Jay P. Renneisen (Bar No. 173531)
LAW OFFICES OF JAY P. RENNEISEN
1931 San Miguel Drive, Suite 210A
Walnut Creek, California 94596
Telephone: (925) 280-8900
Facsimile: (925) 955-1601

Heidi K. Whilden (Bar No. 183458)
LAW OFFICES OF HEIDI K. WHILDEN
1130 Fremont Blvd. #105, PMB 262
Seaside, California 93955
Telephone: (831) 869-9584

Attorneys for Plaintiff
Benjamin Kaatz

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AUG 0 1 2003
SHERRI L. PEDERSEN
CLERK OF THE SUPERIOR COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

[Code Civ. Proc. §527]

DATE: August 7, 2003
TIME: 10:30 a.m.
DEPT: 17

On the evening of August 7, 2003, the date of the hearing on this motion, the Seaside City Council is scheduled to approve the first final subdivision map, legally dividing Hayes Park into smaller residential parcels. The next day the map will be recorded, escrow will close on the first sales of the individual lots, and the value of the public land, approximately $300,000 per lot, will disappear into the pockets of out-of-town developers. For the reasons stated below, defendants' opposition fails to overcome plaintiff's strong and substantial grounds for the granting of a preliminary injunction preventing the City of Seaside from approving any final parcel maps or issuing any building permits for the Hayes Park property, until such time as trial could be had and judgment rendered in this action.

I. PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION REGARDING THE LIKELIHOOD OF PREVAILING ON THE MERITS

A. Because Hayes Park Was Not Acquired By The City Until July 25, 2002, And Not Sold By The City Until July 25, 2002, Defendants Will Not Prevail On Their Claimed Defenses Of The Statute of Limitations and/or Laches.

1. July 25, 2002 is the Date the City Violated the Surplus Land Act, the Prohibition Against Selling Residential Property Below Fair Market Value Without an Affordable Housing Requirement, and the Prohibition Against Gifts of Public Funds.

Defendants suggests that plaintiff's causes of action should have been raised in court no later than May 4, 2002, that date being four years after the LDA was approved in 1998. But such an action would have likely been tossed out by the court as premature and not ripe. Such an action would have sought to enjoin the City from conveying property it did not own at that time, and might never own. Such an action would have sought to enjoin the City, if it ever actually acquired the property, from reselling it below fair market value–even though no price was specified in the LDA and it was possible that the "fair market value, as determined by the Secretary of the Army" might turn out to be the actual fair market value. Finally, such an action would have sought relief from the City for violation the Surplus Land Act, even though the City's legal duty to offer the property for affordable housing had not yet arisen and would not arise unless and until the City actually owned the property in the future.

On May 4, 2002, and up until July 25, 2002, the causes of action alleged in plaintiff's complaint simply did not yet exist. The City could not have been guilty of conveying property below fair market value when it did not own the property and had no guarantee that it would ever own the property. (Public Law 104-106, § 2859 only gave the Army the option of selling Hayes Park to the City of Seaside, it did not require that the property be sold to the City. See, also, Declaration of Nader Agha, para. 5, Ex. B.) In addition, the future sale price of Hayes Park was unknown, as well as the date of sale, so it would be impossible to know what the actual fair market value of the property on the sale date would be. Finally, the Surplus Land Act requires that affordable housing notices be given and options be considered when property that is actually "owned" by a city is to be sold. It would have been impossible for the City to violate the Surplus Land Act until it first owned, and then sold Hayes Park. Even

Defendants' claimed act of compliance in February 1998, the alleged sending out of the questionable notice that was "understood" to have been mailed out by a secretary in the City's Community Development Director's office (Newsome Decl., Ex. H; Guillen Decl. para. 4), although not compliant with the Surplus Land Act, could have been corrected once the City took title to the property.

The violations of law alleged in plaintiff's complaint could not and did not occur until the City took title to the property on July 25, 2002, then reconveyed it for one-twentieth of its fair market value to a private developer with zero affordable housing requirements. Up until that date the harm to Seaside taxpayers and residents was hypothetical–the public treasury had not yet been looted because the public treasury was still empty. The City did not own the property until July 25, 2002, might never have owned it, and still could have complied with the Surplus Land Act and obtained fair market value for the property if it chose to follow the law.

2. Housing Prices and the Lack of Affordable Houses Were Not Publicly Announced until April 2003.

There was no unreasonable delay in filing this action on May 16, 2003, nine months after the City's conveyance, and only one month after the developer publicly announced the 380 unit development would not have any units starting at "below $200,000" (Complaint, Ex. 3), as stated on the record of the May 4, 1998 City Council hearing approving the project, nor any units even close to being affordable to moderate income, let alone low income families.

And the price for which the property was sold to the developer on July 25, 2002, ($5.95 million or $15,000 per developable residential lot with full water rights) was not publicized and still comes as a shock to otherwise concerned and knowledgeable citizens. Further, as admitted in open court on May 16, 2003 at the hearing on plaintiff's initial TRO request, Claudia Martin of Goldfarb & Lipman admitted that the $1 quitclaim price is routinely used to hide from the public the real price paid for a property. It worked. Plaintiff initially alleged that the purchase price was $1 based upon the recorded quitclaim deed, and only at the TRO hearing was the actual price of $5.95 million, not identified in the recorded deeds, revealed (and for which plaintiff has requested leave to amend in a separate motion).

This is consistent with the secrecy and "hide the ball" history of this deal. For example, the deal relocating the Salvation Army off the property (and charging them $300,000 at the same time (Newsome Decl., Ex. W, p. 1)), also include the City's requirement that the Salvation Army not even discuss the deal with any one else, let alone newspapers or other media, until escrow was finally closed and the deal could not be undone. (Newsome Decl., Ex. E, p. 3, sec. 3.B.) For a city to impose a contractual gag order on the Salvation Army as part of a contract to relocate homeless housing is highly unusual, legally questionable, and at the same time reflective of the secrecy surrounding the giveaway of Hayes Park to out-of-town developers.

B. The U.S. Army's Discretionary Decision To Sell Hayes Park To The City of Seaside For $5.1 Million Does Not Relieve The City Of Its Obligation To Comply With State Laws When It Re-Sold The Property To A Private Developer.

1. "Fair Market Value" as Used in the California Government Code and Gift of Public Funds Constitutional Analysis has a Separate and Distinct Meaning From "Fair Market Value as determined by the Secretary of the U.S. Army".

Defendants' brief fails to recognize the distinction between the U.S. Army's statutory authority to sell Hayes Park to the City for "fair market value, as determined by the Secretary of the Army" pursuant to federal law (P.L. 104-1-6, § 2859), and the City of Seaside's statutory obligation not to sell Hayes Park for less than "fair market value" without affordable housing requirements (Govt. Code §§ 37362-37364), nor to sell at a price so far below fair market value as to constitute a gift of public funds in violation of Article 16, section 6 of the California Constitution. Under the relevant California statutes and case law there is no specified designator of what "fair market value" is. Rather, the fair market value of any piece of real property on any particular date is a question of fact subject to proof.

Under federal law, the Secretary of the Army had the final word in setting the price he wanted fair market value to be for Hayes Park. The Secretary of the Army had the discretion and any number of potential reasons, political, practical or internal, for setting a price of $5.1 million. The Army was free to base its determination of fair market value on a six-year-old appraisal commissioned by a questionable municipal bonding company, as alleged by defendant, if it so desired. The Secretary of the

Army had the discretion, for its own reasons, to assume that the value of 105 acres of residential real property on the Monterey Peninsula, with full water rights, ocean views and backed up to a golf course, had remained stagnant and unchanged from 1996 to 2002. Every Monterey Peninsula resident will tell you how wrong that assumption is, but no loyal local resident would object to the federal government passing on valuable real estate to a local government at one-twentieth its value.

California law, however, does not defer to the federal military bureaucracy to define fair market value when cities seek to sell property without any provision for affordable housing. And local governments fortunate enough to receive a large amount of federal property at a bargain price, are not then free to pass on the valuable property to Los Angeles developers at that same discounted price. California Government Code sections 37362-37364 require that, unless the statutorily specified affordable housing requirements exist, cities may not sell property suitable for residential development at below fair market value. There is no statutory or case law exception for property obtained at a discount by the city, nor any deference given to an Army official or any other individual's determination as to what fair market value is.

2. The 1996 Appraisal of Hayes Park Offered by Defendants is Neither Relevant Nor What Defendants Claim It Is.

For the reasons addressed above, the 1996 appraisal of Hayes Park submitted by Defendants is not relevant to the factual question of whether the City of Seaside sold the property to the developers on July 25, 2002 at below fair market value. It is not disputed that the 380 units to be built on Hayes Park contain zero affordable housing. Therefore, if the sales price to the developer of $5.95 million on July 25, 2002 was less than fair market value (and plaintiff has submitted competent evidence that the fair market value of the property on that date was at least $94,195,000) the City violated Government Code sections 37362-37364, and the attempted conveyance is void. A 1996 appraisal is simply not relevant to the issue.

Further, it does not appear that the unverified appraisal is even what defendants claim it to be. Defendants represent in their brief that the apprisal submitted as Exhibit G to the Newsome declaration

is an appraisal that "the Army provided the City" back in 1996, citing the appraisal and defendant Dan Keen's declaration. (Opp., p. 2:8-10.). Nowhere in the appraisal, however, is there any indication that it was prepared by or for the U.S. Army. The appraisal was submitted by the appraiser to an entity identified in the report as "Grigsby-Brandford", and thus was apparently commissioned by that entity. Defendant has not offered any explanation of who "Grigsby-Brandford" is, let alone why their appraisal should be considered the U.S. Army's appraisal. It appears that this entity is a now-defunct municipal bonding company.[1] There does not appear to be any evidence that Grigsby Brandford was acting on behalf of the U.S. Army, nor does there appear to be any evidence that the circumstances surrounding the commissioning of this appraisal provide any basis to believe it accurately reflects the true fair market value of Hayes Park in 1996, or any other time.

C. Defendants' Disingenuously Attempt To Blur The Distinction Between Government Code Laws Governing California Cities and Health and Safety Code Laws Governing Redevelopment Agencies.

At page 31, lines 2-3 of defendants' brief, it falsely asserts that plaintiff is claiming a breach of "the City's legal redevelopment obligations". This statement is false both factually and legally. Factually, plaintiff has made clear that the City acted as a city, and violated laws as a city, and that redevelopment law has nothing to do with this complaint. (Newsome Decl., Exs. B, C, D, E, J, K, M, L, O, R, S, U, V, Z, and AA.) Legally, there is no such thing as a "City's legal redevelopment obligations". Cities have legal municipal obligations. Redevelopment agencies have legal redevelopment obligations. Government Code section 34102 defines a city, and later in the Government Code (sections 37362-37364, 54200 et seq.,) defines a city's obligations to promote affordable housing before selling public property. Health & Safety Code section 33000, et seq. (the "Community Redevelopment Law") on the

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[1]A simple Google internet search of "Grigsby-Brandford" generates as the first hit an Associated Press article entitled "Minority Bond Firm Falls Apart", dated October 2, 1996 (Google Search of World Wide Web, July 30, 2003 (no advanced settings)). The article reports that Grigsby Brandford & Co. was the largest minority-owned municipal bond underwriter in the country, and that the San Francisco based firm was going out of business due to a "far-reaching" municipal corruption probe which included video tape that shows a municipal official and Grigsby "discussing a $300,000 kickback for steering business to the bond firm". The article also reports that Grigsby was fined $5000 by the California Fair Political Practices Commission for illegally funneling $5000 to a mayoral candidate's campaign.

other hand, defines a redevelopment agency and its powers and obligations. Even though the same body of officers acts as the legislative body of the two entities, they are not the same entities and are in no way interchangeable. (Pacific States Enterprises, Inc. v. City of Coachella (1993) 13 Cal.App.4th 1414.)

Defendants seem intent on attempting to escape from the clear language of the Government Code governing cities, leap over the Harbors and Navigation Code, and take refuge in the Health and Safety Code which governs redevelopment agencies. Why? Because the City of Seaside, acting as a city in acquiring and selling Hayes Park, has violated those Government Code statutes requiring that surplus land be made available for affordable housing, and preventing the sale of residential property below fair market value without the statutorily specified affordable housing requirement. By blurring the distinction between municipal and redevelopment law, defendants can then point to redevelopment law provisions and claim compliance, and cite redevelopment case law, which has an entirely different purpose and intent than Government Code statues requiring affordable housing.

Defendant's highlighting of the case Contra Costa Theatre, Inc. v. Redevelopment Agency (1982) 131 Cal.App.3d 860, is a prime example of how blurring the difference between redevelopment law and municipal law can lead to wrong results. In Contra Costa, the court interpreted Health and Safety Code section 33433, part of the Community Redevelopment Law, as allowing a redevelopment agency to hold a required public hearing on the sale of property prior to actual acquisition of the property by the redevelopment agency. The court identified the intent of Health and Safety Code section 33433 as follows: "The primary objective of section 33433 is clearly that of promoting public awareness of redevelopment acquisitions." (Id. at 865.) Further, the Contra Costa court took into consideration overall objectives and goals of the legislation (Id. at 864.) The overall purpose of the Community Redevelopment Law is to "promote the sound development and redevelopment of blighted areas". (Health & Safety Code § 33037.)

The Government Code's Surplus Land Act governing cities, and governing the City of Seaside's conveyance of public property to a private developer on July 25, 2002, does not have a purpose or

objective of "public awareness" of city "acquisitions", nor is it concerned with remedying urban blight.[2] Government Code 54220 et seq. has a very identifiable and focused objective: making absolutely certain that surplus public property owned by local governments, prior to being sold off, is first made available for affordable housing. The first paragraph of the first statute of the Surplus Land Act sets forth the unambiguous objective of the law:

> "The Legislature reaffirms its declaration that housing is of vital statewide importance to the health, safety, and welfare of the residents of this state and that provision of a decent home and a suitable living environment for every Californian is a priority of the highest order. The Legislature further declares that there is a shortage of sites available for housing for persons and families of low and moderate income and that surplus government land, prior to disposition, should be made available for that purpose."

(Govt. Code sec. 54220.)

The Government Code's Surplus Land Act, governing cities, has completely different procedures, priorities and purposes than the Health and Safety Code's Community Redevelopment Law, governing redevelopment agencies. Defendants' attempt to insert redevelopment law into this case is disingenuous and misleading.

D. City Has Forfeited Its Credibility In This Action Regarding Whether The Developer Should Be Joined As A Party To This Action.

Following the hearing on Plaintiff's motion for an ex parte temporary restraining order, counsel discussed both the interest articulated by the Court and the position articulated by defendants' counsel Claudia J. Martin that developer K&B/Bakewell should be named as a potentially necessary party to this action for taxpayer relief. While it was the position of Ms. Martin at the time of the hearing that the developer was necessary and indispensable for resolution of the TRO, and is her current position that the developer is necessary and indispensable for this action, such claims seem shallow and meaningless in juxtaposition to her contrary representations. Indeed, shortly after the hearing on the TRO, Ms. Martin

[2] While defendants attempt to construe the former Hayes Park housing development as "blight" in their opposition, their own appraiser indicates that a baseline study performed by SKMG, deemed "an in-depth study", indicates that similar residential housing units on the former Fort Ord would well be used as rental or for-sale condominium units. (Newsome Decl., Ex. G, p. 30.)

confirmed in writing her oral representation to plaintiff's counsel that K&B/Bakewell was not a necessary party to this action. (Decl. of Heidi K. Whilden, para. 3, Ex. A.) Thereafter, when plaintiff attempted to file his first amended complaint naming the developer as a party with interests at stake in the litigation, defendants objected. Defendants current claim is that the developer is necessary and indispensable in this action. Plaintiff is unable to ascertain what Defendants' position will be at the time of the hearing on this motion, but will seek to join the developer by his motion to file a First Amended Complaint on August 8, 2003.

In any event, plaintiff's motion for preliminary injunction is narrowly tailored to enjoin specific City actions, i.e., approval of final subdivision maps and issuance of permits. If the order is granted, the developer is free to continue acting under the permits already issued by the City. Additionally, the developer can continue to market and sell individual future lots so long as close of escrow is conditioned on ultimate approval and recordation of the final subdivision maps. As a Code of Civil Procedure §526a taxpayer action this lawsuit has priority on the civil calendar. Additionally, the main disputes between the parties involve questions of law, and there are relatively few factual disputes between the parties. Finally, the city has a contractual obligation under the LDA to represent the developer's interests in any lawsuit challenging the development (Newsome Decl., Ex. J, LDA Section 9.13(b) "Legal Actions"), and therefore any developer interest in City map approval and permit issuance is being adequately represented by the City.

E. Defendants' Claim That The LDA Was The Only Way It Could Afford to Purchase the Property is Simply Not True.

Defendants contend that "[t]he 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." (Opp., p. 4: 17-20) and that "if the City had not proceeded the way it did, the property could never have been acquired" (Opp., p. 30: 22-24). These claims neither excuse defendants' illegal conduct nor reflect the true facts. While the City may or may not have had sufficient funds in their coffers to pay fair

market value for Hayes Park, or even the $5.1 million it did pay on July 25, 2002, it certainly had a better offer on the table than the one it accepted, and, alternatively, could have allowed the LDA to expire by its terms while it pursued this and other offers.

The evidence before the Court, to which defendants have filed no objections and thus admit, is that a residential developer with 35 years of experience in real estate acquisition, development, construction, investment and sales within Monterey County prepared and submitted numerous bids for the acquisition and development of Hayes Park between 1994 and 1999, each time substantially increasing his offers. (Decl. Of Nader Agha, para. 1-12, Exs. A, C, D, E, F, and G.) Because the special legislation permitting Hayes Park to be disposed of outside of the FORA process did not provide the City with any actual right to obtain the land, Mr. Agha initially submitted his proposals to the Department of Defense, Army Corps of Engineers, the sole owner of the land until its July 25, 2002 conveyance. The Chief of the Corps of Engineers' Real Estate Division thanked Mr. Agha for his interest in acquiring the land, confirmed that the Army would give his proposal fair and due consideration, would later contact him, and would advise if further information was necessary. (Ibid., para. 5, Ex. B.)

In 1994, Mr. Agha was prepared to pay between $11 million- $11.5 million, based on its valuation in excess of $21 million before discounting. (Decl. Of Nader Agha, para. 4, Ex. A.) Mr. Agha remained in contact with the Army, renewing his interest and submitted further proposals. In 1999, Mr. Agha offered $25 million before discounting. (Ibid., para. 9, 10, Exs. D and E.)

In 1999, Mr. Agha submitted two written proposals to the City of Seaside for Hayes Park. The first proposal was based on the assumption that the site would be cleared for construction of new housing, for which Mr. Agha offered the City $31.5 million. (Declaration of Nader Agha, para. 11, Ex. F.) The second proposal assumed the existing homes would be updated, remodeled and made available for affordable housing, for which Mr. Agha offered in excess of $50 million. (Ibid., para. 12, Ex. G.) As defendants well know, despite their rhetoric, Mr. Agha had no duty to comply with the request in a Surplus Land Act notification (that he was not entitled to receive (Newsome Decl., Ex. H p. 3), and did not receive) that proposals should be addressed to anyone other than the Mayor, nor was he required to

submit his proposals within any timeframe imposed by defendants' questionable notice. (Opp. P. 29, fn. 8.)

Defendants' contention that "without the LDA, the City would never have owned the property at all" (Opp., p. 30: 14-15, emphasis omitted) is simply not true. The LDA provided defendants with an open door to escape from this deal, but they affirmatively elected to remain. Section 2.4(c) of the LDA provides: "If the City and Army have not entered into an Army Purchase Agreement within twenty-four months from the date hereof despite the City's diligent efforts, then either Party may terminate this Agreement without fault pursuant to Section 8.2." (Newsome Decl., Ex. J, see also Ex. O.) In fact, the City and Army had not entered into a Purchase Agreement as of May 4, 200, 24 months after execution of the LDA. (Newsome Decl., Ex. B.) Moreover, during these 24 months the City had received written offers to acquire and develop Hayes Park which would have netted the City over $50 million. (Declaration of Nader Agha, para. 12, Ex. G.) Defendants attempts to cloak themselves as mere conduits unable to do more than simply perform the ministerial duty of passing Hayes Park from the Army to K&B/Bakewell is entirely disingenuous.

F. The Conveyance of Hayes Park By The City to The Developer Was Subject to The Surplus Land Act.

Defendants' brief concedes that there are no appellate cases interpreting the Surplus Land Act, and then proceeds to offer a convoluted interpretation, contrary to the plain language of the Act and its unambiguous intent. (Opp., page 28.) Further, defendants have been inconsistent from the start regarding the Surplus Land Act. The 1998 LDA clearly states that the City was attempting to comply with the Surplus Land Act. (Newsome Decl., Ex. J, LDA Section 2.5 "Surplus Land Act".) The notice allegedly sent by the City in an ineffective attempt to comply with the Act, is an ambiguous language seeming to invite affordable housing bidders while at the same time reserving the right to deny their obligations under the Act if anyone actually responds to the notice. (Newsome Decl., Ex. H.) And now, in their Opposition brief, defendants have employed a contorted twisting of the statute's clear language and intent to come to the conclusion that it never applied in the first place.

Though apparently no published appellate court decisions yet exist interpreting the Surplus Land Act, the plain language is clear in its meaning. Moreover, even if an arguable ambiguity existed, any interpretation should be consistent with the clear intent of the legislation, which urgently and unambiguously favors public property being made available for affordable housing prior to its sale.

G. The Salvation Army Transitional Homeless Units Are Not "Affordable Housing"

Defendants characterize their obligations to provide replacement Salvation Army transitional homeless units as "affordable housing" throughout their brief, still wanting to take credit for providing "affordable housing". But these units are not what is generally recognized by statute as "affordable housing" and are simply replacement units for what the City took from the Salvation Army and was required to replace (albeit with an additional charge of $300,000 imposed on the Salvation Army. (Newsome Decl., Exs. E, J, Y, T.)) Defendants' own exhibits make clear that the Salvation Army units are "transitional housing" for "Very Low Income Households" (Newsome Decl., Ex. F, p. D-3, sec. 2.2.), and were built to replace the Salvation Army's homes on Hayes Park which were handed over to the developer, accordingly, the characterization of these units as affordable housing for "low income persons" (Opp., p. 4:9) is inaccurate and misleading.

II. PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION REGARDING BALANCING OF THE HARMS.

A. The City's Admitted "Contractual Arrangement" with the Developer to Approve All Permits and Maps is a Reason For, Not Against, A Court Order Enjoining the City Until This Action Can Be Resolved.

The City admits at page 32, lines 22-24 of its brief that it 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." Defendants therefore argue, illogically, that a court order enjoining them from approving final subdivision maps and permits would expose the City to liability to the developers. However, it is the converse that is true. If the City, on its own, delayed issuance of permits and maps it

could arguably expose itself to liability to the developer for breach of contract.[3] On the other hand, the City would be insulated from contractual liability by a court order enjoining issuance of permits and approval of final subdivision maps pending resolution of this action. A party to a contract cannot be held liable for breach of contract if its performance is enjoined by a court.

B. Any Harm to the Developer Due to Halting Construction is the Developer's Fault For Commencing Construction Prior to Recordation of the Final Subdivision Map.

The developer only took title to Hayes Park on July 25, 2002, just nine months before this action was filed. Bulldozing did not commence until October 2002, six months before this action was filed. And the housing prices were not announced until one month before this action was filed. The developer has moved so fast to develop and cash out on this development that it did not even wait until a final subdivision map was approved and recorded before commencing construction of houses for sale, as required by Government Code section 66499.30.[4] Any harm that may come to the developer by a delay in the approval and issuance of permits, would arise from the developer's own conduct in rushing the development prior to approval of the required final subdivision maps. Additionally, the value of residential lots with water on the Monterey Peninsula have consistently risen. Thus, it is not at all improbable that any incidental costs in delaying development would be more than offset by the appreciation in the value of the real estate.

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[3]Plaintiff is confident the City would prevail in such a legal action, given that since May 2003 the developer has been illegally commencing construction of homes for sale in violation of the Subdivision Map Act, as argued in plaintiff's initial Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, pages 27-28; see also Ex. 7. In addition, for all of the reasons stated in plaintiff's pleadings, the attempted conveyance of Hayes Park is void as a matter of law and the City of Seaside would be wholly justified in taking all necessary action to halt the giveaway of over $100 million dollars of public property.

[4]Section 66499.30 allows an exception for model homes, and for contracts of sale or contracts of construction so long as conditioned on final approval of the subdivision map. It appears the existing sales contracts are conditioned on approval of the subdivision map (by necessity, because until the final map is approved and recorded, the County Recorder's property records show only one legal lot of record, the original 105 acre parcel). The developer, however, not only entered into contracts for the construction of homes, which is permitted, but has openly commenced construction of dozens of houses for sale in violation of the law.

III. PLAINTIFF'S REPLY REGARDING BOND

Plaintiff submits that, should the Court find in his favor, the Court has discretion to set a bond in a an amount less than the anticipated damage to defendants, given the merits of the litigation, the legitimate public interest nature of the action, the minimal hardship defendants face, and the inability of the plaintiff to post a substantial bond.

Section 529 of the Code of Civil Procedure governs the setting of bonds, and provides that a court "must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined such damages, not exceeding an amount to be specified, as the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." However, a trial court has discretion to waive this requirement in certain circumstances. (See, e.g., Conover v. Hall (1974) 11 Cal.3d 842 [language of sec. 529 allows for some trial court discretion and codifies the common law authority of the courts]; Code Civ. Proc. sec. 995.010 et seq. [Bond and Undertaking Law of 1982]; Fam. Code sec. 6200 et seq. [Domestic Violence Protection Act]; Code Civ. Proc. sec. 995.220 [public entities and officers].

A substantial bond should not be required of an individual litigant bringing a public interest action against a public entity and its officer to right a wrong suffered by the plaintiff and his community. Plaintiff is prosecuting this taxpayer action for the benefit of all Seaside residents. He neither seeks nor will recover any monetary damages through this action apart from the benefits which will enure to all Seaside taxpayers. Plaintiff is unable to afford a substantial bond. Should the Court impose such a bond, plaintiff would be effectively precluded from obtaining injunctive relief pending the time of trial.

Moreover, defendants are confused regarding the purpose of the bond in this action. If the City prevails, it would not be out of pocket its expenses (the City's $10 million estimate seems wildly exaggerated given that the City's total annual budget is only $15 million). Rather, it only potential claim would be for expenses arising from delay. But any incremental loss in fee revenue would be offset as the developers will continue building and property values are likely to continue skyrocketing, given the scarcity of available water and developable lots elsewhere on the Peninsula. And if plaintiff ultimately prevails, the City would not be entitled to any potential delay costs (although its citizens would benefit).

Therefore, because defendants would likely suffer only minimal loss by a delay until this matter could be tried, and because plaintiff will be prevented from access to the court for what will have been recognized as a *prima facie* meritorious taxpayer action if this motion is granted, plaintiff respectfully requests that the posting of a bond be waived, or, alternatively, that the bond be set at the nominal amount of one thousand dollars ($1000).

Dated: August 1, 2003

LAW OFFICES OF HEIDI K. WHILDEN

Attorneys for Plaintiff