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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

BENJAMIN KAATZ, in his capacity as a taxpayer resident of the Cityof Seaside,

Plaintiff,

v.

CITY OF SEASIDE, DANIEL E. KEEN, in his official capacity as City Manager for the City of Seaside, and DOES 1-20, inclusive,

Defendants.

Case No.: M65043

Memorandum Of Points And Authorities In Support Of Opposition Of City Of Seaside And Daniel E. Keen To Motion For Preliminary Injunction

Date: August 7, 2003
Time: 10:30 a.m.
Dept.: 17
Before the Honorable Kay Kingsley

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I. INTRODUCTION

During the decades in which Fort Ord was an active military base the Cities of Seaside and Marina provided the majority of low and moderate income housing on the Monterey Peninsula, while other neighboring cities were able to develop a greater stock of upscale and luxury housing. When the federal government through the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106 [S, 1124]), at Section 2859, provided that the City of Seaside ["SEASIDE" or "City"] could purchase portions of the Fort Ord Army Base for the fair market value as determined by the Secretary of the Army, SEASIDE found itself in a unique position of being able to create some market rate housing as part of its overall redevelopment of the Fort Ord area so as to enhance the City's economic base. Now that the City has begun the first of the development plans for Fort Ord, it is being challenged for creating some market rate housing intended to provide a general public benefit to the community by increasing local revenues, improving and upgrading SEASIDE's general economic situation, and providing a broader range of housing stock. By the present taxpayer action, Plaintiff overlooks the public benefit to SEASIDE derived from having a broader range of housing stock, and particularly some market rate and luxury housing, and instead appears to want to make the City of Seaside alone forever bear the brunt of satisfying the housing needs for low and moderate income residents of the Monterey Peninsula.

II. FACTUAL BACKGROUND

In 1991, the U.S. government announced the planned closure of the Fort Ord military base, a 28,000-acre site situated within the City of Seaside, the City of Marina and in unincorporated Monterey County. In response, local governments put together a group to plan the reuse of the land.

In 1994, the California Legislature enacted the FORA Act (Gov. Code § 67650 et seq.) to "plan for, finance, and manage the transition of the property known as Fort Ord from military to civilian use." Gov. Code § 67658. The Legislature intended the powers of FORA to prevail over those of the local entities. Gov. Code § 67657, subd. (c). However, federal legislation was passed that allowed the Army to convey to the City of Seaside approximately 477 acres of the

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former Fort Ord military base directly bypassing FORA. Public Law 104-106, § 2859. The statute required that the City pay an amount equal to the fair market value of the property to be conveyed, as determined by the Secretary of the Army. P.L. 104-106, § 2859(b). Thus, by law, the fair market value of the property was to be set by the seller, the Secretary of the Army.

In 1996, the City began discussions with the United States Army (hereinafter "Army") for the purchase of the portion of Fort Ord known as the Hayes Park Property which consisted of approximately 103 acres and which contained approximately 500 obsolete housing units containing both asbestos and lead paint. [See, Keen Declaration, paragraph 3.] The Army provided the City with an Appraisal Report prepared by Steven J. Geller, MAI, an independent appraiser, dated April 15, 1996. [See, Keen Declaration, paragraph 4 and Exhibit G to Newsome Declaration.] The opinion contained in the appraisal was that the fair market value for the "as is" acquisition of the Hayes Park Property was Five Million Dollars ($5,000,000.00). [See, Exhibit G to Newsome Declaration.] This opinion was based on the fact that the highest and best use of the property was for a residential development, and in order to proceed with such development, site remediation would exceed Six Million Dollars ($6,000,000.00). [See, Exhibit G to Newsome Declaration.]

During the period in which the City negotiated with the Army for the purchase of the Hayes Park Property, it sent out notification that it was soliciting bids and proposals for its development. This notice was sent to anyone who might be entitled to receive said notice under the Surplus Lands Act. Gov. Code § 54222 et seq. [See, Guillen Declaration, paragraph 4.] The notice stated that the City had not yet determined whether Hayes Park is or will be surplus land. [See, Exhibit H to Newsome Declaration.] No entity responded to this notification. [See, Guillen Declaration, paragraph 5.] During this period Kaufman & Broad of Monterey, Inc. and the Bakewell Company of Monterey, LLC made an offer to the City to assist in the City's negotiations with the Army. These two entities thereafter formed a joint venture known as K & B Bakewell Seaside Venture, LLC, (hereinafter "K & B Bakewell"). [See, Keen Declaration, paragraph 5.]

Therefore, on or about May 9, 1997, the City entered into an Exclusive Negotiating

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Rights Agreement (hereinafter "ENRA") with K & B Bakewell for the purposes of determining whether an agreement could be reached for the development of the Hayes Park Property. [See, Keen Declaration, paragraph 5.]

On May 4, 1998, the City Council considered evidence of the value the City would potentially get above the price the City paid to the Army from K & B Bakewell. [See, Exhibit I to Newsome Declaration.] The City Council approved and adopted a resolution after a duly noticed public hearing [see, Complaint, Exhibits 1 and 3], and the City entered into a Land Disposition Agreement (hereinafter "LDA") with K & B Bakewell with certain terms and conditions which provided that K & B Bakewell might be able to acquire the Hayes Park Property from the City, if the City was able to acquire it from the Army, and if no other third party came forward under the Surplus Lands Act [Gov. Code § 54220 et seq.] offering to acquire this property for a more favorable price than K & B Bakewell was offering. [See, Exhibit J to Newsome Declaration.] The LDA stated that the price would be a price equivalent to what the City would pay the Army to acquire the property. In addition, as further consideration, K & B Bakewell would have to construct ten units of replacement housing if the City could effectuate a property exchange with the Salvation Army, which had acquired the right to build housing for the homeless on the Fort Ord site through the Stewart B. McKinney Homeless Assistance Act. [See, Section 2.6 of the LDA, Exhibit J to Newsome Declaration.]

As further consideration, K & B Bakewell would also have to construct a "turnkey" 4,000-square foot office building for the City on City property for a value not to exceed Three Hundred Thousand Dollars ($300,000.00) or to reimburse the City the Three-hundred Thousand Dollars ($300,000.00). [See, Section 2.7 of the LDA, Exhibit J to Newsome Declaration.]

The LDA was later amended by a letter amendment of January 12, 2000, wherein a maximum purchase price of Six Million Eight Hundred Thousand Dollars ($6,800,000.00) was set as a condition to K & B Bakewell having to purchase the property under the LDA. In addition, K & B Bakewell agreed to pay the City Fifty Percent (50%) of the difference between Six Million Eight Hundred Thousand Dollars ($6,800,000.00) minus the purchase price payable to the Army under the City-Army purchase Agreement. [See, Exhibit N to Newsome

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Declaration.] Thus, if the purchase price between the City and the Army exceeded Six Million Eight Hundred Thousand Dollars ($6,800,000.00), K & B Bakewell would not be obligated under the LDA.

As the City wished to convey one contiguous piece of land to the developer of the Hayes Park Property once the City acquired the land, the City entered into an agreement with the Salvation Army for an exchange of property owned by the Redevelopment Agency of the City of Seaside which would be conveyed to the City, and in turn, that property would be conveyed to the Salvation Army for the construction of the ten units of affordable housing for very low income and low income persons. [See, Exhibits U, X and Y to Newsome Declaration.] It was further agreed that the Developer, K & B Bakewell, would construct these units on the City-owned property conveyed to the Salvation Army. [See, LDA, Section 2.6, Exhibit J to Newsome Declaration.] The exchange property is located at Palm and Contra Costa Streets and is within the Redevelopment Plan Area of the City of Seaside. The Redevelopment Agency did convey the property to the City on July 24, 2002 by grant deed. [See, Keen Declaration, Paragraph 13 and Exhibit W to Newsome Declaration.] The City then conveyed the property to the Salvation Army on the same day. [See, Exhibit Y to Newsome Declaration.]

The City only acquired the Hayes Park Property with the express purpose of simultaneously conveying it to K & B Bakewell pursuant to the LDA. Without such an agreement, the City of Seaside could never have afforded to purchase the Hayes Park Property at all. [See, Keen Declaration, paragraph 5.]

On July 23, 2002, the City entered into an Escrow Agreement with the Army to acquire the Hayes Park Property for Five Million One Hundred Thousand Dollars ($5,100,000.00) based upon the fair market value of the property in an "as is" condition. [See, Exhibit R to Newsome Declaration.] The City, never intending to keep the property, but only purchasing it to convey to the developer, had a simultaneous escrow with K & B Bakewell and the property was conveyed to K & B Bakewell in an "as is" condition. K & B Bakewell paid Five Million Nine Hundred Fifty Thousand Dollars ($5,950,000.00) as well as agreeing to construct ten (10) affordable housing units on City-owned land for the Salvation Army and construct a 4,000-square foot

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office building or contribute Three Hundred Thousand Dollars ($300,000.00) towards its construction. The value of the consideration to the City exceeded One Million Dollars ($1,000,000.00). [See, LDA Sections 2.6 and 2.7 and January 12 letter amendment , Exhibits J and N to Newsome Declaration.]

Plaintiff's challenge to the validity of the sale of the property by the City to K & B Bakewell was filed five years after K & B Bakewell and the City executed the LDA back in May 1998. The LDA was adopted using a public process, including public hearings, in compliance with all local and State laws, and plaintiff has not alleged to the contrary. It is thus undisputed that the LDA was properly adopted and executed.

The LDA provided for the conveyance of the property to K & B Bakewell at a future date. Title to the Property was conveyed in July 2002 pursuant to the LDA. [See, Exhibit AA to Newsome Declaration.] The LDA also required the City to process permits. [See, Section 3.4(a) of LDA, Exhibit J to Newsome Declaration.] In other words, the LDA is the document which is at the heart of this case.

Plaintiff's primary goal in this case is to void the conveyance of the Hayes Park Property from the City to K & B Bakewell. However, the conveyance itself was merely one step of many required to be performed by the City pursuant to the LDA.

Plaintiff brings this action for injunctive relief five years after the execution of the LDA and almost a year after the conveyance of the property to K & B Bakewell, and over five (5) years after the City Council approved the LDA. Since the time the Property was conveyed to K & B Bakewell until the date the instant lawsuit was filed, K & B Bakewell has undertaken demolition, land remediation, building of infrastructure including utilities and streets, the building of the community center and the building of 10 model homes. This work is readily observable to anyone traveling on Highway 1 through the City of Seaside. [See, Keen Declaration, paragraph 24.] Plaintiff could have challenged the validity of the LDA back in 1998. His failure to file a timely challenge must be held against him.

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III. LEGAL ARGUMENT

A. PLAINTIFF FAILS TO MEET HIS BURDEN FOR OBTAINING A PRELIMINARY INJUNCTION

The grant or denial of a preliminary injunction is within the discretion of the trial court. Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1470. The test most commonly applied by courts in determining whether to issue a preliminary injunction considers the following two interrelated factors:

1. The likelihood that the plaintiff will succeed on the merits at trial.

2. The interim harm that the plaintiff will suffer if the injunction is not issued compared to the interim harm that the defendant will suffer if it is. Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286. This showing of harm that a plaintiff must make to support a request for preliminary injunction is often couched in terms of whether there is an adequate legal remedy available to plaintiff and whether plaintiff will suffer irreparable injury. Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471. In balancing the hardships, the trial court must exercise its discretion in favor of the party that is more likely to be injured by that exercise. Mitsui Mfrs. Bank v. Texas Commerce Bank-Fort Worth (1984) 159 Cal.App.3d 1051, 1059.

Defendant will demonstrate below that plaintiff cannot succeed on the merits for the following reasons:

1) There has been no taxpayer waste;

2) The LDA is a valid contract entered into after duly noticed public hearings and deference should be given to this decision;

3) There has been no gift of public funds;

4) Plaintiff's action is time barred;

5) Plaintiff's action is barred by the doctrine of laches;

6) Plaintiff has failed to name an indispensable party and claims against that party are also time barred;

7) Fully executed contracts cannot be enjoined;

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8) The City was not bound by the Surplus Lands Act, and even if it was, it complied with said Act.

Furthermore, defendant will demonstrate that in balancing the hardships, the scales tip heavily in favor of defendant because:

1) K & B Bakewell will be harmed if after investing considerable resources into clearing and remediating the land, building infrastructure, a community center, and ten model homes, its work is halted in the best part of the building season and it is not present to raise these points;

2) If the granting of permits is enjoined, the City and its taxpayers will lose revenues from permits and property taxes, and may be subject to litigation from K & B Bakewell for the failure to issue said permits as well as cause injury to those employed by the project;

3) Plaintiff has alleged no irreparable injury to himself;

4) Plaintiff has an adequate remedy at law, additional payment by K & B Bakewell for the property acquisition.

Finally, injunctions cannot be used to prohibit an act already completed or substantially performed.

> Obviously, a completed wrong cannot be corrected by a preliminary injunction, the purpose of which is to preserve the status quo until after final judgment, though the facts be such that the plaintiff is entitled to some form of permanent relief. Thus, an injunction will not be granted to restrain the destruction of a ditch already destroyed, or to prevent the opening of a street already opened, or to prohibit the erection of a building previously built.

McManus v. KPAL Broadcasting Corp. (1960) 182 Cal.App.2d 558, 563.

In McManus, the court enjoined the construction of a radio tower on the ground of invalidity of proceedings before the planning commission and excess of authority of the city council in granting the permit. However, before the issuance of the restraining order, the tower had been erected. Therefore, the appellate court reversed the order granting the injunction. In the instant case, the lateness of plaintiff's lawsuit makes their request for injunctive relief one for changing the status quo. To enjoin the issuance of permits for K & B to continue the construction at this time would be tantamount to destroying the planned project, including those homes

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already built, and financial costs in the millions of dollars to K & B Bakewell.

1. PLAINTIFF CANNOT PREVAIL ON THE MERITS

a. PLAINTIFF'S ALLEGED CLAIM THAT THE LDA WAS IN VIOLATION OF THE LAW DOES NOT AMOUNT TO TAXPAYER WASTE

i. Plaintiff Cannot Meet the Waste Standard

Plaintiff claims that the LDA between the City and K& B Bakewell is void as a matter of law. Plaintiff makes this claim based on the City's alleged violation of the Surplus Lands Act (Gov. Code § 54220 et seq.), and the City's sale of the property at claimed below market value, in violation of Government Code sections 37362-37364 and the California constitutional prohibition against gifts of public funds [Cal. Const. Art. 16, Sec. 6]. The evidence fails to support claims of waste.

> The term 'waste' as used in section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval.

Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal.App.4th 1017, 1026. Judicial remedies for waste are directed at wasteful, improvident and completely unnecessary spending. Cota v. County of Los Angeles (1980) 105 Cal.App.3d 282, 290. As can be seen by the declarations plaintiff submits, this is political dispute where certain parties, including Representative Sam Farr, have been involved in trying to pressure the local communities to provide more affordable housing at the former Army base of Fort Ord.

Along with a declaration from Representative Sam Farr, there is a declaration from Tom Cravens, a former employee for the Housing Authority of the County of Monterey who has not worked there since 2000. He admits that the Housing Authority made no bid for acquiring Hayes Park [See, Declaration of Tom Cravens, Paragraph 6.] Although plaintiff states that he is attaching a declaration from the now current director of the Housing Authority, Jim Nakashima, stating that the City never offered to sell the property to the Housing Authority, such declaration

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is glaringly missing. It is missing because the City did make offers for interested parties to come forward, and the Housing Authority chose not to do so.

Finally, in support of his motion for preliminary injunction, plaintiff attaches a declaration from a disgruntled developer who negotiated with the Army for the purchase of the Hayes Park Project and, when those negotiations failed, he sent a letter on June 23, 1999, more than a year **after** the LDA was signed by the City and K& B Bakewell, containing a proposal to the Mayor of Seaside rather than responding to the Notice of Intent to Dispose of Surplus Land issued by the City in early 1998. At that time, the City was bound by a valid contract with K & B Bakewell. Plaintiff has a "political beef" with the City which should be played out in the political arena.

Even if the Court were to jump into this political controversy, the test for whether a public expenditure is a waste of public funds is whether it is totally unnecessary or useless or provides no public benefit. County of Ventura v. State Bar (1995) 35 Cal.App.4th 1055, 1059.

Here the City received Eight Hundred Fifty Thousand Dollars ($850,000.00) above what it paid to the Army for the Hayes Park Property. Moreover, K & B Bakewell was obligated under the LDA to build ten (10) units of affordable housing for the Salvation Army and a "turnkey" office building to a value of Three Hundred Thousand Dollars ($300,000.00) [Exhibit J to Newsome Declaration, LDA sections 2.6 and 2.7.][1] Thus, the City received in excess of One Million Dollars ($1,000,000.00) in direct public benefit from the developer. Moreover, the project itself provides a general public benefit in that it eliminates the blight of the obsolete army buildings with new homes and improved streets and infrastructure, and provides the City with much-needed increased real estate tax base.

> An expenditure of funds is not a waste merely because there is a cheaper way. If there is a public benefit, the expenditure is not actionable, even if there is an alternative that is not only less expensive but more efficient.

---

[1] Plaintiff claims that the Salvation Army paid $300,000.00 towards the construction of the homeless housing, but submits no competent evidence to support this fact. There is no declaration from the Salvation Army and Representative Farr's statement is without foundation. Moreover, what is at issue is what obligations the City extracted from K & B Bakewell in exchange for the sale of the Hayes Park property that were for a public benefit. The LDA clearly shows that construction of this housing was a K& B Bakewell contractual commitment. [See, Exhibit J to Newsome Declaration, LDA, Section 2.5.]

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Ibid., 35 Cal.App.4th at 1060.

Not only has the City demonstrated that there is more than sufficient public benefit gained by the LDA, plaintiff cannot show that, had the Army had a higher appraisal than Mr. Geller's Five Million One Hundred Thousand Dollar ($5,100,000.00) appraisal [Exhibit G to Newsome Declaration], it would not have raised its sales price to the City.

The LDA took into account this fact, and based the K & B Bakewell purchase price in relative terms to the City purchase price from the Army, but built in a level of profit for the City through its January 12, 2000 amendment. [Exhibit N to Newsome Declaration.] Plaintiff simply has no evidence that the Army's sales price would not have risen with a higher appraisal, thereby cutting into the margin of profit the City could make in selling the property to K & B Bakewell, or making the sales price so prohibitively expensive that no developer would ever step forward to undertake this project. Thus, the higher appraisal that plaintiff attaches as evidence of waste is irrelevant. Even if the appraisal was accurate, it does not prove that the City could have received more for the property without paying more for the property, thereby eliminating the margin of profit the City did receive.

ii. Deference Should Be Given to the City's Decision

Finally, the LDA was entered into after the City Council held public hearings on the matter and after due consideration of all possible scenarios involved with the City acquiring the Hayes Park Property in Fort Ord. The City Council was vested with the authority to approve the LDA after such duly noticed public hearings, and it did so. Whether the City exercised its judgment in a manner to everyone's liking or even with the best outcome is not a controversy for the courts to adjudicate.

The City's deliberative process in determining the price for the sale of the Hayes Park Property to K & B Bakewell was one that looked at all of the potential benefits to the City that the City would gain beyond the sales price that the City had to pay the Army. [See, Complaint, Exhibits 1 and 3, and Exhibit I to Newsome Declaration.] Because the City did allow and consider evidence on the value potentially to be received for the Property under the LDA, plaintiff must make his case based on the evidence considered by the City Council and must

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show that the City's decision had no substantial evidentiary support.

This is the established rule for challenges to local government administrative actions where a hearing is required by law (under Code of Civil Procedure § 1094.5(c)). It also applies in other proceedings, including legislative and quasi-legislative ones, where a local government decides a factual question based on evidence. Shapell Industries v. Governing Board (1991) 1 Cal.App.4th 218, 233-234; Community Memorial Hospital of San Buena Ventura v. County of Ventura (1996) 50 Cal.App.4th 199, 207 (the determination of what constitutes a public purpose is primarily a matter for the Legislature and will not be disturbed so long as it has a reasonable basis).

This rule avoids inappropriate use of judicial resources to try factual questions which are supposed to be decided elsewhere. Perhaps even more important, it also avoids undercutting the other branches of government which are responsible for making decisions like the one challenged here.

In 1995, the California Supreme Court made this rule essentially universal, eliminating an exception for California Environmental Quality Act cases, determining that "there is no sound reason why CEQA and non-CEQA cases should be governed by different evidentiary rules" in Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 573, and laying down the principle,

> That the factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts, that the substantiality of the evidence supporting such administrative decisions is a question of law, in that both types of substantial evidence review are governed by similar evidentiary rules.

Id. The court went on to hold that evidence not presented to the challenged agency might possibly be considered "under unusual circumstances or for very limited purposes" (*ibid.*, 9 Cal.4th at 578), but "extra-record evidence can never been admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision" (*ibid.*, 9 Cal.4th at 579).

The instant case illustrates the wisdom of this rule. Admission of evidence which was not presented to the City Council would force this Court to make its own determination of the

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value of the Property, substituting the Court's judgment for that of the legislative body, the City Council. It would also invite an extensive hearing before this Court on factual questions, evaluation of which properly belongs to the City. Particularly in an action alleging waste of public funds where the public agency is accorded broad latitude, this would not be appropriate. As noted in Western States Petroleum Assn., one purpose for the rule limiting use of extra-record evidence at subsequent judicial proceedings is to create an incentive for interested parties to make their case before the administrative agency--where it belongs (*ibid.*, 9 Cal.4th at 575).

b. THE PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF ARE BARRED BY THE EQUITABLE DOCTRINE OF LACHES

The Plaintiff, by his present motion, seeks the equitable remedy of a preliminary injunction to stay SEASIDE from issuing any further permits to the developer, K & B Bakewell for the Hayes Park project until a resolution is reached regarding the underlying Complaint for taxpayer waste and related claims. However, the Plaintiff is not entitled to invoke this Court's equitable powers through the extraordinary relief of a preliminary injunction because the undisputed facts establish that Plaintiff has unreasonably and unnecessarily delayed seeking such relief to the substantial prejudice of SEASIDE and the developer, K & B Bakewell. Indeed, no where is Plaintiff's dilatory conduct more apparent than in the fact that he has only recently determined to join K & B Bakewell in this action despite public knowledge of K & B Bakewell's role in this project for a period in excess of five (5) years. In this instance, Plaintiff cannot demonstrate any valid basis for his delay in seeking injunctive relief, and as such Plaintiff's claims must be barred by the doctrine of laches.

It is a fundamental principle of law that one who seeks to invoke the Court's equitable powers must do so with clean hands, that is, the party must demonstrate to the Court's satisfaction that he has not engaged in any conduct which may be found to be wrongful so that the Court's invocation of its equitable powers allows the party to benefit from his wrongful conduct. Bennett v. Lew (1984) 151 Cal.App.3d 1177, 1186; see also, Samuelson v. Ingraham (1969) 272 Cal.App.2d 804. The unreasonable delay in initiating an action that results in prejudice to the defendant or other real parties in interest has consistently been held to constitute

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the kind of wrongful and prejudicial conduct that will bar the grant of injunctive relief based upon laches. See, Johnson v. City of Loma Linda (2000) 24 Cal.4th 61, 77; San Bernardino Valley Audobon Society v. City of Moreno Valley (1996) 44 Cal.App.4th 593, 605.

In evaluating the conduct of the parties where injunctive relief is sought, the Court must look at the extent of prejudice which such relief will impose upon the defendant and contrast that with the reasonableness of the conduct of the moving party, such that, "the greater the prejudice, the more timely must be the relief sought." Mcreadie v. Argues (1967) 248 Cal.App.2d 39, 47. Even where the applicable statute of limitations has not yet run, if "unjustified delay has operated to the detriment of another," relief will be denied based upon laches. Holt v. County of Monterey (1982) 128 Cal.App. 3d 797, 801; see also, In re Marriage of Plescia (1997) 59 Cal.App.4th 252, 259-260.

Whether a situation warrants the imposition of laches to bar injunctive relief is a question of fact to be determined by the Court in light of all established circumstances. San Bernardino Valley Audobon Society, supra, 44 Cal.App.4th at 605. The primary question for the Court to consider is whether the defendant has demonstrated prejudice such that granting the injunctive relief sought by plaintiff would be unjust. Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn. (2001) 92 Cal.App.4th 1247, 1265 (citing, San Bernardino Valley Audobon Society, supra, 44 Cal.App.4th at 605). SEASIDE submits that under the clear and unequivocal circumstances of this matter, it would be patently unjust to allow the Plaintiff to benefit from his unjustified delay in bringing this action, after SEASIDE and the developer have materially changed positions and after substantial financial expenditures and construction work has been ongoing for nearly a year's time. There has been substantial and material change in the status quo of the subject property on the part of SEASIDE and the developer, K & B Bakewell, which has clearly expended millions of dollars to remediate and remove asbestos and lead paint from the site[2], demolish buildings, grade and level lots for

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[2] Although SEASIDE does not know the precise amount of money expended by K & B Bakewell to remediate and begin development of the site, including construction of the existing model homes and other structures on site as of May, 2003, the record shows that as of 1996 the Army's appraiser, Stephen Geller, MAI, estimated that it would cost Six Million Dollars ($6,000,000)

development, install offsite improvements such as electrical, water and sewer utilities, construct roadway access improvements to the development, begun construction of streets and sidewalks within the development, constructed model homes and constructed a community center. All of these construction activities have occurred between the date of transfer of title to K & B Bakewell on July 25, 2002 and May 15, 2003, when Plaintiff finally determined to initiate this legal action. Indeed, no explanation is offered by Plaintiff to justify having waited nine (9) months to bring this action although the construction activity was ongoing daily on the site and clearly open and visible from publicly accessible vantage points, including an easy and unimpaired view of the site from State Highway 1. [See, Declaration of Keen, paragraph 24.] Despite such open and obvious construction activities going on for nearly three-quarters of a year, the Plaintiff delayed in bringing this action until the model homes were fully constructed, the community center was fully constructed and streets and other improvements had been installed.

Indeed, the salient dates of actions are not disputed by the Plaintiff who acknowledges the following:

a) In 1996, while SEASIDE was still in the process of negotiating with the U.S. Army for the acquisition of the 105 acres compromising the Hayes Park Property within the former Fort Ord, SEASIDE received an unsolicited offer from the newly-formed joint venture, K & B Bakewell to develop the property. [Plaintiff's Memorandum of Points & Authorities, at pp. 3:23-27, 4:1-4, referencing Exhibits 2, 3 and 8 to the Plaintiff's Memorandum of Points and Authorities.]

b) On May 9, 1997 SEASIDE and K & B Bakewell entered into an Exclusive Negotiating Rights Agreement ["ENRA"] of limited duration in order to negotiate the development of new housing and infrastructure improvements on the Hayes Park Property

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alone to remove the asbestos and lead paint and demolish existing structures on the site. [See, Exhibit G to Declaration of Newsome.] It is therefore not unreasonable to assume that between July, 2002 and May, 2003 millions of dollars have been spent to remediate, demolish, construct and install all of the improvements and structures, including the model homes which are clearly visible on the site from public roadways including State Highway 1. [See, Keen Declaration, paragraph 24.]

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should SEASIDE acquire said property from the U.S. Army as anticipated. [Plaintiff's Memorandum of Points & Authorities, at pp.3: 23-27. 4: 1-19; Exhibit 8 to Plaintiff's Memorandum of Points & Authorities.]

c) On May 4, 1998 and after public hearing, the City Council of SEASIDE adopted a resolution approving the entry of a Land Disposition Agreement ["LDA"] between the City and K & B Bakewell for the sale and development of the Hayes Park Property after said property is acquired from the U.S. Army. [Plaintiff's Memorandum of Points & Authorities at p.7:6-12; Exhibits 2 and 3 to Plaintiff's Memorandum of Points & Authorities.]

d) On July 25, 2002, SEASIDE acquired the Hayes Park property from the United States of America ["Army"] for Five-Million One-Hundred Thousand Dollars ($5,100,000) and immediately conveyed the property to K & B Bakewell for Five-Million Nine-Hundred and Fifty-Thousand Dollars ($5,950,000). [Plaintiff's Memorandum of Points & Authorities at pp. 9:20-26, and Exhibits 5 and 6 thereto.]

Between 1997, when the ENRA was entered between SEASIDE and K & B Bakewell, and July 25, 2002 when the property was transferred to K & B Bakewell, a period of more than five (5) years, the Plaintiff took no action to challenge the anticipated sale of the Hayes Park Property to the developer, nor the well-publicized intended use of the property for upscale single-family homes and not affordable housing. Although the Plaintiff obliquely suggests that there was public opposition to the adoption of the LDA as configured in 1998, he took no action to challenge or stay this Agreement at any time between 1998 when the LDA was adopted and the close of escrow in July, 2002.

Moreover, as Plaintiff highlights in his Ex Parte Application for Temporary Restraining Order and Supporting Documents filed in this matter, and in particular, Exhibits 1 and 2 thereto, the development of the Hayes Park property was the most publicized project on the Monterey Peninsula for the past decade. Its intended purpose as a site for the construction of upscale, single family housing was well-known and well-reported upon for years, yet Plaintiff a long-time resident of Seaside, took no action to challenge the proposed development agreement as not fulfilling affordable housing requirements as he now contends, until long after the consummation

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of the sale of the property and substantial construction on the project was underway.

Plaintiff waited until long after SEASIDE's Planning Department had reviewed and approved a tentative subdivision plan, after various permits had been applied for and issued, and after the developer had expended millions upon millions of dollars to remediate and prepare the site, as well as commence substantial construction of infrastructure and buildings. Plaintiff's failure to expeditiously act warrants a denial of any equitable relief, and indeed, the entirety of Plaintiff's complaint should be dismissed, based upon the doctrine of laches.

The most telling factor establishing that laches must act as a bar in this matter is that Plaintiff proffers no explanation as to why he waited to institute this action until May 15, 2003 when he had to have knowledge of the project for years, and when he had to have witnessed the initial stages of demolition and construction on the site nine (9) months earlier. Although he necessarily was aware of the agreement between SEASIDE and K & B Bakewell since it was the subject of numerous newspaper articles and public hearings. Such dilatory conduct has been consistently held to constitute the kind of wrongful conduct which warrants a denial of any injunctive relief based upon the equitable defense of laches, particularly where, as here, there has been substantial and material change of position by both the City of SEASIDE and the developer, including the expenditure of enormous sums of money in proceeding with the project.[3]

In the case of Holt v. County of Monterey (1982) 128 Cal.App.3d 797, the First Appellate District affirmed the decision of the Superior Court of Monterey sustaining defendant county's defense of laches to an action for mandamus and injunctive relief which sought to stay the grant of a use permit for a subdivision. The basis denying the grant of injunctive relief in Holt was the plaintiff's unreasonable delay in instituting suit, and the justifiable reliance of the developer on the adoption of the plan and expenditure of substantial costs.

Presenting facts remarkably similar to those before the Court in this matter, Holt involved

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[3] Indeed, Plaintiff did not even attempt to bring K & B Bakewell into this action until July, 2003, a year after the close of escrow and transfer of title, although any stay in the issuance of permits for the project will certainly have direct impact on K & B Bakewell.

a June 1979 challenge by plaintiff to the approval of both a subdivision map approved in January, 1979, and a specific plan approved in 1977, based upon claims of the inadequacy of the County's general plan. In sustaining the trial court's entry of a defense judgment based upon the County's assertion of the defense of laches, the trial court found that plaintiff had known about the plan when it was adopted and unreasonably waited over two years to institute suit. During that time, the developers, in reliance upon the plan's validity, had expended over $4,000,000 in development costs. [*Id.* at pp. 800-801.] The Court rejected the plaintiff's argument that the challenge was timely mainly because it was brought within the applicable statute of limitations period, finding that:

> "Where the unjustified delay has operated to the injury of another, as here, the defense of laches may be successfully invoked even though the lapse of time is less than the applicable period of limitations."

Id. at 801.

Likewise, in San Bernardino Valley Audobon Society v. City of Moreno Valley, supra, 44 Cal.App.4th at 593, it was held that plaintiff had unreasonably delayed for over a year in challenging the public action, and that the developer had justifiably relied upon the agency action in expending upwards of $30,000,000 to complete environmental reports and obtain approval of various development projects. The plaintiff's petition for equitable relief was therefore determined to be barred by laches as a matter of law. *Id.* at 608.

A similar result was reached in Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal.App.3d 257, in which plaintiffs delayed commencing suit challenging certain land development approvals based upon claimed CEQA violations for nine months. During this interim time period the developer had incurred over $700,000 in liabilities for land acquisition and design services in reliance upon the approvals. The Appellate Court affirmed the trial court's finding of unreasonable delay as to the plaintiff's challenge of the approvals, while at the same time concluding that there was resultant prejudice to the developer. The petition for administration mandamus was therefore denied based upon laches.

Finding that there was substantial evidence of delay by the plaintiff in bringing suit, the

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Court of Appeal in San Bernardino concluded that "[a] plaintiff who has unduly delayed seeking equitable relief to the prejudice of a defendant may be barred by the doctrine of laches" [citing, Gerhard v. Stephens, (1968) 68 Cal.2d 864, 904 [69 Cal.Rptr. 612.]].

Further, in Millbrae Association for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222, it was held that laches barred the plaintiffs' attack on an Amended Project General Plan where two years had expired before the plaintiffs sought to enjoin the issuance of building permits, claiming that further permits should not be issued until the Precise Plan was amended. In Millbrae, as in the other cases cited herein, the compelling factor resulting in the trial court's denial of the relief sought, which decision was affirmed on appeal, was the unjustified delay by the plaintiffs in seeking relief of a publicly approved project, where intervenor-developer had shown that it had materially changed its position to its detriment in reliance on the plaintiff's lack of action and had expended over $600,000 in proceeding with the Precise Plan.

In upholding the trial court's dismissal of the plaintiffs' action based upon laches, the First Appellate District in Millbrae concluded that there was ample evidentiary support that the plaintiffs did not act promptly,

> ...and were guilty of laches, particularly in view of the rule that the right to question the validity of a statute must be urged at the earliest opportunity or it will be considered as waived.

Id., 262 Cal.App.2d at 236 [citing, Hershey v. Reclamation District No. 108 200 Cal. 550, 564 [254 P. 542]; Jenner v. City Council (1958) 164 Cal.App.2d 490, 498 [331 P.2d 176.]].

Indeed, the only instances where the delayed institution of legal action to enjoin a public expenditure or approved project have been determined not to be barred by laches arise in those cases where the record shows that the Plaintiffs had not acted in a dilatory manner because they did not acquiesce to the agency's actions but had actively made opposition at each stage of the administrative process, and there was no showing of undue prejudice to the public agency or any relevant party who reasonably and materially altered its position. See, e.g., Craig v. City of Poway (1996) 28 Cal.App.4th 319.

However, such is not the circumstance of the present case. Here, the record clearly

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shows an ongoing process for over five years from the date of City Council approval of the ENRA and then the LDA after public hearing, to the sale and transfer of the property in May, 2002 . Yet Plaintiff took no steps to challenge the efficacy of the LDA or the sale and transfer of the Hayes Park property to K & B Bakewell, until nine (9) months after the close of escrow, after the recordation of deeds, and after the months of easily viewed demolition and construction activity on the site.

Indeed, the record in this matter is unrefuted that Plaintiff delayed in bringing his action seeking, *inter alia,* to enjoin the issuance of further permits for this project until long after SEASIDE had reviewed and approved tentative maps, issued permits and the developer has engaged in substantial construction on the site. While the dilatory conduct of Plaintiff in taking any action is irrefutable, at the same time the substantial harm to SEASIDE and the developer by such delay is real and palpable.

Additional prejudice could result if any there is delay in approval of the final map which is slated for City Council approval imminently.[4] The approval of the final subdivision map is a ministerial act which the City of SEASIDE must grant so long as the developer has complied with all requirements and conditions. See, Government Code section 66458. Any acts which would prevent SEASIDE from approving the final map as this time, including any order enjoining the issuance of permits or final map approval, could subject SEASIDE to claims of damage from the developer. Thus, any action which would impair SEASIDE's ability to perform the remaining ministerial tasks regarding the project will directly have prejudicial effect upon the City.

Moreover, SEASIDE reasonably and justifiably relied upon the Plaintiff's failure to act until now in proceeding under the 1998 LDA and proceeding with the sale to K & B Bakewell for the development of the first upscale housing project within the City. For the Plaintiff to now come forward and seek to stop the project when he necessarily knew of this project for years,

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[4] The Final Map had been slated for City Council review and approval in mid-July, 2003, but has been re-set for an August, 2003 Council Meeting so the developer can complete landscaping requirements.

and where the construction has been plainly and easily visible to the public for more than nine (9) months is unreasonable, and has direct harmful impact upon SEASIDE and upon the non-party developer which is real, immediate and substantial. To stop the issuance of permits at this point when the project is so far along would leave the project uninhabitable and an eyesore and render the partially developed property useless for an indefinite period. It could further subject SEASIDE to legal action by the developer since at this point, approval of the final map and the issuance of the remaining permits is no longer discretionary, but ministerial in nature. The prejudice to the City of SEASIDE and its ability to further develop sites within the redevelopment area and elsewhere in the City could be irreparably impaired. Further, substantial City time and effort has been expended in reviewing and approving the plans and issuing the tentative maps and building permits.

In addition, there is the prejudice to the developer which has clearly expended millions of dollars in the demolition and construction thus far is obvious.

In weighing the enormous prejudices to the City of SEASIDE and the developer against the long-delayed action of the Plaintiff in bringing this action, it is clear that the requirements for establishing the defense laches are met. The facts of this matter are nearly identical to those presented in cases such as Holt and San Bernardino. As such, all relief sought by Plaintiff must therefore be denied and barred by laches due to his unreasonable delay in commencing suit, particularly when weighed against the real and substantial prejudice that would be suffered by SEASIDE and the developer should the equitable relief sought be granted.

c. PLAINTIFF'S ACTION IS TIME-BARRED

Plaintiff brings this action as a taxpayer pursuant to Code of Civil Procedure section 526(a), claiming a laundry list of supposed technical violations to unwind the transaction between SEASIDE and K & B Bakewell, all of which boil down to contentions that: a) there was an invalid transfer of public property and waste of public assets; and b) there was a failure to comply with the Surplus Lands Act [Government Code section 54221, et seq.]. However, all claims brought under or predicated upon these complained of acts are time-barred by the applicable statutes of limitations, and as such, the Plaintiff is not entitled to any of the relief

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sought.

The First, Third, Sixth and Seventh Causes of Action of Plaintiff's Complaint all arise from the same set of operative facts, that is, the attacks upon the validity of the LDA and its terms, including claims that the transfer under the LDA was invalid.

Claims based upon an executed contract in writing or to void instruments, as well as taxpayer lawsuits are subject to a statute of limitations of four (4) years pursuant to Code of Civil Procedure section 343. [See, e.g., Robertson v. Superior Court (2001) 90 Cal.App.4th 1319, 1327-28 (citations omitted).] Here it is unrefuted that the LDA was entered on May 4, 1998. Thus, any challenge to the validity of the contract or taxpayer challenge should have been brought not later than May 4, 2002. Plaintiff's claims are untimely.

The Plaintiff's Second Cause of Action for failure to comply with the requirements of the Surplus Lands Act is likewise untimely. Although it is SEASIDE's position that it had no obligation to comply with the Surplus Lands Act, and it did so voluntarily, as noted in the Guillen Declaration at Paragraph 3, the notices to the required parties were sent in 1998 and no responses showing interest in acquiring the property were received. Pursuant to Code of Civil Procedure section 338(a) there is a three (3) year statute of limitations for liability created by statute. Thus, any claims of non-compliance by the City with the requirements of the Surplus Lands Act should have been brought by 2001.

A cause of action accrues upon the occurrence of the last element essential to the cause of action. [Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 24 Cal.4th 809, 815.] Here the last "occurrence" would have been the sending of the notices by the City in order to satisfy the Surplus Lands Act requirements, which occurrences happened in 1998. Plaintiff argues that the City should not have sent out the statutory notices until July, 2002 when it held title to the property, albeit for a matter of moments. However, there is nothing in the statute which precludes SEASIDE from notifying the potentially interested parties of their right to assert interest in acquiring the property, particularly where in this complex transaction, the City needed to have in place a buyer who had the financial ability to fund the transaction since SEASIDE was not using its own funds to acquire the property from the U.S. Army. Moreover, since there was

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federal legislation expressly providing for the Army to sell the property to SEASIDE, it was certain that once a financially solvent buyer was lined up and a fair market price agreed upon with the Army, SEASIDE would have the right to acquire and then sell the property.

Thus, the 1998 notices were not prematurely sent, but complied with any notice requirements of the Surplus Lands Act, rendering Plaintiff's attempt to invalidate the transaction on this basis as untimely.

The Fourth Cause of Action claiming a failure to bid a public works contract is both inapplicable and untimely. The sale and transfer of the Hayes Park property is not a public works project. It is not subject to public bidding requirements.

Moreover, the "contract" at issue, the LDA, was executed on May 4, 1998 and would be subject to the three-year limitation of Code of Civil Procedure section 338 as a claim based upon a liability created by statute. Plaintiff's action was commenced more than two years too late on this cause.

The Fifth Cause of Action claiming that there was inadequate public hearing is also time-barred pursuant to the four-year limits of Code of Civil Procedure section 343 or the three-year period of Section 338. In either interpretation, Plaintiff is too late since the public hearing in question occurred in May, 1998. If Plaintiff believed that such hearing was inadequate, it was incumbent upon him to timely assert his challenge to the adequacy of that proceeding.

For the reasons delineated above, each cause of action of the Complaint is barred by the running of the applicable statutes of limitations.

d. THERE HAS BEEN NO GIFT OF PUBLIC FUNDS

Another of the arguments asserted by Plaintiff to justify his request for injunctive relief at this time, and the ultimate unwinding of the sale between SEASIDE and K & B Bakewell, is his claim that the City committed a gift of public money in derogation of the California Constitutional proscription set forth in Article XVI, Section 6. The argument employed by Plaintiff appears to be that the transaction is invalid because the sale price was too low,[5] hence, a

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[5] To bolster his position, Plaintiff has submitted a declaration from an appraiser, Richard Van Steenkiste, who opines, without any consideration of demolition and remediation costs for the

"gift" was made to the developer, a private party. However, this attack on the land sale must fail as Plaintiff cannot satisfy the legal requirements which would establish that a "gift" of public funds has occurred.

First, Plaintiff entirely overlooks the fact that great public benefit is to be derived from this project as follows: a) there will be the construction of a new stock of market rate homes in SEASIDE improving a more varied supply of housing stock; b) the project will eliminate the blight of the deteriorated structures on the property [see, e.g., Staff report of 5/4/98 appended to City Council Resolution No. 98-32, Exhibit 3 to Plaintiff's Memorandum of Points and Authorities]; c) there will be a substantially enhanced tax and economic base for the City; d) the sale netted SEASIDE nearly one-million dollars in cash profit without the City having to outlay any of its own money for the purchase; e) in addition, the sale called for the construction of 10 units of affordable housing for the Salvation Army at no cost to the City[6]; and f) the sale resulted in the construction of a community center at no cost to the taxpayers of SEASIDE.

Plaintiff completely ignores these substantial public benefits derived from the sale to K & B Bakewell, and focuses only upon what he believes was an inadequate sale price. However, if the legislative body, here the City Council, determined that the public benefits delineated above

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site, that the property is worth upwards of $115 million. There is little doubt that appraisers can wildly vary in their opinions of value, since the federal government's appraiser, Stephen J. Geller concluded that the "as is" value of the property was $5 million. [See, Exhibit G. to Newsome Declaration.] It is further noted that the fair market value for this property as to the sale between the United States and SEASIDE was to be determined not by a third party's appraiser long after the fact, but by the Secretary of the Army. [See, Public Law 104-106, section 2859, Exhibit A to Newsome Declaration.] One can surmise that since the sale to K & B Bakewell occurred simultaneously, the fair market value of the property remained the same as that determined by the Secretary of the Army. Thus, without expending any monies of its own, SEASIDE garnered a cash profit of $850,000 from the sale plus other benefits for a value gained in excess of One Million dollars. That one can find an appraiser who will put a higher value on the property does not make the subject sale a "gift" nor negate the public benefits derived from the transaction.

[6] In the Declaration of Representative Farr submitted by Plaintiff, it is contended that the Salvation Army had to outlay $300,000 to contribute towards the construction of these affordable housing units. Putting aside whether Rep. Farr has set forth sufficient foundation to support this contention under oath, the fact is that the LDA and City Council Resolution No. 98-32 adopting the LDA at Par. E.3 [see, e.g., Exhibits 2 and 3 to Plaintiff's Memorandum of Points and Authorities] provide for K & B Bakewell to completely construct 10 units of housing on City-owned property for the Salvation Army as part of the bargain. If this was not done, then SEASIDE has a cause of action against K & B Bakewell for breach of contract. However, such failure to fully perform by the developer does not set forth a basis to claim that a gift of public assets was given nor does it negate the public benefit to be derived from the terms of the LDA.

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justified the sale, then no gift of public funds can be found and this Court should not interfere with such legislative determination.

The prohibitions of Article XVI, Section 6 seek to prevent the expenditure of public monies or the extension of public credit for purposes from which no public benefit is derived. [See, e.g., Santa Barbara County Water Agency v. All Persons and Parties (1957) 47 Cal.2d 699, rev'd on other grounds.] Once a public benefit is articulated, a legislative act transferring public property cannot be voided.

In the case of Federated Income Properties v. State (1947) 82 Cal.App.2d 893, a taxpayer and the former owner of the subject property objected to the sale by the state to the City of South Pasadena of plaintiff's former property acquired by state tax deeds. Plaintiff claimed that the one dollar ($1.00) sale price was *de minimis* and therefore amounted to a gift of public funds. However, the trial court concluded, and the court of appeal affirmed, that there was no gift of public funds in derogation of Article XVI, Section 6 because there were other public benefits which would be derived from this sale, and in particular, that the city was likely to fix-up the property and sell it, thus returning it to the tax rolls, improving the property to the benefit of the community in general, as well as ultimately enhancing the tax base of the city and state. As in the present situation, the goals realized by such a sale of public property are real and legitimate public benefits which negate any suggestion of a gift of public assets.

Neither the trial court nor the court of appeal interfered with this minimal sale price set by the state in Federated Income Properties, with the Second Appellate District concluding that,

> The foregoing elements enter importantly into the consideration received by the state for the transfer of its interest in the property to respondent city and are sufficiently adequate to negate the contention that the sale amounted to a gift in violation of the constitution. Before a sale is made by the state to a city, the price shall be agreed upon between the board of supervisors of the county, the state controller and the governing body of the city in which the property is located... Such an agreement was entered into before the sale involved in this action was made to the city of South Pasadena. **The state having determined that other considerations than the cash received furnished an adequate return for the state's tax title and no reason appearing for questioning the wisdom of such decision, the court will not set aside the sale.**

Id. at pp. 897-898 (emphasis added.).

Caselaw consistently provides that an appropriation is not considered a gift if there is a

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public purpose, even if private persons are benefited. [See, e.g., County of Los Angeles v. LaFuente (1942) 20 Cal.2d 870; Community Memorial Hospital of San Buena Ventura v. County of Ventura (1996) 50 Cal.App.4th 199; Jordan v. Department of Motor Vehicles (2002) 100 Cal.App.4th 431.] For example, in Jordan, the settlement of a good faith dispute between the state and a private party was found to be an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds established a valid public purpose.

Likewise, in Community Memorial Hospital where a private hospital and taxpayers filed an action to enjoin a county hospital from treating and charging non-indigent patients as unfair competition and a gift of public funds, the Court of Appeal concluded that no gift existed, even if some private persons benefited from services at the county hospital. In upholding the grant of summary adjudication on this issue in favor of the county hospital, the appellate court stated that:

> Money spent for public purposes is not a gift even though private persons may benefit. (County of Alameda v. Janssen (1940) 16 Cal.2d 276, 281 [106 P.2d 11, 130 A.L.R. 1141].) **The determination of what constitutes a public purpose is primarily a matter for the Legislature and will not be disturbed as long as it has a reasonable basis.** (*Ibid.*)

Id. at 207 (emphasis added).

The fact is, that so long as there is a valid public purpose underlying the transaction, the courts have consistently deferred to the legislative body and have neither interfered with the transaction nor found that a gift of public funds has been made, and none of the cases relied upon by the Plaintiff state anything to the contrary.

In this instance, the uncontradicted evidence establishes substantial public benefit from the sale to K & B Bakewell, including a substantial cash profit and other real and palpable public benefits, including the construction of some affordable housing units at no cost to the City and the construction of a community center. As in the Community Memorial Hospital case, the sale had several public purposes and derived a variety of public benefits. The decision of the SEASIDE City Council must not be disturbed, as no gift of public funds has been made.

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e. K & B BAKEWELL IS AN INDISPENSABLE PARTY AND THUS A RULING ON THE PRELIMINARY INJUNCTION IS PREMATURE

Much of plaintiff's request for relief is directed at K & B Bakewell. [See, Plaintiff's Memorandum of Points and Authorities, page 16, lines 10-12 ("the most equitable remedy for violation of the Surplus Lands Act would be an order requiring K & B to disgorge profits . . . .") and page 26, lines 4-6 ("Plaintiff in this action is seeking the alternative remedy of requiring K & B Bakewell to disgorge . . .").] Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. Beresford Neighborhood Association v. City of San Mateo (1989) 207 Cal.App.3d 1180, 1188; Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal.App.3d 495, 501.

Code of Civil Procedure Section 389(a) states:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

In Beresford, a neighborhood association sought declaratory and injunctive relief against the city alleging improprieties associated with the city's purchase of a site for a senior citizen housing project. The development of the project was transferred to a developer. The association had failed to name the developer in the lawsuit.

Not only did the court hold that the developer was an indispensable party, but the court stated that the developer met all of the criteria for compulsive joinder because

> A disposition in his absence could impair his ability to protect his interest in the action, and his right to collaterally attack an adverse judgment exposed the commissions to the risk of incurring inconsistent obligations.

Ibid. 207 Cal.App.3d at 1188.

K & B Bakewell is in a similar position as the developer in Beresford. The Court can

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hardly rule on plaintiff's request for injunctive relief without permitting K & B Bakewell their rightful day in court.

Plaintiff may argue that a motion to amend and add K & B Bakewell as a defendant is pending and will be heard the day after the Court's hearing on this request for preliminary injunction. The old adage "a day late and a dollar short" cannot be more applicable than in the instant case. The Court simply cannot grant the injunctive relief requested by plaintiff unless K & B Bakewell is added as a defendant and has had notice and an opportunity to be heard.

If after the motion to amend is heard, plaintiff is permitted to amend to add K & B Bakewell, then this hearing must be duly noticed once K & B Bakewell has been served with process. If, on the other hand, this Court denies plaintiff's motion to amend, then this Court must dismiss the entire action for lack of an indispensable party. *Ibid.*, 207 Cal.App.3d at 1190.

Defendant believes that, like the Beresford case, either the statute of limitations or laches will act as a complete defense to any action against K & B [see above, sections b and c] and, therefore, plaintiff's motion to amend to add K & B Bakewell as a defendant will fail.

f. AN EXECUTED CONTRACT WHICH HAS BEEN SUBSTANTIALLY PERFORMED CANNOT BE ENJOINED

By this motion the Plaintiff seeks to enjoin completion of the construction on the Hayes Park property by requesting that SEASIDE be stayed from issuing any further permits to the developer. However, the record is clear that the LDA, the underlying contract between the City and the developer, was entered in May, 1998 and construction actually commenced on the site shortly after the close of escrow, the payment of the funds due to the City, and transfer of title in July 2002. The contract between SEASIDE and K & B Bakewell has been substantially performed at this point in time, with payment made, title transferred and recorded a year ago, the tentative parcel map approved, permits issued, construction of model homes completed, the construction of roadways, utilities and related offsite improvements completed, the construction of the community center completed, and the final map about to be approved.

Although Plaintiff acknowledges that the LDA was executed in May, 1998 and that there has been substantial performance under the LDA, he now argues that the LDA is void.

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However, a contract that has already been executed and upon which all or substantial performance has occurred, cannot be enjoined. Hodgeman v. City of San Diego (1942) 53 Cal.App.2d 610, 618.

Again, the dilatory conduct of the Plaintiff in commencing this action must work against him. Pursuant to the holding in Hodgeman, the Plaintiff no longer has the right to enjoin performance under the LDA since the contract was fully executed over five years ago and substantial performance has occurred. It is too late to seek injunctive relief.

g. THE SURPLUS LANDS ACT DOES NOT APPLY TO THE HAYES PARK PROPERTY

The Surplus Lands Act applies when a local or state agency wishes to dispose of land that it has determined is no longer necessary for the agency's use. Government Code § 54221. The definition of "surplus land" provided for in the statute describes surplus land as land "that is determined to be no longer necessary for the agency's use, **except** property being held by the agency for the purpose of exchange." Gov. Code § 54221 (emphasis added).

Although there is no case law interpreting this definition, one can turn to the plain meaning, or dictionary definition of "exchange," which is "to give or take in return for something else" or "to give up for a substitute." The American Heritage Dictionary, Second College Edition, c. 1982. SEASIDE's purposes for acquiring the Hayes Park Property from the Army falls with this plain meaning of "exchange" and thus lies within the exception to surplus land.

The property was purchased for the purpose of exchange because the City only purchased the property intending to convey it to a developer for residential development. The property was never held by the City for a different purpose which later became defunct. Indeed, the transfer of the property from the Army to the City and from the City to the developer was done through simultaneous escrows. [See, Keen Declaration, paragraphs 12 and 17.]

The words "no longer" in the statute imply that the property was at one time used by the City or put to a City use, which is not the case in this instance. Rather, the City was merely acting as a pass-through conduit for the property. The City only acquired the property for the purpose of parting with it in order to obtain some benefit for the City, *i.e.*, demolition of

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improvements and remediation of land to correct blighted conditions and the construction of greatly-needed housing which would maximize the market value of residential development and realize the economic opportunities associated with redevelopment at the former Fort Ord.[7]

Therefore, the property was never actually held by the City except for the short duration during the simultaneous escrow closings. SEASIDE only held the property for that short duration "for the purpose of exchange." Therefore, the property is not "surplus" for the purposes of the Surplus Lands Act.

h. EVEN THOUGH THE PROPERTY WAS NOT SUBJECT TO SURPLUS LANDS ACT, DEFENDANT VOLUNTARILY MET THE STATUTORY REQUIREMENTS

Although the Hayes Park Property was not subject to the Surplus Lands Act, defendant did go through the procedures set forth in said Act to notify all entities that would be required to receive said notification if the property was surplus land of the availability of the land, and invited said entities to enter into negotiations with the City within 60 days after receipt of the notice. [See, Exhibit H to Newsome Declaration and Guillen Declaration, paragraphs 3 and 4.] Said entity was to send its proposal in writing to the then City Manager and the Community Development Director. [See, Exhibit H to Newsome Declaration.] Indeed, in negotiating the LDA with K & B Bakewell, the City provided an escape clause for itself should one of the designated entities appear and make an offer that was more attractive to the City. [See, Exhibit J to Newsome Declaration, LDA, paragraph 2.5.]

At no time did any of the designated entities come forward with a proposal to negotiate for the purchase of the Hayes Park Property. Declaration of Guillen, paragraph 7.[8] Plaintiff has no declaration from the Monterey Housing Authority that states otherwise. In fact, the only

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[7] Under the Fort Ord ReUse Plan Residential Land Use Policies for the City of Seaside, Section 4.1.2.3, Residential Land Use Policy B-1, Objective C states "Encourage highest and best use of residential land to enhance and maximize the market value of residential development and realize the economic opportunities associated with redevelopment at the Former Fort Ord." See, Exhibit BB attached to Keen Declaration.

[8] Plaintiff's disgruntled developer, Mr. Agha allegedly sent his proposal to the Mayor, and not the City Manager or Community Development Director as called for in the Surplus Lands Act Notice. This proposal was sent after the LDA was executed and not within the time limits set forth in the Notice.

declaration plaintiff has is from Tom Cravens, a former employee of the Monterey Housing Authority who is not in a position to speak for the Housing Authority because 1) he is no longer an employee, and 2) neither of the positions he held, either as an Administrative Analyst or later as the Director of Facilities, gave him any responsibilities for acquisition of available properties since he was, by his own testimony, involved in financial analyses and working on facilities design. Moreover, his declaration confirms that the Housing Authority never made any proposal to the City.

Plaintiff's entire argument that the City violated the Surplus Lands Act rests on the fact that the City did not provide the notification that the Act requires **after** the City owned the property. However, the City **owned** the property for a matter of moments, as the intention of the purchase was to convey it to the developer pursuant to the LDA. The City would not have purchased the property without having a developer lined-up to transfer it to as the City did not have the funds to purchase the property without the developer arrangement. [See, Keen Declaration, paragraph 5.] Thus, without the LDA, the City would never have **owned** the property at all.

Plaintiff argues that to allow a local agency to meet its statutory obligation under the Surplus Lands Act prior to actually owning the property would create "a loophole which would swallow the rule." However, such is not a "loophole" as Plaintiff suggests, since public notice requirements by a public entity in anticipation of acquiring property with the express intention of conveying to a developer, can be satisfied in advance of the actual acquisition. [See, e.g., Contra Costa Theatre, Inc. v. Redevelopment Agency of the City of Concord (1982) 131 Cal.App.3d 860.] The fact is, if the City had not proceeded the way it did, the property could never have been acquired. SEASIDE therefore satisfied any notice requirements when the LDA was entered and it was apparent that the City would be able to acquire the property in question.

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i. SEASIDE HAS NOT VIOLATED ANY AFFORDABLE HOUSING REQUIREMENTS

The Plaintiff claims that one of his motivations in bringing this action is that the project being constructed by K & B Bakewell at the Hayes Park Property does not satisfy affordable

housing requirements, and that at the very least, some of this development should have been set aside for low to moderate income housing. Plaintiff asserts that the failure to provide affordable housing on this site is a breach of the City's legal redevelopment obligations. The Plaintiff's interpretation of redevelopment law and the affordable housing requirements applicable to this property is incorrect.

During the City's approval process for the Hayes Park Development, the City Council adopted the Seaside-Fort Ord Redevelopment Plan (the "Redevelopment Plan"). The redevelopment project area within the Redevelopment Plan consists of all of the land formerly on the Fort Ord site within the City of Seaside, which includes, but is not limited to the property sold to K & B Bakewell. The Redevelopment Plan was adopted on April 18, 2002, pursuant to Section 33000 et seq. of the Health and Safety Code.

Redevelopment project areas are subject to an inclusionary affordable housing requirement. However, there is no obligation to impose this requirement on a project by project basis within the entire redevelopment area. Pursuant to Section 33413(b)(2) of the Health and Safety Code, at least fifteen percent (15%) of newly constructed or substantially rehabilitated housing units in a redevelopment project area must be affordable to low and moderate income persons and households; and forty percent (40%) of such units (or six percent (6%) of the newly constructed or substantially rehabilitated units in the project area) must be affordable to very low-income households (the "Housing Production Requirement"). All housing subject to the Housing Production Requirement must have affordability covenants recorded against the units to ensure that they remain affordable for forty-five (45) to fifty-five (55) years. The Redevelopment Agency may provide financial assistance from its housing fund for such housing.

However, what Plaintiff appears not to understand is that Agency has the discretion to determine if the Housing Production Requirement will be met on a project by project basis or cumulatively within the entire redevelopment area, so long as in the aggregate, the requirement is met for all of the units constructed within the project area within a ten-year time period. Section 33413(b)(3) of the Health and Safety Code specifically provides that:

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> The requirements of this subdivision shall apply, **in the aggregate**, to housing made available pursuant to paragraphs (1) and (2), respectively, and not to each individual case of rehabilitation, development, or construction of dwelling units, unless an agency determines otherwise (emphasis added).

While the City and/or Redevelopment Agency must ensure that the Housing Production Requirement is met every ten (10) years, they have until at least **2012** to meet the first Housing Production Requirement for the Seaside-Fort Ord Redevelopment Project Area. As stated previously, the Agency is not required to impose a fifteen percent (15%) affordability requirement on this particular development. The only requirement regarding the units in the K & B Bakewell project is that the Agency must count these units **and** all of the housing units constructed and/or substantially rehabilitated in the redevelopment project area in the next ten year period, in determining the number of affordable housing units required to meet the Housing Production Requirement.

Thus, Plaintiff's contention that the SEASIDE had a legal obligation to require the developer to include affordable housing units on the Hayes Park Property is simply incorrect; the only requirement is that within ten years the requisite percentage of affordable housing must be constructed or rehabilitated within the entire redevelopment area. There is no legal requirement that the City impose affordable housing on each and every individual development within the redevelopment area.

B. THE BALANCING OF HARDSHIPS WEIGHS IN FAVOR OF SEASIDE

1. THERE IS IRREPARABLE HARM TO SEASIDE

The delayed request of Plaintiff to now stop what is ostensibly a "done deal" will cause substantial harm to SEASIDE and the developer. The City has a contractual arrangement with K & B Bakewell, under which any delay in performance on the part of the City can result in damages owed to the developer. [See, e.g., Section 8.3 to the LDA, Exhibit 2 to the Plaintiff's Memorandum of Points and Authorities.] Further, as stated earlier in this brief, approval of the final map is slated for City Council approval imminently. The approval of the final subdivision map is a ministerial act which the City of SEASIDE must grant so long as the developer has complied with all requirements and conditions. Gov. Code, § 66458. Any acts which would

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prevent SEASIDE from approving the final map as this time, including any order enjoining the issuance of permits or final map approval, could subject SEASIDE to claims of damage from the developer. Thus, any action which would impair SEASIDE's ability to complete performance of the remaining ministerial tasks regarding the project and will directly have prejudicial effect upon the City and could subject the City to contract damages.

Moreover, SEASIDE reasonably and justifiably relied upon the Plaintiff's failure to act until now in proceeding under the 1998 LDA and proceeding with the sale to K & B Bakewell for the development of the first upscale housing project within the City. For the Plaintiff to now come forward and seek to stop the project when he necessarily knew of this project for years, and where the construction has been plainly and easily visible to the public for more than nine (9) months is unreasonable, and has direct harmful impact upon SEASIDE and upon the non-party developer which is real, immediate and substantial. To stop the issuance of permits at this point when the project is so far along would leave the project uninhabitable and an eyesore and render the partially developed property useless for an indefinite period. The prejudice to the City of SEASIDE and its ability to further develop sites within the redevelopment area and elsewhere in the City could be irreparably impaired. Further, substantial City time and effort has been expended in reviewing and approving the plans and issuing the tentative maps and building permits.

2. THERE IS IRREPARABLE HARM TO A PARTY NOT JOINED

In addition, there is the prejudice to the developer, which has clearly expended millions of dollars in the demolition and construction thus far. K & B Bakewell, who until very recently the Plaintiff did not even see fit to join, will suffer direct financial affect should the injunction be granted. Clearly, K & B Bakewell has expended enormous sums of money, including the six million dollars ($6,000,000) spent for the purchase of the property, the monies expended to construct the community center, and monies expended in constructing the model homes, demolition, planning and approval process and site remediation among other expenses. To stay completion of the process at this point would surely impose great financial hardship and potential loss on one who is not even a party. Moreover, at this point, K & B Bakewell has a

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vested right in obtaining the final subdivision map in accordance with Government Code section 66498.1. To prevent them from proceeding to final map approval, which as already noted, is an imminent occurrence, means that K & B Bakewell will be deprived of a property right without due process of law.

3. PLAINTIFF ACKNOWLEDGE THAT THE SURPLUS LANDS ACT DOES NOT PERMIT THE TRANSFER TO BE VOIDED, THERE IS AN ADEQUATE REMEDY AT LAW, AND THUS INJUNCTIVE RELIEF IS IMPROPER

Government Code Section 54230.5 provides:

> The failure by the state or a local agency to comply with the provision of this article [Surplus Land Act] shall not invalidate the transfer or conveyance of real property to a purchaser or encumbrance for value.

Plaintiff acknowledges that this law does not permit him to seek to invalidate the transfer from the City to K & B Bakewell. [Plaintiff's Memorandum of Points and Authorities, p. 15:9-16:13.] What Plaintiff fails to recognize is that the relief he seeks for this alleged violation of the Surplus Lands Act is money damages from an entity that is not named in this lawsuit. The fact that Plaintiff seeks money damages (i.e., disgorgement of K & B Bakewell's alleged profits) is evidence that there is an adequate remedy at law if a violation is held to have occurred by this Court. Injunctive relief is equitable in nature and available only where there is no adequate remedy at law. Code of Civil Procedure §526(a)(4). Whether Plaintiff has an adequate remedy at law is a factor to be considered in the balancing of hardships between the parties. Here, Plaintiff has stated that a disgorgement of profits by K & B Bakewell can provide a remedy. Presumably, Plaintiff is calling for these profits to be put back into the City's coffers.

Indeed, Plaintiff has not shown any actual injury to Plaintiff. A taxpayer's pocketbook is not a substitute for the high degree of existing or threatened injury required for prejudgment injunctive relief. Cohen v. Board of Supervisors (1986) 178 Cal.App.3d 447, 454 (preliminary injunction denied in taxpayer lawsuit where individual taxpayer bringing suit can show no actual or threatened to himself). There is an adequate remedy law and plaintiff's motion for a preliminary injunction should be denied.

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4. THERE IS NO IRREPARABLE INJURY TO PLAINTIFF AND THERE IS A REMEDY AT LAW

Plaintiff does not contend, nor could he, that he would suffer any personal harm should the project not be enjoined at this time. Indeed, Plaintiff acknowledges that under the Surplus Lands Act [Government Code section 54230.5] even if there is a failure by SEASIDE in complying with the provisions of the Act, the transfer or conveyance of the real property to a purchaser for value cannot be invalidated.

Further, there is no showing that the public will be harmed either by the project going forward. As discussed earlier in this memorandum, there is no absolute requirement that this project have an affordable housing component, but rather only that within ten years, there must be a certain percentage of affordable housing constructed within the redevelopment area in its entirety. Thus, the public is not losing any required affordable housing. Moreover, as part of K & B Bakewell's obligations under the LDA, 10 units of affordable housing for the Salvation Army have to be constructed on City-owned property, at a site which the Salvation Army has accepted. [See, Exhibit V to Newsome Declaration.]

Indeed, for the project to be stayed at this point would actually do harm to the public as the benefits to be derived from the completion of the project, including eliminating the blight on the site, the increase of improved housing stock within SEASIDE, and the enhanced tax and economic base gained by the project will be lost or delayed.

Further, there is a remedy at law: that is, if it can be established that the developer did not pay enough for the property, an award of damages to compensate for any shortfall is available.

There is no irreparable injury to the Plaintiff justifying injunctive relief.

C. PLAINTIFF SHOULD FURNISH A BOND IF AN INJUNCTION IS GRANTED

Should the Court be inclined to grant an injunction at this stage, SEASIDE requests that before the effective date of any injunction, the Plaintiff be required to furnish a bond to indemnify the City of SEASIDE against any losses or liabilities which might accrue against the City pending a final determination in this matter. Code of Civil Procedure section 529; Mangini

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v. J.G. Durand International (1994) 31 Cal.App.4th 314, 216-218 (injunction invalid for lack of bond being posted).

Although it is difficult to anticipate the full scope of damages to which SEASIDE might be subjected should it be enjoined from approving the final subdivision map and issuing the remaining permits, in light of the monies already spent in acquiring the property, remediation and demolition of the site, planning and plan approval process and the offsite and onsite construction costs already incurred by the developer, and the considerable time expended by City staff to review and approve the project thus far, it is believed that a bond of at least Ten Million Dollars ($10,000,000.00) should be required of Plaintiff.

IV. CONCLUSION

As set forth more specifically above, the Plaintiff herein is not entitled to a preliminary injunction as he cannot show that there will be immediate and irreparable harm suffered to the public if this relief is not granted, while the overwhelming evidence demonstrates that there will be real, immediate and serious harm to the City and the non-party developer should this project be stayed when it is so far along in construction and the final map, a vested property right of the developer, is about to be approved. Further, Plaintiff cannot show likelihood of success at trial because he cannot demonstrate that any meaningful and substantive statutory requirement was not met, and indeed, the record is clear that the City voluntarily complied with requirements, such as the Surplus Land Act notifications, which had no duty to satisfy.

Last, and most importantly, this Plaintiff is not entitled to injunctive relief because he unreasonably delayed this action, waiting until the project was well underway and the City's performance under the contract substantially completed. Relief must be barred by laches.

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For all of the reasons stated herein, the CITY OF SEASIDE respectfully requests that Plaintiff's Motion for Preliminary Injunction be denied in its entirety.

Dated: July 28, 2003

GOLDFARB & LIPMAN

BY _____
CLAUDIA J. MARTIN
Attorneys for Defendants
CITY OF SEASIDE and DANIEL E. KEEN,
in his official capacity as City Manager

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

BENJAMIN KAATZ, in his capacity as a taxpayer resident of the CITY of Seaside, Plaintiff, v. CITY OF SEASIDE, DANIEL E. KEEN, in his official capacity as CITY Manager for the CITY of Seaside, and DOES 1-20, inclusive, Defendants.	Case No.: M65043 DECLARATION OF RICH GUILLEN IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION Date: August 7, 2003 Time: 10:30 a.m. Dept.: 17 Before the Honorable Kay Kingsley

I, Rich Guillen, declare as follows:

1. I am the former Community Development Director for the City of Seaside ("City"), and have personal knowledge of the matters stated herein.

2. I worked for the City of Seaside as the Community Development Director from 1996 - 1998. I am currently the City Administrator for the City of Carmel.

3. In 1998, I was in charge of ensuring that the Notification Regarding Intent to Dispose of Land under the Surplus Lands Act [Gov. Code §54220 et seq.] for the Hayes Park Property were sent out to the proper entities as prescribed by the statute.

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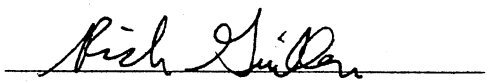
4. I directed my secretary, Mary McRory to send the Notices out to the entities as proscribed by the statute in February 1998 and it was my understanding that she undertook this task.

5. I never received any responses to the Notice.

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

DATED: 7/28/03



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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MONTEREY

BENJAMIN KAATZ, in his capacity as a taxpayer resident of the City of Seaside,

Plaintiff,

v.

CITY OF SEASIDE, DANIEL E. KEEN, in his official capacity as City Manager for the City of Seaside, and DOES 1-20, inclusive,

Defendants.

Case No.: M65043

DECLARATION OF DANIEL E. KEEN IN SUPPORT OF OPPOSITION OF CITY OF SEASIDE AND DANIEL E. KEEN TO MOTION FOR PRELIMINARY INJUNCTION

Date: August 7, 2003
Time: 10:30 a.m.
Dept.: 17

Before the Honorable Kay Kingsley

I, DANIEL E. KEEN, declare:

1. I am the CITY MANAGER for the CITY OF SEASIDE, and am a named defendant herein in my capacity as City Manager. The matters set forth herein are based upon my personal knowledge gained in my official capacity as City Manager, and pursuant to my duties and responsibilities as City Manager for the City of Seaside, California, except as to those matters set forth upon information and belief, and as to that information, it was gained through my duties and responsibilities as City Manager and from personal review of City records and documents, and therefore I believe this information to be true, and if called upon, would so testify as to each matter set forth herein.

2. In or about 1996 the City of Seaside ["CITY,"] began discussions with the United States Army ["ARMY,"] for the acquisition of a portion of the United States Army base known as Fort Ord which was located within the geographic boundaries of the City of Seaside when it became known that the United States Army was intending to convey approximately 477 acres of Fort Ord to the City of Seaside.

3. Among the sites the City of Seaside intended to acquire was the portion of Fort Ord known as the Hayes Park Property consisting of approximately 103 acres and which contained approximately 500 obsolete housing units containing both asbestos and lead paint.

4. During the course of negotiations with the United States Army, the City of Seaside was provided with an Appraisal Report prepared by Steven J. Geller, MAI, an independent appraiser, dated April 15, 1996 and in which Mr. Geller opined that the fair market value for the "as is" acquisition of the Hayes Park Property was Five-Million Dollars ($5,000,000.00). [See, Exhibit G to Declaration of Joyce E. Newsome, City Clerk, filed simultaneous herewith.] Mr. Geller determined that while the "highest and best use" of the property was for residential development, the structures on the site were not viable for rehabilitation and they would need to be demolished, the site cleaned-up, and new site improvements installed before the construction of new residential units could be undertaken. Mr. Geller determined that the cost for site remediation, including removal and disposal of the asbestos and lead-based paint materials and other potential hazards and to level the site for future construction would exceed Six Million Dollars ($6,000,000.00). [See, Exhibit G to Declaration of Joyce E. Newsome.]

5. The CITY was not in a financial position to be able to purchase the property from the Army without the backing of a developer who could fund the entire purchase. I am informed and believe and thereon state that for that purpose, on or about May 9, 1997 the CITY entered into an Exclusive Negotiating Rights Agreement with K&B Bakewell for purposes of determining whether agreement could be reached for the development of the Hayes Park Property.

6. Thereafter, on May 4, 1998, a duly noticed public hearing took place to consider

whether the City should adopt a resolution to enter into the Land Disposition Agreement with K & B Bakewell. After the City Council considered evidence of the value to the City [See, Exhibit I to Newsome Declaration], the Council approved and adopted a resolution for the CITY to enter into a Land Disposition Agreement ["LDA,"] with K&B Bakewell with certain terms and conditions, and which provided that K&B Bakewell might be able to acquire the Hayes Park Property from the CITY, if the CITY was able to acquire it from the Army, and if no other third party came forward under the Surplus Lands Act [Government Code Sections 54220, et seq.] offering to acquire this property for a more favorable price than K&B Bakewell was offering. [See, Exhibit J to Declaration of Joyce E. Newsome.]

7. The Purchase Price as set forth in the LDA was defined as a price equivalent to what the CITY would have to pay to the Army to acquire the property. In addition, as further consideration, K&B Bakewell would have to construct ten units of replacement housing as asserted by the Salvation Army under the Stewart B. McKinney Homeless Assistance Act on land owned by the CITY and within the Redevelopment Project Area if the CITY could effectuate a property exchange with the Salvation Army. [See, Section 2.6 of the LDA, Exhibit J to Declaration of Joyce E. Newsome.]

8. As additional consideration for the Hayes Park Property, K&B Bakewell would also have to construct a turnkey 4,000 square foot office building for the CITY on CITY property for a value not to exceed Three-Hundred Thousand Dollars ($300,000.00) or to reimburse the CITY the Three-Hundred Thousand Dollars ($300,000.00). [See, Section 2.7 of the LDA, Exhibit J to Declaration of Joyce E. Newsome.]

9. I am informed and believe and thereon state that the LDA was amended in January 2000, which included a maximum price for the sale of the Property to K&B Bakewell. [See, Exhibit N to Declaration of Joyce E. Newsome.]

10. The Salvation Army had asserted a right to acquire certain buildings at Fort Ord by submitting an application with the Department of Health and Human Services ["HHS,"] under the authority of Title V of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. section 11301, et seq. and HHS had awarded the Salvation Army the right to acquire ten housing units

on the Hayes Park Property as surplus federal property available for the development of low cost housing.

11. In order to convey a contiguous parcel of land in the Hayes Park Property to the developer once it was acquired by the CITY, an agreement was reached with the Salvation Army to enter into an exchange of other property owned by the Redevelopment Agency of the City of Seaside which would be conveyed to the CITY, and in turn, that property would be conveyed to the Salvation Army for the construction of the ten units of affordable housing for very low income and low income persons. It was further agreed that the Developer, K&B Bakewell would construct these units on the CITY-owned property conveyed to the Salvation Army. [See, Exhibits U, X, and Y to Declaration of Joyce E. Newsome.] The exchange property is located at Palm and Contra Costa Streets and is within the Redevelopment Plan Area of the City of Seaside.

12. The Hayes Park Property was acquired with the express purpose of simultaneously conveying it to K&B Bakewell pursuant to the LDA, and was never property that the CITY owned but no longer intended to use.

13. Thereafter, the Redevelopment Agency conveyed title to the exchange parcel to the CITY by Grant Deed on July 24, 2002 [Exhibit X to Declaration of Joyce E. Newsome].

14. The CITY then entered into an Escrow Agreement with the Salvation Army [Exhibit W to Declaration of Joyce E. Newsome], and by Grant Deed on July 24, 2002 [Exhibit Y to Declaration of Joyce E. Newsome] the CITY conveyed the exchange property to the Salvation Army.

15. No other parties or entities made any other claims upon the Hayes Park Property other than the Salvation Army.

16. On July 23, 2002, the CITY entered into an Escrow Agreement with the Army to acquire the Hayes Park Property for Five-Million and One-Hundred Thousand Dollars ($5,100,000.00) which was the fair market value of the Hayes Park Property on an "as is" basis according to the Army and its appraiser. [See, Exhibit Z to Declaration of Joyce E. Newsome.]

17. A double escrow occurred on July 25, 2002 with Stewart Title of California

acting as escrow agent. The first escrow that closed was the conveyance of the Hayes Park Property from the Army to the CITY for Five-Million One-Hundred Thousand Dollars as agreed in the Escrow Agreement. A Quitclaim Deed transferring title to this property from the Army to the CITY was duly recorded on July 25, 2002. [See, Exhibits R, S, and U to Declaration of Joyce E. Newsome.]

18. Simultaneously, escrow closed on the conveyance of the Hayes Park Property from the CITY to K&B Bakewell for an "as is" purchase price of Five-Million and Nine-Hundred and Fifty-Thousand Dollars ($5,950,000.00) with the additional consideration of K&B Bakewell having to construct the ten (10) affordable housing units for the Salvation Army on the exchanged CITY-owned property, as well as constructing a 4,000 square foot office building or contributing Three-Hundred Thousand Dollars ($300,000.00) towards its construction. Thus, the CITY netted value from this transaction in cash and contributions well in excess of One-Million Dollars ($1,000,000.00.). [See, Exhibits V, Z, and AA to Declaration of Joyce E. Newsome.]

19. The Quitclaim Deed between the CITY and K&B Bakewell does not specify the entirety of the consideration paid by K&B Bakewell for the acquisition of the Hayes Park Property, as it references a price of one dollar and *other good and valuable consideration.* [See, Exhibit AA to Declaration of Joyce E. Newsome.] However, the other consideration paid by K&B Bakewell is as set forth above, a purchase price of $5,950,000.00, plus the contributions towards the construction of the Salvation Army affordable housing units and the construction of a CITY office building, the latter of which was changed during the entitlement process to become the construction of a community center. That community center is under construction by K&B Bakewell at no cost to the CITY and provides additional benefit and value to the residents of the CITY of Seaside.

20. At no time was it ever contemplated nor did the CITY ever agree to sell the Hayes Park Property it was acquiring from the Army for One-Dollar ($1.00) since at all times the CITY was in the process of negotiations with both the Army and K&B Bakewell to ascertain a fair market value for the property on an "as is" basis due to the need for hazardous material remediation and extensive demolition and site preparation.

21. The CITY sold and transferred fee title of the Hayes Park property to K&B Bakewell on July 25, 2002 at the close of escrow. A deed transferring fee title to K&B Bakewell was duly recorded. As such, the CITY is not nor has it been the lawful owner of the subject property for a period of nearly one year and its legal ownership of the Property was for less than one day.

22. I am informed and believe and thereon state that all proceedings for obtaining approvals and adoptions of resolutions for the acquisition and sale of the Hayes Park Property were conducted in accordance with all requirements for notice and comment.

23. To my knowledge, at no time did the Plaintiff nor any other party or group challenge the sale of the Hayes Park Property to K&B Bakewell prior to the closing of escrow and the transfer of title in the property to K&B Bakewell on July 25, 2002, although this project was well-publicized in the newspapers and due public notice was provided as required by law, for all public hearings on the acquisition and sale of this property.

24. Since the time the Property was conveyed to K & B Bakewell until the date the instant lawsuit was filed, K & B Bakewell has undertaken demolition, land remediation, building of infrastructure including utilities and streets, the building of the community center and the building of 10 model homes. This work is readily observable to anyone traveling on Highway 1 through the City of Seaside.

25. Further, the acquisition and sale of the Hayes Park Property is not a "public works project" and as such, the CITY had no obligation to solicit bids for work from the lowest qualified bidder. This was a sale of acquired property for fair market value or greater.

26. In addition, based upon my knowledge and experience as City Manager and in other capacities working for public agencies and entities, it is my understanding that neither Seaside nor the Redevelopment Agency of the City of Seaside (the "Agency"), has an obligation to impose a fifteen percent (15%) affordable housing requirement on the development at the Hayes Park Property, as the Agency has the discretion to determine if the Housing Production Requirement will be met on a project by project basis or cumulatively. Therefore, as long as in the aggregate, the requirement is met for all of the units constructed within the project area, the

CITY has no obligation to provide for any particular percentage of affordable housing in the development being constructed on the Hayes Park Property since Section 33413(b)(3) of the Health and Safety Code specifically provides that *'the requirements of this subdivision shall apply, in the aggregate, to housing made available pursuant to paragraphs (1) and (2), respectively, and not to each individual case of rehabilitation, development, or construction of dwelling units, unless an agency determines otherwise.'* As such, the Agency's only obligation is to ensure that the Housing Production Requirement is met within ten (10) years, or by the year 2012.

27. Attached hereto as Exhibit BB to this declaration is a true and correct copy of a section from the Fort Ord ReUse Plan Residential Land Use Policies for the City of Seaside, a document the CITY relied upon in setting land use policies for the former Fort Ord Redevelopment Plan.

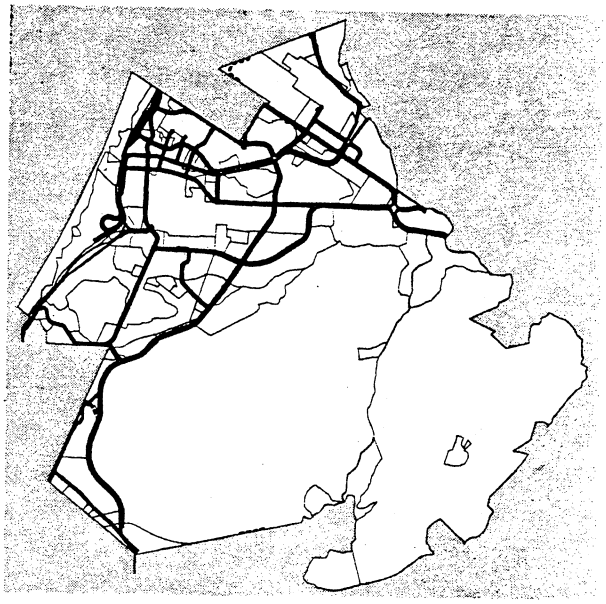
I declare the foregoing true and correct under penalty of perjury under the laws of the State of California. Executed this 28th day of July, 2003 at Seaside, California.

DANIEL E. KEEN
City Manager, City of Seaside

Public Draft

FORT ORD REUSE PLAN

Fort Ord Reuse Authority



May 1996

Volume 2:

REUSE PLAN ELEMENTS

EDAW, Inc. and EMC Planning Group, Inc.

Land Use Designation	Actual Density- Units/Gross Acre
SFD Low Density Residential	up to 5 Du/Ac
SFD Medium Density Residential	5 to 10 Du/Ac
MFD High Density Residential	10 to 20 Du/Ac
Residential Infill Opportunities	5 to 10 Du/Ac
Planned Development Mixed Use District	8 to 20 Du/Ac

Development intensities for residential and other land uses in the City of Seaside are summarized on Table 3.3-3 in the Framework of the Reuse Plan.

The full range of permitted uses in each Land Use Designation is described in Table 3.4-1 in the Framework of the Reuse Plan.

Program A-1.1: Amend the City's General Plan and Zoning Code to designate former Fort Ord land at the permissible residential densities consistent with the Fort Ord Reuse Plan and appropriate to accommodate the housing types desired for the community.

Objective B: Ensure compatibility between residential development and surrounding land uses.

Residential Land Use Policy B-1: The City of Seaside shall encourage land uses that are compatible with the character of the surrounding districts or neighborhoods and discourage new land use activities which are potential nuisances and/or hazards within and in close proximity to residential areas.

Program B-2.1: The City of Seaside shall revise zoning ordinance regulations on the types of uses allowed in the city's districts and neighborhoods, where appropriate, to ensure compatibility of uses in the Fort Ord planning area.

Program B-2.2: The City of Seaside shall adopt zoning standards for the former Fort Ord lands to achieve compatible land uses, including, but not limited to, buffer zones and vegetative screening.

Objective C: Encourage highest and best use of residential land to enhance and maximize the market value of residential development and realize the economic opportunities associated with redevelopment at the former Fort Ord.