classification of the LUE, then a General Plan Amendment is now required.

No specific plan may be adopted or amended unless it is consistent with the general plan. (Gov. Code, § 65454; *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 386.) A specific plan is only consistent with a general when it is "compatible with the General Plan's objectives, policies, general land uses and programs." (*Id* at 355.) A specific plan is inconsistent with a general plan when it "frustrates" the general plan's goals and policies. (*Id* at 379.)

Accordingly, where a land use designation is changed (or, as here, created out of thin air) that changes the ***character*** of the general plan's zoning or land use designations for an area, and a general plan amendment is required.[1] Here the single-family character of the Suburban

[1] We also point out that simply including a deed restriction condition on the Project that requires the Project site be used for senior living is an ineffective mechanism for ensuring such use continues. Assuming that a condition of approval that requires a deed restriction is imposed, it would do little good unless it was a covenant running with the

Residential designation in the County's General Plan is frustrated, as the proposed Project allows for multiple tenants in common buildings with shared walls, ***but no subdivided ownership***. In addition, the single family residential character of the area will be frustrated because the very nature of the Project (senior residential) will serve as a magnet for commercial uses in closer proximity to the Project.

The existing NTSP provides for Residential Single Family ("RSF") zoning for the Project site, as well as the surrounding areas on all four sides of the proposed Project. Nevertheless, the County is considering applying a new land use designation, SRH, to a single parcel within a sea of single family residential homes. Moreover, the Project will require licensing by the State of California, will include both independent and dependent care facilities, and will include commercial components within the Project. ***This will change the character of the area from single-family to, at best, a "mixed use" neighborhood***.[2] Everyday, we read how state facilities are not inspected because of budget shortfalls and local residents are helpless to get assistance. The County Department of Health will have no say how this facility is run because it will have no enforceable jurisdiction. The County is paving the way for a project where it will have no regulatory or administrative oversight.

Despite all this, the County is now considering a General Plan amendment as part of the proposed Project approvals, even though this new proposed Project and land use designation will "frustrate" the single-family character and uses in the area as provided under the General Plan. This should not occur.

II. The CEQA Process Has Been Rushed and Haphazard, Resulting in Prejudice to the Public and a Fatally Flawed CEQA Document.

a. The public has been severely disadvantaged by the County's insistence on rushing the EIR through CEQA process.

After the public comment period for review of the EIR was closed, the County realized that it had failed to include the entire Global Climate Change section in the EIR. (EIR, Appendix A.) On or around July 20, 2010, the County issued a new NOP, but released only the

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land that was ***enforceable*** by the neighboring property owners. A deed restriction (as opposed to a covenant running with the land) is imposed by the owner of land and can always be changed, amended, or removed by the party that imposed the deed restriction. While deed restrictions may have some viability when property is conveyed and the deed provides that if the property is not used for some restricted purpose, it will revert to the original owner, such a restriction would have no practical effect for the Project site. If the property reverted to the party who imposed the deed restriction, the property would still be owned by the Diocese, so there would be no penalty or "teeth" for violating the restriction.

[2] An example of the character-changing nature of the use is multi-colored flags / pennants that Kisco flies on flag poles in front of its senior projects (see its Park Plaza Facility in Orange). These attention-getting devices are typical of senior facilities (see Sunrise Senior Facility on Newport Avenue) and apartment complexes, but are unattractive and inconsistent with the character of a single-family residential neighborhood.

missing section of the EIR for public comment. The EIR says that the County allowed for 45 days for public comment on the Global Climate Change section of the EIR, but the NOP stated that comments were due within 30 days. (EIR, *Appendix A* and p. 1-1.) In addition, comments were limited solely to comments on climate change.

Five months later, on the afternoon of December 30, 2010 (less than two weeks before the Planning Commission hearing and over the holidays), the County released to the public ***over 400 new pages to the EIR***, including a new traffic study, a new Project Alternative Analysis, and a new Water Quality Management Plan ("WQMP"). (See County website for Project.) On the same date and time, the County also released its responses to the Association's comments on the EIR. The County's responses to comments to the Association were over 100 pages, single-spaced. At the Planning Commission hearing, staff and the applicant attempted to justify this massive 11th-hour release of information by asserting that none of the new information was "required" under CEQA, and therefore the late release was proper and not prejudicial to the public. ***Nevertheless, it consists of new information that will be incorporated into the Project EIR, thus triggering the need for re-circulation of the EIR for public review and comment.***

Nevertheless, the CEQA process has been forced along in disregard of the very heart of CEQA (informed decision making and meaningful public review). "The purpose of CEQA is to require the 'public agency [to] explain the reasons for its actions to afford the public and other agencies a meaningful opportunity to participate in the environmental review process, and to hold it accountable for its actions." (*County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, 1103, citing *City of Arcadia v. State Water Resources Control Board*(2006) 135 Cal.App.4th 1392, 1426 [emphasis added].) CEQA is "essentially an environmental full disclosure statute, and the EIR is the method ... [o]f disclosure..." (*Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1020. An EIR functions "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment...." (Pub. Resources Code, § 21061; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 804. An EIR is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return," and "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

Unfortunately, the County has thus far chosen to disregard these important CEQA principles enumerated above by rushing the EIR through the CEQA process and without providing an opportunity for meaningful review by the public and the decision-makers.

b. The New Studies and Analyses must be Recirculated for Public Review.

The County released over 500 new pages of information, including over 400 pages of new analyses, studies, and conclusions regarding water quality, traffic, and project alternatives

just before the Planning Commission hearing on the Project approvals in January, and yet it takes the position that re-circulation of the EIR is not required under CEQA. This determination is incorrect and will likely result in any approvals for the EIR and the use permit being overturned, and payment by the County of the Association's attorneys' fees when this matter is fully litigated.

The CEQA Guidelines[3] state, in pertinent part, the following:

> "A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review ... As used in this section, the term 'information' can include changes in the project or environmental setting ***as well as additional data or other information***."

(Guidelines, § 15088.5, subd. (a) [emphasis added].)

Further, Public Resources Code section 21092.1, states:

> "When ***significant*** *new information* is added to an environmental impact report after notice has been given pursuant to Section 21092 and consultation has occurred pursuant to Section 21104 and 21153, but prior to certification, the pubic agency ***shall*** *give notice again* pursuant to Section 21092, and consult again pursuant to Section 21104 and 21153 before certifying the environmental impact report."

(See also *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 818 [emphasis added].)

In light of clear appellate court guidelines, how can the County say with a straight face that hundreds of pages of new analyses, discussion, and conclusions are not "significant" in relation to the EIR and the Project? Clearly the new traffic study, the new WQMP, and the new Project Alternative Analysis go well beyond "amplifying" or "clarifying" the EIR, and will be incorporated into the final EIR when it is adopted by the County. Thus, recirculation is necessary and required. (*Id* at subd. (b).) Notably, the Guidelines state, "A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record." (*Id* at subd. (e).) There is nothing equating to "substantial evidence" in the EIR or in the record justifying the decision not to re-circulate.

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[3] The term "CEQA Guidelines" references Title 14, sections 15000, *et seq.*, of the California Code of Regulations.

Based on the foregoing, recirculation is warranted before any decision to approve the EIR and/or use permit is made.

c. ***The Current Project is not the Same Project that was Described in the Notice of Preparation ("NOP") for the EIR.***

The EIR stated, "The NOP is used to help determine the scope of the environmental issues to be addressed in the EIR." (EIR, p. 2-1.) One primary purpose for the NOP under CEQA is to give interested persons and groups the right to express their views on the project being proposed. (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733.) Although the project description in a NOP may be brief, an accurate project description is still necessary, and it must provide enough information to give the end user sufficient disclosure about the nature of the project. (*Maintain Our Desert Environment v. Town of Apple Valley* (2004) 120 Cal.App.4th 396.)

Here, the NOP for the Project discussed re-zoning the Project site from residential single family ("RSF") ***to residential multi-family*** ("RMF"). The EIR contains some chapters that are consistent with this Project description, while others contain discussion about the creation of an entirely new zone, entitled Senior Residential Housing ("SRH").[4] ***This new land use designation was not included in the NOP, and was not included as part of the scoping process.*** In fact, it was created out of thin air ***after*** the scoping process was completed. Thus, the public was deprived of an opportunity to voice its opinion on the new SRH land use designation, and its implications on the NTSP area, as part of the initial scoping process for the Project's EIR.

This approach by the County flies in the face of CEQA's public participation requirements. "The purpose of CEQA is to require the 'public agency [to] explain the reasons for its actions to afford the public and other agencies ***a meaningful opportunity to participate in the environmental review process***, and to hold it accountable for its actions." (*County of Amador v. City of Plymouth, supra,* 149 Cal.App.4th at 1103 [emphasis added].)

The current proposed Project is not the same project described in the NOP. In fact, the EIR now even goes so far as to describe the Project as a "campus." (EIR, p. 5.1-3.) Given that the Project has been substantially changed since the NOP was issued and scoping occurred, a new NOP describing the revised Project must be issued, and proper scoping on the brand new land use designation and revised Project must occur.

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[4] While some areas of the EIR discuss creating the new SRH zone for the Project site, other areas of the EIR still discuss re-zoning the site to multi-family. See, for instance, pp. 1-1 through 1-10 of the EIR. As the result, the reader cannot determine whether the County is pursuing one or the other, or possibly both, the rendering the EIR confusing and internally inconsistent, as described later in this letter.

d. The EIR is Internally Inconsistent, Rendering it Invalid.

The EIR sends mixed messages as to the true Project, thereby depriving the public and the decision-makers of meaningful review. When the NOP was issued and the scoping process occurred, the County was intent on re-zoning the Project site to Residential Multiple Family ("RMF"). It appears that at some point after the scoping and public comment opportunities were closed, the County unilaterally changed the Project to something that had never been discussed before – a brand new land use designation entitled Senior Residential Housing ("SRH"). (County's Responses to Comments, p. 3-206, stating that the new SRH designation was created after the public comment period was closed in response to issues raised during the scoping process.)

Nevertheless, the entire first chapter of the EIR states that the Project involves re-zoning the Project site from single family to ***multi-family***. For instance, page 1-4 of the EIR states, in relevant part, the following:

> "The project will require a Conditional Use Permit, pursuant to Section 7-9-142, *Senior Living Facilities*, of the County of Orange Zoning Code (Ordinance No. 08-015) and a Specific Plan Amendment to modify the NTSP to change the land use designation from Residential Single Family (100-RSF) ***to Residential Multiple Family (RMF)*** 1.51 Medium High Density Residential..."

(Emphasis added.)

Another example is on page 1-10, which states in relevant part:

> "Also of concern to the community are ... impacts related to increasing the density ***and changing the zoning designation from Residential Single Family (100-RSF) to Residential Multiple Family (RMF)***..."

(Emphasis added.)

Yet another example of the EIR calling for a "multi-family" project can be found on page 5.1-17, which states:

> "Permitting higher density on the project site allows for the development of a ***multi-family*** residential senior living community."

(Emphasis added.)

However, the Land Use and Planning Chapter of the EIR states that the site is being considered for a brand new land use designation (Senior Residential Housing, or "SRH"). Thus, it is impossible to discern the true intent of the County for this Project based on the EIR's inconsistencies on this primary issue. Will the Project site be re-zoned as Residential Multiple Family (RMF), or Senior Residential Housing (SRH)? Or will it be both?

CEQA requires an EIR to be internally consistent so that the environmental review process can be meaningful and informative not just to the agency, but to the public as a whole. "The ultimate decision of whether to approve a project, be that decision right or wrong, is nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 [emphasis added].) "If a final [EIR] does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decision making cannot occur under CEQA ***and the final EIR is inadequate as a matter of law***." (*Communities for a Better Environmental v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83 [emphasis added].) Further, "[T]he existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." (*Id* at 82, citing to *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392).)

Based on the numerous internal inconsistencies in the EIR, the document is fatally flawed and must be revised and recirculated so that informed public review and decision making can take place.

e. ***The County Gave Inadequate Notice to the Public of the New NTSP-Wide Senior Residential Housing Land Use Designation.***

(1) The County Avoided Giving Proper Notice by Switching the Project after the Close of Public Comments.

The County states that it gave notice of the EIR to residents within a 300-foot radius of the Project site. This is likely the case because at the time the NOP for the EIR was issued, the proposed Project was to re-zone ***just the Project site*** from RSF to RMF. Thus, notice of the potential re-zone was only given to residents within the 300-foot radius of the proposed Project.

However, subsequent to the close of public comments, it appears the County unilaterally decided to significantly alter the proposed Project to instead create a brand new land use designation called Senior Residential Housing (SRH) that applies ***on a Specific Plan-wide basis, not just limited to the 7.5 acre parcel in question***. The County now must concede the point and admit in its Responses to Comments that "it is possible that future, unknown applicants may seek a Specific Plan amendment to utilize the new Senior Residential Housing (SRH) district at some point." (See County's Responses to Comments, p. 3-201.) The County further "understands and

acknowledges that the project would be the ***first*** in the NTSP area with the SRH district designation." (County Response 01-70, p. 3-233 [emphasis added].) So it appears that the SRH overlay will apply to the entire NTSP, leading the way for future SRH projects to be applied for to the County and yet, the County has never provided notice to residents outside of the 300-foot radius of the Project site, even though the proposed new SRH designation could conceivably be implemented elsewhere in the NTSP area once it is adopted.

(2) All Affected Property Owners are Entitled to Notice of the "True" Project.

All property owners within the NTSP are entitled to notice as a matter of law. This project cannot go forward until property notice is given to all affected property owners. The Board of Supervisors must direct the Applicant to start over and issue a new NOP that describes the true project, including the newly-proposed SRH zoning designation.

In addition, if a proposed specific plan amendment would affect permitted uses or intensity of uses of real property, notice of the proposed amendment must also be given under Government Code, Section 65091. (Gov. Code, § 65353, subd. (b) [emphasis added].) Section 65091, subdivisions (a)(3) and (a)(4) require that notice be mailed or delivered not only to each local agency that is expected to provide water, sewage, streets, roads, schools, and other essential facilities or services, but also to all owners of real property within 300 feet of the real property that is the subject of the hearing. Here, the NTSP Amendment is intended to apply specific plan-wide, and thus could be implemented, if certain criteria are met, anywhere in the NTSP area once it's adopted. Although the County initially intended to re-zone only the Project site as Residential Multiple Family (RMF) when the NOP was issued and the CEQA scoping process occurred, the County changed its mind after the public comment period was closed and decided to create a brand new land use designation with increased density from what is allowed in the NTSP, and a different product that could be implemented anywhere in the NTSP. But the County did not provide the required notice to residents in the NTSP under sections 65090 and 65091 of the Government Code.

(3) Courts Have Determined that Failing to Provide Notice on a Plan-Wide Basis Results in an "Illusory" Process.

California courts have held that an amendment to a general plan applying a new land use designation falls within the scope of CEQA, and an EIR is required as part of the approval. (*Christward Ministry, Inc. v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187.) "In assessing the impact of the amendment, the local agency must examine the potential impact of the amendment on the existing physical environment; a comparison between the proposed amendment and the existing general plan is insufficient." (*Id.*) "[C]omparison of potential impacts under the amendment with potential impacts under the existing general plan is insufficient." (*Id* at 190.) ***Similar to the case of Christward Ministry, the County in this case is improperly comparing the impacts of the proposed Project to the maximum allowable density***

under the General Plan (18 dwelling units per acre), rather than the existing zoning limitations for the site under the NTSP (2-3 dwelling units per acre under the NTSP). This directly violates the holding in *Christward Ministry*, and similarly results in an "illusory" comparison of impacts. (*Id.*)

Nothing in the proposed amendment to the NTSP limits the SRH designation just to the Project site. So, once it is adopted by the County, any resident in the NTSP area could become a victim of what is happening to the residents living near the proposed Project now – to wake up one day and find out the County is re-zoning property adjacent to theirs in such a way that puts multi-family projects directly next door (although the County insists that the SRH designation is akin to single-family zoning, which it is not).

f. Approval of the EIR Would Violate State and Federal Laws Regarding the Separation of Church and State.

The EIR repeatedly emphasizes that one of the main project objectives is to "further the faith-based mission of the Catholic Diocese," and "Providing faith-based independent and assisted living facilities for seniors." (See, for example, EIR, pp. 1-6, 3-1.) While it is questionable at best whether this is a valid Project objective for the County to rely upon in approving the EIR given state and federal laws requiring separation between church and state, ***it is unmistakably improper to reject a Project Alternative as infeasible because it fails to further religious goals***.

The rule of government neutrality in religious matters is found in Article XVI, Section 5 of the California Constitution, which states, in relevant part, the following:

> "Neither the Legislature, nor any county ... shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of a religious sect, church, creed, or sectarian purpose..." (Emphasis added.) "This provision bans not only monetary aid to religion, ***but any official involvement that promotes religion.***"

(*Lucas Valley Homeowners Assn v. County of Marin* (1991) 233 Cal.App.3d 130, 146, citing to *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 605 [emphasis added].)

One primary reason given by the County for rejection of the park/land swap project alternative (the "Land Swap Alternative") is that "it would not fulfill a faith-based mission of the Diocese of Orange County in Tustin..." (EIR, Chapter 7, Section 7.9.) This goes beyond any proper legal reasoning for the County to reject the Land Swap Alternative, ***as it impermissibly imparts the church's faith-based mission on the County in rejecting the project alternative.*** Further, it equates to the County's "official involvement that promotes religion" in violation of

state and federal laws and the California Constitution. (*Lucas Valley Homeowners Assn*, *supra*, 233 Cal.App.3d at 146.) By supporting its rejection of the Land Swap Alternative based on the failure to further religion, the County has gone beyond being a neutral, unbiased reviewer and decision-maker for the EIR, and has taken on the role of supporting a religious, church-based, purpose.

While we applaud the Diocese for providing faith based housing and services, that alone does not put the Applicant at the "front of the line," or allow its sponsored project to violate CEQA. In fact, the County has a legal responsibility to ensure that the Diocese follows all the applicable CEQA guidelines since a reviewing Court must consider if a project such as this one has received special consideration just because it originated from a faith-based/religious source. Based on the foregoing, the adoption of the EIR in its current form will result in violations of state and federal laws, and the United States and California Constitutions, and will render any approvals of the NTSP Amendment and/or the EIR invalid.

g. The EIR Fails to Properly Tier Off of the North Tustin Specific Plan EIR.

Under CEQA, tiering may be used when the sequence of environmental review begins with an EIR prepared for a program, plan (such as a specific plan), policy, or ordinance. (Pub. Resources Code, § 21094, subd. (a).) When the lead agency has prepared and certified an EIR for a plan, the lead agency "***shall*** examine the significant effects of the later project upon the environment by using a ***tiered*** environmental impact report…" (*Id* [emphasis added].) The first-tier EIR may be followed by an EIR for another plan or policy of lesser scope, or a site-specific EIR for a specific project. (*Id*; Guidelines, § 15152, subd. (b).)

Also, the CEQA Guidelines ***require*** a lead agency to use a tiered EIR when (1) the later project is consistent with the program, plan, policy, or ordinance (Pub. Res. Code, § 21094, subd. (b)(1), and Guidelines, § 15152, subd. (d)); (2) the later project is consistent with the applicable general plan (Pub. Resources Code, § 21094, subd. (b)(2), and Guidelines, § 15152, subd. (e)); (3) the later project is consistent with applicable zoning ordinances or includes rezoning to maintain conformity with the general plan (Pub. Resources Code, § 21094, subd. (b)(2), and Guidelines, § 15152, subd. (e)); and (4) the project is not subject to Public Resources Code, Section 21166 (changes necessitating a subsequent report). The EIR appears to claim that all of the above criteria are met by the EIR and the proposed Project, yet has declined to follow the mandatory tiering requirement when all such criteria are present.

In the present case, a program EIR ("PEIR") was prepared and certified for the NTSP in 1982, and was subsequently amended in 1986. The applicant now asks the County to certify an EIR for an amendment to the NTSP, yet the EIR completely ignores the PEIR for the NTSP. Not only is the EIR not tiered off of the PEIR for the NTSP, ***it completely ignores the PEIR as if it never existed.*** This is improper under CEQA and violates the mandatory tiering requirement for the EIR. (Pub. Res. Code, § 21094, subd. (a).) Based on the EIR's complete failure to properly

tier of the NTSP PEIR, the EIR is devoid of meaningful review and must be revised and recirculated, at a minimum.

So the EIR chases its own tail in order to form legally adequate conclusions. It appears to claim that all of the above criteria are met by the EIR and the proposed Project, yet has declined to follow the mandatory tiering requirement when all such criteria are present.

h. The County's Rejection of the Park/Land Swap Alternative is not Supported by Substantial Evidence.

The County's inappropriate behavior in acting as an advocate for the Project applicant rather than a neutral and unbiased decision-maker is glaringly evident in the recently released Land Swap Alternative analysis.[5] In addition, the Land Swap Alternative contains inconsistent and confusing statements that confuse the reader, in violation of CEQA. The EIR must contain a meaningful discussion of Project alternatives. (*Laurel Heights I, supra,* 47 Cal.3d at 403; Guidelines, § 15126.6, subd. (a) and (d).)

First, on page 1 of the Land Swap Alternative, the EIR states that the County of Orange owns the property in Irvine near the Great Park where the Project could be located as an alternative. Specifically, the EIR states, "The County of Orange owns this property through a grant deed from the City of Irvine." (*Id.*) But then the next sentence states, in pertinent part, "The land swap would require a Resolution and a majority approval vote of the County of Orange Board of Supervisors to acquire the Irvine site..." (*Id.*) This directly contradicts the preceding sentence that states the County already owns the Irvine site.

What staff most likely meant to state was that a land swap and a new designated use would require Board of Supervisors approval. But how is that any more of an obstruction or require additional procedural steps than the process in which we are presently engaged in requiring a re-zone and an amendment to the NTSP? Instead, the land swap should have been fully evaluated on its merits and given to the Board of Supervisors, as the County land use policy makers. Instead, by cutting the analysis short (or non-existent), the County violated CEQA. The Board of Supervisors should direct County staff to provide an adequate analysis of this alternative so that it can be properly consider. Indeed, the genesis for this land swap idea came from the Third District Supervisor himself. So for County staff to discount the land-swap as a

[5] As mentioned previously in this letter, the County did not even release for public review its Land Swap Alternative analysis until the afternoon of December 30, 2010, less than two weeks before the Planning Commission hearing on the Project and in the middle of the holidays. The Association questions why the County would not grant a short continuance of the Planning Commission hearing so that the public could have meaningful review of the 400-plus hundred new pages to the EIR, and over 100 pages of County Responses to Comments. The Association objects to this "rubber stamp" approach to such an important decision. Given the County's advocacy for this Project, along with the lack of meaningful analysis regarding the Land Swap Alternative and a biased rationale for rejecting the alternative, a court will see this Project for what it is: advocacy for a religious institution project that is getting special treatment just because it is faith-based.

constructive, viable, alternative is actually to discount and dismiss a reasonable alternative that is the more appropriate land use for this Project than the parcel in question that is zoned, and should remain zoned, as single-family. If this alternative could be so easily dismissed, then why was this alternative first suggested by the Supervisor who is elected to represent this District and his constituency? Just because the original grantor of the parcel does not support the land swap, that does not justify the County's rubber-stamp rejection of the Land Swap Alternative.

Then, to make matters worse, the County sets forth its main reason for finding the Land Swap Alternative infeasible. The EIR states, "This alternative is not feasible because of the uncertainty of accomplishing it in a reasonable amount of time." The County supports this supposed finding by stating that the County's "uncertainty" stems from the need for the Board of Supervisors, among other agencies, to take action. (*Id.*) The internal inconsistencies abound in this section, and the County's finding of infeasibility is, at best, unsupported. At worst, this is a sham, or a rubber stamp, to reject the Land Swap Alternative because the Land Swap Alternative is more inconvenient for the Project applicant.

Additionally, the finding of infeasibility for the Land Swap Alternative is impermissibly vague and ambiguous. The reader cannot reasonably discern what the County means by rejecting the alternative due to "uncertainty of accomplishing it in a reasonable amount of time." (*Id.*) Meaningful review of the Land Swap Alternative analysis cannot occur based on this vague language, and it therefore fails under CEQA. (*Laurel Heights I,* 47 Cal.3d at 403; Guidelines, § 15126.6, subd. (a) and (d).) The applicant has owned the Project site for over 50 years. The NTSP has been in place since 1982 and the designation of the land use was agreed to be a school or a church and adopted by Ordinance by the County. Why is there a sudden rush to develop this Project? What does a "reasonable amount of time" mean? Given that the original question of whether the NTSP as a whole should be revisited to determine whether community sentiment for the parcel has changed, why should any part of a CEQA be shortchanged?

No meaningful analysis is included in the Land Swap Alternative to inform the reader of the County's true concerns in this regard. All the reader is left with is that the County does not know how long the Land Swap Alternative would take to implement. This does not equate to "substantial evidence" to support a finding of infeasibility for a Project Alternative. Section 15088.5, subdivision (a), states that a EIR must be recirculated for public review where significant new information is presented. Subdivision (e) states that a decision not to recirculate an EIR must be supported by substantial evidence in the record.

Moreover, subdivision (a)(3) of Section 15088.5 of the Guidelines states that recirculation is required where a feasible project alternative would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it. Here, the Land Swap Alternative would lessen impacts in the areas of (1) Geology and Soils, due to substantially less grading due to the elimination of the need for large subterranean parking and less grading at the North Tustin site due to its conversion to a park instead of a large multi-family "campus" (EIR, Sec. 7.9.1), (2) Transportation and Traffic, due to significantly less truck trips

for soils relocation resulting from the elimination of mass excavation for the subterranean parking structure, and "substantially fewer vehicle trips" due to the park use instead of the senior residential campus in North Tustin[6] (EIR, Sec. 7.9.3), (3) Air Quality, due to significantly less truck trips due to the elimination of the subterranean parking (EIR, Sec. 7.9.4), (4) Noise, due to shorter duration of construction of a park at the North Tustin site and the substantially reduced truck trips due to the elimination of the subterranean parking[7] (EIR, Sec. 7.9.5), (5) Aesthetics, due to "fewer surrounding land uses that would be affected by the construction of a senior living facility in Irvine" (EIR, Sec. 7.9.6), (6) Recreation due to the provision of much needed park facilities in North Tustin[8] (EIR, Sec. 7.9.8), and (7) Global Climate Change, due to the reduced emissions from trucks constantly hauling dirt from the North Tustin site since the subterranean parking would be eliminated under the Land Swap Alternative (EIR, Sec. 5.14).

Under CEQA, a project alternative need not be environmentally superior to the project in all respects; the CEQA Guidelines authorize consideration of alternatives that would reduce any of the significant effects of a project. (*Sierra Club v. City of Orange*, 163 Cal.App.4th 523 (2008). Here, we have Land Swap Alternative project that is environmentally superior in at least ***seven*** major areas of the EIR.

Clearly, this alternative is feasible and has not been evaluated thoroughly by the County, but the author of the EIR has rubber-stamped this alternative as infeasible based on "uncertainty" about timing so that the County will not have to recirculate the EIR. (Guidelines, § 15088.5, subd. (a)(3).) Additionally, the Noise, Traffic, and Cumulative Impacts sections on the Land Swap Alternative are deficient since no studies or analyses were performed on the Irvine site in these critical areas. (EIR, § 7.9.13.) The Land Swap Alternative is also rejected in violation of state and federal laws regarding separation of church and state by finding it infeasible based on its failure to advance religion, as discussed previously in this letter. For the foregoing reasons, the EIR must, at a minimum, be revised and recirculated before this Project can be considered for approval.

i. The EIR Incorrectly Presupposes that Future Discretionary Approvals have Already Been Granted, or Will Be Granted.

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[6] It is impossible to tell from the EIR how vehicle trips at the alternative site in Irvine would be affected by its development since the County never evaluated that as part of its analysis. (EIR, Section 7.9.3.)

[7] The Land Swap Alternative analysis also conveniently ignores the fact that construction of the Project at the alternate Irvine site would have significantly less noise impacts than construction at the North Tustin site because the surrounding area to the Irvine site is largely undeveloped. Failure to include this as part of the noise analysis results in lack of meaningful review of this project alternative, in direct violation of CEQA. (*County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, 1103.)

[8] Although the EIR fails to acknowledge that park land is greatly needed in the NTSP area, a review of the NTSP itself makes it very clear that there is a significant shortage of park land in the Project's vicinity. (NTSP, p. II-3-1, stating that the parks in the NTSP do not meet the need of the growing residential population, and p. II-3-4, stating, "The analysis above has determined that a need exists for additional local park acreage."

Throughout the EIR, the Project site is incorrectly described as a singular, undeveloped 7.25 acre parcel. (See, for example, Sections 1.4, 1.5.1, 3.1, 5.1.1, etc.) This is incorrect and improperly assumes that future discretionary approvals and actions by the property owner(s) have occurred.

In reality, the Project site is made of ***up to six parcels*** that appear to have never been merged. The EIR presumes that a lot merger has already taken place for all of these parcels necessary for the Project, and that they now constitute one large 7.25 acre parcel that is ready for development. ***This presumption is flat out wrong.***[9] The County's misunderstanding on this point is made even more evident by its own Responses to Comments on the EIR. For instance, in response to the Association's comment that it is unclear under the EIR which discretionary approvals will be needed to implement the proposed Project, the County responds:

> "The commenter is referred to Section 3.3.4 (Project Approvals) of the EIR, which clearly explains that ***two*** discretionary approvals will be required in connection with the project: a Specific Plan amendment from Residential Single Family (100-RSF) to Senior Residential Housing (SRH), and a Use Permit."

(County Responses to Comments, p. 3-204 [emphasis added].) Evidently, the necessary lot merger for the proposed Project is a forgone conclusion in the County's mind.[10]

By approving the EIR, NTSP Amendment, and use permit in their current forms, the County would be pre-committing itself to granting the lot merger required in order to construct the Project. Such pre-committal results in a "sham proceeding," or a "rubber stamp proceeding," where governmental momentum commits the County to grant certain discretionary approvals in the future (e.g., lot merger or lot line adjustments). As the California Supreme Court has previously held, a public entity that retains legal discretion to reject a permit or approval for a project can still, as a practical matter, improperly commit itself to the project and granting future approvals. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135.) If the County

[9] The NOP issued in July 2010 appears to acknowledge that a lot merger of up to ***six*** parcels will be necessary for the Project. Nevertheless, the EIR ignores this and is devoid of any such analysis, and treats the Project as a single parcel. The County's Responses to Comments states that only ***two*** discretionary approvals are necessary (change in land use designation, and the use permit). The staff report also stated that ***three*** discretionary approvals and necessary (use permit, site development permit, and specific plan amendment). Nothing issued by the County acknowledges that an additional discretionary approval (a lot merger) is also required to implement the Project. Thus, the required approvals for this Project are unclear to the public and the decision-makers, in violation of CEQA.

[10] At the Planning Commission meeting, Commissioner Adams inquired of County Counsel whether the merger of the lots could be done "administratively" via a lot line adjustment, to which County Counsel responded in the affirmative. This is ***incorrect***, as state law only permits lot line adjustments when there are four or fewer parcels. Here, County staff told the Planning Commission there are at least five parcels, and the NOP and EIR state that there are up to six parcels that make up the Project.

approves the Project now, but were to attempt to deny the merger of the lots later, the applicant would have the vested right to build the Project under the approvals and substantial hard costs expended in reliance thereon, and could sue the County to permit the lot merger. California Courts have long held that this sort of "bureaucratic momentum" is intolerable under CEQA. (*Save Tara*, *supra*, 45 Cal.4th at 134-135.) Further, the County cannot elect to defer CEQA analysis on the lot merger until the applicant applies for it, as necessary lot merger is clearly foreseeable, and CEQA requires that environmental review occur at the agency's "earliest commitment" to the project." (*Id*; see also Laurel Heights, *supra*, 45 Cal.3d at 395.)

Further, the County cannot ignore the fact that the individual parcels that will make up the 7.25-acre Project do not themselves meet the County's own "minimum site development standards" (i.e., minimum 7 acres), or that other parcels in the NTSP could be combined to effectuate a similar project once the SRH designation is approved.

An EIR is "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return," and "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.) This pre-committal by the County in treating the lot merger for the Project as a foregone conclusion is a violation of CEQA and California case law regarding impermissible governmental momentum, and good land use planning in general. The County should not issue any approvals for the Project until the EIR contains sufficient analysis relating to a lot merger and it has been recirculated for public review, or until the lots have been formally merged by the property owner.

j. The Air Quality Analysis in the EIR is Inconsistent and Incorrect.

The Air Quality Analysis in the EIR fails in several areas. Therefore, the EIR should be revised to comply with CEQA, and recirculated for public review and comment.

The Air Quality section determines, "The project would be inconsistent with the AQMP under the first indicator." (EIR, p. 5.6-11.) Consequently, if there are any federal approvals, permitting, or funding as part of the Project's construction or operation, then any Project approval would be in violation of federal law because the Project cannot be approved under the Clean Air Act conformity provisions. (See, for instance, § 176 of the Clean Air Act.) The EIR does not discuss funding for the construction or operation of the Project. However, it appears that Kisco receives grants from several sources for operation of its facilities, including possibly grants that include federal funds.

Additionally, the Air Quality analysis concludes that "because the proposed project is not regionally significant, changes in the population, housing or employment growth projections do not have the potential to substantially affect SCAG's demographic projections and therefore the

assumptions in SCAQMD's AQMP." (EIR, p. 5.6-12.) This is wrong. Growth projections are based on existing plans, which is the existing NTSP. This project changes the Specific Plan and increases density from what is currently allowed in the NTSP by over 600%. Therefore, this Project is inconsistent with regional assumptions and increases growth more than currently planned for by SCAG.

Also, the Air Quality Analysis is missing the required disclosures on air toxics. Diesel particulates are considered a carcinogen. In addition, diesel combustion contains air toxics other than criteria pollutants. The EIR states that diesel equipment will be used in constructing the Project, but the necessary disclosures about the air toxics associated with diesel emissions are missing, thus meaningful review cannot occur.

The EIR also includes "Mitigation Measures 6-1 and 6-2" for short-term construction activities. (EIR, p. 5.6-18.) However, the EIR lacks any analysis on this point. Moreover, the mitigation measures do not address the inconsistency with SCAQMD's AQMP. Thus, the EIR's statement that Mitigation Measures 6-1 and 6-2 "would lessen impacts associated with Impact 5.6-1" is not true, and is inconsistent with the statement on p. 5.6-19 that states, "Consequently, Impact 5.6-1 would remain significant and unavoidable." (EIR, p. 5.6-19.)

Based on this, the Air Quality analysis in the EIR is inconsistent and flawed, and should be revised and recirculated in accordance with CEQA.

k. The Traffic Analysis is Defective under Recent Case Law.

In the recent case of *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, which was published on December 16, 2010, the City of Sunnyvale's EIR was overturned because, similar to the EIR in the case at hand, it used projected traffic conditions as the baseline to evaluate traffic impacts. (*Id* at 1358.) The Court of Appeal ruled that the EIR was fatally flawed because under CEQA, the baseline for measuring environmental impacts must be the conditions "as they exist at the time the notice of preparation is published..." (*Id* at 1372 [emphasis included].) The Court went on to hold that using future conditions as the baseline results in illusory impacts, and constitutes "a failure to proceed in the manner required by law." (*Id* at 1383.)

In the present case, the NOP was published on July 20, 2009. Thus, under the *Sunnyvale* case and section 15125 of the CEQA Guidelines, the baseline for measuring traffic impacts should have been the conditions that existed on the ground in the vicinity of the Project in July 2009. However, the EIR for the Project uses an improper projected baseline that is based on future hypothetical conditions. The EIR states, in pertinent part, the following:

> "The relative impact of the added project traffic volumes generated by the proposed project during the AM and PM peak hours was

> evaluated based on analysis of ***future*** operating conditions at the six key study intersections, without and with the proposed project."

(EIR, p. 5.5-45 [emphasis added].)

While the EIR contains discussions about "horizon year 2013" and also discusses "existing conditions," it appears for purposes of establishing a baseline for measuring traffic impacts, the EIR uses projected future conditions in year 2035. (Appendix E, pp. 23 and 24.) Appendix E to the EIR states, "Review of Columns 3 and 4 of Table 8-3 shows that traffic associated with the proposed Project will not have a significant impact at any of the six (6) key study intersections, when compared to the County of Orange LOS standards and significant traffic impact criteria." (App. E, p. 23.) Table 8-3 then describes estimated traffic conditions in year 2035 both with and without the project, and concludes that no significant traffic impacts will result. (App. E, Table 8-3.)

The EIR contains no comparison of traffic impacts on the environment as the environment existed in July 2009, both with and without the Project, as required under recent case law and the CEQA Guidelines.[11] As the Court of Appeal held, "Case law makes clear that '[a]n EIR must focus on impacts to the existing environment, not hypothetical situations.'" *Sunnyvale*, *supra*, 190 Cal.App.4th at 1373, citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246-247.) As the result of using a future hypothetical baseline for traffic impacts in the EIR for the Project, the decision makers and the public lack complete information because an improper baseline was used for determining traffic and related impacts. This constitute[s] a failure to proceed in the manner required by law. (*Id* at 1383.)

The California Supreme Court has also recently looked at this issue, and similarly concluded that the proper baseline is the existing conditions on the ground at the time the NOP is published. In *Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, the Supreme Court explained:

> "An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead public as to the reality of the impacts and subvert full consideration of the environmental impacts,' a result at direct odds with CEQA's intent.'"

(*Id* at 322, citing *Environmental Planning Information Council v. County of El Dorado*, (1982) 131 Cal.App.3d 350, 358.) ***As noted by the Court in Sunnyvale, the Supreme Court has "never sanctioned the use of predicted conditions on a date subsequent to EIR certification or project***

[11] Section 15125, subdivision (a) of the Guidelines states, in relevant part, that a lead agency's examination of impacts should be limited to "changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published..." The NOP for the Project was published in July 2009.

approval as the 'baseline' for assessing a project's environmental consequences." (*Sunnyvale*, *supra*, 190 Cal.App.4th at 1375 [emphasis added].)

Based on the foregoing, the EIR is flawed because it lacks sufficient analysis regarding the traffic impacts of the Project in comparison to the conditions existing on the ground in July 2009. Therefore, the EIR should not be certified. At a minimum, the traffic study for the EIR should be redone, and the EIR should be recirculated for public comment.

l. Approval of the Project will Result in Improper Project Splitting under CEQA.

The County has taken the position in the EIR that the newly-proposed SRH designation need not be evaluated under CEQA on a NTSP-wide basis, but rather should only be evaluated as applied to the Project site. Aside from creating an illusory review of environmental impacts because of the overly-limited scope of review and the County's insistence on comparing the impacts to the maximum density allowed under the General Plan rather than the existing NTSP, it also results in illegal piecemealing under CEQA.

In *Christward Ministries*, the Appellate Court held that the City had acted improper under CEQA because it, among other things, opted to examine a new land use designation as part of a general plan amendment in relation ***to the specific project site***, rather than on a plan-wide basis. (*Christward Ministries, supra,* 184 Cal.App.3d at 193.) Specifically, the court found that under such a position, "an EIR would never be required for a general plan amendment so long as somewhere down the road an EIR was required." (*Id.*)

Similar to *Christward Ministries*, the County here is looking at the SRH designation only as it applies to the Project site, and not beyond, despite the fact that the County concedes in the EIR and in Responses to Comments that this is the "first" site to get the SRH designation, and that others could follow. Such an approach results in illegal project-splitting, as the County will simply evaluate the SRH designation on a project-by-project basis, rather than the entirety of the action. (*Id.*)

III. Conclusion.

The EIR is flawed to the point that it is invalid. It is riddled with procedural and substantive deficiencies, as outlined in this letter and the letter submitted by Environmental Impact Sciences on behalf of the Association. Errors occur when projects are rushed. The cumulative number of errors in the CEQA document shows that the process has been rushed here. This means that not only is the public unable to discern the consequences of the actions of the Planning Commission and Board of Supervisors in relation to this Project, but the decision-makers and their staff will be equally uninformed. The EIR cannot be approved in its current form, and must, at a minimum, be significantly revised and recirculated for public review and comments.

In addition, the proposed NTSP Amendment cannot be incorporated into the NTSP without resulting in a specific plan that is severely inconsistent and flawed. No attempt has been made by the Project applicant or the County to prepare an amendment to the NTSP that would make the newly-proposed SRH land use designation consistent with the remainder of the NTSP. If the NTSP Amendment is incorporated in its current form, the NTSP will contain chapters discussing the Project site ("Detailed Review Parcel 2") and its inability to receive any density increase from its current zoning at 2-3.5 dwelling units per acre, but also a new land use designation that has been shoehorned into the NTSP to somehow allow for a 600% density increase for a parcel that has already been studies in detail and rejected for any sort of density increase.

On behalf of the Association, we respectfully request that you consider these comments and all other public comments received, and reject the proposed Project.

Sincerely,

Gregory P. Powers, Esq.

EXHIBIT "A"

86-189273

EXEMPT
C6

RECORDED IN OFFICIAL RECORDS
OF ORANGE COUNTY, CALIFORNIA

-3 25 PM MAY 9 '86

COUNTY RECORDER

NORTH TUSTIN SPECIFIC PLAN

ORANGE COUNTY, CALIFORNIA

The accompanying text constitutes the land use regulations under which development will be governed for the area hereinafter to be referred to as the North Tustin Specific Plan. The North Tustin Specific Plan was originally adopted by the Board of Supervisors by Ordinance Number 3348 on September 29, 1982. Amendment 86-1 to the North Tustin Specific Plan revised the land use regulations text, but not the map.

I hereby certify that this text material, consisting of 31 pages plus a table of contents, which will regulate the development of those properties shown on the Land Use Regulations Map, was approved by the Orange County Planning Commission on April 14, 1986 and adopted by Ordinance Number 3586 by the Orange County Board of Supervisors on April 30, 1986.

Orange County Planning Commission
C. Douglas Leavenworth

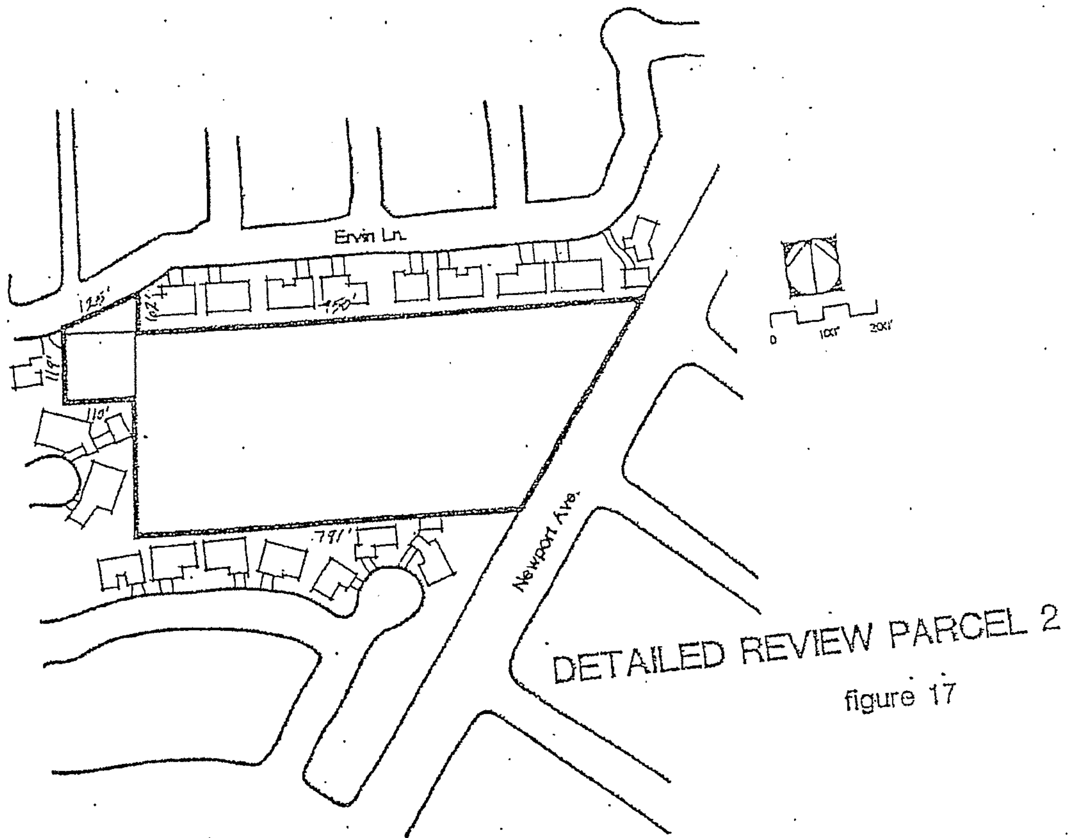
By: Robert G. Fisher
Director of Planning, EMA

Linda D. Roberts
Clerk of the Board of Supervisors
County of Orange

Recording requested by and call for pick up to:
Current Planning/Drafting, Rm. G24, Bldg. 12
Phone x4778 Mary Walker/Dick Weger
Exempt from Recording Fee per Govt. Code 6103

Signature

EXHIBIT "B"



DETAILED REVIEW PARCEL 2

figure 17

TABLE 15

NORTH TUSTIN SPECIFIC PLAN DETAILED REVIEW PARCEL 2
EXISTING CONDITIONS

statistics

AP NO.	AREA(S.F.)	ZONING	USE
395-554-13	3,400	100-E4	Vacant
395-554-12	11,660	100-E4	Vacant
395-033-01	287,060	100-E4	Agriculture

conditions

Design Review Parcel 2 consists of one large lot fronting on Newport Avenue and two smaller lots abutting at a right angle as depicted in Figure 17. Each lot is vacant, however in the past the lots were used for agricultural purposes. Access could be gained directly from Newport Avenue and Ervin Lane. Uses abutting the detailed review parcel include Newport Avenue on the east and two-story single-family residences along the remaining sides. The abutting residences are part of a medium-low density subdivision constructed prior to 1970. Newport Avenue has been improved to its ultimate right-of-way width and curb and gutter facilities presently exist along the frontages.

<u>EXHIBIT 2</u>

LEIBOLD MCCLENDON & MANN
A PROFESSIONAL CORPORATION

23422 MILL CREEK DRIVE, SUITE 105
LAGUNA HILLS, CALIFORNIA 92653
(949) 457-6300
FAX: (949) 457-6305

JOHN G. McCLENDON
john@CEQA.com

April 13, 2011

Via United States Postal Service
Darlene J. Bloom, Clerk of the Board of Supervisors
333 West Santa Ana Boulevard – Room 465
P.O. Box 687
Santa Ana, CA 92702-0687

Re: *Notice of Commencement of Action – Public Resources Code Section 21167.5 [Planning Application PA090004 for Specific Plan Amendment, Use Permit, and Site Development Permit; Environmental Impact Report [SCH No. 2009-051066] for the "Springs at Bethsaida" Project at 11901 Newport Avenue in North Tustin]*

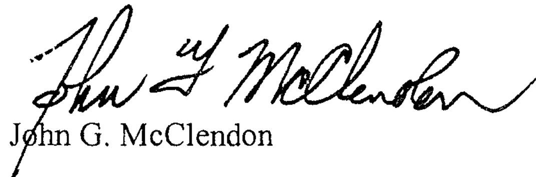
Dear Ms. Bloom:

Please take notice that the Foothill Communities Coalition intends to commence an action against the County of Orange and Orange County Board of Supervisors to set aside its approval of the "Springs at Bethsaida" project (the "Project") proposed for development by the Roman Catholic Diocese of Orange and Kisco Senior Living, LLC. The litigation will challenge (among other things) the certification of the environmental impact report ("EIR") prepared for the Project and will allege (among other things) the County's and its Board of Supervisors' violation of the California Environmental Quality Act (Public Resources Code §§ 21000 *et seq.*), the State Guidelines for Implementing CEQA (Title 14, California Code of Regulations, §§ 15000, *et seq.*), and the Planning and Zoning Law (Gov. Code §§ 65000 *et seq.*). The grounds for these allegations were previously provided to the County's appointed and elected decision-making bodies by the members of the Foothill Communities Coalition and others during the administrative processing and review of the Project.

This notice is provided to you pursuant to Public Resources Code section 21167.5.

Very truly yours,

LEIBOLD MCCLENDON & MANN, P.C.



By: John G. McClendon

PROOF OF SERVICE

I declare that I am over the age of 18 and not a party to the within action. I am employed in the County of Orange, State of California, and my business address is 23422 Mill Creek Drive, Suite 105, Laguna Hills, California 92653.

On April 13, 2011, I served the foregoing document entitled "***Notice of Commencement of Action – Public Resources Code Section 21167.5***" on the County of Orange and Orange County Board of Supervisors by placing the original of such document in a sealed envelope addressed as follow:

Darlene J. Bloom, Clerk of the Board of Supervisors
333 West Santa Ana Boulevard – Room 465
P.O. Box 687
Santa Ana, CA 92702-0687

☒ BY MAIL: I am "readily familiar" with this firm's practice for collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day this declaration was executed with postage thereon fully prepaid at Laguna Hills, California, in the ordinary course of business. Following ordinary business practice, I caused such envelope with postage thereon fully prepaid to be placed for collection in the United States Mail at Laguna Hills, California.

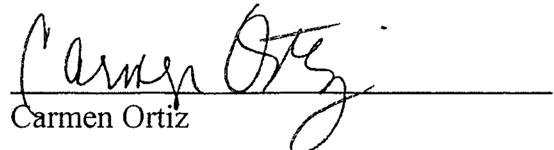
☐ BY OVERNIGHT COURIER: I caused such envelope to be deposited in a box or other facility regularly maintained by ❑ OVERNITE EXPRESS; ❑ FEDERAL EXPRESS; ❑ _[specify name of service]_ with delivery fees fully provided for, or I delivered the envelope to a courier or driver of such service.

☐ BY FACSIMILE: I served a copy of said document(s) on the parties in this action. The facsimile transmission was reported as complete and without error, and a copy of the transmission report issued by the facsimile machine is attached hereto.

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

☐ [Federal] I declare under penalty of perjury that the foregoing is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 13, 2011, at Laguna Hills, California.



Carmen Ortiz