SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

HONORABLE KAY KINGSLEY, JUDGE

BENJAMIN KAATZ, in his capacity as a taxpayer resident of the City of Seaside, PLAINTIFF, VS. CITY OF SEASIDE, a California municipal corporation, DANIEL E. KEEN, in his official capacity as City Manager for the City of Seaside, K&B BAKEWELL SEASIDE VENTURE, LLC, a California limited liability company, and DOES 1-20, inclusive, DEFENDANTS.	NO. 65043

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONTEREY, CALIFORNIA

MONTEREY COUNTY

AUGUST 7, 2003

APPEARANCES OF COUNSEL:

For the Plaintiff:	For the Defendants:
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HEIDI K. WHILDEN Attorney at Law	CLAUDIA J. MARTIN Attorney at Law

MONTEREY, CALIFORNIA - AUGUST 7, 2003

MORNING SESSION

* * *

THE COURT: Good morning. In the matter of Benjamin Kaatz versus City of Seaside, et al. The attorneys make their appearance for the record.

MR. RENNEISEN: Jay Renneisen on behalf of plaintiff.

MS. WHILDEN: Heidi Whilden on behalf of the plaintiff.

MR. FREEMAN: Don Freeman on behalf of the defendant City of Seaside and Dan Keen.

MS. MARTIN: Claudia Martin on behalf of Defendant City of Seaside and Daniel Keen.

THE COURT: All right. You may be seated, if you wish.

MS. MARTIN: Thank you.

THE COURT: We are here on hearing on the motion for preliminary injunction pending trial, and I have read everything in the file and reviewed it. Perhaps to give focus on the arguments, I have somewhat in the form of a tentative decision I would like to announce what my impressions are after reading the moving papers, and that might be able to direct your comments because you have everything very extensively briefed.

And rather than spend time rearguing what

you have already put in your papers, and which I

may not be disagreeing with or may not have any questions about, to give you focus I would like to proceed in that way unless there is something new you want to bring to my attention that has developed since I read everything.

MS. WHILDEN: No, Your Honor.

THE COURT: No, okay. First, on the objections or motions to strike declarations or evidence of Richard Van Steenkiste --

MS. WHILDEN: Yes.

THE COURT: -- I would be inclined to overrule -- and declaration of Tom Cravens, motion to strike, I would be overruling the motions, and as to the Sam Farr declaration, and allow those declarations to be part of the record.

On the balancing between or the issues of likelihood of prevailing in terms of the City acting as a redevelopment agency and the issues relating to redevelopment law, it seems pretty clear that this is -- the City is not a redevelopment agency that's acting in all regards that give rise to this action.

It's the City that acquired the housing, it's the City that acquired the property, the City that sold the property. And so the redevelopment -- although a redevelopment agency

was created, it's a little unclear as to whether that includes Hayes Park, I'm assuming it does, but in terms of description on the boundaries, I

don't know what the relevance of that is in terms of the argument that the affordable housing requirements can be met in the aggregate so -- since the agency never owned the property. And so I have some lack of clarity in terms of the City's arguments in that regard when I see that the City was acting not as a redevelopment agency.

On the issue of the statute of limitations or laches, I tend to agree with the petitioners that the controversy occurred when the land was transferred; that there would have been no remedies in court prior to July 2002. That would go to statute of limitation and laches, although I think there is some arguments to be made in terms of whether there was a delay, the delay of nine months would create laches even within the statute of limitations.

On the Surplus Land Act, I think there is some very strong issues made by the moving parties on that issue. I have questions in regard to whether the notice that was sent out in '98, I think it was, about their intent to dispose of surplus land, it was very ambiguous, it was very tentative. It was, "If we get it and

if we decide then we're going to do this," and I don't think there is adequate proof from the defense that notices were actually sent.

There is the representation of that through

a secretary who designated entities. There is no proof of service as to when or to whom that was sent. There is the declaration of Mr. Cravens that he didn't receive it, and he would have been interested in bidding on the land.

On the affordable housing issues relating to the Government Code Sections 37364 and sections around there, I think there is some issues there, maybe weaker than the Surplus Land Act issue on behalf of the Petitioner because I have some real questions in my mind as to whether an appraisal by the Army for purposes of the Army, this being fair market value back in 1996, is fair market value in 2002 when the property is actually sold to the developer.

So it's not really relevant to this case. There is nothing I'm taking into account in terms of evidence but I bought my home around '95 and had it appraised last year and it's doubled. So just in that period of time, I mean there is probably even judicial notice could be taken of just the state of the real estate market in that period of time and how much it's gone up. Nobody is bringing that to my attention at this point.

As to the gift of public funds, there I have -- I think that's a weaker argument than the affordable housing requirements under the Government Code and Surplus Land Act in that there is obviously some benefits, substantial benefits, public benefits to the City as set

forth in terms of increased market value, tax base, elimination of blight, the other things that were going to be done as part of the contract; in other words, theoretically if the City had acquired the property, disposed of it and complied with all statutes, certainly the purpose for which they are disposing it and what they got out of it seems to be -- to be for public benefit.

I think for the gift of public funds, you would have to depend on the affordable housing section as far as that and showing that to be a gift of public funds. But in terms of no public benefit, I think that's a weaker issue for the moving parties.

The Subdivision Map Act, that is going on, and whether that's been violated by the current building, I have questions as to whether a City can waive -- a Community Development Director can waive an ordinance. The City cannot waive a state statute but whether a Community Development Director can waive a City ordinance as opposed to

the City would have to pass an ordinance waiving an ordinance.

There is an attorney general opinion which I I didn't get a chance to read. I saw only headnotes -- footnotes under Government Code Section 66499.30 that would suggest that an ordinance can only be waived by an ordinance. So

I have some questions as to how that applies in this case. I am not leaning one way or the other.

As to harm, I can see arguments of harm on both sides and it's kind of a balancing there. And so definitely on that, I encourage more argument by each party. I don't know how it balances out yet. I was waiting to hear arguments.

That gives you an indication where I have questions and where I have been preliminarily persuaded by the moving parties and how to direct your arguments.

Moving party may proceed.

MR. RENNEISEN: Thank you, Your Honor.

If I may, I think the Court has an accurate feel on the legal issues involved in the case. The way I see it in terms of legal issues, there is distinction between a 526(a) action for what I call subjective waste, which kind of is a constitutional analysis that we put here today

saying 94 million is what you should have got and you didn't get near 94 million. That's kind of a factual issue.

We appreciate the Court seeing how that analysis kind of gets put forth and distinguishing that from a 526(a) action that says this act by the governmental entity is invalid because it didn't follow all the procedures and rules that it's supposed to do.

And in this case, we do believe we have strong arguments at this point on Subdivision Map Act and the affordable housing in residential property.

With respect to the balancing of the harms, Your Honor, we are very concerned that this project is going to go forward with a developer that is on the fast pace even to the point where we say convincing the City to violate the Subdivision Map Act to get this project done and to get out of town. And we are very concerned about what's going to happen to that if this is an invalid act by the City, what's going to happen at the end of the day. We are asking that the deed be canceled, void.

The harm that is going to happen if the property goes forward in the development is that you are going to have all of these individual homeowners with their homes moving in with

multiplicity of lawsuits and interests coming into court, and it's going to be very difficult, if at all possible, for the Court to decide what to do with who owns the property. Keep in mind, Your Honor, that as of today, that property, the Hayes Park property, was one piece of property. It's one piece of property. It was one piece of property when the federal government sold it to the City and one piece of property when the City sold it to K&B/Bakewell, one APM number.

So our motion is to the extent the Court has some hesitancy in balancing the harms to stop the construction, which would be the necessary result if the Court granted our request to prohibit the further issuance or approvals of building permits. If the Court is hesitant to do that at this point in the game, we are asking that the Court take a somewhat easier, softer road, which would be to prohibit the City from issuing further approvals pending the trial on the merits approving the subdivision maps.

The reason for that, Your Honor, is because once that approval is done, once that approval is done the property is going to be split up and formally legally subdivided and it is going to change the status quo tremendously here.

And I do understand, Your Honor, that the subdivision approval, the approval of subdivision

plans are done kind of in groupings. It's my understanding that the first group is going to be discussed and probably approved tonight at a City of Seaside Council Meeting. So we think relief is necessary now. To the degree the City has argued special relief, I see their points when they are saying, Well, you want to stop construction. That's a harder issue.

But to the extent the City is saying what the harm is with respect to simply not allowing the property to be subdivided and legally parceled off to all these 380 different people,

the City is basically saying -- I appreciate the Court paying attention to it. They are saying, Your Honor, the City can't refuse to do these things because K&B/Bakewell will have claims against the City for breach of contract. If we refuse to do these things, K&B/Bakewell is going to come in and claim we breached our agreement with them.

And Your Honor, you see that's really why we are here. That's really why this issue of Hayes Park property can only be resolved in a court with Your Honor looking at what happened. Because the City of Seaside either believes it can't or can't take a position inconsistent with that contract because of fear of what K&B/Bakewell is going to do. If the City of

Seaside has an order from the Court, following an order from a Court is not a breach of contract of K&B/Bakewell. So in large degree with the harm on the Subdivision Map Act, we are asking the Court to order the City to do what it really can't do for itself.

And again, we realize there are issues with the stopping of construction. But with respect to at least keeping this as one piece of property, the unique real property that we are dealing with, void the deed for which we are trying to void, we think the Court should issue an order prohibiting the City from approving the

subdivision maps which would prohibit that property from being divided up. That's the -- of course that is pending resolution of the lawsuit, putting it on hold, but we hope it will resolved be in the near future.

THE COURT: It was Government Code Section 54230.5 when you talk about wanting to get the deed canceled, and you seem to address this in a different way in some of your moving papers. That code section which was part of the Surplus Land Act says, "Failure by the state or a local agency to comply with the provisions of this article shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrancer for value."

And I think you have addressed that in your moving papers in that you are not really asking for the deed to be canceled but some disgorgement of profits or --

MS. WHILDEN: Your Honor, in fact we are asking for both. We are asking that the deed from last July be set aside. The remedy for violation of the Surplus Land Act under 54230.5 would be for the Court to order that a constructive trust be imposed and placed over the proceeds from the sales of these homes pending, of course, the outcome at trial. That is what we are asking for. We are asking that should the Court find that there has been a violation of Government Code Section 37362, prohibitng the

sale by the City of this residential property below fair market value without requiring that any affordable housing be built on the property, and Article 16, Section 6 of the Constitution prohibiting the city from making gifts of public funds, which I would be happy to address in just a moment, Your Honor, we are -- what we are seeking is that the appropriate remedy would be to set aside the deed.

THE COURT: But in terms of Surplus Land Act, if a violation of that was the basis for any remedy, that specifically provides that the failure to comply with the Surplus Land Act does

not invalidate the transfer. So I mean separate and apart from the Government Code sections that talk about selling property at fair market value, when they sell the property at less than fair market value they have to comply with some affordable housing provisions. That's the 3400 sections that you are citing.

More specifically, how do you seek for cancellation of the deed on the basis of a violation of the Surplus Land Act when that code section says you can't invalidate that transfer?

MS. WHILDEN: That's true, Your Honor. Under the Surplus Land Act we would not be entitled to set aside the deed. We would be entitled to placement of a constructive trust over the proceeds but not cancellation or setting

aside of the deed.

THE COURT: Now that I understand your argument, you would be basing the deed cancellation remedy on violation of the affordable housing provisions relating to --

MS. WHILDEN: Yes. Section 37362, Your Honor.

THE COURT: Right. I think I misquoted when I said 3400. I'm thinking of Health and Safety sections that apply to the Redevelopment Agency.

MR. RENNEISEN: If I may, Your Honor, it's true that we have multiple angles we're taking to

attack this transaction, and there are multiple remedies or different remedies that we can get. Whether it's invalidating the deed for the failure to sell at fair market value when you are dealing with residential property and not doing affordability housing, or if it's a Surplus Land Act, the net effect here is we are asking today that the Court stop the property from being subdivided and sold off. And the value ultimately if it's a subdivision, if it's Surplus Land Act, that value is going to be gone.

We are looking for -- as you know, Your Honor, we have asked for K&B/Bakewell parties to join the case, and that's going to be heard tomorrow. To the extent that the Surplus Land Act necessarily has to give us a remedy, that remedy is some sort of disgorgement of profits or some sort of equitable remedy where the actual

value is paid. If the property is subdivided and each 380 parcels are sold, that value of that property, that is disgorgement, is going to be gone. It's going to be gone. The only way to deal with that, we think, is to stop it from being subdivided.

THE COURT: Okay.

MS. WHILDEN: Moreover, Your Honor, as the Court is aware, K&B/Bakewell has created the entity, the holding company as an LLC for this

one-time limited deal of just constructing these homes, pocketing the proceeds and getting out of town. There won't be a K&B/Bakewell entity once the homes are constructed, escrows close, and new owners move in. That's also the urgency.

THE COURT: Okay. All right.

MR. RENNEISEN: If I may, I have one more issue.

THE COURT: Yes.

MR. RENNEISEN: On hardship, Your Honor, this may go to the reason we kept in the request to stop the construction, that you stop the approval of further building permits, which is K&B/Bakewell decided to do a deal with the City. K&B/Bakewell knows you have to go through certain hoops to make sure that deal is valid. All of this harm, supposedly a third party at this time, points to K&B/Bakewell. It's its own doing. It is acting based upon an understanding with the

City that is invalid as a matter of law.

There is no reason why K&B/Bakewell shouldn't have known better. And all the harm that they are saying that K&B/Bakewell has incurred is its own fault.

THE COURT: Okay. All right.

MS. WHILDEN: Your Honor, if I might be heard on the gift of public funds argument?

THE COURT: Yes.

MS. WHILDEN: My take on maybe the best way to understand this constitutional issue of public funds, since there do not appear to be any cases on point, is to understand that the fair market value, the undisputed fair market value as evidenced before the Court is last July the property was worth upwards of $94 million. On the same date, the City acquired somewhere around a million dollars, a little more, a little less. The difference between what the City received, the one million dollars, and the true value of the land, 94, upwards of $114 million, could certainly be constituted a gift that was taken away from the citizens of Seaside. I understand some of the cases that defendants cite speak of public benefit, and the Court has talked about that as well; that there might be some public benefit that the City or its residents realize through this transaction.

And I disagree. I don't agree that there is any public benefit to the City getting only

one-twentieth of the value of the land. Certainly there was a promise of either a 300,000-dollar contribution by the developer or the building of an office or government building. Same number actually that was required of the Salvation Army that they had to cough up for the building of their own houses and this

building of ten more units for the Salvation Army. But those were -- it was put on land Salvation Army was entitled to, had that land pursuant to the Homeless Assistance Act, and it was entitled to the 10 homes that were on the land, not just the land. It was a valuable parcel right in the middle of Hayes Park.

The city and the developers acted in concert through the LDA and later agreements that the Court has through all of the documents attached to Joyce Newsome's declaration, acted in concert to kick the Salvation Army off this beautiful parcel of land that it was entitled to. It's very valuable now. We know from the fair market value appraisals that we had performed what it's truly worth.

They got kicked downtown. They were told that before the City or the developer had any obligation to rebuild those housing units, they had to pony up $300,000 of their own money. Whether or not the building of a new office for the city for $300,000 and around $850,000 profit

is enough to overcome Plaintiff's argument that this was a gift, the 94, upwards of $114 million that the developers walked away with, or not, that's for the courts to decide. But I believe a fair and reasonable interpretation of gift under these arguments and the Constitution would be the

difference between what the City received and here what the developer received as a gift.

THE COURT: I understand your argument.

MS. WHILDEN: Thank you.

Your Honor, as to Section 37364 of the Government Code, requirements that a public entity may not sell residential property at below fair market value without requiring the construction of affordable housing on the property, I believe that the intention of the legislature there is crystal clear as actually it is under the Surplus Land Act:

That we have a critical affordable housing crisis in California, certainly here on the Monterey Peninsula, but within the state of California. Cities don't routinely sell their own land, unlike redevelopment agencies, that are just created for the acquisition and sale of land to cure urban blight, which is not what we are dealing with here.

It's unusual for a City to part with its own land. And the legislature, I understand in creating section 37362, understood that there is very little property available for the creation

of affordable housing. Property here is very valuable and when -- the way they could cure this problem is that whenever a City intends to sell below fair market value, it must first -- unlike

a redevelopment agency, it must first make that land available for affordable housing purposes; not on another parcel, not 15 or ten years down the road; not if you get water rights or have enough money, but also on the parcel that is going to be conveyed by the City, affordable housing must be required of the developer.

I am unaware of any exceptions to this Government Code. And under this Government Code provision, a deed restriction runs with the land. It requires the developer, in this case K&B/Bakewell, to put on affordable housing as set forth by the statute. It's very clear in Section 37364, Subdivisions B and C, exactly how much housing, exactly what increments for low and very low income households as defined by Health and Safety Code.

The City, by selling this property at one-twentieth of its value last July, violated the law. And by doing so we believe that the Court is now empowered to set aside the deed.

Would the Court like further argument as to the Surplus Land Act?

THE COURT: No, that's fine.

MS. WHILDEN: Okay. Submitted, Your Honor.

THE COURT: All right. And Miss Martin.

MS. MARTIN: Thank you, Your Honor. I would like to at least start by addressing the issues

the Court raised in your -- sort of the tentative ruling, your impression that the Court gave us. Further, I would like to clarify why in our moving papers -- in our opposing papers we set forth the elements of affordable housing requirements for redevelopment agencies. We want to make it clear that we don't believe that Government Code Section 37364, which was just talked about regarding agency or government entity, may not sell the property below fair market value is applicable in this case. And that's because we are dealing with a sale that is fair market value.

And the federal statute was very clear when the property is to be sold by the Army to the city, that it was to be sold at fair market value as determined by the Secretary of the Army. We don't believe that simply because there is someone who will come in and say this is worth a substantially greater sum of money, that the sale was not a fair market value sale, and there is nothing to show that the Secretary did not sell the property at fair market value. And in fact the City then turns around and sold it for a substantially higher amount of money to the developer.

THE COURT: How can you say that a sale

based on an appraisal in 1996 as to what the fair market value was at that time still applies?

MS. MARTIN: But it's what was used by the U.S. Army, who by the federal statute was to determine what the fair market value of the property was. It is what they relied upon in making their analysis. As the Court can see from some of the documents there was extensive negotiations between the City and the U.S. Army over a period of years as to what the fair market value price was. And the price that was finally arrived at is the 5.1 million-dollar figure for the sale from the U.S. Army to the City.

THE COURT: I don't see that there was negotiations extensively about what the value of the property would be over that period of seven years. There were negotiations relating to a lot of other things about transferring the property, but it looks as though they looked at fair market value in '96, established it, then negotiated basically whether to transfer it or not to the City. And once they decide, they just go back to the previous market value. There is no re-analysis.

MS. MARTIN: It's in the record and there is a letter, there is an addendum in 2000 in which it actually set a maximum sale price of 6.8 and continued to negotiate. That was 6.8 for the development and actually that the sale price,

that would be a 50 percent splitting of the difference. So it actually shows that they were still in the process in 2000 of negotiating the sale price.

THE COURT: That seems to me to be -- I took that to be negotiation between the City and developer, not the City and the federal government.

MS. MARTIN: It was dependent upon, if you read the language of that addendum, the LDA, that was the 2000 document, it was dependent upon what the ultimate sale price was between the Army and the City. It wasn't a fixed sum of money, but actually talked about when the sale price was agreed upon between the U.S. Army to not exceed $6.8 million, it would then be a split between the City and the developer as to what the sale price would be. It shows there is in fact as of 2000 they were still in negotiations with the U.S. Army as to sale price and apparently reaching the agreement of the $5.1.

THE COURT: What about in that regard when you talk about the traditional or standard definition of fair market value, it even appears in the appraisal reports about what on an open market a willing seller and buyer would agree upon. And in the meantime, earlier than 2000 and 2002 you have a developer in Monterey County

offering twenty-five then fifty then significant amounts of money for that property.

MS. MARTIN: Well, as you can see, that never went anywhere. And you know there is a developer who we are not real sure is really a viable developer because there is a developer who even after the LDA was entered seemed to not be aware of the fact that, for example, there was federal legislation to sell the land to the City. He was still dealing with the Army.

Even after there was public hearings on the LDA, he seemed not to be aware of this and continued to deal with the Army. I don't know how viable this particular developer was and how sophisticated this particular developer was. And frankly, I would ask the Court to discount his valuation. He's not -- he's not an appraiser. He does have some development experience but seems to me that Mr. Agha -- and I think it's his declaration the Court is referring to -- that Mr. Agha was -- did not know what he was doing, was not going to develop things in an appropriate manner. That even after the sale documents had been signed, he was still talking to the wrong people. He really did not know what he was doing, and his valuation should be discounted by the Court.

And again, I would turn the Court back to

the statute that talks about the Secretary;

that when you go back and look at the fair market value, at the very least the Secretary of the Army's valuation really sets the -- kind of the base for what fair market value is, and that was the $5.1 million.

And I don't think it really matters that there was an appraisal that was relied on that was a few years old by the time the Secretary entered into the agreement because the Secretary did not -- did have more information available to them they certainly could have used. And they arrived at the $5.1 million figure, which I believe was slightly higher than the actual appraisal report itself. I think the appraisal report was for $5 million. They reached a 5.1 million-dollar figure.

And then the fact the City turned around and sold the property at an 850,000-dollar profit immediately to the developer, but that was not the only profit that the city gained from that because there was construction of the -- what was originally to be an office building which later negotiated and became a community center and which in fact is built on the site in its place.

There was the building of the Salvation Army units, the 10 units of houses. Even though it was replacement housing, not the --

THE REPORTER: Counsel, please slow down.

MS. MARTIN: The Salvation Army property, there is an allegation they were kicked off by

the City and that was not the case. There was negotiations. There were contracts entered into that are part of the record. They received a piece of property. And it's also simply not true that they had to spend $300,000 of their own money. I actually have a supplemental declaration to the effect it was money that was HUD grants that they had to basically use or lose for both operations and replacement housing. So that's where the $300,000 comes from.

There was a developer that in fact did build the replacement housing on the alternate site still within the redevelopment area. It was finaled in October of 2002 and valued at $905,000. So even if the Salvation Army spent $300,000 of the HUD money, they still got value in excess of that because that building in October of 2002 was valued at $900,000. So by October of 2002 there is substantial public value.

Getting back to the issue of affordable housing, which I think we were talking about earlier, we don't see that fair market value applies under these circumstances because we think there is sufficient basis in the record for

the City to have determined that the $5.1 million accepted by the Secretary of the U.S. Army set a base for fair market value. And if they sold it for anything in excess, they were

selling it for at least fair market value, if not greater.

So we put in the brief the affordable housing requirement because this property falls within the Seaside Fort Ord Redevelopment Area and is subject to affordable housing requirements. And those requirements are set forth in 15 percent of the total new housing units built and they must be completed within a 10-year period. That is the obligation of the Redevelopment Agency which oversees the redevelopment area.

THE COURT: How is that relevant though to the City if they sold this for less than fair market value? I don't know where that argument comes in, what it addresses. I understand that you're arguing Section 37364 of the Government Code does not apply because they received fair market value and you got your evidence on what you are basing that, but -- therefore we don't even have to talk about redevelopment obligation.

So if you are talking about in terms of if the Court were to consider that that isn't fair

market value, what the Secretary of the Army said that the property wasn't sold by the City for is fair market value, in your view the Government Code Sectio 37364 is complied with because in the meantime the property has become part of Redevelopment Agency and that has a requirement

for affordable housing. Is that what you're trying to argue?

MS. MARTIN: What we are arguing is that the -- only as far as the City is concerned, because the property was sold for fair market value, the only affordable housing requirements that are applicable to this particular parcel of land are the housing requirements under the Affordable Housing Act. And those are the sections we cited earlier with the 15-percent requirement because this land is in fact part of the Seaside Fort Ord Redevelopment area.

So the houses that are built as part of this project would be counted towards the total required affordable housing requirement for the entire Redevelopment Plan area.

THE COURT: You are only bringing up that issue to say there is affordable housing requirements that apply but they come under the Redevelopment Act?

MS. MARTIN: Exactly, Your Honor.

THE COURT: But that's not -- that doesn't

fulfill any kind of obligations that the City might have under 37364. That's not your argument?

MS. MARTIN: No, that's not our argument. Our argument is simply as far as the City's concerned, the only affordable housing requirement applicable to this parcel fall within

the Redevelopment Agency's requirements; that 37364 is not applicable. There is no below market sale here, and it's clear there is no below market sale because the sale price that was set by the Secretary in the Army through the federal statutes, which said it was not to be sold -- that it was to be sold for fair market value.

I think the Court has to assume that what the Secretary of the Army determined was fair market value is in fact the fair market value, especially since this is a simultaneous sale, and the City in fact sold this for nearly a million dollars more simultaneously to the developer; plus more than a million dollars in other public benefits -- the public buildings and the additional benefits gained from the additional taxpayers that would be derived from the houses built.

I would like to go to the laches argument since the Court seemed not to be persuaded by

that, and I think the laches argument is extremely persuasive in this instance and that the cases regarding laches show that this is a case in which laches in fact should apply. The case law is -- first of all, case law is clear that one who seeks equity in this case, restraining order, or injunctive relief have to act at the first opportunity.

I'm certainly -- even if the Court is going

to consider the transaction, the actual transfer of title back in July of 2002, there is no explanation in this record to explain why this particular Plaintiff waited nine months to come forward. The deal was very public. The LDA had been accrued after a public hearing in 1998. There had been numerous newspaper articles, some of which the Plaintiff, I believe, attached to some of the moving papers on this subject.

The site itself was clearly visible from Highway 1. The development started almost immediately after the title was transferred and was clearly visible. And the Plaintiffs waited until the buildings were demolished, the off-site improvements, the streets, utilities, all those things were in place, buildings were in place, the community center was completely built, and the replacement housing for the Salvation Army was not only completely built but had been

occupied more than a year.

So there is no explanation from the Plaintiff, there is no declaration from the Plaintiff as to why he didn't come forward sooner. The only thing that we have in this record is the argument of counsel in which he says he didn't realize what the prices would be until April when the developer announced the prices. Well, the prices of the houses are not the issue before this Court.

If we look at the Complaint in this matter, because ultimately for an injunction you're looking at whether or not the Plaintiff can prevail at the trial on the merits of his Complaint. The Complaint in this matter pertains solely to invalidating the LDA and invalidating the deed. These two things happen either nine months ago or five months -- years ago. And in fact if you look at the Complaint itself, every single cause of action, I think except for two, pertains solely to the LDA, invalidating the LDA as a transfer, invalidating LDA for not having a public hearing. All of the causes of action goes to the LDA and to the deed transfer. That was nine months ago. Plaintiff offers no explanation as to why he didn't come forward then when the deed was transferred.

The sale of the houses is completely

irrelevant or what the prices were. And I would point out that in the record there is ample evidence that these houses were never going to be affordable housing. The LDA does not talk about affordable housing anywhere. And in fact if one goes back to the original Fort Ord plan for this property -- give me one moment -- there is actually language within the plan itself where one of the objectives of the plan was to maximize the value of the land, and that's Objective C, and I would refer to the Court to Exhibit BB to Dan Keen's declaration.

So as early as 1996 when that plan was put into place, there was indications there was going to be areas of Fort Ord that were not going to be used for affordable housing but they were going to be used for market rate or better housing. And that's, I believe, Objective C set forth in the excerpts that are attached.

Further, even if you look in 1998 when they had the hearing on the LDA on land disposition agreement, the representative from the developer got up, and while he did say that some of the houses would be sold for under $200,000, he also clearly said that these houses would be between 4,000 and 15,000 square feet, they would have three to eight bedrooms, and that some would sell for in excess of $500,000.

At no time was there any indication that these houses would ever be sold as affordable houses. This has been publicly known since at least 1998, if not sooner, and you have the 1996 Fort Ord Reuse Plan where it is clear this was to sell at market rate and higher housing to maximize the highest and best use of the land.

So any suggestion by the Plaintiff they didn't realize this wasn't going to be affordable housing is simply disingenous. I would point out there is nothing in the record that says that's when they first learned about this. There is no declaration from the Plaintiff himself. All we

have is some suggestive argument in the brief. Also, the Plaintiffs do not even address any of the cases that were cited regarding laches which seems to have fact situations which are remarkably similar to what we see here. The Court made some remark that this is only nine months; and in fact, if we look at the Concerned Citizens case, which is cited in the brief, it deals with approvals, and the Plaintiff delayed nine months, exactly the same time period.

And that case, the Court of Appeal approved a dismissal based on laches, refusing to grant injunctive relief where it says plaintiffs delayed the suit challenging certain land development approvals for nine months. The

developer had incurred over $700,000 in costs and laches was a bar to injunctive relief. So if we look at the fact situation, it is almost identical to the present situation.

I would also refer to the Court to the Holt versus County of Monterey case cited in the brief. And that's one where the Court of Appeal affirmed the trial court's denial of both Writ of Mandamus and injunction on the grounds of laches. And that's where the Plaintiff wanted to stay the grant of a use permit for a subdivision based on the claim there was an inadequate County plan. And he had known about the plan. The plan had been adopted two years earlier. Here we have the LDA was adopted five years

earlier.

In that case the developer had already spent $4 million in developing costs. Here we have a developer that actually has been building up on the site. Beyond development costs, they have several buildings up on the site which are clearly visible. They have the community center clearly built. All the off-site improvements built. They are still at a point where they are entitled as a matter of law to have their subdivision plan approved and they have a vested property right, and they are not here. And I don't want to argue that, but it would seem to me

if the Court is not going -- is going to grant the injunction, they are being deprived of a vested property right without the due process of law. They are not here today.

Going back to the laches argument, the Plaintiffs offer no explanation as to why they didn't come forward sooner. They also offer no cases to support their position. There is absolutely nothing in their reply brief or moving papers which shows why laches shouldn't apply in this case. And as I said, the cases cited, over a half dozen cited in our opposition papers which have fact situations which are remarkably similar to these fact situations.

Again, nine months is not a bar where they knew the developer was out there doing work. It

was hard to miss that developer out there doing work because you can see him from Highway 1 very easily. He had been working there for nine months. The buildings are clearly visible and had been visible for months. And why this Plaintiff waited until nearly the eve of the approval of the subdivision plan is inexplicable.

I don't think the Court should, when we are dealing with an injunction, grant a Plaintiff who waits until the developer has spent all of this money until we are at a point of final approval of a plan to now grant an injunction. And this

is not any different than the Holt versus Monterey case or the Concerned Citizens case or any of the other cases, San Bernardino Valley Audobon case, all of which have very similar fact situations, all of which a plaintiff delayed, waited for the developer to spend literally millions of dollars and said, "Wait a minute, there was a defect in the procedure. I want the whole thing stopped." In each case the Court of Appeals said, No, you waited too long. You delayed and the harm is too great.

On the laches issue I would also point out under the Hodgeman case, which is also cited in our opposition, that you can't enjoin an executed contract, and that's what we're dealing with here. And there is absolutely nothing in any of the reply papers from the Plaintiff that refutes that. The case stands there unrefuted. The

contract, the LDA, if you are going to consider that the contract was executed in 1988 and full performance occurred at the last in 2002, in July of 2002 when the deeds were executed and the property was transferred.

The Plaintiff has not come forward. This is a completely executed contract and under the Hodgeman holding, this Court cannot enjoin. So for those reasons we believe laches argument is really very persuasive. We have fact situations

that are so close to the one in this particular case. And for the Court to stop the project when were are really on the eve of the developer getting the final approval would be to -- would be a derogation of these cases. And to enjoin an executed contract, it would also deprive this developer, who is not here, of a vested property right.

And I would point the Court to the Government Code section cited in the brief in which it's clear that it's such a vested right that the City Council does not even have the right to deny the developer so long as they meet all of the requirements of the plan. They can't even deny them from approving it. If they should disapprove the plan, for some reason deny them the final approval, the city clerk by state statute is directed to approve the plan. So this is a Plaintiff who waited until the, literally to

the end to come forward to this Court and say, Now I want you to stop this.

I would also point out to the Court that ultimately what I hear these plaintiffs saying is they are looking at the money; that somehow this developer paid too little for this property. That seems to be the essence of this case and the fact is that's money. Money is not an injunctive relief basis. Money damages can be acquired in a

court of law. And if that is the case, there is no basis for injunctive relief.

They have a cause of action either against the city and/or the developer and they can get money damages. There is some suggestion that the developer is going to suddenly run off with their profits. Well, I think the Court may be able to take judicial notice of that the Kaufman & Broad has been around a very long time and have offices all over California, offices in the South Bay. And this is not a developer that's going to be here today and gone tomorrow.

And I would say the same thing for Mr. Bakewell as well. He's a well-known developer, been around for a very long time. And if that is their concern, it certainly has no basis in fact that this is a fly-by-night developer. So if what they are looking for is money damages to compensate what they believe is inadequate compensation for the land, that is not the basis for injunctive relief.

I would like to just talk a little bit about the issues of waste, the standard for waste. The Plaintiff seems to ignore the standard of waste. They don't seem to like the cases because the cases are against them in this instance. It's very clear that once there is evidence -- and cases are cited in our opposing papers. It's

clear that once there is evidence that there is a public benefit, there is no waste.

The Court cannot substitute its judgment for that of the legislative body, in this case the City Council. And here there is clearly public benefit. Not only did the City get $850,000 cash from this transaction without having to lay out any money of their own, but they got improvements of streets and utilities. They got the building of a community center. They got the building of replacement housing at no cost to themselves that's valued close to $1 million.

They are getting increased taxpayers in the city, increased tax base, increased benefits from the increased population, increased money spending in this town. And I would point to several of the cases in which this is found not to be waste at all.

First of all, in the case of County of Ventura as cited in our moving papers, it's really clear that if there is a public benefit, the expenditure is not actionable. And if

there -- it doesn't matter even if there is a small public benefit. If there is any public benefit, you cannot come in. And the public benefit is not based upon whether or not you can go in and say, "Well, somebody else would have paid more and the City could have made a greater

profit." That's not the basis for a public benefit.

And there is a case cited in our moving papers in which -- I believe it's the Federated Income Properties case, that's 82 Cal. App. 2d 893 and cited on page 24 of our brief. And I would ask the Court to revisit that case because in that case, this is one where the City -- where the State obtained property on a tax default basis and sold it for one dollar back to the City of Pasadena. And the property owner came in and claimed waste saying that the property was worth far more than one dollar. And the Court of Appeal said, No, there is no gift. It's not waste because the City intends to fix the building up and return it to the tax rolls, and that alone is sufficient to find public benefit.

In this case we not only have several, 300 or more homes going on the tax rolls as a result of this deal, which in itself is a benefit, but we have the cash benefit to the City, the benefit of the community center to the City. There are several benefits listed in our moving papers to the City. And under cases such as Federated

Income Properties, Santa Barbara County Water Agency, several of the cases cited in our brief, there is no public waste. And in fact there is no gift under Article 16, Section 6.

And once there is some public benefit, cases are very clear the courts cannot interfere with the legislative decision of the City Council as long as they had a reasonable basis to find there was some public benefit. That's the end of it.

I would also like to go in and address the Surplus Land Act which we talked about. First of all, it's our position there seems to be -- to have been some assumption the Surplus Land Act applied. And again, we would like to first argue that the Surplus Land Act does not apply at all in this case.

Now admittedly this is a case of first impression. There is no case law on this whatsoever. So we need to look at the language of the statute, and that's Government Code section 54220 -- I'm sorry.

THE COURT: That is the beginning section.

MS. MARTIN: Beginning of the section. And if you look at it, it's the sale or transfer of property that is already owned. If you look at Government Code section 5.221b is the applicable section.

THE COURT: 54211b.

MS. MARTIN: And it says it means land

owned by the agency that is determined to be no longer necessary for the agency. And although there is no case law, I think the clear language

on the statute implies that at one point it was being used and it's no longer necessary for the Agency use. That's not the land here.

The purpose of the acquisition of this land always is, at least as far as 1998 is concerned under LDA, was the City would acquire the land and immediately transfer it to the developer for development purposes. It was not surplus land under this act. It was never land which the City had and then determined it no longer wanted. And that seems to me to be the plain language of 54221(b), land that is determined to be no longer necessary.

The implication from the language is at one point it was necessary and used by the government entity. That's not what this land was. It may be surplus land for the federal government but it is not surplus land for the City of Seaside. And so therefore we don't believe the Surplus Land Act applies at all. But going beyond that, the City did have provisions within the LDA and did attempt to comply with Surplus Land requirements anyway to give other developers notice. We don't believe that they had any obligation to do so under the clear language of the statute, but they did.

The Court has indicated she wasn't impressed

with the notices that were sent out and the

declaration from Mr. Guillen who is the former Community Development Director. But in fact if you look at the notices, I don't know how familiar with the Court is with notices sent out under this statute, but he sent a standard notice. There is nothing different than any other notice. There is no obligation on the part of the City to go forward with the project.

Because the Court is somewhat concerned about some of the vague language, if the City can obtain the land, if the City decides to go forward, but that is fairly typical of the kind of notices that you would see under the Surplus Land Act. The City is not making any obligation. It's simply inviting interested parties, those parties required by statute and any of the parties it knows about to come forward and indicate they were interested, should the City acquire the property, of making a bid and doing some work on the property.

And we attached a copy of the notice. That is part of the record in this case. And it was sent out on September 1998 when the City was still in negotiation. And I would point out that the City couldn't have sent it after the end of the LDA because they would have problems with violation of LDA. But no one came forward. We have proof from the declaration of Mr. Jones that

the notices that were sent out were in conformity with the requirements of the Surplus Land Act. No one came forward.

Now there is that developer out there, Mr. Agha. He didn't come forward. He was still talking to the Army. Mr. Agha seemed not to --

THE COURT: What about the Housing Authority?

MS. MARTIN: First of all, the person at the Housing Authority never says that he was in the position to make those decisions. And I would go back to his declaration and ask the Court to look at what he says his job duties were.

THE COURT: He was in a position to receive those notices and act upon them and make recommendations.

MS. MARTIN: I don't think that is what the declaration says, Your Honor. I think -- I would ask the Court to go back and look again. He was doing design work. He was doing accounting work. I think he was involved once a project was underway. That was what his job responsibilities were. And there is nothing from anyone who is currently with the RDA. The notice could have come into anyone at RDA. It was a signed green receipt. If the Court wants, we can ask for a recess and go out and get the signed receipts. The City did keep some of the green cards that

were sent by certified mail.

THE COURT: You have copies of receipts --

MS. MARTIN: I have been told --

THE COURT: -- of things being sent and they didn't provide that yet?

MS. MARTIN: I have been told they have been located. I have not seen them. We had already submitted our papers. I have been told there are a number of green card receipts, that they were signed for. I cannot tell the Court who actually signed, but I have been told there were at least three to five green cards from these 1998 notices that have now been found.

THE COURT: How can a notice sent in 1998 as to property the City doesn't own comply with the Surplus Land Act?

MS. MARTIN: Well, there is -- I would point to the language of the Surplus Land Act itself. There is absolutely nothing in that notice requirement that says -- that has anything to do with timing. That's very typical in government acquisition. They are not quite sure exactly when they are going to acquire the property because they are still in negotiation. They send out the notice that potential developers, potential interested parties can come forward. And that's basically why we submitted the Contra Costa Theatre Case.

Although it's not the exact same statute,

it's the same concept. This is a case in which the notice, the Court -- the entity was obligated to notify -- to send out notice to various parties and they had not yet owned the property. And the Court said that is all right. They have substantially satisfied their obligation for notice. And so we have a case that is very close on point.

THE COURT: I don't think Contra Costa is very close.

MS. MARTIN: It's not the same statute but it talks about notice requirements for public agencies when they are acquiring property. And in the Contra Costa case the purpose of acquiring the property was to transfer it to a developer. That was exactly the purpose of the Contra Costa case.

THE COURT: On the one hand they own the property sufficiently to give notice in 1998, or they had enough understanding that they could own the property to give notice in '98 sufficient to satisfy the Surplus Land Act even though they didn't acquire the property until July 2002. But on the same hand, they didn't own the property long enough for them to come within the definition of fee, that they owned the property and determined it's no longer necessary for the

agency's use.

In some ways I can see arguments being made here that they had this property for Surplus Land

Act notification purposes as of '98. Then they sold it in July 2002. There is a sufficient period of time for them to determine it's no longer necessary for their use.

MS. MARTIN: I would refer the Court back to the express language of the notice requirements under the Surplus Land Act because there is nothing whatsoever in any of the language of the statutes that says that the agency, the entity, must at the time the notices are sent, own the property, be the legal owner. There is nothing that requires that. And in fact this is not an unusual situation where an agency that is in the process of acquiring the property, in the process of acquiring the property, sends out the notices to comply.

Again, we go back to first we don't believe it's applicable because it's not really -- at this point it's not public property. It's not property that they had that they no longer needed. They never used it.

THE COURT: It's not applicable because they don't own it but their notice is appropriate and valid because they were anticipating they might own it?

MS. MARTIN: That's right. And we know they were anticipating they might own it because there is a federal statute that says the federal government can sell its land to the City of

Seaside. And that federal statute went into effect years before, I believe in 1994.

THE COURT: Okay.

MS. MARTIN: So we know that they could have owned it. They were in process of negotiating to acquire it. But again when we look at what surplus land is, surplus land is -- for example, this courthouse. If the County of Monterey now decides that they don't want to use this as a courthouse and build a new courthouse in another location in the county, this would become surplus land of the County of Monterey.

But there was never any ownership of this particular parcel of land by the City of Seaside except for that brief moment during the double escrow when it was first transferred from the U.S. Army to the City and then from the City to the developer, which as we all know occurred within moments of each other. And we have that from the escrow documents themselves which are part of the record. So it was not land that was occupied, used by the City and the City said we no longer want this property and we are going to sell it, which is why the Surplus Land Act

doesn't apply.

Again, in over abundance of caution, the City sent out notices to any potential parties that was required under the Surplus Land Act. The City is now being basically punished for having done more than they actually had to do.

They sent out the notices. The notices did comply. We have Mr. Guillen who says that he complied. We have the actual copy of the actual notice which very standard: If we acquire the property, are you interested in coming forward and developing that property?

And although they were sent out and received, no one came forward at that time. And I would remind the Court that that was the time when the City was in fact in negotiations with the developer who had come forward. So it would have been natural for other potential parties who wanted to develop the property in 1998 to come forward during the course of the period when the City was in fact in negotiations with different parties.

I would just point out that, for example, with Mr. Agha, who was talking to the -- to the Army still in 1998, he had an opportunity under the Surplus Land Act to come forward within 60 days and make his offer to purchase the property. He never did. And it doesn't matter if he didn't

receive the notice. When the notice is publicly sent out, any party can come forward within 60 days, and he didn't do that. He was still talking to the U.S. Army and still talking to the U.S. Army two years later.

Mr. Agha simply didn't know what he was doing in that regard. But going back to the

Surplus Land Act, again, it doesn't apply. And even if the Court found that it did, the City complied and the City -- there is no case that refutes the Contra Costa case which is set forth in the brief. Again, it doesn't stand for the exact proposition but it is an analogous situation in which a city was obligated to send out notices to other parties. It was about to transfer property to a developer, and even though it sent out notices before it actually acquired the property, the Court said that is substantial compliance. You put all parties on notice.

The last thing which I would point out, there is nothing in the record that would indicate that had the notices been sent in 2002, anybody else would have come forward. There is nothing in the record, other than speculation, anyone else would have come forward. So we have compliance with the Surplus Land Act if the City had to, and again, we would argue the City didn't have to.

Last I would just point the Court to what an injunction does. An injunction says that there is no immediate and irreparable harm to the other party; the Plaintiff would suffer immediate irreparable harm and Plaintiff is likely to win at trial. We don't believe this is the case, primarily because of the delay that the Plaintiff has made and also because we can show there was substantial compliance with all of the

requirements that the City had with regard to entering into the arrangements with the developer and the sale price.

Again, we would go back to the sale price was a fair market value price and the fact that someone else could come forward and say, "I would have paid a hundred million dollars more" does not make the price paid not fair market value.

The other thing I would point out is that in granting injunctive relief, we are looking at a situation in which there is no legal relief that can be granted. And that's not the case because ultimately everything that the Plaintiffs have been arguing comes down to money. And if the Plaintiffs can be compensated by money, they are not entitled to injunctive relief.

And that is what they are saying. They are saying the developer did not pay enough and they

should be disgorged, that was their words, of their profits. That's money. And in that instance the Court cannot grant equitable relief because there is money damages that can be awarded.

Last I would again point out that ultimately the damage and the harm that is suffered is suffered by a party who is not here, who cannot defend itself. The Plaintiffs, for reasons we don't know, failed to join them from the

beginning. They have a vested property right they are not here to defend. And if the Court grants any injunctive relief, they are primarily the party that suffers and they are deprived of this vested property right without due process of law.

THE COURT: Take a lunch break and resume at one o'clock.

(Noon adjournment.)

MONTEREY, CALIFORNIA - AUGUST 7, 2003

AFTERNOON SESSION

* * *

THE COURT: All right. Moving party may respond.

MR. FREEMAN: Could I have a few minutes, please?

THE COURT: Yes, you may.

MR. FREEMAN: Okay. Thank you, Your Honor. On behalf of the City, again what I want to do is just take a few minutes to kind of summarize the different points, if I can.

THE COURT: Yes.

MR. FREEMAN: Starting off with the first one, and that is what they are really asking this Court to do is substitute its judgment for that of the federal government in determining fair market value of property. The government is federally mandated to sell the property to the City for fair market value. Regardless of when that occurred, the sale did occur, and they are asking this Court to substitute its judgment for that of the federal government, as well as the City of Seaside, but especially the federal government.

Second point I would like to make deals with the Surplus Land Act. There seems to be a lot of attention applied to that. If you look at the

Surplus Land Act, it says "surplus land." It doesn't say "all land." It would have been very easy for the legislature to say all land owned by any City with the exception of land that is exchanged shall be, and they could have gone on with the noticing procedures. But they didn't do that. All it said was surplus land.

What we have here is an LDA that was executed back in 1998. Forget about the fact that we sent out notices. In our opinion it doesn't apply because it wasn't surplus land. This is nothing more than a real estate deal, plain and simple. The City did not have the

money to purchase the property back in 1998. So what they do was they negotiated with the Army for a fair market value as determined by the federal government, the U.S. Army. And what they did was they turn around and sold it to K&B/Bakewell and made a profit off of it.

There is nothing dealing with waste, nothing dealing with any other appraisals, nothing dealing with Surplus Land Act. Strictly a real estate deal. True, conditions of the contract weren't performed for several years later, but the contract itself was entered into in 1998. That is the time when you start the statute of limitations. That's the time you want to look at laches. That's the beginning of it.

The third issue I wanted to make is that they are asking basically that -- they are focusing -- all of their arguments are focused on that 1998 LDA and asking the Court to set aside the deed. The reality of it is, I don't believe this Court has the power to do that today, and the reason for that is because if the Court is interested in trying to set something aside or even is thinking in terms of any type of preliminary injunction, again, there is a fully-executed contract which has been performed and courts are without power to have any effect on the real parties that are injured in this, and that's the indispensable parties, K&B/Bakewell. And they are not properly before the Court today.

As a result of that, in my opinion the Court really does not have the power to issue a preliminary injunction which would affect essentially the real parties in interest, the parties that are going to be injured in the event the Court elects to consider preliminary injunction. If the Court wishes to consider that then this matter ought to be continued to give the hearing -- the parties an opportunity to be heard tomorrow. If they are enjoined as indispensable parties then this matter would be set for a future date.

The rush to judgment that they are talking

about in terms of the final map this evening, the tentative map by state law, once the conditions have been complied with becomes ministerial in nature. The city clerk -- even if the City Council were to say no, the city clerk today would have the legal right and responsibility to issue the final map once all conditions have been complied with. To the best of my knowledge, all conditions have been complied with; otherwise it would not be on the agenda for consideration this evening.

The next point I wanted to make is that all of the petitioner/plaintiff arguments deal around money, money damages. If money damages is the answer, again, that's not a basis for a preliminary injunction. And if money is the

answer and the Court -- or if the Court was looking at some type of preliminary injunction, it would be necessary to look at again what the money would be, what the harm would be in this case, and would have to set a bond appropriately. And I think that would be highly speculative as to what the values would be in this particular case. I know they are asking for a very low bond. They think 10 million is a high bond. Probably not high enough. There's probably more money that has been spent to date in terms of debt service than to win this case and we would

also have people who are not going to be working, the properties that aren't going to be on the tax rolls for increased taxes for the City. So there's a lot of harm that is going to come to both the City and developer.

And again, the developer, K&B/Bakewell, are not parties to the action as we speak today. So it's for those reasons that I believe that first, the Court lacks the power, the Surplus Land Act really doesn't apply. If it did, it could have said all property the City owns and it didn't. It specifically said surplus land, and that is a different definition.

If you look at the Act itself, it defines what surplus land is. Strictly a real estate deal. You are being asked to substitute your judgment as to fair market value for the federal government's determination. Thank you.

THE COURT: All right. Response?

MR. RENNEISEN: If I may, Your Honor. Strictly a real estate deal. City gave away property for one-twentieth of its value. Your Honor, they are saying that we are only going after money damages here. It's just not true. The cause of action for the failure to identify affordable housing when you are selling residential real property, that allows us that remedy, setting aside the deed. We can have that

remedy here and we are going for that. We are asking for that.

It's not just a situation where the claims in here are only going after money. If you find that there is a likelihood to prevail on that argument then we should be able to preserve the deed, preserve the property. It should not be parceled up into 300 different lots. More importantly, Your Honor, the issue here is not just about what is the money damages. The issue here is really looking at what is the right thing to do to preserve the status quo because that's what we do on a preliminary injunction.

The status quo right now is that the property that we say was improperly deeded. Regardless of what the remedy was, the property improperly deeded is about to be divided up into 380 different pieces, 380 different pieces. And the amount of multiplicity of actions that that

could cause when we all of a sudden have 380 different lots being sold to 380 different people, that is going to change the character of this case altogether.

Now there is a lot of argument about the ministerial act. The court clerk, if this judge issues an order, will not approve it. There is no way the court clerk is going to violate an order from this Court. So we would submit that

the injunctive relief we seek today is appropriate.

Now Your Honor, there has been a lot of discussion about K&B/Bakewell, and that's going to be dealt with, I think, tomorrow. But I would like to raise kind of the issues that they raise. The way I see it, K&B/Bakewell was the proper party, probably a necessary party, but not an indispensable party. And I want to cite, if you have any qualms about issuing the relief we seek today based upon the absence of K&B/Bakewell, I ask that you review two case.

The first is Deltakeeper versus Oakdale, 94 Cal. App. 4th 1092, and the second is People versus Community Redevelopment 56 Cal. App. 4th 868. Both these cases are cited in our reply on the request to bring in K&B. Those cases stand for the proposition, really a lot of analysis around CCP 389. What do you do when somebody is going to be affected by this ultimate judgment in the case? How does the Court handle that? What

do you do if someone is claiming that that person cannot be brought in? Because that's the argument they are going to try to make. They can't be brought in based on argument on statute of limitation.

The analysis now goes to what harm that's going to happen to this person or entity that is

not joined? How are they limited in their ability to protect their interests? Let's take a look at what their interests are and what potential harm there could be. The case of Redevelopment Agency case, that's a deal where property was given to an American Indian tribe. And there was a claim that it shouldn't have been given to them. The deal was wrong for whatever reason.

And the Court -- the parties said well, they are an indispensable party. The American Indian tribe is indispensable and you have to dismiss their action because their interests are very important here. You can't even go forward.

Well, the Indian tribe had sovereign immunity and couldn't be brought in. The Court went through all the steps of CCP Section 389 and said, "Well, let's take a look at what the interest is that they would be preserving." And the Court identifies that the actual interests that the Indian tribe would be trying to assert is the legality of the actual government action,

the legality of the transaction; not anything else behind it but the legality, whether or not it was legal or not.

And the Court said that that is the only thing that this Indian tribe would be asserting is the legality and the party that is in the

lawsuit is already adequately asserting and arguing that point so that the case could go forward without this necessary party that the Court found to be indispensable.

The second case kind of has the same analysis, the Deltakeeper case. It has one additional, you know, party that can't be added. Claims that it can't go forward because they aren't added. And what I think is relevant to right now is what is a claim of harm? In the Deltakeeper case, the City that couldn't be joined and one of the parties that was joined, the Water District, had a -- this is at page 1096 -- a separate agreement binding the named party to a collective litigation decision in which the nonjoined parties participate in the control of litigation.

The Court found it very important that there was this agreement that the nonjoined party had with a joined party about how to handle litigation. Your Honor, that's exactly what we have here. K&B thought about this early on. The Land Disposition Agreement at Section 9.13b pointed out in our papers, requires the City and

K&B to basically put up a joint defense. K&B/Bakewell, through its contractual relationship with the City, can adequately defend itself in this case. So the argument that it

can't issue the relief today because K&B Bakewell isn't here just is not true.

Now, Your Honor, I have -- moving on to another argument, I have a hard time any time anyone says you can't do something to a Court; you are without power to do something to the Court sitting in equity. They are saying that this Court is without power to issue the relief we seek here today because this contract has been executed and performed. And they are saying that that argument is based upon the Hodgeman case which is 53 Cal App 2d 610.

The Hodgeman case does not stand for the proposition that defendants want it to. Here is the situation: A Court really deals with the issue of can a Court even physically enjoin something that has already been done? Analysis in the Hodgeman case is you want us to enjoin the execution of a contract. Well, you have already admitted that it was executed. Execution as opposed to performance. Enjoining execution means enjoining the parties from entering into the agreement.

In the Hodgeman case the Court said, Well, we can't stop them from executing the agreement

because it's done. Now we get into the issue of well even Hodgeman also the issue was shall we enjoin them from performing? And that's really

the language they want -- I think they want to rely on. If you look at Hodgeman, the facts of that case was this: The City of San Diego had a bid out for parking meters and there was a scheme by which the City was supposed to go about picking the proper bidder. And a company won and another company challenged and said, "You can't do this. You didn't follow the pro forma."

The Court of Appeal was looking at a situation where the meters had already been put in and had already been accomplished. And in fact the meters were being paid for already by the funds that were being generated from the meters. Looking back, looking at procedurally how the Court would issue any sort of relief, the Court said it would seem reasonable to expect a court of equity to enjoin the performance of a contract that undoubtedly will be fully performed before the case can be retried.

That case stands for the proposition of the Appeal Court saying by the time it gets back to the trial court, it's going to be done. It's going to be done before we can even get it back to the trial court. It does not stand for the proposition that the Court can't stop a -- they want to say a substantially-performed agreement or substantially-performed act. It doesn't stand

for that proposition.

So -- and Your Honor, the Hodgeman case really does kind of stand alone. It doesn't cite any cases in the opinion. All of the cases that are cited to Hodgeman don't team with that issue. So it's our position that if this Court really looks at Hodgeman, their argument that you cannot give us the relief we want today, is specious. Additionally, Your Honor, they want to say that this contract is done. You know, this bird is not yet cooked, Your Honor. There is a lot that is going to be done over the next year. This contract is not -- this development is not done. The only buildings, as I understand it that are up, are the model buildings and some other general buildings. But the actual homes haven't even begun construction, for sure aren't done.

So the argument that somehow this has been substantially completed or completed and therefore the Court can't enjoin it just doesn't -- is not true. There is a lot of conduct and action that this Court can and should enjoin.

Now finally, Your Honor, before I defer to Miss Whilden, there has been lots of discussion about fair market value. Fair market value. That's an issue of fact. It is what it is. Fair market value is an issue of fact. And in this

case the evidence regarding that factual issue has been put forward by plaintiffs because you asked us the last time we were before you on this issue to put forward the evidence from experts in the field saying the fair market value on the date that is relevant to this case was 94 million plus. That's a factual determination.

Now the defendant wants to look back at a 1996 appraisal, which is questionable to begin with, and say that that somehow should be fair market value in 2002. That's not the case. Moreover, there is no indication that fair market value was analyzed or thoroughly investigated as a part of that process.

Your Honor, the fact of what fair market value is, is not dependent upon what two separate people agree it to be. If you and I agree that your house, for our purposes, is worth $25 for whatever our purposes contractually, that doesn't mean that it is worth $25. My point being that just because the federal government in its bureaucracy, military bureaucracy comes up with some sort of conclusion or puts a number, a label on a number, doesn't mean that the California courts in this taxpayer action or that reality about the factual issue is somehow changed.

The reality is fair market value is what it is which is in fact, it was 94 plus million. So

we think the argument that is being presented today that they got a good deal, that they got fair market value, we disagree with it and the evidence doesn't support it. With that, I'll defer to Miss Whilden.

MS. WHILDEN: Thank you, Your Honor.

As to the issue of laches, in the nine months between the conveyance of the property by a one-dollar quitclaim deed and the date that Plaintiff came into Court, even though as we now see through the documents submitted by Plaintiff in this action, that perhaps fair market value was determined by the Army in 2001 through the offer to purchase agreement, this was one more example of the Defendants' ongoing activities of just hiding the ball in this deal of what the true facts were concerning the acquisition and conveyance of Hayes Park.

The offer to purchase agreement between the Army and the City of Seaside states very clearly the data contained herein shall not be disclosed outside the government and shall not be duplicated, used in whole or in any part the data herein contained in pages 1 through 22 and Exhibits A through E.

The short form notice of offer to purchase agreement that was filed September 2001 is mystifyingly silent as to price. It contains no

price term. When we were in here on the

Temporary Restraining Order, as the Court will likely recall, counsel for the Defendant said use of a one-dollar quitclaim deed is routinely used by parties when one party wants to shield the true fact of the price paid from the general public. Clearly that was the case here.

It certainly wasn't a public record nine months ago that housing prices would start at close to half a million dollars. That became public record in mid-April and 30 days later we were here in Court seeing Your Honor on a Temporary Restraining Order on an ex parte basis. Prior to that plaintiff did not know and certainly could not have known that the developer was not going to be constructing affordable housing on the project.

Certainly it flies in the face of the representations made at the May 1998 public hearing where the developer said housing prices would be available to Seaside residents beginning at a price below $200,000. Until we were made aware through the public records, seeing the article in the Herald that prices were not going to be affordable in somewhere below $200,000, but in fact were starting then at close to half a million dollars and, of course, now the median price is around $660,000, we did not know and

could not have known then, and that was no delay.

Laches is an equitable defense that a Court

determines based on a particular unique facts before it. And the unique facts before this Court are that this was a very secret action back in 1998 when the LDA entered into it. There was no date of performance, there was no price discussed other than sometime in the future if the Army and City reach terms, the developer will pay what the Army deemed as fair market value. Was that enough to alert that the plaintiff that something was wrong? Absolutely not.

If we had come into Court back in 1998, the Court would have thrown this matter out as not being ripe. Certainly at that time there was no agreement between the Army and the City that the City would acquire Hayes Park, even though there was legislation created by Congressman Farr allowing for the conveyance to bypass FORA. The document right here in the Plaintiff's exhibits simply says that the Secretary of the Army may convey to the City of Seaside, not shall.

And as stated clearly in the LDA in 1998, the City did not have a right to acquire that property. It wasn't until as a matter of fact in June 2002, the City and the developer were still discussing whether or not they were going to go

forward with the deal and there was the price that was set. Certainly there has not been laches here where this action was not ripe prior to conveyance on September 25th, 2002. And in

fact Plaintiff was not informed of the true price at one-twentieth of its fair market value until we were here in court, although Plaintiff had sought disclosure of those records through a public records request.

As to Plaintiff's cited cases for the proposition of laches, Harry Holt versus County of Monterey and Concerned Citizens of Palm Desert versus Board of Supervisors of Riverside County, these cases both involve the administration review of land use decisions. With Harry Holt over in Carmel Valley, the plaintiff was concerned about a condo project, the development of a condo project.

And plaintiff before you is not at all opposing or challenging the project. Instead we are before the Court because the City has violated Government Code Section 37362, California Constitution Article 16, Section 6, and the Surplus Land Act as we have been discussing this morning.

Moreover, your Honor, any delay in this action has been caused by Defendants' conduct in hiding the ball, in keeping these documents

secret including the escrow documents with the Salvation Army where the Salvation Army also is effectively precluded from discussing any terms of their arrangement of being kicked off the property. There was a gag order imposed there as well. Any discussion, as we may have pointed out

regarding the five-year statute of limitations argument, I believe we have addressed in the ripeness issue.

Do you have any further questions in that area?

THE COURT: Go ahead.

MS. WHILDEN: I would also point out to the Court, as Mr. Renneisen suggested, we're not here before the Court on the 11th hour. The final subdivision map has not been approved. This is still one contiguous 105-acre parcel just as it was a year ago. The developers may have jumped the gun by beginning the construction of homes before approval of this Map Act but that was at their own expense. And they -- as we have submitted to the Court in our exhibits, there was an agreement between the developer and the City that if the developer proceeded it was at its own peril and risk.

This afternoon now defense counsel has even asked this Court to delay further by setting aside this hearing for a few months until such

time as the developers enter into the action. And I believe that further goes to undermining their credibility with respect to an argument of laches.

As to Defendants' contention that Plaintiff will be unable to show waste in this action, this case is not about subjective judgment of the

Court as to whether or not the City of Seaside has engaged in unlawful spending. It's about the Defendants' violations of the laws that we have been discussing today. And we are not asking Your Honor to substitute the Court's judgment for that of the City about whether or not it's a good idea to give away the public trust.

The laws presented to the Court this morning are clear. The Government Code prohibits sales of residential real property below fair market value unless affordable housing is created thereon. And the statutory construction is very clear in exactly what the legislature intended there. California Constitutional prohibitions clearly prohibit cities from making gifts of public funds, which we argue to the Court is the difference between the million dollars the City received and the 93 up to $114 million that it gave away.

Surplus Land Act prohibition, that by its plain language, contrary to Defendants'

assertions, requires that any land owned by the agency of the state which becomes surplus by a City's decision to dispose of it must first be made available for the development of affordable housing. The cases cited here by counsel which is Federated Income and Community Memorial also are not on all fours with the case here before the Court.

In Federated Income Properties the issue

before the Court was the right of an individual to redeem property for nonpayment of taxes. And the entire case involves simply the Revenue and Tax Code which is not at all on point. In Community Memorial Hospital, the issue involved two hospitals and, you know, the sole issue really before the Court was whether a County hospital allowing patients to come in who were private patients and who could pay somehow violated the Business and Professions Code and was a competition between the private hospital San Buena Ventura.

The issue before the Court is has the Defendant violated these Government Code provisions and the Constitution and can they get away with it? Your Honor, as to the Surplus Land Act, I would first point out that defense counsel at 54222, the language is clear that any agency of the state and local agency disposing of

surplus -- excuse me, Your Honor. I misspoke myself. In 54221(b) as used in this article, the term surplus land means land owned by any agency of the state.

Any land owned by an agency of the state, a city, shall before it's sold to a private developer shall first be made available to designated agencies for the creation and development of affordable property -- for affordable housing. Defendants suggest that a

City may avoid their obligations under the Surplus Land Act by simply not making a determination that this is surplus land. But the Surplus Land Act doesn't require any formal determination. It does not require a hearing. It does not require any document that can be presented to Court.

I believe that the intent of the Surplus Land Act and its clear language before the Court require that a Court's understanding, that once an agency disposes of the land it must by definition be surplus land by definition. Once the City has conveyed it, it has made a determination that it will not use that land. It's giving it away. And if that were the case, that cities could simply suggest that no determination was ever made then any city could avoid their obligation under the Surplus Land

Act. And I'm sure that cities would not make their land available for the development of affordable housing; thereby in direct conflict of the goals of the legislature who, you know, have stated that this is of vital state-wide importance to the California citizens, a priority of the highest order.

The statute does not require that the land be used or occupied to be deemed surplus. And in fact all lands that a city owns is surplus land if and when the city determines that it will no longer use the land and it will convey it to a

third party. Although Defendants question, seem to question the wisdom and integrity of Mr. Agha, Mr. Agha has 35 years' experience developing properties here in our county and in Contra Costa County, and as an individual was not a designated agency entitled to notice under the Surplus Land Act.

He wasn't entitled to notice. He didn't receive notice. And as he understood, the public law providing for the conveyance of the land directly to the City of Seaside, he understood what it said clearly, the City might have the opportunity to acquire it directly from the Army. When Mr. Agha sent his proposals directly to the Army, it was to the Army as the owner. Later, as it became clear to him that the City

was in negotiations with the Army, he made those offers directly to the City.

I just wanted to clarify for the Court and perhaps for defense counsel as well, that certainly the Surplus Land Act does not require cities to send out notices to the general public, as perhaps as in the case under Contra Costa where that's the very purpose of the notice requirement. But here it's only to those designated agencies, including the Housing Authority, that could develop the property for affordable housing.

Would your Honor be interested in further

briefing as to Contra Costa? Did you have any questions as to whether or not that applies?

THE COURT: No.

MS. WHILDEN: Thank you, Your Honor.

THE COURT: Okay. In terms of the moving party's argument that -- actually your argument that Kaufman & Broad is a well-known company and they are going to be there to collect damages but they are not defendants and they are not developers, it's a limited liability company.

MS. MARTIN: Kaufman & Broad and Bakewell are both well-known developers, Your Honor.

THE COURT: Well-known developers but in terms of being an entity available to respond to damages. Would you like to address their

argument that that's a limited liability company for a single purpose and once that purpose is done, it's over with?

MS. MARTIN: It is a limited liability company. If in fact there is some, for example, fraud you can always pierce the limited liability company and go to the individuals or the entities for this matter who are responsible for that. So that is their -- that is a remedy. There is no indication that this limited liability company is going to disappear tomorrow. They still have work. This site only has the beginnings of the homes. This site is slated for, I believe other 380 structures. So this is a project that it took nine months to simply get to this point

where we have model homes up, some pads up, the infrastructure up. So there is still several hundred homes to be built. This is not a company that is going to be gone tomorrow.

Clearly -- and as I indicated before, I can't really respond for a company that I don't represent and I don't know what their assets are or what their intentions are, but clearly these are both well-known long-standing developers. I don't think they are going to simply disappear. I also think it's disingenous of the Plaintiffs to simply argue that tomorrow this land is going to disappear into several hundred parcels,

because clearly what they are seeking is not the sale prices of the properties as they are sold to the general public, but they are claiming that the underlying transaction between the City and the developer was in some way deficient and there should be some additional monies paid by the developer.

In that instance we don't have a situation where the subdivision lands would be affected at all. We are still talking about money. They have not sold the homes. Not one home has been sold yet; obviously because the map is not final. The map has not been approved. So there is still the opportunity for the Plaintiff, should it get to that point, to collect monies from the profits that would likely occur from the sale of these

properties, which haven't even been built yet.

At this point we have model homes and may be some additional structures that have been started on the property. But that's it. And we are talking about a project that is slated for 380 homes, I believe. So we are looking at developers who are not going to disappear tomorrow as the plaintiffs would suggest. First of all, they are going to be out there continuing to build this project.

And we also have behind this limited liability company, two well-known, very

well-reputed developers who have been around in this area for a very long time and have been in the state of California for decades. So I think it's disingenous of the plaintiffs to argue they couldn't get a remedy against the developer because we are talking about two parties who formed this company, who are here in the state of California and intend to continue building this property.

The only way they will get their profit is to build the property and to sell it, and that's going to take them obviously several months, if not years, to complete. So I think the plaintiff's argument that they are going to disappear tomorrow when the map is approved is simply disingenous and they certainly are not intending to sue the individual property owners. Their complaint is what the developer paid

for the property and that is not going to disappear tomorrow.

THE COURT: What if the argument is, is that the City violated the Surplus Land Act and the Government Code provisions relating to the power of the City to sell property for less than fair market value, and in terms of that goes to the City's actions in this sale of land, not the buyer's actions in buying. The buyer, if the buyer got a great deal from the City, even if the

City acted in violation of those code sections, they may not have any remedy against that buyer. Their remedy is against the City.

MS. MARTIN: I believe under the Surplus Land Act you cannot invalidate the transaction.

THE COURT: Right.

MS. MARTIN: I think the Court acknowledges that. So what we are looking at is -- I'm not quite sure where the Court is going -- for remedies, for damage remedies.

THE COURT: I'm trying to figure it out. You are offering as a reason for not issuing a preliminary injunction to preserve the status quo pending a full trial on the case; that the developer is not going away. They could easily respond to damages and --

MS. MARTIN: If we have damages.

THE COURT: They are not even in the case yet.

MS. MARTIN: I don't know that there is a remedy when you can't -- I think the only remedy when you cannot invalidate the transfer is to look for monetary compensation, and the monetary compensation would come either from the City or from the developer or some combination of both. And certainly the City of Seaside is there.

But if they feel in some way -- I don't know what remedy there is. The statute doesn't

provide for any specific remedy other than to say if there is a violation of the Surplus Land Act, you cannot invalidate the deed once the transfer has been accomplished. It does not provide the Court with any remedy against the government entity that may be in violation of the Surplus Land Act. And I think the presumption is that if there is a violation, you look to the party who benefited from the deal to make some kind of monetary compensation.

But I have to say there is nothing in the Act itself that provides the Court with any remedy if there is a violation. Again, we would argue that there isn't a violation and I would like to just focus, because counsel did look at Section 54221(b) and her interpretation of that section. If we look at it and go through the logical conclusion of counsel's interpretation, basically there is no reason to even have the word "surplus land" because ownership ostensibly would be at any time any land owned by any city

is decided that they no longer need the property, it's surplus land.

And that's not what it says when it uses the term "surplus land." Doesn't say any time the City decides to sell land they must follow this procedure. It says "surplus land" and there is a specific definition of surplus land. That's not

simply any land owned by a city, but any land owned by the city which is determined to no longer be necessary for the agency's use.

This agency, the City, has never used that property. It is clearly not within this definition, and I think that's probably why there is no cases on point because I think the statutory definition and the legislative intent is fairly clear. If the legislature wanted it to be any time any government entity, any city owned any property and then decided to sell it, it was surplus, it would have said so, and it didn't. So I think that we are looking at a definition that really tells the Court that this Surplus Land Act does not apply in this particular situation.

And I would like to just briefly address some of these that we're talking about, the 114-million-dollar gift, a number that has come up several times during the course of this proceeding. And there seems to be a presumption that somehow in this transaction, the City would

have gone to the Army at the time of the sale, and the Army still would have said yes, this property is only worth $5.1 million, and the City could have immediately turned around and sold this to the developer for $114 million. And there is no evidence of that.

In fact, it's very likely that if the government got wind of that, that it was worth -- the fair market value was $114 million or $94 million, it would have asked for something of that nature. And the profit margin probably would have been about the same because the City would not have been able to sell it for 300 or 400 or $500 million to make the large difference.

So I think there is nothing in the record to support the Plaintiff's suggestion that there was -- that somehow this 100-million-dollar is a give-away by the City of Seaside. There is nothing to suggest that had the Army believed that the fair market value was 94 million or a hundred million or 114 million, that it would not have demanded that the City of Seaside pay it.

So I think that is kind of disingenous. Here we are still looking at what the differential would be, what the benefit to the City would be, and we would suggest that in all likelihood if it was believed that the fair market value was greater than what the Army demanded, that it would have demanded a sale

price higher and then the City would have to turned around and sell it to -- have a higher sale price. So I think that we're still looking at what the difference would be and probably have

been in the same range. And there is nothing in the record to contradict that.

I would also point out that once again we're talking about fair market value. There is nothing that says that the definition of fair market value as used by the Army is in some way a different fair market value than would be used in the ordinary course of real estate transactions. And there is nothing to indicate that that wasn't the fair market value. And we know that that transaction went on for several years before it was -- a sale price was finally agreed upon. So I think that the Court cannot substitute its judgment at this point for what was the legislative decision of the City of Seaside that this was the fair market value price, and then turned around and selling it at profit at no cost to themselves, I think it is mentioned in opposing papers.

But I would again point out that this is a situation in which the City could not have come forward with its own money to acquire this property and then gone through the process. The only way this kind of transaction could have occurred, which did bring substantial public

benefit, was with the help of the developer to purchase the property, which is why there was a simultaneous double escrow transaction in this instance.

Under the Plaintiff's theory, the City would have had to come up with five, $6 million of its own, put it out there, paid for the property and then gone through the process and lost the benefits of that. No guarantee that any developer would have come forward at that point to develop the property. Maybe they would have. Maybe Mr. Agha would have. Maybe somebody else would have. But that process, as we know from looking at what happened here, is a process that went on for several years.

So the City would have lost the benefit of its $5 million if it had bought the property and then gone on because that's assuming the City even had $5 million to spend on the property. The reality is without the benefit of the developer, the City could not have gone forward with this deal.

I also would like to just kind of point out there seems to be a blending of concepts here that really is very disingenous. I would like to call it to the Court's attention that this is kind of use of the affordable housing information as opposed to what the sale price of a land is, and I think it's a really key distinction that the Court needs to make.

THE COURT: I think I know where you are 8

going with that, and that was actually a question I had. In some ways I think that the moving parties -- let me use the word affordable. You're not using it in the way as let's say as a term of art under affordable housing law such as in the redevelopment statutory scheme. You are using affordable in a different sense in terms of able to be purchased by people, middle income range; not affordable under the Government Code and Health and Safety Code; is that correct?

MS. WHILDEN: No, Your Honor. I'm sorry if I have led you in the wrong direction. We definitely mean "affordable" as defined in the Health and Safety Code and as set out in the statutory scheme of 37364.

THE COURT: But I mean in terms of the LDA and the deal that was being contemplated, even in terms of the minutes from the City Council meeting in May of '98 when the developer said there would be housing available, some under 200,000, up to I forget what it was, over 500,000, that isn't -- that wasn't a representation of affordable housing within the meaning of the Government Code or Health and Safety Code?

MS. WHILDEN: That's correct, Your Honor. There was nothing at the hearing or in the LDA that either required the developers to construct 8

affordable housing or prevented them from doing so. And we didn't know until July 25th, 2002, that the price or the fact that it would be sold and we didn't know until just several weeks before we came into Court that there would be no affordable housing. There could have been. The developer certainly on July 25, 2002, could have placed affordable housing on that parcel. But that's correct, back in 1998 they were neither required to nor prevented from constructing affordable housing.

THE COURT: Is the crux of your argument as to why they should have been required to is that the Government Code Section 54220 et seq on the Surplus Land Act -- excuse me -- of 37364 Government Code Section regarding powers of the city, requires when the City is selling land below fair market value that they make certain affordable housing provisions; and if they had made those provisions, a home of 200,000 wouldn't necessarily be. It would be much less than that perhaps?

MS. WHILDEN: Perhaps, Your Honor. Yes, perhaps.

THE COURT: Okay. All right. And that's the point you're trying to make?

MS. MARTIN: That's part of the point I'm trying to make. And I think that only

underscores the fact that this has been an argument that has fluidly moved back and forth, concepts that don't always relate to one another. And I think that's something the Court really needs to be cognizant of in ruling on this because affordable housing under the requirements of various affordable housing statutes under the Government Code and Health and Safety Code is not really what is being complained about.

When the Plaintiff comes into Court and says, I didn't know that there wasn't going to be affordable housing, they're really talking about the fact that they didn't realize that prices for these units were going to be greater than the 200,000 initially discussed five years ago when, as the Court noted, real estate prices were different and has gone up considerably. I didn't realize it was going to be more than the $200,000 than the K&B/Bakewell representative said it might be back in 1998 when they had the hearing on the LDA approval.

But that's not affordable housing under the statute as the Court well points out.

THE COURT: I understand that but that doesn't necessarily get the City around the violations of law alleged for the Government Code Section 37364 and the Surplus Land Act.

MS. MARTIN: Actually, if I may finish, I

was actually looking at that argument for the

purposes of the laches argument because in that case we are looking at when the Plaintiff should have known. And all of the cases and everything with regard to laches requires a Plaintiff to act with due diligence. And here we have Plaintiff saying I didn't know that it wasn't going to be affordable housing. I put that in quotes because we don't mean in the legal term of the article. We mean it in kind of moderate income, anybody being able to go in and buy at an affordable housing price until April when the prices started showing up in the newspaper.

That's not what this case is about. This case is attempting to invalidate the deed, and the LDA, and that goes back -- that should have been known at least by July. And doesn't matter it wasn't a public record because the Plaintiff was certainly aware all along. This was well publicized, as the Court may take notice of, a well-publicized project. There was a public hearing. And from the minutes of the public hearing, which the Plaintiff attached as Exhibit 3 to his Complaint, it's clear there were lots of citizens from the City of Seaside at this hearing expressing themselves.

I don't see in the record that Plaintiff was one of them but there were lots of citizens there

well-known and people were keeping tabs on this project. It closed in July and with due diligence and also certainly could have seen the

equipment out on the site shortly thereafter, the plaintiff had the duty to come forward.

THE COURT: Everybody knew about the project. It's been talked in the papers for years. And the transfer of Hayes Park to Seaside by the federal government has been talked about for a long time. But in terms of knowing what the price was that the City bought it for and what they turned around and sold it for, nobody knew that until the first time you were in court, correct?

MS. MARTIN: The fact is I don't know what other people knew. What I'm saying is that the Plaintiff, under laches, under the cases under laches had an obligation to act with due diligence. It certainly wasn't something that he couldn't have made, for example, as he did in this instance, public records request and obtain that information certainly after the transaction closed. So there is no reason why they delayed. The statutes require the Plaintiff to act with due diligence and not wait until the point where we're just about to have the final map approved. Certainly there is lots of notice to the Plaintiff that something was going on out there.

And if he was curious about it and was concerned about it, he had the obligation to go forward and find out about it. And he did not do that. And the fact that the prices of the houses were

higher than he expected is not the triggering event.

The triggering event is when the deed and when the sale transaction -- at the very least when the sale transaction occurred. That was in July of 2002, and the Plaintiff did nothing for nine months and waited for the newspaper articles to come out to see that oh, these prices are going to be higher than I would have expected. That's not what laches is. Laches says you can't wait that long. If you are going to come into Court and ask for the extraordinary relief of an injunction to stop something from going forward, you cannot come to court and say, I was just waiting until the newspapers told me what was going on out there. You have an affirmative duty to act with due diligence, to move forward and get the information, and this Plaintiff did not do that.

THE COURT: You want to respond?

MS. WHILDEN: Yes. Thank you, Your Honor. It's true that July 25th, 2002, is the triggering event. That is the date that a sales price was set between the Army snd the City and between

City and the developer. That's the date that the parcel was reportedly conveyed to the developer and put bulldozers on the property at that point, taking away -- not only pulling all the buildings down but all the trees and everything. It was quite a bulldozing event there, although it was

very fast. It was completely bulldozed within nine months.

But the escrow documents that the City is suggesting we should have received, we did request. We requested from the City by a Public Records Act all documents pertaining to Hayes Park in the transfer of this property to K&B/Bakewell. What we were given by the City, we were given quitclaim deeds showing that the parcel was conveyed for one dollar. And as we discussed earlier here in court, counsel believes that this is routinely used to hide from the public the purchase price.

THE COURT: That's not what I recall being stated at the first hearing on the TRO, is that those were the documents that you received per your public records request and the City came in with, Oh no, this is what we bought it for, 5.1; and this is what we sold it for, 5.95. And I remember the surprise on the petitioner's faces.

MS. WHILDEN: Yes. That's right, Your Honor. We did have some surprise and we continue

to be surprised in this case. And I think it's just because of the constant hiding the ball. We are working so hard here to try to discern the truth of the matter. We went in on a second public records request and asked for, among other things, a copy of this purported Surplus Land Act notice that went out.

I did have access to some certain documents from the City, mostly draft EIR reports, draft agreements, draft everything; certainly not this Surplus Land Act notice or any other pertinent documents.

THE COURT: You have the return receipts?

MS. MARTIN: Somebody indicated we found them but the person was out to lunch when I tried to locate them.

MS. WHILDEN: If I may continue. It wasn't until July 25th of this year when Defendants decided they were going to attach that notice as one of their exhibits that they conveniently found it and said, "Oh, pursuant to your request, we are still looking for more documents and here it is." And you know it as an undated document suggesting that land may or may not be deemed surplus if at any time in the future the City acquires it.

Did you have anything further, Mr. Renneisen?

MR. RENNEISEN: I want to make two comments.

One, we have a copy of the transcript from the last time. The representations are exactly as the Court recalls, and you can take a look at it, if you want, Your Honor, at page 13. The other thing we would like to point out is that the quitclaim deed may have said one dollar. That's often done in quitclaim deeds, as the Court is certainly aware, when parties don't want to disclose generally in the deed what the price was

that was paid. That's exactly what happened.

The other thing, Your Honor, is I hear a lot of discussion, just a lot of discussion about affordable housing. Regardless of what definition you use, it didn't happen here. I don't care what definition you use. It didn't happen here. The fact is there was some discussion of affordable housing for first-time homebuyers by the developer at the City Council meeting. There may have been public perception there was going to be something like that. We don't find until the time that we actually have the deed transferred and what the property is actually going to be built, that that didn't happen, either for purposes of what was represented to the public originally or for purposes of the statutory schemes that we brought to the Court's attention today.

Additionally, Your Honor, I think the Court

is picking up a little bit about perhaps what my concern is with respect to the Surplus Land Act and our efforts to get remedy there. And I'll just note there is a lot of discussion about K&B, Kaufman & Broad and Dana Baker being great human beings or entities and human beings. The fact is K&B Baker Seaside Venture, LLC, a limited liability company is -- the owners of that company is Kaufman & Broad Monterey Bay, Inc., and the Bakewell Company of Monterey, LLC.

We have actually two tiers of protection here. And my concern is once we change the status quo here, who are we going to go after? How is it going to happen? So I would argue to the extent that on the Surplus Land Act, the remedy there, there is a real concern here about preserving a remedy at the end of the day here. And as we all know, when you have a Kaufman & Broad developing a piece of property, they are not only the purchasers of the property but they are the ones who are constructing it and their costs and expenses that go to the construction, the people who are -- who own the property and are ordering it constructed are also talking to their sister or brother corporation saying this is the price that you are going to get for constructing this property.

At the end of the day there is a real

concern that there will be nothing left, and that's kind of the reason why we need some relief today. And that's all I have to say.

THE COURT: Okay.

MS. WHILDEN: Thank you, Your Honor.

MS. MARTIN: If I may just respond?

THE COURT: All right.

MS. MARTIN: I'm glad you brought up the one-dollar quitclaim deed because I think it only underscores the fact that this Plaintiff delayed because certainly if it was -- if the Plaintiff believed, as they apparently did when they first

came into court, this property was sold for one dollar, why wasn't that recorded? It was recorded on July 25th of 2002 which made it a public record. And if he thought this property was sold for one dollar to the developer in July of 2002, he still has offered no explanation as to why he waited until May of 2003 to come into Court and say that this was an unfair deal and the City didn't pay a fair amount, didn't get fair amount of return on the property.

If he believed that it was only sold for one dollar, that -- that certainly put him on notice way back when he made this first public records act request, way back when this deed was recorded in July of 2002, that this property, if he believed it was sold for one dollar, where was

he? Laches requires due diligence. And even if it was sold for a different amount, he believed from the public information he had obtained, it was sold for one dollar, again, laches requires him to come forward at the first opportunity, not the last opportunity.

And I think it's clear this is the last opportunity, particularly when the only thing that kind of spurred this plaintiff to action, by his counsel's own statements, was when he heard about the price of the houses were actually going to be sold for. But that's not what this case is about. This case is about what the land was sold

for, and that was in July of 2002. And if he believed then it was a dollar, he should have come forward then. And we believe that laches bars him from getting any injunctive relief at this time.

THE COURT: All right. Mr. Renneisen, would you hand my bailiff the transcript you're referring to? I want to take a quick look at some of the pages you've referenced. I'm going to take a 15-minute recess and we'll resume at 2:30.

(Break in proceedings.)

THE COURT: Well, this is a very complicated and interesting case. And I find that for purposes of a preliminary injunction

that there is a reasonable probability that the Plaintiffs will prevail on the merits as to a violation of the Surplus Land Act; and perhaps less likelihood, but still reasonable probability of prevailing under Government Code Section 37364 for transfer -- sale of government -- city-owned property for less than fair market value. I find that the Surplus Land Act, as everybody has noted, is completely not interpreted by case law. It's new and will be very interesting to find out what ultimately the Court of Appeal and higher courts say about this.

But for the time being since I'm required to interpret it, I think surplus land, the language

is pretty straightforward, owned by the agency determined not to be necessary for the agency's use. I'm not sure that you have to have an end use for that for any appreciable period of time. So that is if land is being acquired for the intent and purpose of -- to turn it over, sell it to a developer, then it's land owned by the agency no longer determined as necessary for the agency's use and becomes surplus land.

As to fair market value, actually have to get the transcript. I left it on my desk. I have to return it to you. From the first hearing I would note that there are requests in the

record for copies of public records, requests made to the City for information. I don't see that until the day of the hearing that the information was provided about the amount of the sale, and actually at that hearing it was represented that this was not part of a redevelopment agency or part of redevelopment, the area designated within a redevelopment.

As I said, whether it is or isn't, I don't know because it appears to be that the City is arguing that it is in its moving papers for today's hearing, but at the earlier hearing it was stated that it was not.

My main point in bringing that up is I think the Plaintiffs have a point in that they have been trying to get information from the City and

it hasn't been forthcoming. Whether -- I know there is complications within the City in terms of -- I'm not trying to say there is bad faith in not providing that. I don't need to make that determination for our purposes here. But certainly even the idea of the notices under the Surplus Land Act are still being searched for. So the concept that the Plaintiff should have known something before they brought the lawsuit for laches purposes, I don't see a significant argument that persuades me that the Plaintiffs aren't going to prevail on that.

There is no laches that attaches for that nine-month period. They said earlier, I believe the actual controversy ensued when the land was transferred, not four or five years ago when the LDA was entered into.

Harm is difficult in this situation because both sides -- the City primarily is arguing a harm to the real party in interest who is not here. So the harm to the City that they may be liable, I think the Plaintiffs have a point. They are under a Court order to do things. There is some question as to whether they could be held liable for following a Court order.

There's harm to the Plaintiffs in not getting an injunction at this time because they are going to have a problem of adding multiple defendants if the subdivision map is recorded and the lots are conveyed and it goes forward. And

there is a question as to what remedy is possible under the Surplus Land Act. And if it's disgorgement of profits for the party not here and what remedies against the City, I think it's going to be further complicated as the development proceeds in terms of the taxpayer being able to assert his rights on behalf of the taxpayers and citizens and residents of the City of Seaside in determining whether the City operated validly when it entered into the

agreement and transferred this land.

While this case is not factually similar in any way, it's the only case that I found cited under essentially the code sections that would cover 37364 of the Government Code, and that's South Bay Senior Housing Corporation versus City of Hawthorne 56 Cal. App. 4th 1231. And again, factually it's not on point. It has some interesting language about case law in terms of enforcible contracts and the City's power to enter into a contract which is governed by statute. And so that when the statute limits the City's power to make certain contracts to a certain prescribed method, and they don't follow that, then the contract is void. It's not merely voidable. It's void.

So I have a question as to what extent, if the City violated statutory requirements in entering into a contract to sell city land, that

is voidable -- a void contract as opposed to a voidable contract. In any event, I'm going to, at least pending the opportunity for the hearing tomorrow to take place and for the Court to determine whether there is going to be the developer added as a party and whether further preliminary injunction hearings will be required with that added party, I'm going to grant a preliminary injunction limited solely to

prohibiting the City or any City employees from taking any action to approve any final subdivision map pending further order of the Court and require a 1000-dollar bond.

MS. MARTIN: May I be heard on the bond issue?

THE COURT: You already addressed it and put it in your papers but you may say something further. Please limit your remarks.

MS. MARTIN: I would, Your Honor. I appreciate the opportunity. We do think that under the circumstances where the Court is now issuing this order staying any further action basically by the developer who is not here to argue --

THE COURT: I'm not saying anything about the developer. I have not made any actions or orders regarding the developer.

MS. MARTIN: The impact of the Court's order, by not issuing the final -- by prohibiting the issuance of the final map at this point that

we know is scheduled for this evening before the City Council, you are effectively telling the developer you cannot go forward. So all the models are built at this point. The only thing that would be built next would be the other homes and to sell the homes. So you are basically telling them they cannot go forward on that

project.

So even though they are not a party here, the effect of the Court's decision is to stop the developer from doing anything further on this project, to continue construction of other homes, or to sell any of the homes that are already constructed. We think that a thousand-dollar bond is far too low under the circumstances where we have no date set for a trial, where we don't know how long it will take before this happens, or ostensibly they are stopped from proceeding with this project, which by the Plaintiffs' testimony the land alone is worth over a hundred million dollars.

We know the developer has spent over $6 million on the land, and certainly millions of dollars more. And we think that a thousand dollars really is diminimus just concerning the impact that this effect has on a party who is not even before this Court, who had a vested right to get the map act approved.

THE COURT: Well, my response to that is

that they did try to bring in on an ex parte motion to amend to add that developer earlier and the City's response was no, let's do it by noticed motion. Let's proceed in an orderly fashion. I agreed with proceeding in an ordinarily fashion. And that happens to be

tomorrow.

So in essence I think that we'll let that developer come in and make arguments on their behalf once -- if they are determined to be in the case. It's either the developer could have been here if the ex parte motion had been allowed to go forward and argued and they had been brought in at that time. I mean, I think that it's inappropriate for you to argue on behalf of the developer at this point.

MS. MARTIN: Well, which is exactly the point, is that they are not here to defend themselves and the Court has issued a bond that certainly does not provide them with any protection when they are not even before this Court.

THE COURT: Right. And they will be here tomorrow on motion to have -- actually, whether they will be added will be determined tomorrow, and that will be determined quickly, and it can be reviewed. But what I'm anticipating is that this would quickly move to the next hearing stage, and I find that the arguments set forth for a minimal bond in the moving papers are

persuasive.

MS. WHILDEN: Thank you, Your Honor. And Your Honor, would it be appropriate for us to post the bond here and provide the check to the

Court so that we don't have to serve the parties this afternoon at the hearing? Would it be possible for the Court to issue the bond?

MR. RENNEISEN: I think what we are looking at, we're not looking for you to issue a bond, but we are looking for some sort of relief right now so there is no question later tonight. So I guess are we going to be able to get an order from the Court immediately? And to the extent that you want a bond posted, we are willing to post cash, a check for a thousand dollars.

MR. FREEMAN: Let me assure the Court that the matter will not be going forward this evening.

THE COURT: Okay.

MR. FREEMAN: Okay.

THE COURT: All right. I'll accept that representation from Mr. Freeman that it will not go forward. The City's attorney has notice of the Court's order and you can take that in the normal course.

MS. WHILDEN: Thank you, Your Honor.

THE COURT: Okay.

MR. RENNEISEN: Thank you, Your Honor.

THE COURT: Court is in recess.

(Proceedings adjourned.)

STATE OF CALIFORNIA)
) SS.
COUNTY OF MONTEREY)

I, JODI HALE, a Certified Shorthand Reporter in and for the State of California, do hereby certify:

That I am the Reporter, duly appointed and sworn, who reported the above and foregoing proceedings in the within matter at the time and place therein states;

That I reported the said proceedings as fully and correctly as possible; and that the foregoing pages number 1 to 103, inclusive, are a full, true, complete and accurate transcript of my shorthand notes taken at said time and place, prepared under my direction and supervision; and that the said pages constitute a full, true, complete and correct record, to the best of my ability, of the said proceedings then and there had.

Dated this ____ day of _____, 2003.

_____

JODI HALE, RPR, CSR
Certificate No. 8638