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APPENDIX A
MEMORANDUM OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 28, 2024)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; ET AL.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

D.C. No. 3:20-cv-0 1896-AJB-DEB

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding

Argued and Submitted May 7, 2024
Pasadena, California

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

MEMORANDUM*

This case arises out of the County of San Diego's denial of Village Communities'[1] mixed-use development proposal near West Lilac Road in San Diego County. As a condition of approval, the County required that Village Communities obtain fifty easements from the properties adjoining West Lilac Road to mitigate wildfire risk from the development. Village Communities did not obtain the easements, and the San Diego Board of Supervisors voted to deny the proposal because of fire safety concerns. Village Communities sued the County of San Diego and San Diego Board of Supervisors (collectively, "the County") under 42 U.S.C. § 1983 for inverse condemnation and a temporary taking under the Fifth Amendment as well as for equal protection and substantive due process violations under the Fourteenth Amendment. After the district court ruled on the parties' cross motions for summary judgment, only the Fifth Amendment takings claims remained.[2]

The district court adopted the parties' proposed final pretrial order, which stated that the only claim Village Communities was pursuing was the inverse

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] Plaintiffs-Appellants are real estate development entities Village Communities, LLC, Shirey Falls, LP, Alligator Pears, LP, Gopher Canyon, LP, Ritson Road, LP, Lilac Creek Estates, LP, Sunflower Farms Investors, LP. We refer to them collectively as "Village Communities."

[2] The district court requested and considered supplemental briefing on the takings claims before ruling on the cross motions for summary judgment.

condemnation claim. The district court then granted the County's motion in limine to preclude Village Communities from presenting testimony from property owners along West Lilac Road.[3] After the motion in limine ruling, the district court issued an order vacating the May 2023 trial date and requesting supplemental briefing on whether there was a taking under *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). The district court sua sponte granted summary judgment in the County's favor.

Village Communities appeals the district court's order granting summary judgment sua sponte, the order granting the County's motion in limine, and the order denying Village Communities' motion to amend the final pretrial order. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Because Village Communities had adequate notice and time to respond, the district court did not abuse its discretion in ruling under Federal Rule of Civil Procedure 56(f). *See Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) ("A district court's decision to grant summary judgment *sua sponte* is reviewed for abuse of discretion."). "After giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3). "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward

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[3] The district court also denied Village Communities' motion to amend the final pretrial order.

with all of her evidence." *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)).

Before the district court granted summary judgment sua sponte, there had been cross-motions for summary judgment and two rounds of supplemental briefing on the takings claim. And the district court had warned Village Communities specifically that it "[saw] no evidence in support of Plaintiffs' takings claim." This warning—plus the fact that the parties had the opportunity to present all their evidence with their cross-motions for summary judgment—was sufficient to put Village Communities "on notice that [it] had to come forward with all of [its] evidence."[4] *Albino*, 747 F.3d at 1176 (quoting *Celotex*, 477 U.S. at 326).

2. The district court did not abuse its discretion in disallowing Village Communities' two new takings theories as contrary to the pretrial order. *See Acorn v. City of Phoenix*, 798 F.2d 1260, 1272 (9th Cir. 1986) ("We review the district court's decision to exclude issues as contrary to the pretrial order for a clear abuse of discretion."), *overruled on other grounds by Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc). As the district court correctly noted, the operative second amended complaint and final pretrial order included

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[4] Although Village Communities argues that the district court did not comply with Rule 56(f) because it limited the supplemental briefs to fifteen pages and did not allow for a reply brief, Village Communities does not provide any authority to support its position. We similarly see no merit in Village Communities' argument that the district court violated Rule 56(f) because it "failed to acknowledge" counsel's declaration that Village Communities would present additional evidence at trial.

only one takings theory—that the County's "easement condition required [Village Communities] to expend money in exchange for obtaining the easements and as such, the condition resulted in an unconstitutional taking of property or money under the Takings Clause of the Fifth Amendment." Even "liberally construe[ing]" the pretrial order, *In re Hunt*, 238 F.3d 1098, 1101 (9th Cir. 2001), Village Communities' two new takings theories—(1) that the County's requirement that Village Communities "assign and convey" the easements to the County was an unconstitutional exaction; and (2) that the "easement condition was a taking of Appellants' right to process the permit application"—were not clearly set out in the final pretrial order. The district court therefore did not abuse its discretion in barring these new theories.[5] *See S. Cal. Retail Clerks Union & Food Emps. Joint Pension Tr. Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984) ("Under Rule 16(e) of the Federal Rules of Civil Procedure, a pretrial order controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. We have consistently held that issues not preserved in the pretrial order have been eliminated from the action.").

3. Nor did the district court abuse its discretion in denying leave to amend the final pretrial order to include Village Communities' two additional takings theories. *Hunt v. Cnty. of Orange*, 672 F.3d 606, 616 (9th Cir. 2012) ("We review the district court's denial of a motion to modify a pre-trial order for abuse of dis-

[5] Village Community also argues that its proposed jury instructions and verdict form are "part and parcel" of the final pretrial order and should be considered together. But Village Communities cites no authority or evidence to support this contention.

cretion." (citation omitted)). A district court "*may* modify the order issued after a final pretrial conference *only to prevent manifest injustice*." Fed. R. Civ. P. 16(e) (emphasis added). Thus, while the district court has discretion to modify the final pretrial order, it need not do so. Here, we see no abuse of discretion nor any manifest injustice.

4. Although we disagree with the district court's reasoning, we nevertheless affirm[6] the summary judgment ruling on alternative grounds.[7] As noted above, Village Communities' only claim on appeal is an inverse condemnation takings claim; a claim that the easement condition "deprived Plaintiffs of their constitutional right under the Fifth Amendment Takings Clause of the U.S. Constitution by requiring Plaintiffs to pay money or convey property as a condition of approving their permit application."[8]

"The Takings Clause of the Fifth Amendment provides that 'private property' shall not 'be taken for

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[6] As Village Communities conceded at oral argument (Oral Argument at 2:50– 3:11), to grant the relief Village Communities seeks, we would need to answer the question left open in *Koontz*—"whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause." *Koontz*, 570 U.S. at 610. This question has not yet been answered in our circuit nor in any other circuit. Because we find that the inverse condemnation claim fails on well-settled grounds, we assume that damages would be available in the circumstances here, acknowledging that the Supreme Court left this question open.

[7] We may affirm on any ground supported by the record. *See, e.g., Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015).

[8] Village Communities conceded at oral argument that it did not make a regulatory takings claim. Oral Argument at 3:12–3:17.

public use, without just compensation.'" *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022) (citation omitted). And under the unconstitutional conditions doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 570 U.S. at 604 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)). *Koontz* involves a "'special application' of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id.* (citations omitted). Under *Koontz*, the government is allowed to "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.* at 605–06.

The Supreme Court explained that this doctrine was meant to address the concern that

> land-use permit applicants are especially vulnerable to . . . coercion . . . because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.

Id. at 604–05 (citations omitted). For example, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a permit to build a three-bedroom house was impermissibly conditioned on the landowners granting an easement for the public to cross the property for easier access to the county park and cove. *Id.* at 828. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a permit to redevelop land was impermissibly conditioned on the landowner "dedicat[ing] the portion of her property lying within the 100–year floodplain for improvement of a storm drainage system" and "dedicat[ing] an additional 15–foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway." *Id.* at 380. And in *Koontz*, a landowner who sought permits from his water district to develop 3.7 acres of his 14.9-acre tract of land could not receive a permit unless (1) he reduced the size of his development to one acre and deeded the remaining 13.9 acres to the water district or (2) deeded 11 acres to the water district *and* hired contractors to improve about fifty acres of district-owned land. 570 U.S. at 601–02.

This case is distinguishable from *Koontz*, *Nollan*, and *Dolan*. Assuming that acquiring the West Lilac Road easements would have required a significant expenditure from Village Communities, Village Communities did not carry its burden to show that this condition was used to coerce it into "voluntarily *giving up* property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605 (emphasis added). None of Village Communities' own land was at risk of being taken. Even assuming (without deciding) that the County's proposed condition for the mitigation of the extreme fire safety risk from the large new development was "coercive," the

condition was, at most, "coercing" Village Communities into *acquiring* additional property interests in the form of easements. And Village Communities provides no authority that requiring that a landowner *acquire* property as a condition of permit approval constitutes the type of unconstitutional *taking* it claims occurred here.[9] *See Ballinger*, 24 F.4th at 1292 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred. . . . [A]ppropriation means *taking* as one's own." (citations omitted)). Because the easement condition was not a taking of the type claimed by Village Communities, it could not have been an unconstitutional exaction under *Koontz*. *Id.* at 1298 ("Because the [condition that the landowners pay a] relocation fee [to evicted tenants] was not a taking, it cannot have been an unconstitutional exaction."). Village Communities' takings claim therefore fails, and we affirm the grant of summary judgment.

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[9] We express no view on whether the type of claim made by Village Communities can constitute a regulatory takings claim. We similarly express no view on whether an "irrational" proposed condition can violate the substantive due process rights of a property owner.

5. We decline to consider Village Communities' challenge to the motion in limine ruling because it was raised for the first time on appeal.[10] *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal.").

AFFIRMED.

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[10] The parties do not dispute that this argument was raised for the first time on appeal.

APPENDIX B
ORDER DENYING PUBLICATION REQUEST, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 15, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; ET AL.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

D.C. No. 3:20-cv-0 1896-AJB-DEB
Southern District of California, San Diego

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

ORDER

Plaintiffs-Appellants' request for publication dated October 24, 2024 is DENIED.

APPENDIX C
MANDATE, U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
(OCTOBER 10, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; ET AL.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO and BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

D.C. No. 3:20-cv-0 1896-AJB-DEB U.S. District Court for Southern California, San Diego

MANDATE

The judgment of this Court, entered August 28, 2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

APPENDIX D
ORDER DENYING MOTION FOR NEW TRIAL AND TO AMEND FINAL PRETRIAL CONFERENCE ORDER, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA (JULY 24, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA, U.S. District Judge.

ORDER:

(1) DENYING MOTION FOR A NEW TRIAL, TO ALTER OR AMEND JUDGMENT, AND FOR RELIEF FROM JUDGMENT; and

(2) DENYING MOTION FOR LEAVE TO AMEND/CORRECT THE FINAL PRE-TRIAL CONFERENCE ORDER

(Doc. Nos. 132, 133)

Presently before the Court is Plaintiffs' motion for a new trial, to alter or amend judgment, and for relief from judgment, (Doc. No. 132), and motion for leave to amend the final pre-trial conference order, (Doc. No. 133). Defendants County of San Diego and Board of Supervisors of County of San Diego (collectively, "Defendants") filed an opposition, (Doc. No. 139), to which Plaintiffs replied, (Doc. No. 140). For the reasons set forth below, the Court DENIES Plaintiffs' motions. Accordingly, the Court VACATES the hearing set for August 17, 2023.

I. Background

The facts of this case have been recited in previous orders. (*See* Doc. No. 55.) Plaintiffs challenge the Court's May 15, 2023 Order, which granted summary judgment, *sua sponte*, on Plaintiffs' takings claim. (*See* Doc. No. 128.) A brief procedural history of this case provides helpful context.

In February 2022, the parties filed cross-motions for summary judgment. Plaintiffs moved for partial summary judgment for their first claim for Inverse Condemnation, second claim for Temporary Taking, third claim for Equal Protection Violation, and fourth claim for Substantive Due Process violation on the grounds that there is no genuine issue as to any material fact. (*See* Doc. No. 37.) Defendants moved for summary judgment as to all of Plaintiffs' claims. (*See* Doc. No. 36.)

On June 2, 2022, the Court took the motions under submission and issued an order requiring supplemental briefing, as the Parties fell "far short of briefing the issue of whether a taking occurred. . . . " (Doc. No. 52 at 2.) After Defendants filed a supplemental brief, the Court provided Plaintiffs with an opportunity to respond. The Court then denied Plaintiffs' motion for summary judgment, denied Defendants' motion as to the takings claims, and granted Defendants' motion as to the Substantive Due Process and Equal Protection claims. (*See* Doc. No. 55.)

Thereafter, the Parties filed their respective jury instructions, various motions in limine, and trial briefs. The Court thereafter granted Defendants' motion in limine to exclude testimony from property owners along West Lilac Road, and thus "*sua sponte* [found] no triable issue as to Plaintiffs' takings claim in that the Court [saw] no evidence in support of Plaintiffs' takings claim." (Doc. No. 123 at 1.) Thus, on May 15, 2023, the Court instructed Plaintiffs "to file a supplemental brief explaining what evidence of a taking exists . . . under *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 608–09 (2013). . . . " (*Id.* at 2.) The Court provided Defendants with an opportunity to respond. Based on the briefs submitted by the Parties, the Court granted summary judgment, *sua sponte*, in Defendants' favor as it found Plaintiffs had failed to submit evidence of a violation of the takings clause under the Fifth Amendment. (Doc. No. 128.) Additionally, the Court declined to consider two additional theories of Plaintiffs' takings claim as they were not encompassed in their Second Amended Complaint or Final Pretrial Conference Order. (*Id.* at 3.) The instant motions follow.

II. Legal Standard

Where the Court's ruling has resulted in a final judgment or order, a motion for reconsideration may be based upon Rule 59(e) (motion to alter or amend judgment) or Rule 60(b) (relief from judgment) of the Federal Rules of Civil Procedure. *See School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Absent "highly unusual circumstances," reconsideration of a final judgment or order is appropriate only where (1) the Court is presented with newly-discovered evidence, (2) the Court committed "clear error or the initial decision was manifestly unjust," or (3) there is an intervening change in the controlling law. *Id.* at 1263. "Clear error occurs when 'the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.'" *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). It cannot be used to ask a court to rethink what it has already thought, merely because a party disagrees with the court's decision. *Collins v. D.R. Horton, Inc.*, 252 F.Supp.2d 936, 938 (D. Az. 2003) (citing *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D. Az. 1998).

III. Discussion

Plaintiffs bring the instant motion under Rule 59(e) on the grounds that the Court "needs to correct clear errors and prevent manifest injustice," and under

Rule 60(b)(1), (2), and (6) "to correct the Court's clear error and Plaintiffs' surprise." (Doc. No. 132-1 at 13.)

Plaintiffs argue the Court committed clear error by granting summary judgment, *sua sponte*, as to Plaintiffs' first takings theory, ruling that "Plaintiffs fail to provide evidence that Defendants County of San Diego, et al. ("County") ever demanded that Plaintiffs pay money for the easements." (*Id.* at 7 (citing Doc. No. 128 at 4).) First, Plaintiffs specifically assert they were not provided with adequate notice and a reasonable opportunity to respond under Federal Rule of Civil Procedure 56(f) of the Court's consideration of granting summary judgment. (*Id.* at 15–18.) Second, Plaintiffs contend the Court's dismissal of Plaintiffs' takings theory for lack of evidence was clearly erroneous. (*Id.* at 14.) Plaintiffs assert the Court further erred by barring Plaintiffs' two other takings' theories; namely, that the County's plan to require the assignment and conveyance of the easements was an extortionate demand for Plaintiffs' property, and that the easement condition resulted in a taking of Plaintiffs' right to process its land use permit application. (*Id.* at 7–8.)

A. Adequate Notice and Reasonable Opportunity to Respond

Courts in this circuit "have long recognized that, where the party moving for summary judgment has had a full and fair opportunity to prove its case, but has not succeeded in doing so, a court may enter summary judgment *sua sponte* for the nonmoving party." *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (en banc); *see Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir. 2003) ("Even

when there has been no cross-motion for summary judgment, a district court may enter summary judgment *sua sponte* against a moving party if the losing party has had a 'full and fair opportunity to ventilate the issues involved in the matter.'" (quoting *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982))). A district court may only grant summary judgment *sua sponte* if the losing party has reasonable notice that the claims are at issue and has an opportunity to be heard. *Norse v. City of Santa Cruz*, 629 F.3d 966, 971–72 (9th Cir. 2010); *see also United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008). "Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Portsmouth Square, Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985); *see also S.R. Nehad v. Browder*, 929 F.3d 1125, 1142 (9th Cir. 2019) (reversed the district court's *sua sponte* grant of summary judgment on appellants' negligence and wrongful death because it failed to provide appellants' notice and the opportunity to respond since those issues were not the subject of appellees' motion for summary judgment).

Here, the Parties' cross-motions for summary judgment on Plaintiffs' takings claim were fully briefed as of April 2022. Plaintiffs submitted declarations and various exhibits in support of their motion and in opposition to Defendants' motion. Thus, as of April 2022, Plaintiffs "had a full and fair opportunity to develop and present facts and legal arguments in support of its position." *See Chamness v. Bowen*, No. CV 11-01479 ODW FFMX, 2011 WL 3715255, at *5 (C.D. Cal. Aug. 23, 2011), *aff'd*, 722 F.3d 1110 (9th Cir.

2013) (citing *Portsmouth Square, Inc.*, 770 F.2d at 869). Moreover, as the Court instructed the Parties to further brief the takings claim issue, Plaintiffs were put on notice at least twice that the Court "found no triable issues" and "sees no evidence in support of Plaintiffs' takings claim." (Doc. No. 123 at 1.)

The Court finds unavailing Plaintiffs' claim they did not have a full and fair opportunity to respond as "the Court was apprised Plaintiffs had not presented all their evidence and that they would present 'full proof' at the time of trial." (Doc. No. 132-1 at 18.) In its order requiring supplemental briefing as to Plaintiffs' takings claim, the Court stated it "found no triable issue as to Plaintiffs' takings claim in that the Court sees no evidence in support of Plaintiffs' takings claim." (Doc. No. 123 at 1.) The Court thus directed Plaintiffs "to file a supplemental brief explaining what evidence of a taking exists. . . . " (*Id.* at 2.) Despite this, Plaintiffs merely submitted "examples of the type of evidence Plaintiffs would present on the burdening /taking committed by Defendants" and asserted "the full proof of the burdening/taking will be presented at the time of trial." (Declaration of Mark Dillon, Doc. No. 125-1, ¶ 2.) This was not what the Court directed the Parties to file. Thus, as the Court wrote in its summary judgment order, "Plaintiffs fail to demonstrate that Defendants' request for easements 'would be a taking independent of the conditioned benefit,' as Plaintiffs do not show they were required to pay money in exchange for the easements." (Doc. No. 128 at 5.) Finally, Plaintiffs sought no additional time to file the supplemental briefing nor protested the briefing schedule in the first instance. The Court therefore

finds Plaintiffs' claim that they did not have an opportunity to brief its takings claim is without merit.

Separately, it is also telling that Plaintiffs' motion cites to authority outside this Circuit to suggest the Court improperly entered *sua sponte* summary judgment. Plaintiffs' cite the First Circuit case *Rogan v. Menino*, 175 F.3d 75, 78–80 (1st. Cir. 1999), where the court held "the mere announcement that the court might dismiss the defendants at the final pretrial conference falls well short of the *specific* notice to which parties are entitled" under Rule 56. While the Court is not bound by the First Circuit, the Court gave specific notice in its April 18, 2023 Order that it found no triable issue or evidence in support of Plaintiffs' takings claim, thus requiring supplemental briefing.

B. Lack of Evidence of Plaintiffs' Takings Theory

Plaintiffs next assert their supplemental brief included evidence that the County's easement condition was an impermissible demand for money, raising a genuine factual dispute precluding summary judgment. (Doc. No. 132-1 at 19.) Plaintiffs further assert the evidence, "coupled with common sense[,]" was sufficient to preclude grant of summary judgment. (*Id.*)

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The court does not make credibility determinations, nor does it weigh conflicting

evidence. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992). But conclusory and speculative testimony in affidavits and moving papers is insufficient to raise triable issues of fact and defeat summary judgment. *Thornhill Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties present must be admissible. Fed. R. Civ. P. 56(c).

In the Court's Order *sua sponte* granting summary judgment in favor of Defendants, it noted that

> while Plaintiffs' attached exhibits indicate that money *could have* been requested in exchange for easements, they have failed to show that any demand was actually made. (*See* Deposition of Mark Wardlaw, Doc. No. 125-1 at 28 ("However [Plaintiffs] chose to acquire the easements was up to them. Whether it was for a fee, whether it was for some mutual benefit, that was not–it's really not germane to the requirement of the easement."); Deposition of David Nissen, *id.* at 30–32 (stating West Lilac Road property owners could "conceivably" request money in return for the easement); Deposition of Mark Slovick, Doc. No. 125-1 at 35 (stating the county easement form contemplated that Plaintiffs would pay money to the property owners in exchange for the grant of easements); Deposition of David Sibbet, *id.* at 39 (affirming that it was *possible* that "one or more of [the] property owners could literally extort money from the landowner that needs that easement").)

(Doc. No. 128 at 5.) In Plaintiffs' instant motion, they merely cite the same evidence as above, which the Court previously found speculative.

Plaintiffs also argue the Court "weighed and rejected the evidence Plaintiffs offered, which is inconsistent with established summary judgment standards." (Doc. No. 132-1 at 20.) This contention is incorrect. In the context of a motion for summary judgment, the Court must not weigh the evidence and determine the truth of the matter. *Anderson*, 477 U.S. at 249. However, the Court is required to undertake some evaluation of the evidence. Indeed, the point is whether admissible evidence exists on both sides of an issue to create a question of fact. In the end, only admissible evidence may create a question of fact. Fed. R. Civ. Proc. 56. Here, the Court found Plaintiffs' evidence was largely inadmissible speculation and that any admissible evidence presented was insufficient to create a triable issue of fact that there was a demand for money constituting a taking. Specifically, Plaintiffs relied largely upon the testimonies of third parties—rather than that of the private property owners along West Lilac Road—who speculated the easements would have to be purchased. On this basis, these third-party witnesses were struck as part of the in limine motions before the court under Federal Rules of Evidence 104, 401, 402 and 403. (*See* Doc. No. 121.) This determination of a lack of admissible evidence on an issue is within the contemplation of Rule 56 and does not constitute weighing of evidence.

For example, the County's Planning Director Mark Wardlaw testified:

Q. The intent was to purchase the required fuel modification roadside easements. Fair statement?

A. Purchase–

MR. HEINLEIN: Objection. Go ahead.

BY MR. DILLON:

Q. Yes, right?

A. Purchase and secure the easements.

Q. Right?

A. Yes.

(Doc. No. 125-1 at 25–26.) However, Mr. Wardlaw later clarified:

Q. Okay. The applicant could have purchased the off-site easements and still not receive county staff's recommendation for the board to approve the project, correct?

A. I would say yes with a caveat, in that how the applicant secured the easements was not of interest to us. It could have been an option. It could have been a purchase. It could have been an agreement that gives me the access rights and I'll go trim your weeds, whatever it was. We didn't specify that they had to purchase. They just had to secure acquire. I think that was the intent of the communication.

* * *

Q. And earlier you testified pretty clearly that the applicant would need to purchase those off-site easements, right?

> A. I did, but I should clarify that that was too general of a comment for me, so I didn't mean to misconstrue. The key is that the applicant had to secure the easement in order to enable the maintenance and clearing of the vegetation.

(Doc. No. 139-1 at 21–22.)

Plaintiffs further "offer four signed declarations from West Lilac Road residents to rebut the erroneous assertion that no West Lilac Road residents ever asked for money in exchange for an easement." (Doc. No. 132-1 at 26.) However, the Court previously granted Defendants' Motion in Limine as to these witnesses and found it "notable that Plaintiff has stated that no property owner along West Lilac Road ever asked for money in exchange for an easement and that not a single easement was obtained." (Doc. No. 121 at 1–2.) Thus, the Court excluded the speculative post hoc testimony under Federal Rules of Evidence 401 and 403. (*Id.*) Indeed, during Jon Rilling's deposition, individually and as person most knowledgeable of Village Communities, LLC, when asked "And did any homeowner, any property owner along West Lilac, give you a dollar mount that they wanted in exchange for it?" stated, "We never got there." (Doc. No. 36-5 at 412.) When again asked, "And none of those individuals ever gave you a price that they would demand in exchange for that easement, correct?" Mr. Rilling responded, "We never got to the point of, of the transaction." (*Id.* at 414.) In reviewing Plaintiffs' offered evidence in light of Federal Rule of Civil Procedure 56(c)(2) and (4), the record belies Plaintiffs' claim that the evidence was sufficient and raised disputed facts

precluding summary judgment. As such, the Court does not find it committed clear error.

C. Barring of Plaintiffs' Other Takings Theories

Plaintiffs next assert it was clear error to bar Plaintiffs' other takings theories; specifically, that the County's plan to require the assignment and conveyance of the easements was an extortionate demand for Plaintiffs' property, and that the easement condition resulted in a taking of Plaintiffs' right to process its land use permit application. (Doc. No. 132-1 at 29–31.)

The Final Pre-Trial Conference Order ("PTO") states:

> Plaintiffs contend that the County Board of Supervisors denied the project because of Plaintiffs' failure to acquire the 50 offsite fuel modification easements; and that the County Board's easement condition required Plaintiffs to expend money in exchange for obtaining the easements and as such, the condition resulted in an unconstitutional taking of property or money under the Takings Clause of the Fifth Amendment to the Constitution.

(Doc. No. 86 at 4.) The PTO further states:

> Plaintiffs must prove each of the following elements by a preponderance of the evidence: . . . 2. The County Board of Supervisors deprived Plaintiffs of their constitutional right under the Fifth Amendment Takings Clause of the U.S. Constitution by requiring Plaintiffs to pay money or convey property as

> a condition of approving their permit application.

(*Id.* at 5.) Pursuant to Federal Rule of Civil Procedure 16 (and consistent with the express terms of the parties' pretrial order in this action), pretrial orders are binding on the parties and limit the legal theories that may be pursued at trial.

> Pretrial orders play a crucial role in implementing the purposes of the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Unless pretrial orders are honored and enforced, the objectives of the pretrial conference to simplify issues and avoid unnecessary proof by obtaining admissions of fact will be jeopardized if not entirely nullified. *Accordingly, a party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms.* Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial.

United States v. First Nat'l Bank, 652 F.2d 882, 886 (9th Cir. 1981) (emphasis added). As in *First Nat'l Bank*, the PTO in this case was signed by both counsel and filed and docketed by the clerk on January 26, 2023, and has been treated by the Parties as a valid and effective order throughout this litigation. (*See* Doc. Nos. 82, 86.)

Consistent with the PTO, Plaintiffs in this action did not pursue a takings claim under the theory that the easement condition resulted in a taking of Plaintiffs' right to process its land use permit application. *S. Cal. Retail Clerks Union & Food Emps. Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (citing *United States v. Joyce*, 511 F.2d 1127, 1130 n.1 (9th Cir. 1975)). Nor does the Court find Plaintiffs encompassed in the PTO the theory that the County's plan to require the assignment and conveyance of the easements was an extortionate demand for Plaintiffs' property. To consider the pleadings and the PTO as broadly as Plaintiffs contend would prejudice Defendants, as Defendants had no opportunity to conduct discovery as to these theories. Indeed, after three years, two amended complaints, and cross-motions for summary judgment, Plaintiffs failed to raise these theories until they filed their trial brief, proposed jury instructions, and proposed verdict form on April 6, 2023. (*See* Doc. Nos. 89, 90, 105.)

Moreover, the Court in unpersuaded by Plaintiffs' assertion that they had no opportunity to respond to the PTO bar of these two theories, or that the Court "should have granted Plaintiffs either a reply brief or further argument. . . . " (Doc. No. 132-1 at 20.) To note, Plaintiffs did not request leave to file a reply. Additionally, Plaintiffs are aware of their right to file a motion for leave to file a reply or sur-reply, as they have previously done. (*See, e.g.*, Doc. No. 46); Judge Anthony J. Battaglia Chamber Rule II.E (indicating parties may request leave of Court to file sur-replies). Nor is the Court persuaded by Plaintiffs' argument that "it was a substantive error for the Court to quote, at the County's instigation, not from Plaintiffs' claim,

but rather from the PTO summary of the agreed-upon, non-argumentative statement of the nature of the case to be read to the jury." (Doc. No. 132-1 at 31 (internal citations omitted).) Plaintiffs fail to cite any case law in support of this theory that the Court committed clear error by relying upon the PTO, and the Court finds none. As such, the Court finds it did not commit clear error by barring Plaintiffs' two takings theories.

IV. Conclusion

Based on the foregoing, the Court DENIES Plaintiffs' motion for a new trial, to alter or amend judgment, and for relief from judgment, (Doc. No. 132), and DENIES AS MOOT motion for leave to amend the final pre-trial conference order, (Doc. No. 133).

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: July 24, 2023

APPENDIX E
FINAL PRE-TRIAL CONFERENCE ORDER
(FEBRUARY 2, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 3:20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA, U.S. District Judge.

FINAL PRE-TRIAL CONFERENCE ORDER

[TOC, Omitted]

INTRODUCTION

Pursuant to the Court's Second Amended Scheduling Order (ECF No. 74), the Court's Order on Defendants' Motion for Reconsideration (ECF No. 79), and Local Rule 16.1(f)(6), Plaintiffs Village Communities, LLC, *et al.* and Defendants the County of San Diego

and the Board of Supervisors of County of San Diego hereby submit this [Proposed] Final Pre-Trial Conference Order in the captioned case. Per the Court's Second Amended Scheduling Order (ECF No. 74), the trial will be heard before Judge Battaglia in Courtroom 4A on May 2, 2023 and will last 3 weeks.

A. Statement of the Case Local Rule 16.1(f)(6)(c)(1)

To help you follow the evidence in the case, I will read you a brief summary of the nature of the case:

Plaintiffs owned 608 acres of land in unincorporated San Diego County near Interstate 15, north of the City of Escondido. In 2012, Plaintiffs' predecessor submitted a permit application to the County to develop the proposed Lilac Hills Ranch project on the 608-acre project site. Plaintiff Village Communities took over the majority interest in the land in 2017 and became the project applicant.

In 2019, the County told Plaintiffs that the County Fire Authority identified concerns with the project's wildfire safety and evacuation measures. While Plaintiffs continued to revise the project to address requests from County staff, in late 2019 the County Fire Authority requested that Plaintiffs obtain "fuel modification" roadside easements from 50 landowners along West Lilac Road. West Lilac Road is one of the evacuation routes, and a roadside fuel modification easement grants to the easement holder the right to enter a portion of the roadside and clear combustible vegetation as a fire prevention measure. In 2020, staff recommended project denial because Plaintiffs did not acquire the easements.

[. . . .]

Exhibit No. 42

TITLE Email from Slovick to Rilling re Request May 29, 2020.

DESCRIPTION Email from Mark Slovick to Jon Rilling dated May 29, 2020 (first two pages of Plaintiffs' Exhibit 224)

G. Statement of Stipulated Facts Local Rule 16.1(f)(6)(c)(5)

The parties have either agreed (stipulated) or admitted to the following facts and such facts require no further proof:

1. Plaintiff Village Communities, LLC was the beneficial owner of the subject property and is the beneficial owner of the claims by and through assignments and its 100 percent ownership interest in the following limited partnerships: (1) Shirey Falls, LP; (2) Alligator Pears, LP; (3) Gopher Canyon, LP; (4) Ritson Road, LP; (5) Lilac Creek Estates, LP; and (6) Sunflower Farms Investors, LP – record owners of the subject property.

2. Defendant County of San Diego is a local government within the State of California responsible for land-use permitting and environmental review within the unincorporated areas of San Diego County.

3. Defendant Board of Supervisors of the County of San Diego is the duly elected decision-making body of Defendant County.

4. The Lilac Hills Ranch project site is located on approximately 608 acres in unincorporated North San Diego County, California.

5. The project site is approximately one-half mile east of Interstate 15 (I-15) and Old Highway 395.

6. Portions of the project site are located south of West Lilac Road approximately 10 miles north of the City of Escondido.

7. The Project proposed 1,746 homes; a town center with a 50-room country inn and 90,000 square feet of commercial, retail, and office uses; a K-8 school on a 9.7-acre site; a 200-bed group care facility; a senior community center; a community purpose facility (including a fire station site and a 24-hour fully staffed fire station); 25.6 gross acres of public and private parks; 16 miles of multi-use community trails and pathways, waste and water recycling facilities; and approximately 104 acres of permanent open space to retain sensitive biological/wetland habitat, cultural resources, and some existing agriculture.

8. The Project application submitted by the original applicant Accretive Investments, Inc. involved requests for a General Plan Amendment, Specific Plan, Rezone, Tentative Maps, Major Use Permit, and Site Plan to implement the Project.

9. The Project's planning and processing spanned an approximate 10-year period.

10. In November 2009, then-applicant Accretive Investments requested authorization to apply for a General Plan Amendment through County Board Policy I-63, at the time when County was in the long-standing process of updating its General Plan.

11. Due to the General Plan update process, Policy I-63 provided that any applications for amendments to the General Plan must be authorized by the

Planning Director, Planning Commission, or Board of Supervisors and that property owners could present private requests to initiate General Plan Amendments, and such requests were referred to as a "Plan Amendment Authorization."

12. On December 17, 2010, the Planning Commission granted the Plan Amendment Authorization, which gave the green light for the Project applicant to move forward with its project application.

13. In August 2011, the County's Board adopted its General Plan Update.

14. In April 2012, Accretive Investments submitted its development application to the County, including its request for a General Plan Amendment to the Land Use and Mobility Elements of the County General Plan and associated community plan amendments.

15. In May 2012, the County publicly circulated the Notice of Preparation of the Draft Environmental Impact Report (commonly referred to as an "EIR") for the project and held an EIR public scoping meeting in July 2012.

16. In July 2013, the County completed the Draft EIR for the project, which was made available for public review and comment from July 3 to August 19, 2013.

17. Based on the comments received, the County required substantial changes to the Draft EIR, and further required that it be recirculated for an additional 45-day public review and comment period from June 12 to July 28, 2014.

18. In 2015, the County required completion of the Project's Draft Final EIR (2015 Final EIR), which included the County's written responses to public and agency comments, clarifications to the EIR, and minor modifications to the Project, and made the 2015 Final EIR available on the County's website to facilitate additional public review and agency consultation.

19. The Deer Springs Fire Protection District was the fire authority having jurisdiction over the Project site. In 2015, the Deer Springs Fire Protection District conducted its own review of discretionary projects and accepted the Project's Wildfire Protection Plan and Evacuation Plan.

20. The project and the 2015 Final EIR were presented to the County's Planning Commission at three public hearings held on August 7, August 12, and September 11, 2015.

21. On September 11, 2015, at the recommendation of County staff, the Planning Commission voted to recommend EIR certification and Project approval to the Board with modifications and conditions.

22. In November 2015, the California Supreme Court issued its decision in *Center for Biological Diversity v. California Department of Fish and Wildlife*, 62 Cal.4th 204 (2015), regarding the adequacy of the methodology employed in the analysis of greenhouse gas emissions under the California Environmental Quality Act. The Court's ruling affected the greenhouse gas emissions analysis in the 2015 Final EIR for the Project and put a pause on further processing.

23. In 2016, then-applicant Accretive Investments placed a modified version of the Project on the 2016

countywide ballot as a voter initiative, which was not approved by the voters.

24. On December 1, 2016, the County and the Deer Springs Fire Protection District entered into an agreement, whereby Deer Springs Fire Protection District retained the County Fire Authority to provide fire prevention services on behalf of the Deer Springs Fire Protection District. The Deer Springs Fire Protection District remained the fire authority having jurisdiction over the Project site but delegated certain responsibilities to the County Fire Authority pursuant to the agreement.

25. In June 2017, the new applicant, Village Communities, resumed processing of the revised project.

26. In 2017 and 2018, Village Communities revised the project's draft EIR, and the 2018 Specific Plan for the project was made available for review.

27. The 2018 Draft Revised EIR was made available for another 45-day public review and comment period, starting February 22, and ending April 9, 2018.

28. CALFIRE submitted a comment letter on the 2018 Draft Revised EIR, which was signed by Chief Tony Mecham and dated March 7, 2018.

29. In June 2018, the County Planning Commission considered the changes made to the Project since the Commission's 2015 approval recommendation to the Board and voted to advance the Project to the Board.

30. In 2019, Village Communities made additional modifications to the project.

31. In 2019, County Fire hired a consultant, Rohde & Associates, to independently review the project's fire-related aspects.

32. Rohde & Associates is a consultant the County hired to review other discretionary projects, including other large General Plan amendment projects.

33. In December 2019, Village Communities submitted its Wildfire Safety Compendium (Fire Compendium; Volumes I and II) to the County.

34. West Lilac Road is a Primary Evacuation Corridor as identified in the Deer Springs Fire Safe Council's Community Wildfire Protection Plan.

35. The Board's public hearing on the project was held on June 24, 2020, and the agenda was posted for the hearing.

36. Village Communities did not obtain the fuel modification easements before the Board's hearing on June 24, 2020.

37. On June 24, 2020, the Board voted to deny the Project and adopted Resolution No. 20-078.

38. The County Board's June 24, 2020, decision to deny the Project was final.

[. . .]

ORDER

The Court, having reviewed the proposed joint pretrial order is adopted as presently constituted. All pending dates are confirmed. The Court will seat an 8-person jury and is allotting each side 27 hours to present their case. The time limit applies to opening statements, closing arguments, side bars requiring

the jury to wait, and direct and cross examination. Counsel are expected to have sufficient witnesses ready each day to fill the trial day.

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: February 2, 2023

APPENDIX F
JUDGMENT IN A CIVIL CASE,
U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA
(MAY 22, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC; SHIREY FALLS, LP; ALLIGATOR PEARS, LP; GOPHER CANYON, LP; RITSON ROAD, LP; LILAC CREEK ESTATES, LP; SUNFLOWER FARMS INVESTORS, LP,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Civil Action No. 20-cv-1896-AJB-DEB

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED: the Court sua sponte Grants Summary Judgment in

the Defendants' favor. Fed. R. Civ. P. 56(f)(3). Judgment is entered in favor of the Defendants and the case is closed.

CLERK OF COURT

John Morrill
Clerk of Court

By: /s/ M. Quinata
Deputy

Date: 5/22/23

APPENDIX G
ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA (MAY 15, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA, U.S. District Judge.

ORDER GRANTING SUMMARY JUDGMENT

On April 18, 2023, the Court ordered supplemental briefing as to Plaintiffs' takings claim as the Court *sua sponte* found no evidence in support of their remaining takings claim. (Doc. No. 123.) Plaintiffs filed their supplemental brief on May 1, 2023, (Doc.

No. 125), to which the County responded on May 8, 2023, (Doc. No. 127). The Court finds this matter suitable for determination on the papers and without oral argument in accordance with Local Civil Rule 7.1.d.1. After considering the papers submitted, supporting documentation, the evidence on the record, and applicable law, the Court GRANTS summary judgment, *sua sponte,* in Defendants' favor as Plaintiffs have failed to submit evidence of a violation of the takings clause under the Fifth Amendment.

Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, "[a]fter giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (noting a district court's power to enter sua sponte motions under Rule 56). The Ninth Circuit's guidance on Rule 56's notice requirements states, "[b]efore sua sponte summary judgment against a party is proper, that party must be given reasonable notice that the sufficiency of his or her claim will be in issue: Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment." *Albino v. Baca,* 747 F.3d 1162, 1176 (9th Cir. 2014) (internal quotation marks and citation omitted).

On July 1, 2022, the Court denied Plaintiffs' motion for partial summary judgment and granted in part and denied in part Defendants' motion for summary judgment. (Doc. No. 55.) While Plaintiffs' takings claim remained in this case, the Court, *sua sponte,* issued an Order Requesting Supplemental Briefing as

to whether Plaintiffs have evidence in support of their takings claim. (Doc. No. 123.)

Plaintiffs argue evidence of a taking exists under the Fifth Amendment because (1) the easement condition was an extortionate demand for money, burdening their Fifth Amendment rights; (2) the demand for assignment/conveyance of easement constitutes an extortionate demand for applicant's property; and (3) the easement condition was a taking of plaintiffs' right to process the permit application. (Doc. No. 125 at 8, 11-17.) Plaintiffs additionally assert they have evidence of damages because Section 1983 provides a federal damages remedy for *Koontz* project denial/failed condition, wherein the measure of damages should be the value lost as a result of the imposition of the unconstitutional condition. (*Id.* at 18-21.) The County responds the Final Pre-Trial Conference Order does not claim a taking from either a "refusal to process" the Project or from a plan to assign the fuel modification easements if Plaintiffs first obtained them. (Doc. No. 127 at 9-10, 13-14.)

I. The Final Pretrial Conference Order Controls

The Ninth Circuit has "consistently held that issues not preserved in the pretrial order" are "eliminated from the action." *S. Cal. Retail Clerks Union & Food Emps. Joint Pension Trust Fund v. Bjorklund,* 728 F.2d 1262, 1264 (citing *U.S. v. Joyce,* 511 F.2d 1127, 1130 n.1 (9th Cir. 1975)). "The very purpose of the pretrial order is to narrow the scope of the suit to those issues that are actually disputed and, thus, to eliminate other would-be issues that appear in other portions of the record of the case." *Id.* Once signed, "[a] pretrial order has the effect of amending

the pleadings and controls the subsequent course of action of the litigation." *Nw. Acceptance Corp. v. Lynwood Equip., Inc.,* 841 F.2d 918, 924 (9th Cir. 1988) (internal quotations and citations omitted). However, the pretrial conference order need only implicitly include a theory of damages in order to preserve an issue for trial. *Apple, Inc. v. Samsung Elecs. Co. Ltd.,* 2014 WL 6687122, at *3-4 (N.D. Cal. Nov. 25, 2014).

Here, the Pre-Trial Order ("PTO") makes no reference to Plaintiffs' takings claim based on either (1) an interference with Plaintiffs' right to process its permit application or (2) an impermissible demand for an assignment/conveyance of the easements. *(See generally* Doc. No. 86.) Rather, the PTO explicitly states:

> Plaintiffs contend that the County Board of Supervisors denied the project because of Plaintiffs' failure to acquire the 50 offsite fuel modification easements; and that the County Board's easement condition required Plaintiffs to expend money in exchange for obtaining the easements and as such, the condition resulted in an unconstitutional taking of property or money under the Takings Clause of the Fifth Amendment to the Constitution.

(*Id.* at 4.) Plaintiffs had multiple opportunities to include their additional theories in their PTO but chose to pursue their claim based solely on the above theory. The purpose of the pretrial order is to narrow the scope of issues at trial, and a party waives the issues not raised in the pretrial order. As such, Plaintiffs' claims for a taking based on (1) an interference with Plaintiffs' right to process its permit applica-

tion or (2) an impermissible demand for an assignment/conveyance of the easements are barred.

II. Plaintiffs' Takings Claim Fails

Plaintiffs assert the "County's imposition of the easement condition was a constitutionally cognizable injury under *Koontz [v. St. Johns River Water Management District,* 570 U.S. 595 (2013)] because the condition was an extortionate demand for money, which lacked the nexus and rough proportionality required under the unconstitutional conditions doctrine." (Doc. No. 125 at 11.) As stated in *Koontz,* "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." 570 U.S. at 607. The Ninth Circuit has held that the "starting point to [the] analysis of exactions claims is . . . whether the substance of the condition . . . would be a taking independent of the conditioned benefit." *Ballinger v. City of Oakland,* 24 F.4th 1287, 1300 (9th Cir. 2022) (internal quotation marks omitted) (citing *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2073 (2021); and *Koontz,* 570 U.S. at 612).

First, Defendants' argument that Plaintiffs' takings claim fails because "it is undisputed that Defendants never promised Project approval even if Plaintiffs had obtained the easements" is unavailing. (Doc. No. 127 at 14.) In the PTO, Defendants do not raise this argument as a defense to Plaintiffs' claim. (*See* Doc. No. 86 at 4-7); *S. Cal. Retail Clerks Union,* 728 F.2d at 1264. As such, this defense is barred.

Next, Plaintiffs fail to provide evidence that Defendants ever demanded that Plaintiffs pay money for the easements. Although Plaintiffs repeatedly contend that the "County's easement condition was an extortionate demand for money," Plaintiffs fail to provide evidence as such. (*See* Doc. No. 125 at 9, 11.) However, the Court's Order requesting supplemental briefing on this issue explicitly instructed Plaintiffs to explain "what evidence of a taking exists under *Koontz*. . . . " (Doc. No. 123.) Plaintiffs have not done so. Plaintiffs' supplemental brief is silent as to what evidence exists of an "extortionate demand for money," and while Plaintiffs' attached exhibits indicate that money *could have* been requested in exchange for easements, they have failed to show that any demand was actually made. (*See* Deposition of Mark Wardlaw, Doc. No. 125-1 at 28 ("However [Plaintiffs] chose to acquire the easements was up to them. Whether it was for a fee, whether it was for some mutual benefit, that was not--it's really not germane to the requirement of the easement."); Deposition of David Nissen, *id.* at 30-32 (stating West Lilac Road property owners could "conceivably" request money in return for the easement); Deposition of Mark Slovick, Doc. No. 125-1 at 35 (stating the county easement form contemplated that Plaintiffs would pay money to the property owners in exchange for the grant of easements); Deposition of David Sibbet, *id.* at 39 (affirming that it *was possible* that "one or more of [the] property owners could literally extort money from the landowner that needs that easement").)

Based on the foregoing, the Court finds no taking has occurred. Plaintiffs fail to demonstrate that Defendants' request for easements "would be a taking

independent of the conditioned benefit," as Plaintiffs do not show they were required to pay money in exchange for the easements. Accordingly, the Court *sua sponte* grants summary judgment in Defendants' favor. Fed. R. Civ. P. 56(f)(3). The Motions in Limine filed in the case are herewith denied as moot.

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: May 15, 2023

APPENDIX H
ORDER VACATING TRIAL AND ORDERING SUPPLEMENTAL BRIEFING, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA (APRIL 18, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA, U.S. District Judge.

ORDER

On April 6,2023, the Parties filed their respective jury instructions, various motions in limine, and trial briefs. (*See* Doc. Nos. 89-106.) Upon review of the Parties' competing papers, it is clear the Parties' legal arguments are incongruous and the Parties are

not in a meaningful position to begin trial. Moreover, upon the Court's granting of Defendants' motion in limine to exclude testimony from property owners along West Lilac Road, the Court *sua sponte* finds no triable issue as to Plaintiffs' takings claim in that the Court sees no evidence in support of Plaintiffs' takings claim. Plaintiff's Trial Brief suggest a due process "processing" theory not pled nor part of the Joint Pretrial Order. (Doc. No. 108 at 6.) That Order focuses on a taking. (Doc. No. 86.)

Thus, the Court VACATES the motion in limine hearing set for Thursday, April 20, 2023, and VACATES the trial set to begin May 2, 2023. The Court further finds supplemental briefing is required as to Plaintiffs' legal and factual support of the takings claim. As such, the Court ORDERS the following:

1. Plaintiffs are instructed to file a supplemental brief explaining what evidence of a taking exists here under *Koontz v. St. Johns River Water Management Dist.,* 570 U.S. 595, 608-09 (2013), which held that "[w]here a permit is denied and the condition is never imposed, nothing has been taken[,]" no later than May 1, 2023.

2. Defendants are instructed to file a response to Plaintiffs' supplemental brief no later than May 8, 2023.

3. The Parties' supplemental briefs must not exceed fifteen pages and are limited to addressing the issue discussed above. Further argument will be scheduled as needed. *See* Civ. L. R. 7.1.

4. The Court will otherwise rule on the remaining Motions in Limine and will set further proceedings after the issue presented herein in resolved.

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: April 18, 2023

APPENDIX I
ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA (JANUARY 11, 2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA, U.S. District Judge.

ORDER ON DEFENDANTS MOTION FOR RECONSIDERATION

Presently pending before the Court is Defendant's motion for reconsideration, which Defendants requested leave to file and which the Court granted during the Pretrial Conference held on October 20, 2022. (Doc.

No. 75.) This motion is suitable for determination on the papers and without oral argument in accordance with Local Civil Rule 7.1.d. 1 . Accordingly, the Court hereby VACATES the Pretrial Conference currently set for January 19, 2023 at 2:00 p.m. For the reasons provided in detail below, the Court DENIES Defendants' motion for reconsideration.

I. Background

Village Communities, LLC is a real estate development entity that owns approximately 608 acres of land in an unincorporated area of San Diego County, California (the "Property"). (Second Amended Complaint ("SAC"), Doc. No. 27, ¶ 1.) The Property is located east of Interstate 15 and south of West Lilac Road, approximately ten miles north of the City of Escondido. (*Id.* ¶¶ 27-28.) Village Communities purchased the Property in 2017 from Accretive Investments, the former developer, and thus became the owner and project applicant. (*Id.* ¶ 30.) Village Communities and its predecessor proposed to build a housing and mixed-use community on this site, entitled Lilac Hills Ranch (the "Project"). (*Id.* ¶ 27) Specifically, the Project proposed 1,746 homes, a town center with a fifty-room inn and commercial, retail, and office spaces, a K-8 school, and a senior community center, among other uses. (*Id.* ¶ 33.)

In 2010, the County granted Accretive the "Plan Amendment Authorization" for Lilac Hills Ranch. (Doc. No. 37-1 at 10.) In 2012, Accretive submitted its development application to the County, and the Project underwent environmental and public review between May 2012 and 2015. (*Id.)* In September 2015, the San Diego County Planning Commission voted to recom-

mend Environmental Impact Review certification and project approval to the Board, subject to modifications. (*Id.* at 11.) However, later that year, the California Supreme Court issued a decision affecting the 2015 Project's greenhouse gas emissions analysis, which paused movement on the project. (*Id.*)

In 2016, Accretive placed a modified version of the 2015 Project on the ballot as a voter initiative, but it was rejected by 64% of county voters. (*Id.;* Doc. No. 36-1 at 5.) In 2017, Village Communities overtook the Project and resumed processing the application. (Doc. No. 37-1 at 12.) After acquiring the Property, Village Communities revised the proposed project, working with Defendants' Planning Department staff to address various concerns. (*Id.*) Nonetheless, on June 20, 2020, the Board formally voted to deny the project, and Plaintiffs filed suit. (*Id.* at 26.)

This case ultimately concerns wildfire safety, as the Property sought to be developed is in a high-risk area for such disasters. Plaintiffs assert that through its work with Planning Department staff, it revised the Project to mitigate the risk down to acceptable levels consistent with the County's General Plan, a master zoning document that governs all future development within the County's boundaries. Despite these revisions, Plaintiffs allege Defendants denied the permit only after Village Communities refused to meet an alleged unconstitutional condition—namely, acquiring "fuel modification easements" from fifty adjacent landowners.

A fuel modification easement grants the easement holder the right to enter property and control vegetation on the portion of the property subject to the easement. In the context of wildfires, the permitted entry typically

involves destroying and removing vegetation that serves as "fuel" for fires, which can help stop a fire's spread across a roadway. Here, the main road leading to and from the Project site is a two-lane road called West Lilac Road, which is surrounded to the north and east by an area called Keys Canyon that is characterized by large, dense, flammable brush. (Doc. No. 36-1 at 9.) Particularly of concern, the County Fire Authority ("County Fire") found that the addition of over 3,000 cars from the Project residents, plus additional vehicles from people traveling to and from the Project, would cause substantial traffic congestion on West Lilac during a wildfire evacuation, presenting a risk of people becoming entrapped in their vehicles during an evacuation. (*Id.* at 10.) Thus, Defendants allegedly required Village Communities to obtain these easements from the individual property owners as a condition for approving the development.

Plaintiffs contend Defendants unconstitutionally required Plaintiffs to obtain the easements because (1) the County already had the legal authority the easements supposedly convey, (2) other similar projects have not been subject to the same requirement, and (3) Defendants' actions were arbitrary and capricious. Plaintiffs assert four claims for relief, each alleging violations of 42 U.S.C. § 1983.

On July 1, 2022, this Court denied Plaintiffs' motion for summary judgment and granted in part and denied in part Defendants' motion for summary judgment, or in the alternative, partial summary judgment ("July 1 Order"). (Doc. No. 55.) Relevant to this memorandum, in the July 1 Order, this Court held there was no legislative act which would preclude Plaintiffs' takings claim under *Nollan/Dolan*. (*Id.* at

9.) As to Defendants' second defense, the Court held that "while the Supervisors of the Board may have had additional independent reasons for denying the Project, Plaintiffs' failure to acquire offsite easements was the basis for the motion denying Project approval." (*Id.* at 10.) Thus, the Court held that Project denial was not for reasons independent of the easement condition, as discussed further below.

During the October 20, 2022 pretrial conference, Defendants requested the Court to reconsider denial of summary judgment and again raised these two defenses of (1) project denial for independent reasons, and (2) the existence of a legislative action, and requested further supplemental briefing on these issues, which the Court granted. The parties submitted their supplemental briefs, (Doc. Nos. 75, 77), and this order follows.

II. Legal Standard

Federal Rule of Civil Procedure 59(e) provides that, after entry of judgment, a court may alter or amend the judgment. "[T]he district court enjoys considerable discretion in granting or denying [a Rule 59(e)] motion." *Allstate Ins. Co. v. Herron,* 634 F.3d 1101, 1111 (9th Cir. 2011) (quoting *McDowell v. Calderon,* 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam)). However, because "the rule offers an extraordinary remedy, [it should] be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000) (citation and internal quotation marks omitted). As such, a Rule 59(e) motion generally should not be granted absent highly unusual circumstances, *389 Orange St. Partners v.*

Arnold, 179 F.3d 656, 665 (9th Cir. 1999), such as an intervening change in controlling law, the availability of newly discovered or previously unavailable evidence, or the need to correct a clear error or prevent a manifest injustice, *Allstate Ins. Co.,* 634 F.3d at 1111; *see also McDowell,* 197 F.3d at 1255 n.4 (finding no abuse of discretion "merely because the underlying order is erroneous, rather than clearly erroneous").

III. Discussion

Relevant to this motion, Plaintiffs' first and second claims allege violations of their rights under the Fifth Amendment's Takings Clause through (1) inverse condemnation and (2) a temporary taking, on the grounds that the County's request for offsite fuel modifications is an unconstitutional condition. (SAC ¶¶ 107-117.)

In their supplemental briefing, Defendants argue (1) the Board denied the Project for additional reasons independent of the easement condition, and thus Plaintiffs cannot prove causation; and (2) the Board's rejection of the Project was a legislative action that is not subject to an unconstitutional conditions claim. (Doc. No. 75.)

A. Motion for Reconsideration

As a preliminary matter, Defendants fail to address the legal standard for motions for reconsideration, and do not provide a basis for reconsideration, such as an intervening change in controlling law, the availability of newly discovered or previously unavailable evidence, or the need to correct a clear error or prevent a manifest injustice. *Allstate Ins. Co.,* 634 F.3d at 1111. Additionally, Defendants fail to show

"what new facts or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application." CivLR 7.1.i.l. Rather, Defendants merely state that denial of a summary judgment motion is an interlocutory order and thus has the inherent procedural power to reconsider, rescind, or modify the order. (Doc. No. 75 at 5.) Defendants further state they "do not believe that the Court's ruling *denying* both parties summary judgment on Plaintiffs' takings claim definitely ruled against Defendants on defenses two and three, but to the extent the Court believes it did so, the Court has the power to revisit those rulings." (*Id.*)

Defendants also fail to address Civil Local Rule 7.1.i.2's requirement that a motion for reconsideration "be filed within twenty-eight (28) days after the entry of the ruling, order, or judgment sought to be reconsidered." Twenty-eight days from the Court's July 1 Order was July 29, 2022. However, rather than filing a motion for reconsideration within the appropriate time, Defendants requested supplemental briefing on these issues during the pretrial conference on October 20, 2022. Defendants have not raised any additional basis for asking the Court to reconsider its holdings from the July 1 Order.

B. Defense 2: Whether the Project Denial Was for Independent Reasons

As in its motion for summary judgment, Defendants argue that because the Board allegedly denied the Project for multiple reasons independent of the easement condition, no taking occurred. (Doc. No. 75 at 5-10.) Specifically, Defendants assert the Board denied the Project because the majority of the Super-

visors (1) were not going to disregard the public vote to reject the proposed Project just four years prior, and (2) found the proposed Project inconsistent with General Plan Policy H-2.1. (*Id.* at 5-6.) In support, Defendants point to the June 24, 2020 County of San Diego Board of Supervisors Statement of Proceedings and Minute Order, which "[f]ound that th[e] project is inconsistent with General Plan Policy H-2.1, "Development that Respects Community Character." (Doc. No. 36-4 at 18, 45.) Thus, assert Defendants, the "Statement of Proceedings confirm that the Board's denial was independently based on General Plan Policy H-2.1." (Doc. No. 75 at 7.) However, both documents state Resolution No. 20-078 was *also* adopted by the Board. (Doc. No. 36-4 at 18, 45.) The adopted resolution was Resolution No. 20-078, "A Resolution of the San Diego County Board of Supervisors Denying General Plan Amendment (GPA) . . . , Zoning Reclassification . . . , Specific Plan . . . , Master Tentative Map . . . , Implementing Tentative Map . . . , Major Use Permit . . . , and Site Plan . . . " which states the Project was inconsistent with the General Plan "based on these significant unresolved fire safety concerns. . . . " (*Id.* at 49.) In the body of the Resolution, Plaintiffs' failure to obtain the offsite easements is discussed extensively. (*See id.* at 48-50.)

At the June 24, 2020 County of San Diego Board of Supervisors Meeting, the relevant item on the agenda was for "Recommended denial of Lilac Hills Ranch general plan amendment, specific plan, zone reclassification, tentative maps, major use permit, and site plan, located in the Valley Center and Bonsall Community Plan Areas." (*Id.* at 7.) At this meeting, after Cal Fire San Diego Unit Chief Tony

Mecham recommended denial of the Project due to Plaintiffs' failure to acquire the easements, Supervisor Desmond made a "motion to refer the project back to staff for further analysis and allow the applicant additional time to try to resolve fire-related issues. . . . " (*Id.* at 226.) Thereafter, Supervisor Jacob made a substitute motion "for the staff recommendations which would be to deny the Project. There are two recommendations. The first one is regarding CEQA, *and the second recommendation is to adopt the resolution."* (*Id.* at 248.) This motion was seconded by Supervisor Fletcher, who then stated he "would just add to the staff recommendation . . . to find that the project is inconsistent with the general plan Policy H-2.1, development that respects community character." (*Id.*) However, there was no second to Supervisor Fletcher's add-on/amendment. (*See id.* at 243-46.) Thereafter, Supervisor Jacob's motion was restated by the clerk and passed by a majority vote. (*Id.* at 248.)

Defendants assert that because Supervisor Jacob "separately [found] the Project inconsistent with General Plan Policy H-2.1[,]" that denial was not based upon the easement condition. However, Resolution 20-078 was adopted at the meeting *alongside* the finding "that the project is inconsistent with General Plan Policy H-2.1, "Development that Respects Community Character." (*Id.* at 18.) Moreover, as discussed, Supervisor Fletcher's amendment regarding General Plan Policy H-2.1 was not seconded or voted on. Thus, there is a question as to whether the clerk's minutes reflecting that the Project was denied in part due to inconsistency with General Plan Policy H-2.1 was in error.

Moreover, although there may have been additional independent reasons for denying the Project, Plaintiffs' failure to acquire offsite easements remains one basis for the motion denying Project approval, as found in the July 1 Order. Defendants admit "Resolution No. 20-078 is only part of the Board's official actions denying the Project" but argue that *Koontz* is distinguishable because "there was no indication that the defendant water district in *Koontz* denied the permit at issue for reasons other than the plaintiff's failure to pay for improvements to district-owned land." (Doc. No. 75 at 8.) However, Defendants fail to cite any law for the proposition that where *multiple* reasons are on the record for denial of a project, that the alleged unconstitutional condition is no longer a relevant consideration. Indeed, as argued by Plaintiffs', the County's "other reasons" defense is insufficient under the Supreme Court's unconstitutional conditions doctrine. In *Koontz v. St. Johns River Mgmt. Dist.,* 570 U.S. 595 (2013), the Supreme Court noted that "[e]ven if respondent would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights." *Id.* at 608.

Defendants further assert that Plaintiffs' takings claim fails because they cannot prove causation. (Doc. No. 75 at 9.) Specifically, Defendants argue that even without the easement condition, the Project would still have been denied. (*Id.)* Defendants also argue that because Plaintiffs cannot prove but-for causation, they are not entitled to compensatory damages. (*Id.* (citing *Goss v. City of Little Rock,* 151 F.3d 861 (8th Cir. 1998)).) However, these arguments were not

raised in Defendants' motion for summary judgment and are outside the scope of supplemental briefing. As such, the Court declines to consider these new arguments.

Based on the foregoing, the Court finds that denial of the Project was not for reasons independent of the easement condition.

C. Defense 3: Whether the Board of Supervisors' Rejection of the Project Was a Legislative Action

Next, Defendants assert that because the County could not approve the Project without amending its General Plan or zoning ordinance, the County's decision was a legislative one which does not give rise to a taking. (Doc. No. 75 at 11.) Defendants point to California's longstanding law that "[a]dopting or amending a general plan is a quintessential legislative act[,]" as opposed to adjudicative or administrative. *Molloy v. Vu,* 42 Cal.App.5th 746, 758 (2019). Indeed, "the amendment of a legislative act is itself a legislative act and the amendment of a general plan is thus a legislative act. . . . " *Yost v. Thomas,* 36 Cal.3d 561, 570 (1984) (internal quotation marks and citations omitted). "Similarly, the rezoning of land is a legislative act. . . . " *Id.* "California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts." *Arnel Dev. Co. v. City of Costa Mesa,* 28 Cal.3d 511, 514 (1980).

Courts recognize that "adjudicative" zoning decisions are typically *ad hoc,* characterized by the exercise of discretion by the city or administrative body. Legislative actions, on the other hand, are characterized by "generally applicable legislation . . . that [] applie[s],

without discretion or discrimination," to every property within the purview of the legislation. *San Remo Hotel L.P. v. City of San Francisco,* 27 Cal.4th 643, 645 (2002); *see also Ballinger v. City of Oakland,* 398 F.Supp.3d 560, 570 (N.D. Cal. 2019) (holding the plaintiff's unconstitutional exaction claim failed as a matter of law because it was generally applicable legislation); *Better Housing for Long Beach,* 452 F.Supp.3d at 933 (positing that for "general land use regulations," the appropriate test is a *Penn Central* regulatory takings analysis, rather than *Nollan/Dolan* scrutiny).

Plaintiffs' permit application filed with the County in January 2018 consisted of: (1) a General Plan Amendment; (2) Specific Plan; (3) Rezone; (4) two Tentative Maps subdividing the parcels; (5) Major Use Permit to operate project wastewater facilities; and (6) Site Plan for Project parks. (Doc. No. 77 at 19.) Plaintiffs first respond that their permit application was to be heard concurrently as a whole as one application and decided at one public hearing and in one final decision, and the application was specific and limited to the Lilac Hills Ranch Project. (*Id.*) During the pretrial conference and in their supplemental briefing, Defendants rely upon *Arnel Development Co.,* which stood fast to the California precedent that "zoning ordinances, whatever the size of parcel affected, are legislative acts," 28 Cal.3d at 514, and thus the *Nollan/Dolan* unconstitutional conditions claim does not apply. (Doc. No. 75 at 15.)

Plaintiffs respond that "[c]ourts treat a government action that consists of a mix of legislative and adjudicatory decisions as adjudicatory." (*Id.* (citing *Mountain Defense League v. Board of Supervisors,* 65

Cal.App.3d 723, 729 (1977) ("Where . . . an agency in two capacities is simultaneously disposing of two legally required functions with but one decision, review of that determination must be by the more stringent standard.").) Plaintiffs specifically assert that the Project's final map stage is an adjudicatory action arising under California's Subdivision Map Act. (*Id.* at 20.) Plaintiffs are correct that the "approval of a tentative subdivision map by a local agency is an *adjudicatory* administrative decision." *Griffis v. Cnty. of Mono,* 163 Cal.App.3d 414, 426 (1985) (emphasis added). "The reason the decision is adjudicatory in nature is that it represents the application of general standards to specific parcels of real property; the decision is therefore determined by facts peculiar to the individual case." *Id.* at 426-27; *see also Linborg-Dahl Investors, Inc. v. City of Garden Grove,* 179 Cal.App.3d 956, 961 (1986) (applying legal standard for adjudicatory decisions in considering city council's decision to deny site plan application).

Moreover, "where the government makes an adjudicative decision to condition an application for a building permit on an individual parcel[,]" the burden shifts to the government to show its condition is roughly proportional to the burden placed on the permit applicant. *Garneau v. City of Seattle,* 147 F.3d 802, 811 (9th Cir. 1998). In *Dolan,* the Supreme Court highlighted that the "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[] classifying entire areas of the city. . . . " 512 U.S. at 385; *see also Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 546 (2005) ("Both *Nollan* and *Dolan* involved

Fifth Amendment takings challenges to adjudicative land-use exactions."); *Better Housing for Long Beach v. Newsom,* 452 F.Supp.3d 921, 932 (C.D. Cal. 2020) (same). Courts within the Ninth Circuit have since interpreted *Koontz,* noting that "the Ninth Circuit and the California Supreme Court have expressly stated that a development condition need only meet the requirements of *Nollan* and *Dolan* if that condition is imposed as an 'individual, adjudicative decision.'" *Bldg. Indus. Ass'n—Bay Area v. City of Oakland,* 289 F.Supp.3d 1056, 1058 (N.D. Cal. 2018); *see Ballinger v. City of Oakland,* 398 F.Supp.3d 560, 571-72 (N.D. Cal. 2019) (adopting analysis of *Building Industry Association).* Thus, the "sine qua non" for application of *Nollan/Dolan* scrutiny is the "discretionary deployment of the police power" in "the imposition of land-use conditions in individual cases." *Ehrlich,* 12 Cal.4th at 869.

Here, Defendants utilized their discretion to impose an easement condition in Plaintiffs' individual case. Thus, because Plaintiffs' takings claims are predicated on a combination of adjudicative and legislative determinations, and because Defendants "made an adjudicative decision to condition [Plaintiffs'] application for a building permit on an individual parcel," the Court finds Defendants' acts amounted to an adjudicative decision under which *Nollan* and *Dolan* would apply.

D. Remaining Issues

Defendants newly assert that denial of the Project defeats Plaintiffs' takings claim altogether and thus should be dismissed. (Doc. No. 75 at 8.) However, this argument is outside the scope of the Court's requested supplemental briefing and was not raised

in Defendant's motion for summary judgment. (*See generally* Doc. No. 36-1.) As such, the Court declines to address this argument.

E. Length of Trial

Lastly, Defendants assert that precluding these two defenses will not reduce the length of the trial. (Doc. No. 75 at 18.) Specifically, Defendants argue Plaintiffs claimed that trial would take 16 days before the issue of allowing these defenses arose. (*Id.*) Thereafter, Plaintiffs revised their trial estimate down despite Defendants' intention to present these defenses. (*Id.*) Moreover, Defendants argue the time it would take to present the evidence on these two defenses is minimal. (*Id.*) Plaintiffs respond that the County's two defenses will prolong the trial because "virtually every County deponent testified extensively on precisely [these] two issues" and there are "numerous exhibits that address these two defenses/issues." (Doc. No. 77 at 23.) As such, Plaintiffs assert that "[e]limination of such defenses will . . . ensure that the parties' counsel are able to try this case in the time allotted by the Court." (*Id.* at 24.)

As a matter of law, the Court has ruled on the issue of these two defenses and finds it unnecessary to waste the jury's time with adjudicated matters. Therefore, the Court declines to extend the length of trial. Based on the Final Pretrial Conference Order, the Court will set time limits for the trial.

IV. Conclusion

For all the reasons stated, the Court DENIES Defendants' motion for reconsideration. The Court moves the Pretrial Conference to February 2, 2023 at

2:00 p.m. and confirms the Motion in Limine Hearing remains set for April 20, 2023 at 2:00 p.m. The jury trial for this case remains set for May 2, 2023 at 8:30 a.m. The Court further ORDERS the parties to:

- File a Proposed Pretrial Conference Order in compliance with Local Rule 16 and consistent with the Court's rulings by January 26, 2023; and
- Contact the Magistrate Judge for a Mandatory Settlement Conference forthwith.

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: January 11, 2023

APPENDIX J
ORDER RE: SUMMARY JUDGMENT MOTIONS
(JULY 1, 2022)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA,
U.S. District Judge.

ORDER:

(1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; and

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

(Doc. Nos. 36 & 37)

Presently pending before the Court is (1) Defendants Board of Supervisors of San Diego (the "Board") and County of San Diego's (the "County") (collectively, "Defendants") Motion for Summary Judgment, (Doc. No. 36), and (2) Plaintiffs' Motion for Partial Summary Judgment, (Doc. No. 37). The motions have been fully briefed. (Doc. Nos. 40-43.) The Court thereafter ordered supplemental briefing on one issue as discussed below. (Doc. No. 52.) Defendants filed their supplemental brief on June 17, 2022, (Doc. No. 53), and Plaintiffs responded on June 24, 2022, (Doc. No. 54). For the reasons set forth below, the Court DENIES Plaintiffs' motion for partial summary judgment and GRANTS IN PART AND DENIES IN PART Defendants' motion for summary judgment.

I. Background

In 2010, the County granted then-applicant Accretive Investments a "Plan Amendment Authorization" for the Lilac Hills Ranch planned community (the "Project") on 608 acres of land in unincorporated North San Diego County, California (the "Property"). (Doc. No. 37-1 at 10.) In 2012, Accretive submitted its development application to the County, and the Project underwent environmental and public review between May 2012 and 2015. (*Id.)* In September 2015, the San Diego County Planning Commission voted to recommend Environmental Impact Review certification and project approval to the Board, subject to modifications. (*Id.* at 11.) However, later that year, the California Supreme Court issued a decision affecting the 2015 Project's greenhouse gas emissions analysis, which paused movement on the project. (*Id.*)

In 2016, Accretive placed a modified version of the 2015 Project on the ballot as a voter initiative, but it was rejected by 64% of county voters. (*Id.;* Doc. No. 36-1 at 5.) In 2017, Village Communities overtook the Project and resumed processing the application. (Doc. No. 37-1 at 12.) After acquiring the Property, Village Communities revised the proposed project, working with the County's Planning Commission staff to address various concerns. (*Id.*) Nonetheless, on June 20, 2020, the Board formally voted to deny the project, and Plaintiffs filed suit. (*Id.* at 26.)

This case ultimately concerns wildfire safety, as the Property sought to be developed is in a high-risk area for such disasters. Plaintiffs assert that through its work with Planning Commission staff, it revised the Project to mitigate the risk down to acceptable levels consistent with the County's General Plan, a master zoning document that governs all future development within the County's boundaries. Despite these revisions, Plaintiffs allege Defendants denied the permit only after Village Communities refused to meet an alleged unconstitutional condition—namely, acquiring "fuel modification easements" from fifty adjacent landowners.

A fuel modification easement grants the easement holder the right to enter property and control vegetation on the portion of the property subject to the easement. In the context of wildfires, the permitted entry typically involves destroying and removing vegetation that serves as "fuel" for fires, which can help stop a fire's spread across a roadway. Here, the main road leading to and from the Project site is a two-lane road called West Lilac Road, which is surrounded to the north and east by an area called Keys Canyon that is characterized

by large, dense, flammable brush. (Doc. No. 36-1 at 9.) Particularly of concern, the County Fire Authority ("County Fire") found that the addition of over 3,000 cars from the Project residents, plus additional vehicles from people traveling to and from the Project, would cause substantial traffic congestion on West Lilac during a wildfire evacuation, presenting a risk of people becoming entrapped in their vehicles during an evacuation. (*Id.* at 10.) Thus, Defendants allegedly required Village Communities to obtain these easements from the individual property owners as a condition for approving the development.

Plaintiffs contend Defendants unconstitutionally required Plaintiffs to obtain the easements because (1) the County already had the legal authority the easements supposedly convey, (2) other similar projects have not been subject to the same requirement, and (3) Defendants' actions were arbitrary and capricious. Plaintiffs assert four claims for relief, each alleging violations of 42 U.S.C. § 1983.

II. Legal Standard

A court may grant summary judgment when it is demonstrated that there exists no genuine dispute as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). The party seeking summary judgment bears the initial burden of informing a court of the basis for its motion and of identifying the portions of the declarations, pleadings, and discovery that demonstrate an absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). A fact is "material" if it might affect the outcome of

the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). A dispute is "genuine" as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See Long v. Cty. of Los Angeles,* 442 F.3d 1178, 1185 (9th Cir. 2006).

Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the movant. *See Soremekun v. Thrifty Payless, Inc.,* 509 F.3d 978, 984 (9th Cir. 2007). Where the non-moving party will have the burden of proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential element of the non-moving party's claim or by merely pointing out that there is an absence of evidence to support an essential element of the non-moving party's claim. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102-03 (9th Cir. 2000). If a moving party fails to carry its burden of production, then "the non-moving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion." *Id.* If the moving party meets its initial burden, the burden then shifts to the opposing party to establish that a genuine dispute as to any material fact actually exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The opposing party cannot "rest upon the mere allegations or denials of [its] pleading but must instead produce evidence that sets forth specific facts showing that there is a genuine issue for trial." *See Estate of Tucker,* 515 F.3d 1019, 1030 (9th Cir. 2008) (internal quotation marks and citation omitted).

Where cross-motions for summary judgment are at issue, the court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *A.C.L.U. of Nev. v. City of Las Vegas,* 466 F.3d 784, 790-91 (9th Cir. 2006) (internal quotation marks omitted). That said, "the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme,* 632 F.3d 526, 532 (9th Cir. 2011). However, "[b]ald assertions that genuine issues of material fact exist are insufficient." *See Galen v. Cty. of Los Angeles,* 477 F.3d 652, 658 (9th Cir. 2007); *see also Day v. Sears Holdings Corp.,* No. 11-09068, 2013 WL 1010547, at *4 (C.D. Cal. Mar. 13, 2013) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment."). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007).

III. Requests for Judicial Notice

To begin, Defendants request judicial notice of five exhibits as part of their motion, (Doc. No. 36-2), and two exhibits in their reply in support of their motion, (Doc. No. 42-1). Under Federal Rule of Evidence 201, the court "may judicially notice a fact that is not subject to reasonable dispute" for the following two reasons: (1) "it is generally known within the trial court's territorial jurisdiction," or (2) it "can be accurately and readily determined from sources whose

accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

A. Defendants' Request for Judicial Notice: Exhibits 1-5

First, Defendants ask the Court to take judicial notice of (1) County of San Diego Resolution No. 17-001, dated January 10, 2017; (2) Statement of Proceedings for the June 24, 2020 County of San Diego Board of Supervisors Regular Meeting Planning and Land Use Matters; (3) Minute Order No. 3 for the County of San Diego Board of Supervisors Meeting of June 24, 2020; (4) County Board of Supervisors Resolution No. 20-078, dated June 24, 2020; and (5) Letter from Deputy Chief Administrative Office Sarah E. Aghassi to the San Diego County Board of Supervisors for its June 24, 2020 meeting. (Doc. No. 36-2 at 2; *see also* Doc. No. 40-2.) Plaintiffs did not oppose this request or dispute the authenticity of these documents. *(See generally* Doc. No. 41.)

Courts routinely grant judicial notice of public records. *Harris v. Cty. of Orange,* 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"). Accordingly, Defendants' request for judicial notice of Exhibits 1-5 is GRANTED.

B. Defendants' Request for Judicial Notice: Exhibits 34 & 39

Next, attached to Defendants' reply brief are additional requests for judicial notice of (1) portions of the Statement of Proceedings for the July 8, 2020 County of San Diego Board of Supervisors Regular Meeting Planning and Land Use Matters, and (2)

California Fire Code § 1010.1.9. (Doc. No. 42-1 at 2.) The Court finds these two documents irrelevant to the present matter. Thus, at this stage of the proceedings, as the two exhibits are irrelevant to any controversy the Court must resolve and the documents cannot be incorporated by reference, judicial notice of Exhibits 34 and 39 is DENIED. *See Gerritsen v. Warner Bros. Entm't Inc.,* 112 F.Supp.3d 1011, 1026 (C.D. Cal. 2015) (declining to take judicial notice of several exhibits finding they were irrelevant to the matter).

IV. Evidentiary Objections

Defendants lodge a separate statement of evidentiary objections to Plaintiffs' evidence submitted in support of Plaintiffs' motion for summary judgment. (Doc. No. 40-1.) However, Defendants' objections do not comply with the Civil Case Procedures of the Honorable Anthony J. Battaglia, U.S. District Judge, which requires objections relating to the motion to be set forth in the parties' opposition or reply. J. Battaglia Civ. Case Proc. § II.A. As such, the Court does not consider Defendants' objections.

V. Discussion

Plaintiffs' four claims allege violations of 42 U.S.C. § 1983, which prohibits state actors from depriving a plaintiff of the "rights, privileges or immunities secured by the Constitution." To prevail on a Section 1983 claim, a plaintiff must show that "(1) acts by the defendants (2) under color of state law (3) depriv[ed] [it] of federal rights, privileges or immunities [and] (4) caus[ed] [it] damages." *Thornton v. City of St. Helens,* 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game*

Comm'n, 42 F.3d 1278, 1284 (9th Cir. 1994)) (internal quotation marks omitted). Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Id.* (internal quotation marks omitted).

Defendants move for summary judgment on each of Plaintiffs' four claims for (1) inverse condemnation, (2) temporary taking, (3) equal protection violations, and (4) substantive due process violations. (Doc. No. 36.) Plaintiffs move for partial summary judgment to establish Defendants' liability under its four claims alleging violations of Section 1983. (Doc. No. 37.) The Court will address each basis for summary judgment below.

A. Plaintiffs' First and Second Takings Clause Claims

Plaintiffs' first and second claims, brought pursuant to Section 1983, allege violations of their rights under the Fifth Amendment's Takings Clause through (1) inverse condemnation and (2) a temporary taking, on the grounds that the County's request for offsite fuel modifications is an unconstitutional condition. (SAC ¶¶ 107-117.) Plaintiffs and Defendants both move for summary judgment on these claims. (Doc. Nos. 37-1 at 29-31,36-1 at 14-25.) Specifically, Plaintiffs assert the County wrongfully conditioned the Project on the purchase of fifty fuel modification easements from off-site landowners, which would only come at a "substantial cost" to Plaintiffs. (Doc. No. 37-1 at 31.) Plaintiffs further contend the County did not need those easements because the County Consolidated Fire Code already provided the County and/or fire authority with the legal authorization to clear vegetation near the public

roadway—the same authority the easement would provide. *(Id.)* Defendants counter that (1) the County needed to undertake legislative acts to amend its General Plan and zoning ordinance to approve the Project; (2) the Board denied the Project for additional reasons independent of the easement condition; (3) there is no unconstitutional taking because the County did not require Plaintiffs to give up property; and (4) there is no unconstitutional taking because the easement condition satisfies the test set out in *Koontz v. St. Johns River Water Management Dist.,* 570 U.S. 595 (2013), under *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). (Doc. No. 36-1 at 14-25.)

1. Generally Applicable Legislation

As an initial matter, Defendants assert that because the County could not approve the Project without amending its General Plan or zoning ordinance, the County's decision was a legislative one which does not give rise to a taking. (Doc. No. 36-1 at 17.) Although Defendants again raise this argument in their supplemental briefing, it is outside the scope of what the Court previously ordered and thus will disregard this argument. (*See* Doc. No. 52.) The Court ultimately finds this argument unavailing.

In *Dolan,* the Supreme Court highlighted that the "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[] classifying entire areas of the city. . . . " 512 U.S. at 385; *see also Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 546 (2005) ("Both *Nollan* and *Dolan* involved Fifth Amendment takings

challenges to adjudicative land-use exactions."); *Better Housing for Long Beach v. Newsom,* 452 F.Supp.3d 921, 932 (C.D. Cal. 2020) (same). Courts recognize that "adjudicative" zoning decisions are typically *ad hoc,* characterized by the exercise of discretion by the city or administrative body. Legislative actions, on the other hand, are characterized by "generally applicable legislation . . . that [] applie[s], without discretion or discrimination," to every property within the purview of the legislation. *San Remo Hotel L.P. v. City of San Francisco,* 27 Cal. 4th 643, 645 (2002); *see also Ballinger v. City of Oakland,* 398 F.Supp.3d 560, 570 (N.D. Cal. 2019) (holding the plaintiff's unconstitutional exaction claim failed as a matter of law because it was generally applicable legislation); *Better Housing for Long Beach,* 452 F.Supp.3d at 933 (positing that for "general land use regulations," the appropriate test is a *Penn Central* regulatory takings analysis, rather than *Nollan/Dolan* scrutiny).

Plaintiffs do not allege or argue that amending the County's General Plan or zoning ordinance is a regulatory taking under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978), or a facial challenge to either. (Doc. No. 41 at 9.) Rather, Plaintiffs assert its takings claims are adjudicative decisions based on Defendants' denial of the Project solely because Village Communities refused to secure fifty offsite roadway fuel modification easements. (*Id.* at 8.) The Court agrees.

Plaintiffs' takings claims are not predicated on legislative determinations classifying an entire area of the County or on the County's decision not to amend the General Plan or zoning ordinance. Rather, Defendants made an adjudicatory decision to condition only

Plaintiffs' development application with an easement condition. Moreover, the proposed development application did not involve a countywide general plan amendment or a zoning ordinance generally applicable to the entire county area. As such, the Court finds there was no legislative act which would preclude a takings claim under *Nollan/Dolan*.

2. The Board's Denial of the Project

Defendants further argue that because the Board allegedly denied the Project for multiple reasons independent of the easement condition, no taking occurred. (Doc. No. 36-1 at 18-19.) Specifically, Defendants assert the Board denied the Project because the majority of the Supervisors (1) were not going to disregard the public vote to reject the proposed Project just four years prior, and (2) found the proposed Project inconsistent with General Plan Policy H-2.1. (*Id.* at 19.) After insufficient briefing by both parties, the Court ordered supplemental briefing and requested Defendants and Plaintiffs to address whether Defendants had the ability to exercise their police power to deny the Project altogether. (Doc. No. 52.)

In *Nollan,* the Supreme Court agreed with the Government's position that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836. Thus, the Court held, if the Government "could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional." *Id.* However, "unless the permit condition serves the same governmental purpose as the

development ban, the [condition] is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837.

Defendants point to the June 24, 2020 County of San Diego Board of Supervisors meeting minutes, where Supervisor Dianne Jacob discussed these various concerns, including that the public vote "was soundly defeated by the public in 2016. Sixty-four percent of the voters rejected the project." (Doc. No. 36-4 at 241.) Supervisor Jacob went on further to state the "[c]urrent project still grossly violates the county general plan, 1,746 homes versus 110 that would be allowed to our general plan." (*Id.*) Defendants rely on *Nollan,* asserting "[a] refusal to approve the proposed Project for reasons independent of the easement condition is not a taking." (Doc. No. 36-1 at 19 (citing *Nollan,* 483 U.S. at 836).) However, Supervisor Jacob acknowledged the motion pending before the Board "was only on the easement issue and the fuel modification along West Lilac Road." (Doc. No. 36-4 at 239-40.) Additionally, Resolution No. 20-078 ("A Resolution of the San Diego County Board of Supervisors Denying General Plan Amendment (GPA)") specifically outlines Plaintiffs' failure to obtain offsite easements as the basis for the Board's denial of the Project. (Doc. No. 37-7 at 195-99.) As such, while the Supervisors of the Board may have had additional independent reasons for denying the Project, Plaintiffs' failure to acquire offsite easements was the basis for the motion denying Project approval.

In their supplemental briefing, Defendants additionally contend they had the police power to deny the Project because (1) state planning and zoning laws expressly gave the Board the power to deny the

Project; (2) the California Environmental Quality Act ("CEQA") gave Defendants the authority to deny the Project; and (3) they lawfully exercised their discretion to deny the Project for reasons other than the easement condition. (Doc. No. 52 at 2-10.) However, the Supreme Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Koontz,* 570 U.S. at 608. Although Defendants are correct they had the authority to deny the Project on grounds unrelated to the easement condition, the County explicitly conditioned approval of the Project on Plaintiffs' acquisition of offsite easements. As such, "[e]ven if [Defendants] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights." *Id.*

3. Transfer of Property Interest

Next, Defendants assert there is no unconstitutional taking because the County did not require Plaintiffs to give up any property, either in the form of an easement or money. (Doc. No. 36-1 at 19-21.) Specifically, Defendants argue County Fire did not demand Plaintiffs to set aside any portion of the Project site or otherwise give up any portion of the Project site to the County. (*Id.* at 20.) Moreover, despite Plaintiffs' speculation that they "would need to pay exorbitant amounts of money to obtain the easements," Defendants neither required this, nor did Plaintiffs ask a single West Lilac property owner for an easement. (*Id.*) Thus, no property owner demanded money in exchange for an easement. (*Id.*) Plaintiffs

counter that some property owners would want money for an easement, and that the fifty property owners "could extract $50,000 for each easement, or $2.5 million total, or 'higher.'" (Doc. No. 43 at 10.)

The Fifth Amendment prohibits the government from taking private property for public use without just compensation. Additionally, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan,* 512 U.S. at 385. "In evaluating [a plaintiff's claim, the Court] must first determine whether the `essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [government entity]." *Id.* at 386 (quoting *Nollan,* 483 U.S. at 937). The Supreme Court described this "essential nexus" as a "rough proportionality" between the exaction demanded by the government entity and the "nature and extent to the impact of the proposed development." *Id.* at 391.

In the land-use context, "a special application of [the unconstitutional conditions] doctrine . . . protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz,* 570 U.S. at 604 (citations and internal quotation marks omitted). In *Nollan,* for example, the Supreme Court held that a state agency could not, without paying just compensation, require the owners of beachfront property to grant a public easement over their property as a condition for obtaining a building permit. 483 U.S. at 831-42; *see also Dolan,* 512 U.S. at 379-80, 394-95 (concluding that

a taking occurred when a city required a landowner to dedicate a portion of her real property to a greenway that would include a bike and pedestrian path for public use). Because of the typically broad powers wielded by permitting officials, landowners who seek governmental authorization to develop their properties "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Koontz,* 570 U.S. at 605. "Extortionate demands" made by permitting authorities can "frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Id.; see Dolan,* 512 U.S. at 396.

Here, the Court finds neither party has adequately provided evidence of whether Plaintiffs were required to give up property in the form of money. Kenneth Keagy, a state-licensed and certified general real estate appraiser, estimated that an easement along West Lilac would cost $3,000 or less for twelve of the forty-eight parcels, while the remaining thirty-six parcels would likely range from about $4,000 to $65,000 per parcel, averaging about $22,000 per parcel. (Declaration of Kenneth Keagy, Doc. No. 37-9, ¶ 7.) However, despite this appraisal, Plaintiffs fail to offer evidence that any property owners along West Lilac would indeed demand money in exchange for an easement. Likewise, Defendants fail to offer any evidence that Plaintiffs would *not* be required to pay money in exchange for easements along West Lilac. As such, the Court DENIES both Plaintiffs' and Defendants' motions for summary judgment as to Plaintiffs' takings claims, and declines to engage in determining whether there was a nexus and rough proportionality.

B. Plaintiffs' Substantive Due Process Claim (Claim Four)

Plaintiffs next argue Defendants violated their rights under the Due Process Clause of the Fourteenth Amendment by arbitrarily and unreasonably denying their development application. (SAC ¶¶ 124-28.) Specifically, Plaintiffs assert the easement condition imposed by Defendants lacks any relationship to the public health, safety, or general welfare, and thus violated Plaintiffs' substantive due process rights. (Doc. No. 37-1 at 32.) Defendants respond that Plaintiffs' substantive due process claim fails because they do not have a protected property interest, and that even if they did, the easement condition had a rational relationship to the County's legitimate interest in ensuring the Project did not create an undue risk of entrapment to nearby residents during a wildfire evacuation. (Doc. No. 36-1 at 25-26.) Although the Parties again raise this argument in their supplemental briefings *(see* Doc. Nos. 53 at 18; 54 at 13), it is outside the scope of what the Court previously ordered. (*See* Doc. No. 52.) Thus, the Court does not consider these arguments.

"To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel,* 540 F.3d 1082, 1087 (9th Cir. 2008). However, "[t]he Supreme Court has 'long-eschewed . . . heightened [means-ends] scrutiny when addressing substantive due process challenges to government regulation' that does not impinge on fundamental rights." *Id.* (quoting *Lingle,* 544 U.S. at 542). As such, "the irreducible minimum of a substantive due process

claim challenging land use action is failure to advance any legitimate governmental purpose." *Id.* (internal quotation marks and citation omitted); *Matsuda v. City and Cty. of Honolulu,* 512 F.3d 1148, 1156 (9th Cir. 2008) ("[S]tate action which neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process only if the action is not rationally related to a legitimate governmental purpose.") (internal quotation marks omitted). The Ninth Circuit has described a plaintiff's burden on such a claim as "exceedingly high." *Shanks,* 540 F.3d at 1088. Moreover, "there is a due process claim where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.'" *N Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 484 (9th Cir. 2008) (quoting *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 856 (9th Cir. 2007)).

Here, Plaintiffs' substantive due process claim is not premised on an allegation that the County's actions impinged on their fundamental rights. Rather, Plaintiffs contend the County used its ability to impose a conditional use permit on the Project as a pretext to effectuate a private taking. As previously discussed above, to maintain a substantive due process claim for a private taking, "a plaintiff must allege: (1) the government's action was "arbitrary, irrational, or lacking any reasonable justification in the service of a legitimate government interest"; and (2) the government's actions deprived them of a protected property interest. *Colony Cove Props., LLC v. City of Carson,* 640 F.3d 948, 962 (9th Cir. 2011) *overruled on other grounds by Knick v. Township of Scott,* 139 S. Ct. 2162 (2019).

Next, "[i]f it is 'at least fairly debatable' that the decision to [require the acquisition of easements] was rationally related to legitimate government interests, the[n] [Defendants' action] 'must be upheld.'" *Christensen v. Yolo Cnty. Bd. of Sup'rs,* 995 F.2d 161, 165 (9th Cir. 1993) (quoting *Nelson v. City of Selma,* 881 F.2d 836, 839 (9th Cir. 1989)).

Defendants present extensive evidence indicating they acted in good faith in an effort to advance legitimate governmental interests—namely, that they were concerned with the safety of persons evacuating on West Lilac Road during a wildfire, and that they required the easement condition to address wildfire evacuation concerns. For example, Defendants have offered sufficient evidence that due to substantial fuel along West Lilac Road, a main area evacuation route, these areas would pose a significant risk of entrapping those in the area during a wildfire evacuation, were the Project to be implemented. (Doc. No. 36-1 at 22-23; Declaration of Anthony Mecham ("Mecham Decl."), Doc. No. 36-8, ¶¶ 12-15; Doc. No. 36-3 at 262, 265, 405-409.) Specifically, there are currently approximately eighty-one residences located along West Lilac Road. (Doc. Nos. 36-1 at 22-23, 36-3 at 265.) However, the Project proposes to add approximately 5,000 residents and over 3,000 vehicles to the area, not including those staying at the proposed hotel or senior care center, or visiting the retail and commercial area, which creates a risk of entrapment along West Lilac Road during a wildfire evacuation. (*Id.*) Moreover, County Fire determined that before supporting the Project, vegetation management on West Lilac Road was necessary to make the Project safe for current and future residents because the addition of over 3,000 cars to the area

from the Project would cause substantial traffic congestion on West Lilac Road during a wildfire evacuation, which, coupled with the presence of brush along West Lilac, would present a risk of people becoming entrapped in their vehicles during an evacuation. (Doc. No. 36-1 at 10.)

Under *Koontz, Nollan,* and *Dolan,* "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development," so long as it does "not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz,* 570 U.S. at 605.

Plaintiffs' contention that the County's fire risk concerns were not legitimate merely because the County's evacuation time analysis differed from that of Plaintiffs' and failed to consider Plaintiffs' alternative proposals to the easement condition do no more than present the type of "'run of the mill dispute between a developer and a town planning agency' that fails to implicate concerns about due process deprivations." *Teresi Invs. III v. City of Mountain View,* 609 Fed. Appx. 928, 930 (9th Cir. 2015); *Creative Env'ts, Inc. v. Estabrook,* 680 F.2d 822 (1st Cir. 1982); *Stubblefield Constr. Co. v. City of San Bernardino,* 32 Cal.App.4th 687, 711-12 (1995). Plaintiffs have not met the "exceedingly high burden" required to show the Board or the County behaved in a constitutionally arbitrary fashion, *Matsuda,* 512 F.3d at 1156, nor have they established that Defendants' easement requirement, or the denial of the Project, was arbitrary and capricious. Rather, Defendants' decision was rationally based on the perceived undue risk of entrapment to nearby residents during a wildfire evacuation. Plaintiffs

have not presented evidence adequate to permit a reasonable fact finder to decide that the County's motivations for requiring the easement condition did not include any legitimate concern for public safety. Indeed, the evidence shows the County was motivated in substantial part by safety concerns. Accordingly, the decision to require Plaintiffs to acquire easements did not violate their due process rights. *See Teresi Invs. III,* 609 Fed. Appx. at 930.

Accordingly, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS summary judgment in favor of Defendants as to the fourth claim for relief in the SAC based upon Plaintiffs' assertion of violation of substantial due process under the Fourteenth Amendment.

C. Plaintiffs' Equal Protection Claim (Claim Three)

Plaintiffs further assert Defendants violated their rights under the Equal Protection Clause of the Fourteenth Amendment by imposing a condition for development on Plaintiffs that Defendants did not impose on other, similarly situated development proposals during the same period. (SAC ¶ 120.)

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "When an equal protection claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' action." *N. Pacifica LLC,* 526 F.3d at 486 (citing *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (per curiam)). To succeed on this kind of "class of one" equal protection claim,

Plaintiffs must demonstrate that Defendants "(1) intentionally (2) treated [Plaintiffs] differently than other similarly situated property owners, (3) without a rational basis." *Gerhart v. Lake Cnty.,* 637 F.3d 1013, 1021-22 (9th Cir. 2011).

Defendants argue that class-of-one equal protection claims do not arise out of exercises of discretion based on subjective, individualized determinations. (Doc. No. 40 at 31.) In *Towery v. Brewer,* 672 F.3d 650, 660 (9th Cir. 2012), the Ninth Circuit stated "[t]he class-of-one doctrine does not apply to forms of state action that 'by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.' (quoting *Engquist v. Oregon Dep't of Agric.,* 553 U.S. 591, 603 (2008)). The Ninth Circuit further noted in *Towery* that the class-of-one theory is inapplicable only "[a]bsent any pattern of generally exercising the discretion in a particular manner while treating one individual differently *and* detrimentally." *Id.* at 660-61 (emphasis in original); *see Prime Healthcare Servs., Inc. v. Harris,* 216 F.Supp.3d 1096, 1117 (S.D. Cal. 2016).

In *Las Lomas Land Co. v. City of Los Angeles, 177* Cal.App.4th 837 (2009), the California Court of Appeal held the class of one equal protection theory was inapplicable to the city's decision to deny approval of the plaintiff's proposed development project, which "presented complex urban planning and land use issues." *Id.* at 860. The California Court of Appeal explained: "The decision whether to approve a project of this sort ordinarily would involve numerous public policy considerations and the exercise of discretion based on a subjective, individualized determination." *Id.*

Here, like the city's decision in *Las Lomas Land Co.* to deny approval of the plaintiff's proposed development project, the County's decision on this case involved "numerous public policy considerations and the exercise of discretion based on [the] subjective, individualized determination[s]." 177 Cal.App.4th at 860. The San Diego County Board of Supervisors based their decision on the Environmental Impact Report, reviewed and considered by the Planning Commission, and County Fire's recommendations. (Doc. No. 37-7 at 195.) Additionally, the Board noted the Project was inconsistent with the General Plan and would not minimize the population exposed to wildfire hazards. (*Id.* at 196.) The Board ultimately rejected Plaintiffs' project after it explicitly found "the Project has not implemented measures that reduce the risk of structural and human loss due to wildfire and is inconsistent with [the] General Plan Policy[.]" *(Id.* at 196-97.) As such, the Court finds the class-of-one doctrine is inapplicable here.

Defendants further contend that even if a class-of-one equal protection claim did apply, Plaintiffs cannot prove the second and third elements of their claim. (*Id.*) Specifically, they argue Plaintiffs cannot prove the County treated Plaintiffs differently than other similarly situated property owners, or that the County lacked a rational basis for the easement condition. (*Id.*)

Here, there is a genuine issue as to a material fact regarding whether Plaintiffs were treated differently than other similarly situated developers. Plaintiffs have identified other allegedly similarly situated development projects (Valiano, Harmony Grove Village South,

Newland Sierra, Village 14, and Village 13), to which Howard Windsor, Plaintiffs' fire protection consultant, opined the Project had a lesser proportion of their land in "County Fire Hazard Severity Zones" as compared to allegedly similar projects. (Doc. No. 41-3 at 38.) However, as noted by Defendants, Plaintiffs admit each GPA is unique, and that no two GPA project is the same. (Declaration of Mark Slovick, Doc. No. 36-6, ¶ 3; Deposition of Jon Rilling, Doc. No. 40-12 at 398-99.) Defendants contend the County analyzed the Project using the same process it uses on every General Plan Amendment ("GPA") project, and that because each GPA project is unique, there are no similarly situated property owners. (Doc. No. 40 at 31.) Additionally, Defendants assert there are no other GPA projects that have the same fire and evacuation issues, "such as a nearby canyon with substantial fuels and locations of uninterrupted fuels from that canyon to a main evacuation route." (*Id.*)

However, because Defendants have shown the easement condition is rationally related to the County's legitimate interest in wildfire evacuation safety, as discussed above, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS Defendants' motion for summary judgment as to the third claim for relief in the SAC.

VI. Conclusion

For all the reasons stated, the Court GRANTS IN PART AND DENIES IN PART Defendants' motion for summary judgment and DENIES Plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

/s/ Anthony J. Battaglia
U.S. District Judge

Dated: July 1, 2022

APPENDIX K
ORDER GRANTING IN PART
MOTION TO DISMISS
(FEBRUARY 3, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; and BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants.

Case No. 3:20-cv-01896-BEN-DEB

Before: Hon. Robert T. BENITEZ,
U.S. District Judge.

ORDER GRANTING-IN-PART
DEFENDANTS' MOTION TO DISMISS

[ECF No. 5]

Plaintiff Village Communities, LLC ("Village Communities") is suing Defendants the County of San Diego (the "County") and the San Diego County Board of Supervisors (the "Board") (collectively, "Defendants") for claims arising from the denial of development permits. The matter comes before the

Court on Defendants' Motion to Dismiss the First Amendment Complaint, ECF No. 4 ("FAC"). ECF No. 5. As set forth below, the Motion is granted-in-part.

I. Background[1]

Village Communities is a real estate development entity that owns approximately 608 acres of land in an unincorporated area of San Diego County, California (the "Property"). FAC, ECF No. 4, ¶ 1. The Property is located just east of Interstate 15 and south of West Lilac Road, approximately ten miles north of the City of Escondido. *Id.* at ¶ 28. Village Communities purchased the property in 2017 from another developer that unsuccessfully tried to develop the Property into approximately 1,750 homes, with an associated school, commercial, and retail facilities. *Id.* at ¶¶ 33, 47. After acquiring the Property, Village Communities substantially revised the proposed project, working with Defendants' Planning Department staff to address various concerns about its scope. *Id.* at 9 47-52. Nonetheless, Village Communities alleges the Planning Department staff was not satisfied with its efforts to reform the project and recommended the Board deny approval. *Id.* at 9 94-100. On June 20, 2020, the Board formally voted to deny the project, and Village Communities filed suit. *Id.*

Fundamentally, this case involves concern (or lack thereof) about wildfires. The Property sought to be developed is in a high risk area for these disasters.

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[1] The following overview of the facts is drawn from Village Communities' FAC, ECF No. 4, which the Court assumes true in analyzing Defendants' Motion to Dismiss. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007). The Court is not making factual findings.

FAC at ¶ 98. Village Communities argues that through its work with Planning Department staff, it revised the project to mitigate the risk down to acceptable levels consistent with the County's General Plan, a master zoning document that governs all future development within the County's boundaries. *Id.* at 9 54. Despite these substantial revisions, Village Communities alleges Defendants denied the permit only after Village Communities refused to meet an unconstitutional condition, namely—purchasing "fuel modification easements" from 50 adjacent land owners. *Id.* at ¶ 102.

A fuel modification easement grants the easement holder the right to enter property and control vegetation on the portion of the property subject to the easement. FAC at ¶ 9. In the context of wildfires, the permitted entry typically involves destroying and removing vegetation that serves as the "fuel" for fires, which can help stop a fire's spread across a roadway, like West Lilac Road. *Id.* Defendants allegedly required Village Communities to obtain these easements from the individual property owners as a condition for approving the development. *Id.* at ¶ 100.

Village Communities argues Defendants' unconstitutionally required Villages Communities to obtain the easements because (1) the County already has the legal authority the easements supposedly convey, (2) other similar projects have not been subject to the same requirement, and (3) Defendants' actions were arbitrary and capricious.

Village Communities asserts five claims for relief FAC at ¶¶ 107-136. Claims one through four allege violations of 42 U.S.C. § 1983, while claim five seeks administrative mandamus pursuant to California

Civil Procedure Code section 1094.5. *Id.* Defendants move to dismiss each of the claims with prejudice. *See* Mot., ECF No. 5.

II. Legal Standard

A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or absence of sufficient facts to support a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.,* 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2011). When considering a Rule 12(b)(6) motion, the Court "accept[s] as true facts alleged and draw[s] inferences from them in the light most favorable to the plaintiff." *Stacy v. Rederite Otto Danielsen,* 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must not merely allege conceivably unlawful conduct but must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Zixiang Li v. Kerry,* 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678.

If a court dismisses a complaint, it may grant leave to amend unless "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.,* 911 F.2d 242, 247 (9th Cir. 1990).

III. Analysis

Village Communities' first four claims allege violations of 42 U.S.C. § 1983 ("Section 1983"), which prohibits state actors from depriving a plaintiff of the "rights, privileges or immunities secured by the Constitution." To prevail on a Section 1983 claim, a plaintiff must show that "(1) acts by the defendants (2) under color of state law (3) depriv[ed] [it] of federal rights, privileges or immunities [and] (4) caused [it] damages." *Thornton v. City of St. Helens,* 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n,* 42 F.3d 1278, 1284 (9th Cir. 1994)). Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Id.* (citations omitted). Accordingly, each of Village Communities' Section 1983 claims must plausibly allege the deprivation of a right protected by the Constitution or laws of the United States. As noted above, Defendants move to dismiss each claim.

A. Takings Clause Claims (Claims 1 and 2)

Village Communities' first and second claims brought pursuant to Section 1983 allege violations of its rights under the Fifth Amendment's Takings Clause through (1) inverse condemnation and (2) a temporary taking. FAC, ¶¶ 107-117. Village Communities argues Defendants committed a taking without just compensation by denying its proposed development project "solely because Village Communities refused to accede to the County's unconstitutional condition to secure 50 off-site roadway easements, at a substantial cost, to establish and maintain a 20-foot 'fuel modification zone' for fire clearing purposes." Opp'n, ECF No. 8, 9.

Defendants argue the FAC fails to state claims for relief because (1) "the County's failure to enact legislation is not a taking," (2) the unconstitutional conditions doctrine does not apply to legislative enactments, and (3) there is no taking because Defendants did not require Village Communities to give up any property. Reply, ECF No. 11, 1-5.

The Fifth Amendment prohibits the government from taking private property for public use without just compensation. Additionally, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994). "In evaluating [a plaintiff's claim, the Court] must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [government entity]." *Id.* at 386 (quoting *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 837 (1987)). The Supreme Court described this "essential nexus" as a "rough proportionality" between the exaction demanded by the government entity and the "nature and extent to the impact of the proposed development." *Id.* at 391.

In 2013, the Supreme Court clarified that the unconstitutional conditions doctrine does not depend "on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant fails to do so." *Koontz v. St. Johns River Water Management District,* 570 U.S. 595, 606 (2013). The Court further confirmed "that the government's demand for property from a

land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when . . . its demand is for money." *Id.* at 619. Reading these authorities together, an unconstitutional conditions claim may arise if the government demands an exaction of money that is not roughly proportional to the nature and extent of the development as a condition of permit approval.

Here, Village Communities alleges Defendants conditioned approval of its proposed development on agreeing to the purchase of fifty fuel modification easements. FAC, 10. Village Communities argues acquiring these easements would only come at a "substantial cost" because it was essentially required to purchase these easements from each of the fifty landowners surrounding the Property in order to obtain approval for the project. *Id.* at ¶ 9. Village Communities also plausibly alleges Defendants did not need those easements because the County Consolidated Fire Code already provided Defendants the authority to take the actions the easements would provide: destroying and clearing vegetation near a public roadway to prevent the spread of a wildfire. *Id.* These allegations plausibly state *prima facie* inverse condemnation and temporary takings claims based on the unconstitutional conditions doctrine.

Defendants' arguments concerning legislative enactments may be persuasive at later phases of the litigation. Village Communities will also have to prove the casual relationship between the alleged unconstitutional condition and the Board's decision, not just the Planning Department staff's recommendation. However, "accept[ing] as true facts alleged and draw[ing] inferences from them in the light most

favorable to the plaintiff," the Court finds Village Communities has plausibly stated claims for relief invoking the Takings Clause. *Stacy,* 609 F.3d at 1035. Accordingly, the Court denies Defendants' Motion to Dismiss these claims.

B. Due Process Claim (Claim 4)

Village. Communities next argues Defendants violated its rights under the Due Process Clause of the Fourteenth Amendment by arbitrarily and unreasonably denying its development application. FAC, ECF No. 4, ¶ 125-26. Defendants argue that legislative immunity shields them from this claim, because approving Village Communities' permits "required two legislative acts—amending the County's General Plan and its zoning ordinance." Reply, ECF No. 11, 6 (citing *Thornton v. City of St. Helens,* 425 F.3d 1158, 1163 (9th Cir. 2005)).

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). Violations of rights protected by the Due Process Clause may be either substantive or procedural. To maintain a substantive due process claim, a plaintiff must show (1) a governmental restriction on a liberty that (2) lacked a rational relationship to a government interest. *N. Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 485 (9th Cir. 2008). Thus, in the context of this case, "a challenge to land use regulation may state a substantive due process

claim, so long as the regulation serves no legitimate government purpose." *N. Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 484 (9th Cir. 2008). A regulation serves no legitimate government purpose where a "land use action lacks any substantial relation to the public health, safety, or general welfare." *Id.* (quoting *Crown Point Dev., Inc. v. City of Sun Valley,* 506 F.3d 851, 856 (9th Cir. 2007)).

Here, Village Communities alleges Defendants imposed a requirement that it obtain useless fuel modification easements as a condition precedent to approval of the proposed development. FAC, ECF No. 4, ¶ 76. Village Communities reasons these easements lack any relationship to the public health, safety, or general welfare because Defendants already have the authority to do the action the easements supposedly allow—*i.e.,* destroy and remove vegetation on the Property that would be subject to the easement. *Id.* Because this condition for project approval is allegedly needless and redundant of existing authority, it "serves no legitimate government purpose." *N Pacific LLC,* 526 F.3d at 484.

Without deciding the issue, the Court concludes Village Communities has plausibly alleged a substantive due process claim. Moreover, it finds Defendants' arguments unpersuasive. In *North Pacifica,* the Ninth Circuit analyzed whether the allegedly wrongful behavior of failing to timely process land use permits could support a substantive due process claim. *Id.* at 485. That court concluded the defendant city council had legitimate reasons for delaying the permit applications and affirmed dismissal of the substantive due process claim. *Id.* Notably, however, the court reached the

merits of that question and did not rely on a grant of legislative immunity. *Id.*

Moving forward, Village Communities retains the burden of proving particular conduct violated its substantive due process rights and Defendants remain free to advance legislative immunity arguments for particular Defendants and particular actions. Here, however, the FAC plausibly alleges Defendants denied the development application for reasons unrelated to public health, safety, or general welfare. Accordingly, the Court denies Defendants' Motion to Dismiss this claim as well.

C. Equal Protection Claim (Claim 3)

Village Communities next alleges Defendants violated its rights under the Equal Protection Clause of the Fourteenth Amendment by imposing a condition for development on Village Communities that Defendants did not impose on other, similarly situated development proposals during the same time frame. FAC, ¶ 120. Defendants argue their decision to deny permitting was discretionary, precluding an equal protection claim, and also benefits from legislative immunity. Reply, ECF No. 11, 6-7.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "When an equal protection claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' action." *N. Pacifica LLC,* 526 F.3d at 486 (citing *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (per curiam)). To support such a claim, Village Communities must allege the govern-

ment treated it "differently from others similarly situated." The discriminatory treatment must be "intentionally directed" at the plaintiff, as opposed "to being an accident or random act." *Id.* (citations omitted).

Here, Village Communities has plausibly pled these allegations. It alleges Defendants imposed the fuel modification easement condition only on its proposed development and not on "other similarly situated properties and projects in the County at or about the same time frame." FAC, ¶ 120. The FAC even lists several projects, providing Defendants additional notice of the nature of Village Communities' claim. *Id.* As discussed above, Village Communities alleges the fuel modification easement condition is an unconstitutional condition, and by imposing the condition Defendants are treating Village Communities "differently from others similarly situated." *N. Pacifica,* 526 F.3d at 486. Therefore, the Court finds this claim is also facially plausible, and denies Defendants' Motion to Dismiss this claim. *See Zixiang Li,* 710 F.3d at 999.

D. Administrative Mandamus (Claim 5)

Village Communities' final claim seeks Administrative Mandamus. FAC, ECF No. 4, ¶¶ 129-136. It asks the Court to issue "an alternative or peremptory writ of mandate commanding Defendants to vacate and set aside its decision to deny the Project and take steps necessary to right the wrong imposed on Village Communities." *Id.* at ¶ 140. Village Communities also argues that in light of the Supreme Court's decision in *Knick v. Township of Scott,* 139 S. Ct. 2162 (2019), it no longer needs to pursue a mandate claim as a con-

dition precedent to a federal Takings Clause claim. Opp'n, ECF No. 8, 17. Defendants argue the claim should be dismissed because the Court cannot grant the relief Village Communities requests. Mot., ECF No. 5, 9-10.

The Supreme Court recently held that "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Knick,* 139 S. Ct. at 2172. Here, Village Communities alleges the unconstitutional condition is the taking, which accrued on the date the Board denied its development application. Accordingly, the Court finds the alleged taking has already occurred, and in accordance with *Knick,* Village Communities can now bring a Takings Clause claim without separately pursuing mandamus relief. Moreover, the Court agrees with Defendants that the requested mandamus relief asks the Court to "compel a legislative body to act in a particular way," which raises concerns of infringing on the separation of powers on which this country was founded. *See Johanson v. City Council of Santa Cruz,* 222 Cal.App.2d 68, 72 (1963). Put simply, the Court may grant Village Communities damages and other relief if it proves its § 1983 claims, but it cannot order the Board to approve this development. Accordingly, the Motion to Dismiss the fifth claim is granted.

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED-IN-PART, ECF No. 5, as follows:

1. Defendants' Motion to Dismiss the first through fourth claims for relief in the FAC brought pursuant to Section 1983 is DENIED.

2. Defendant's Motion to Dismiss Plaintiff's Fifth Claim for Relief, seeking administrative mandamus is GRANTED. This claim is dismissed.

3. If Plaintiff wishes to file an amended complaint, Plaintiff must request leave of this Court within fourteen (14) days of this Order. *See* Fed. R. Civ. P. 15(a)(2).

IT IS SO ORDERED.

/s/ Robert T. Benitez
U.S. District Judge

Dated: February 2, 2021

APPENDIX L
ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 2, 2024)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; ET AL.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

D.C. No. 3:20-cv-0 1896-AJB-DEB
Southern District of California, San Diego

Before: WARDLAW, CHRISTEN, and BENNETT, Circuit Judges.

ORDER

Plaintiffs-Appellants have filed petitions for panel rehearing and rehearing en banc. Dkt. No. 37. The panel has unanimously voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the

petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc are DENIED.

APPENDIX M
CONSOLIDATED FIRE CODE, COUNTY OF SAN DIEGO (2020), RELEVANT PARTS

COUNTY OF SAN DIEGO
2020
CONSOLIDATED FIRE CODE,

7th Edition

This Consolidated Fire Code includes the County amendments to the 2019 California Fire Code and the ordinances of the 13 unincorporated County fire protection districts.

Effective March 27, 2020

[. . .]

. . . inspection and provides penalties for violation of this code. It shall apply to all new construction and to any alterations, repairs, or reconstruction, except as otherwise provided for in this chapter.

Nothing in this chapter shall interfere with or impede the authority of the final decision maker authorized to approve, conditionally approve or deny discretionary projects.

Amendment to Section 96.1.001.

Each of the fire protection districts to which this consolidated fire code applies adopt the following code amendment:

> Section 2. That the Board of Directors of the (insert fire district's name) adopts as the Fire Code for the (insert fire district's name) the following: the 2019 California Fire Code, including the appendix to Chapter 4 and appendices B, C, H, I & K, the 2018 International Fire Code (IFC), and the National Fire Protection Association Standards 13, 13-R & 13-D, as referenced in Chapter 80 of the CFC, together with the District's amendments in this ordinance. This Fire Code is adopted for the protection of the public health and safety. It includes definitions, provisions for the safeguarding of life and property from fire and explosion hazards arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the occupancy of buildings, requirements for permits and inspection for installing or altering systems, regulations for

the erection, construction, enlargement, alteration, repair, moving, removal, conversion, demolition, equipment use and maintenance of buildings and structures, including the installation, alteration or repair of new and existing fire protection systems and their inspection and provides penalties for violation of this code. Each and all of the regulations, provisions, penalties, conditions and terms of the (insert fire district's name) Fire Code on file in the office of the (insert fire district's name) are hereby referred to, adopted, and made a part hereof, as if fully set out in this ordinance.

Sec. 96.1.002. California Fire Code.

The "California Fire Code" means the 2019 Fire Code portion of the CBSC, including the appendix to Chapter 4 and appendices B, C, H, I & K and the IFC (2018 edition).

Sec. 96.1.003. County Fire Code.

References to "this chapter" shall mean the County Fire Code. References to a section number not proceeded by the prefix "96.1," which stands for the title, division and chapter respectively of a section in this chapter, shall refer to the California Fire Code.

Sec. 96.1.004. Responsibility For Enforcement.

(a) The County Fire Warden or authorized representative shall be responsible for ensuring County enforcement of Chapter 56 of the California Fire Code as adopted by and incorporated in the County Fire Code insofar as it pertains to fireworks and pyrotechnics and California Code of Regulations, Title 19,

Division 1, Chapter 6. The Sheriff shall be responsible for enforcement of Chapter 56 of the California Fire Code as adopted and incorporated in the County Fire Code insofar as it pertains to explosives and California Code of Regulations, Title 19, Division 1, Chapter 10.

(b) All other portions of the County Fire Code shall be enforced as follows:

1. By the Fire Warden or his/her duly authorized representative of the San Diego County Fire Authority in all unincorporated areas of the County which are outside a fire protection district.

2. For areas in a fire protection district, by the district fire chief or his/her duly authorized representative.

Sec. 96.1.005. Geographic Limits.

The geographic limits referred to in certain sections of the 2019 California Fire Code are established as follows:

(a) Sec. 5704.2.9.6.1. The geographic limits in which the storage of Class I and Class II liquids in above-ground tanks outside of buildings is prohibited: the unincorporated area of the County of San Diego.

Exceptions:

1. In areas zoned for mixed, general or high impact industrial uses.

2. Crankcase draining may be stored in specially constructed above-ground storage tanks, approved by the fire code official, with a maximum capacity of 550 gallons. These tanks may be located within a building when the fire code official deems appropriate and the container meets U.L. Standard 2085. Containers shall be installed and used in accordance with their listing and provisions shall be made for leak and spill containment. In no case shall storage be allowed on residential or institutional property.
3. With the fire code official's approval, Class I and II liquids may be stored above ground outside of buildings in specially designed, approved and listed containers which have features incorporated into their design which mitigate concerns for exposure to heat, ignition sources and mechanical damages. Containers shall be installed and used in accordance with their listing, and provisions shall be made for leak and spill containment. The fire code official may disapprove the installation of these containers when in his or her opinion their use presents a risk to life or property.

Amendment to Section 110.4.

The Alpine, Bonita-Sunnyside, Borrego Springs, Deer Springs, Lakeside, North County, Ramona, Rancho Santa Fe, Rincon Del Diablo, San Miguel, Valley Center and Vista Fire Protection Districts adopt the following code amendment:

Sec. 110.4 Violations, penalties and responsibility for compliance. Any person who shall violate any of the provisions of this code or standards hereby adopted or fail to comply therewith, or who shall violate or fail to comply with any order made there under, or who shall build in violation of any detailed statement or specification or plans submitted and approved there under, or any certificate or permit issued there under, and from which no appeal has been taken, or who shall fail to comply with such an order as affirmed or modified by the attorney for the (insert fire protection district) or by a court of competent jurisdiction within the time fixed herein, shall severally for each and every violation and noncompliance respectively, be guilty of an infraction or misdemeanor, punishable by a fine not exceeding $1,000.00 or by imprisonment in County Jail not exceeding six (6) months, or both. The imposition of one penalty of any violation shall not excuse the violation or permit it to continue; and all such persons shall be required to correct or remedy such violations or defects within a reasonable time; and when not otherwise specified, each day that prohibited conditions are maintained shall constitute a separate offense.

The application of the above penalty shall not be held to prevent the enforced removal of prohibited conditions.

Amendment to Section 112.4.

The Alpine, Bonita-Sunnyside, Deer Springs, Lakeside, North County, Ramona, Rancho Santa Fe, Rincon Del Diablo, San Miguel, Valley Center and

Vista Fire Protection Districts adopt the following code amendment:

> Sec. 112.4 Failure to comply. Any person who shall continue any work, having been served with a stop work order, except such work as that the person is directed to perform to remove a violation or unsafe condition, shall be liable to a fine of not less than $250.00 or more than $1,000.00.

Sec. 96.1.202. Definitions.

Section 202 of the California Fire Code is revised by adding or modifying the following definitions:

ACCESSORY DWELLING UNIT. Defined as an attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and

DWELLING UNIT. Any building or portion thereof which contains living facilities including provisions for sleeping, eating, cooking and/or sanitation for not more than one family.

ENCLOSED. Closed in or fenced off.

EXPLOSIVES PERMIT. A permit to possess or use explosives, issued by the Issuing Officer, pursuant to California Health and Safety Code Sections 12000 et seq. and Chapter 56 of this Code. An explosives permit shall be valid for a period not to exceed one year, as provided in the permit conditions.

FIRE APPARATUS ACCESS ROAD. A road that provides fire apparatus access from a fire station to a facility, building or portion thereof. This is a general term that includes, but is not limited to a fire lane,

public street, private street, driveway, parking lot lane and access roadway.

FIRE AUTHORITY HAVING JURISDICTION (FAHJ). The designated entity providing enforcement of fire regulations as they relate to planning, construction and development. The FAHJ may also provide fire suppression and other emergency services.

FIRE CHIEF. The fire chief is one of the following:

a) The person appointed by the Board of Supervisors to serve as fire chief in the unincorporated areas not within a fire protection district.

b) The chief officer of a fire protection district.

c) The Fire Warden or her or his delegated representative when enforcing Section 96.1.5608.1 of this Chapter.

FIRE CODE OFFICIAL. The Fire Warden or her or his delegated representative, the fire chief or a duly authorized representative, or other person as may be designated by law, appointment or delegation and charged with the administration and enforcement of this Chapter.

FIRE DEPARTMENT. Any regularly organized fire department, fire protection district, fire company, or legally formed volunteer fire department registered with the County of San Diego regularly charged with the responsibility of providing fire protection to a jurisdiction.

FIRE HAZARD. Any condition or conduct which: (a) increases or may increase the threat of fire to a greater degree than customarily recognized as normal

by persons in the public service regularly engaged in preventing, suppressing or extinguishing fire or (b) may obstruct, delay, hinder or interfere with the operations of the fire department or the egress of occupants in the event of fire.

FIRE PROTECTION DISTRICT. Any fire protection district created under State law and any water district providing fire protection services.

FUEL MODIFICATION ZONE. A strip of land where combustible vegetation has been thinned or modified or both and partially or totally replaced with approved fire-resistant and/or irrigated plants to provide an acceptable level of risk from vegetation fires. Fuel modification reduces the radiant and convective heat on a structure and provides valuable defensible space for firefighters to make an effective stand against an approaching fire front.

GREEN WASTE. Organic material that includes, but is not limited to, yard trimmings, plant waste, manure, untreated wood wastes, paper products and natural fiber products.

HARDSCAPE. Concrete, gravel, pavers or other non-combustible material.

HAZARDOUS FIRE AREA. Any geographic area mapped by the State or designated by a local jurisdiction as a moderate, high or very high fire hazard area or which the FAHJ has determined is a hazardous fire area, because the type and condition of vegetation, topography, weather and structure density increase the probability that the area will be susceptible to a wildfire.

HOGGED MATERIALS. Mill waste consisting mainly of hogged bark but may include a mixture of

bark, chips, dust or other by-product from trees and vegetation.

INSPECTOR. For the purposes of Sections 96.1.5601.2, an inspector is a person on the Issuing Officer's approved list of inspectors authorized to conduct inspections, before and after a blast. To be on the Issuing Officer's approved list, an inspector shall have a blasting license issued by Cal/OSHA.

MAJOR BLASTING. A blasting operation that does not meet the criteria for minor blasting.

MID-RISE BUILDING. A building four or more stories high, but not exceeding 75 feet in height and not defined as a high-rise building by Section 202 of the California Building Code. Measurements shall be made from the underside of the roof or floor above the topmost space that may be occupied to the lowest fire apparatus access road level.

MINOR BLASTING. A blasting operation that meets all of the following criteria: quantity of rock to be blasted does not exceed 100 cubic yards per shot, bore hole diameter does not exceed 2 inches, hole depth does not exceed 12 feet, maximum charge weight does not exceed 8 pounds of explosives per delay and the initiation of each charge

Sec. 96.1.3206.2. General Fire Protection and Life Safety Features.

Section 3206.2 Exception "h" of Table 3206.2 of the California Fire Code is deleted.

Sec. 96.1.3318. Fuel Modification Zone Requirements.

Section 3318 is added to the California Fire Code to read:

Sec. 3318.1 Fuel modification zone during construction. Any person doing construction of any kind which requires a permit under this code, or the County Building Code shall install a fuel modification zone prior to allowing any combustible material to arrive on the site and shall maintain the zone during the duration of the project.

Sec. 96.1.4902. Definitions.

Section 4902 of the California Fire Code is revised to read:

Sec. 4902.1 General. For the purposes of this chapter, certain terms are defined as follows:

BUILDING OFFICIAL means the Director of the Planning and Development Services or any person appointed or hired by the Director to administer or enforce the County's planning and construction standards. The building official duties shall include plan checking, inspections and code enforcement.

CDF DIRECTOR means the Director of the California Department of Forestry and Fire Protection.

COMBUSTIBLE VEGETATION means material that in its natural state will readily ignite, burn and transmit fire from native or landscape plants to any structure or other vegetation. Combustible vegetation includes dry grass, brush, weeds, litter or other flammable vegetation that creates a fire hazard.

DEFENSIBLE SPACE is an area either natural or man-made, where material capable of allowing a fire to spread unchecked has been treated, cleared or modified to slow the rate and intensity of an advancing wildfire and to create an area for fire suppression operations to occur. Distance measurements for defensible space shall be measured on a horizontal plane.

FIRE HAZARD SEVERITY ZONES are geographical areas designated pursuant to California Public Resources Code, Sections 4201 through 4204, and classified as Very High, High and Moderate in State Responsibility Areas or as Local Agency Very High Fire Hazard Severity Zones designated pursuant to California Government Code, Sections 51175 through 51189.

The California Code of Regulations, Title 14, Section 1280 entitles maps of these geographical areas as "Maps of the Fire Hazard Severity Zones in the State Responsibility Area of California."

FIRE PROTECTION PLAN (FPP) is a document prepared for a specific project or development proposed in the wildland-urban interface fire area that describes ways to minimize and mitigate potential loss from wildfire exposure, with the purpose of reducing impact on the community's fire protection delivery system.

FUEL BREAK is an area, strategically located for fighting anticipated fires, where the native vegetation has been permanently modified or replaced so that fires burning into it can be more easily controlled. Fuel breaks divide fire-prone areas into smaller areas for easier fire control and to provide access for firefighting.

LOCAL AGENCY VERY HIGH FIRE HAZARD SEVERITY ZONE means an area designated by a local agency upon the recommendation of the CDF Director pursuant to Government Code Sections 51177(c), 51178 and 51189 that is not a State Responsibility Area and where a local agency, city, county, city and county, or district is responsible for fire protection.

OPEN SPACE EASEMENT means any right or interest in perpetuity or for a term for years in open-space land, as that term is defined in Government Code Section 51051, acquired by the County, a city or a non-profit organization where the instrument granting the right or interest imposes restriction on use of the land, to preserve the land for public use or enjoyment of the natural or scenic character of the land.

OPEN SPACE PRESERVE means open-space land, as that term is defined in Government Code Section 65560(b), for the preservation of natural resources, managed production of resources, outdoor recreation, public health and safety, buffer for a military installation or the protection of cultural resources.

SLOPE is the variation of terrain from the horizontal; the number of feet, rise or fall per 100 feet, measured horizontally, expressed as a percentage.

STATE RESPONSIBILITY AREA (SRA) means lands that are classified by the Board of Forestry pursuant to Public Resources Code Section 4125 where the financial responsibility of preventing and suppressing forest fires is primarily the responsibility of the State.

Amendment to Section 4907.2.

The San Marcos Fire Protection District adopts the following code amendment:

Sec 4907.2 Fuel modification. A person owning, leasing, controlling, operating or maintaining a building or structure in or adjoining a hazardous fire area, and a person owning, leasing or controlling land adjacent to a building or structure in or adjoining a hazardous fire area shall maintain an effective fuel modification zone by removing, clearing or modifying combustible vegetation and other flammable materials from areas within 150 feet from each building or structure. The fuel modification zone may be replanted with either approved irrigated, fire-resistant planting material or approved non-irrigated, drought-tolerant, fire-resistant plant material. Replanting of the fuel modification zone may be required for erosion control.

Exceptions:

1. Single specimens of trees, ornamental shrubbery or similar plants used as ground cover, provided that they do not form a means of rapidly transmitting fire from the native growth to any structure.
2. Grass and other vegetation located more than 30 feet from a building or structure and less than 18 inches in height need not be removed where necessary to stabilize the soil and prevent erosion.
3. With the approval of the FAHJ, the width of the fuel modification zone may be reduced where ignition-resistant structures or other features are constructed. However, in no case shall the fuel modification zone be reduced to less than 100

feet. This exception shall not be construed to allow the FAHJ to require ignition-resistant construction on an existing structure with a fuel modification zone of less than 100 feet.

Sec. 4907.2.1 Fuel modification of combustible vegetation from sides of roadways. The FAHJ may require a property owner to modify combustible vegetation in the area within 20 feet from each side of the driveway or a public or private road adjacent to the property to establish a fuel modification zone. The FAHJ has the right to enter private property to insure the fuel modification zone requirements are met.

Exception: The FAHJ may reduce the width of the fuel modification zone if it will not impair access.

Sec. 4907.2.2 Community fuel modification. The FAHJ may require a developer, as a condition of issuing a certificate of occupancy, to establish one or more fuel modification zones to protect a new community by reducing the fuel loads adjacent to a community and structures within it. The developer shall assign the land on which any fuel modification zone is established under this section to the association or other common owner group that succeeds the developer as the person responsible for common areas within the community.

[. . .]

APPENDIX N
BOARD RESOLUTION
(JUNE 24, 2020)

Resolution No.: 20-078
Meeting Date: 06/24/2020 (03)

A RESOLUTION OF THE SAN DIEGO COUNTY BOARD OF SUPERVISORS DENYING GENERAL PLAN AMENDMENT (GPA) PDS2012-3800-12-001, ZONING RECLASSIFICATION PDS2012-3600-12-003 (REZ), SPECIFIC PLAN PDS2012-3810-12-001 (SP), MASTER TENTATIVE MAP PDS2012-3100-5571 (TM), IMPLEMENTING TENTATIVE MAP PDS2012-3100-5572 (TM), MAJOR USE PERMIT PDS2012-3300-12-005 (MUP), AND SITE PLAN PDS2012-3500-12-018 (STP)

WHEREAS, GPA PDS2012-3800-12-001 has been filed by Village Communities, LLC (Applicant) for the Lilac Hills Ranch Project (Project), consisting of an amendment to the Land Use Element, Mobility Element, and Valley Center and Bonsall Community Plans; and

WHEREAS, associated Zoning Reclassification (PDS2012-3600-12-003), a Specific Plan (PDS2012-3810-12-001), Master Tentative Map (PDS2012-3100-5571), Implementing Tentative Map (PDS2012-3100-5572), Major Use Permit (PDS2012-3300-12-005 (MUP), and Site Plan (PDS2012-3500-12-018) have also been prepared for the Project; and

WHEREAS, on August 7, 2015, August 12, 2015, September 11, 2015, and June 8, 2018 the Planning Commission, pursuant to Government Code Sections 65351 and 65353, held duly advertised public hearings on GPA PDS2006-3800-06-009; and

WHEREAS, on September 11, 2015, the Planning Commission reviewed and considered the information contained in the Environmental Impact Report dated July 1, 2015, on file with Planning & Development Services as Environmental Review Number (ER) PDS2006-3910-12-02-003, which identified that the Project will have significant unmitigated impacts on the environment, prior to making its detailed written recommendation on the Project; and

WHEREAS, the Project is located within a very high fire severity zone and the areas surrounding the Project contain fuel concentrations and corridors that, if combined with certain weather conditions, could result in significant wildfire development in the area; and

WHEREAS, the County Fire Authority reviewed the Project and identified fire safety concerns, specifically regarding evacuations along West Lilac Road, a critical access route for area residents. The County Fire Authority required the Applicant to secure 20-foot easements on both sides of West Lilac Road from Covey Lane to the northwestern Project entrance. The easements would be used to establish and maintain a fuel modification zone in perpetuity to slow the rate of wildfire spread and reduce the entrapment risk to evacuating traffic; and

WHEREAS, the Applicant has not obtained the required easements along West Lilac Road, and therefore the Project involves significant unresolved fire safety concerns; and

WHEREAS, based on these significant unresolved fire safety concerns, the Project is inconsistent with the General Plan as follows:

Safety Element Policies S-1.1, S-3.1 and S-3.6 — The Safety Element of the General Plan includes policies to minimize the exposure to hazards, including assigning land use designations and density that reflect site specific constraints and hazards, and to ensure development implements measures that reduce the risk of human loss due to wildfire. The policies also require development to be located, designed, and constructed to minimize the risk of life safety resulting from wildland fires.

Safety Element Policy 1.1 (S-1.1) requires projects to minimize the population exposed to hazards by assigning land use designations and density allowances that reflect site specific constraints and hazards. The Project proposes to increase the density on the site from 110 dwelling units to 1,746 dwelling units, which will increase the number of residents to be evacuated during an emergency. The Project is located within a very high fire severity zone and the areas surrounding the Project contain fuel concentrations and corridors that, if combined with certain weather conditions, could result in significant wildfire development in the area. This fire risk, combined with the increase in area residents, presents entrapment potential on West Lilac Road during an evacuation. To minimize hazards from the proposed increase in dwelling units and ensure the safety of existing community residents and future Project residents, the

County Fire Authority required offsite easements to ensure annual fuel modification along West Lilac Road. The offsite easements have not been obtained by the Applicant, leaving the significant fire safety concerns unresolved. As a result, the Project will not minimize the population exposed to hazards and is inconsistent with General Plan Policy S-1.1.

Safety Element Policy 3.1 (S-3.1) requires development to be located, designed, and constructed to provide adequate defensibility and minimize the risk of structural loss and life safety resulting from wildland fires. The Project is located along West Lilac Road and Circle R Drive, which provide access to the site. The Project is located within a very high fire severity zone and the areas surrounding the Project contain fuel concentrations and corridors that, if combined with certain weather conditions, could result in significant wildfire development in the area. The Project would increase the number of residents to be evacuated from the area during an emergency. The fire risk in the area, combined with the increase in area residents, presents entrapment potential on West Lilac Road during an evacuation. To minimize hazards from the proposed increase in dwelling units and ensure the safety of existing community residents and future Project residents, the County Fire Authority required offsite easements to ensure annual fuel modification along West Lilac Road. The offsite easements

have not been obtained by the Applicant, leaving the significant fire safety concerns unresolved. As a result, the Project is not located, designed, and constructed to provide adequate defensibility and minimize the risk of structural loss and life safety resulting from wildland fires and is inconsistent with General Plan Policy S-3.1.

Safety Element Policy 3.6 (S-3.6) requires development located within fire threat areas to implement measures that reduce the risk of structural and human loss due to wildfire. The Project is located within a very high fire severity zone and the areas surrounding the Project contain fuel concentrations and corridors that, if combined with certain weather conditions, could result in significant wildfire development in the area. The Project would increase the number of residents to be evacuated from the area during an emergency. The fire risk in the area, combined with the increase in area residents, presents entrapment potential on West Lilac Road during an evacuation. To minimize hazards from the proposed increase in dwelling units and ensure the safety of existing community residents and future Project residents, the County Fire Authority required offsite easements to ensure annual fuel modification along West Lilac Road. The offsite easements have not been obtained by the Applicant, leaving the significant fire safety concerns unresolved. As a result, the Project has not implemented measures that reduce the risk

of structural and human loss due to wildfire and is inconsistent with General Plan Policy S-3.6.

WHEREAS, on June 24, 2020, the Board of Supervisors, pursuant to Government Code Section 65355 held a duly advertised public hearing on GPA PDS2012-3800-12-001; and

NOW THEREFORE, BE IT RESOLVED that the Board of Supervisors takes the following actions:

1. Find that this action is not subject to environmental review under Section 21080(b)(5) and 15270 of the California Environmental Quality Act (CEQA) guidelines because CEQA does not apply to projects which a public agency rejects or disapproves.

2. Deny GPA PDS2012-3800-12-001, which consists of amendments to the Land Use Element Map, Mobility Element, and Valley Center and Bonsall Community Plans.

3. Deny the following associated permits: Zoning Reclassification (PDS2012-3600-12-003), Specific Plan (PDS2012-3810-12-001), Master Tentative Map (PDS2012-3100-5571), Implementing Tentative Map (PDS2012-3100-5572), Major Use Permit (PDS2012-3300-12-005) and Site Plan (PDS2012-3500-12-018).

BE IT FURTHER RESOLVED that all the above recitals are true and correct and incorporated herein.

BE IT FURTHER RESOLVED that the Board of Supervisors finds the Project is not consistent with the San Diego County General Plan for the reasons discussed above.

Approved as to Form and Legality
County Counsel

By:

William W. Witt,
Chief Deputy County Counsel

ON MOTION of Supervisor Jacob, seconded by Supervisor Fletcher, the above Resolution was passed and adopted by the Board of Supervisors, County of San Diego, State of California, on this 24th day of June 2020, by the following vote:

AYES: Cox, Jacob, Gaspar, Fletcher
NOES: Desmond

– – –

STATE OF CALIFORNIA)
County of San Diego) ss

I hereby certify that the foregoing is a full, true and correct copy of the Original Resolution entered in the Minutes of the Board of Supervisors.

ANDREW POTTER

Clerk of the Board of Supervisors

By: /s/ Joana Santiago
Deputy

Resolution No. 20-078
Meeting Date: 06/24/2020 (03)

APPENDIX O
DEED OF EASEMENT 2020

[. . .]

DEED OF EASEMENT

This Deed of Easement is made and entered into as of _____, 2020, by and between _____, (hereinafter, "Grantor") and [PROJECT APPLICANT], together with its successors and assigns (hereinafter, "Grantee"):

RECITALS

A. Grantor(s) are/is the owner(s) of certain real property located in the County of San Diego, State of California, more particularly described in Exhibit "A", attached hereto and by this reference made a part hereof (hereinafter, the "Grantor's Property").

B. An improved, dedicated publicly-maintained road owned by the County of San Diego, commonly known as "West Lilac Road" (hereinafter, "W. Lilac Rd."), is adjacent to the Grantor's Property. The limits of the improved portion of W. Lilac Rd. and Grantor's Property are shown on Exhibit "B", attached hereto and by this reference made a part hereof.

C. Grantee intends to construct approximately houses located to the west and south of W. Lilac Rd. An easement on Grantor's property along W. Lilac Rd. and similar easements on neighboring properties are necessary for public safety to limit the spread of wildfire and allow a safe evacuation route in the event of such a fire.

NOW, THEREFORE, Grantor, for and in consideration of the sum of and other valuable consideration paid by Grantee, does hereby give, grant, and convey unto Grantee the perpetual rights and easements as more fully described below.

1. Grant of Easement. Grantee shall have a permanent a non-exclusive easement (hereinafter, "Easement") over the portion of Grantor's Property consisting of an area that is located within twenty (20) feet of the W. Lilac Rd., and is shown on Exhibit "B" (hereinafter, "Easement Area"). Grantee shall have the right of access, ingress. and egress over, upon. through, and under the Easement Area, and the right to convey said easement, or any portion of said easement, including to public entities. This Easement and the rights granted hereunder are in addition to any and all existing rights of Grantee.

2. Purpose of Easement. The purpose of this Easement is for Grantee to maintain the Easement Area free of combustible vegetation and structures and/or otherwise in compliance with the County of San Diego Consolidated Fire Code and State Fire Code, as amended from time to time (collectively hereinafter, "Fire Code"). Nothing stated herein shall be interpreted as precluding Grantor from carrying out such maintenance.

3. Scope of Easement. Grantor shall retain fee simple ownership of the Easement Area; provided, however. no use may be made of the Easement Area that interferes with Grantee's full. reasonable use of the Easement and rights described herein. Further, this Easement entitles, but does not obligate, Grantee and/or its duly authorized successors, assigns, agents, and or contractors to modify and/or clear combustible

vegetation in the Easement Area to the standards of the Fire Code and to enter upon the Easement Area at any and all times for said purposes. The grant of this Easement is not intended to supersede or replace the Fire Code. or relieve Grantor(s) of their obligations thereunder. and Grantee does not hereby assume any duty or responsibility assigned by the Fire Code to the Grantor(s) or any other person.

4. No Obligation to Maintain: This Easement does not impose on Grantee any obligation to maintain the Easement Area, or otherwise clear the area or perform any other affirmative act of maintenance.

5. Covenants by Grantor. Grantor for itself, its heirs. executors, administrators and assigns, does covenant with Grantee, its successors and assigns, that to the Grantor's actual knowledge. it is the owner in fee simple of Grantor's Property and that it has good right to grant and convey the Easements and rights described herein. Grantor further covenants that the individuals executing this document on behalf of Grantor have all necessary and appropriate authority to bind Grantor to the obligations and conveyances granted herein, and, in the event that Grantor is a corporation or similar entity, that the execution of this document has been authorized by all appropriate and necessary corporate action.

6. Term of Easement: Grantor and Grantee hereby agree that the rights and Easement granted to Grantee and its successors and assigns shall continue in perpetuity and are hereby granted appurtenant to and run with Grantor's Property.

THIS GRANT DEED shall be deemed to have been executed as of the date first written above.

Grantor(s): _____

By: _____
Name:
Its: Authorized Signatory

[. . .]

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

State of California)
County of San Diego)

On _____, 2020. before me, _____, a Notary Public, personally appeared _____. who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person. or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

State of California)
County of San Diego)

On _____, 2020. before me, _____, a Notary Public. personally appeared, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity. and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted. executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

[. . .]

Exhibit A to Deed of Easement
Legal Description of Grantor's Property

[. . .]

Exhibit B to Deed of Easement
West Lilac Road Improvements

APPENDIX P
PC HEARING REPORT, EXCERPTS
(AUGUST 7, 2015)

The County of San Diego
Planning Commission Hearing Report

Date: August 7, 2015

Case/File No.: Lilac Hills Ranch Master Planned Community
PDS2012-3800-12-001 (GPA),
PDS2012-3810-12-001 (SP),
PDS2012-3600-12-003 (REZ),
PDS2012-3100-5571(TM 5571 RPL 5),
PDS2012-3100-5572 (TM 5572 RPL 5),
PDS2012-3300-12-005 (MUP), &
PDS2012-3500-12-018 (STP)

Place: County Conference Center 5520 Overland Avenue San Diego, CA 92123

Project: Master Planned Community consisting of 1,746 dwelling units, 90,000 square feet of commercial, civic and other associated uses on 608 acres

Time: 9:00 a.m. Location: South and West of West Lilac Road, North of Mountain Ridge Road and West of Covey Lane, Valley Center/Bonsall

Agenda Item: #2 General Plan: Existing: Semi-Rural SR-4 (1 unit per 4, 8, or 16 gross acres) and Semi-Rural SR-10 (1 unit per 10 or 20 gross acres)

Proposed: Village Residential (VR-2.9) and Village Core Mixed-use (C-5)

Appeal Status: N/A Zoning: Existing: Limited Agriculture (A70) and Rural Residential (RR)

Proposed: Single-Family Residential Use Regulations (RS) and General Commercial–Residential Use Regulation (C34)

Applicant/Owner: Accretive Investments, Inc./ Numerous

Community: Valley Center Community Planning Area (VCCPA) and Bonsall Community Planning Area (BCPA)

Environmental: Environmental Impact Report

APNs: 127-072-14, 20, 38, 40, 41, 46, 47; 128-280-10, 27, 37, 42, 46; 128-290-07, 09, 10, 11, 51, 54, 55, 56, 57, 58, 59, 60, 61, 69, 70, 71, 72, 74, 75; 128-440-01, 02, 03, 05, 06, 14, 15, 17, 18, 19, 20, 21, 22, 23; 129-010-62, 68, 69, 70, 71, 72, 73, 74, 75, 76; 129-011-15 & 16; 129-300-09 & 10

[. . .]

f. Does the project comply with the California Environmental Quality Act (CEQA)?

B. Development Proposal

1. Project History

This section of the staff report describes the history of the Lilac Hills Ranch project, including the Plan Amendment Authorization (PAA) and discretionary process.

a. Plan Amendment Authorization (PAA) Process

In November 2009, a PAA was filed by Accretive Investments, Inc. requesting authorization to submit an application for a General Plan Amendment (GPA). The PAA process occurred while the County was in the process of updating the General Plan, which was adopted in 2011.

The PAA request was for a master planned community that would include the following:

- 1,746 dwelling units, a school, a neighborhood-serving commercial village center with retail uses, and an active park on 416 acres;
- Requested change in the General Plan Land Use Designation from (17) Estate Residential to (21) Specific Plan Area with an overall density of 4.3 dwelling units per gross acre;
- Requested change in the Regional Category from 1.3 Estate Development Area (EDA) to 1.1 Current Urban Development Area (CUDA);
- Amendment to include Road 3A in Circulation Element; and
- An amendment to the Valley Center Community Plan to include a description of the proposed Specific Plan Area.

The Director of Planning and Land Use (DPLU) denied the PAA request in December 2009. The applicant subsequently appealed the Director's decision to the Planning Commission. The Planning Commission conducted a number of hearings regarding the PAA,

including a site visit and on December 17, 2010, the Planning Commission authorized the PAA (Vote: 4-2-0-1). Following the PAA approval, the Board of Supervisors adopted an updated General Plan on August 3, 2011. (The Road 3A segment that was previously planned through the project site was not included in the updated General Plan.) Please refer to Attachment F for a detailed chronology and description of the events related to the project.

b. Application Submittal

On April 30, 2012 an application for a General Plan Amendment, Specific Plan, Rezone, Master Tentative Map, Implementing Tentative Map, Major Use Permit and two Site Plans were submitted (on December 3, 2013, the Site Plan for the single-family dwelling units in Phase 1 was withdrawn).

The project application includes an amendment to the Land Use and Mobility Elements of the General Plan to include the following:

- 1,746 dwelling units (2.9 dwelling units per acre);
- 90,000 square feet of office and retail;
- Amend the Valley Center and Bonsall Community Plans to include a new Village and a description of the project;
- Change the classification of West Lilac Road from a 2.2C Light Collector with Intermittent Turn Lanes to a 2.2F Light Collector with Reduced Shoulder; and
- Amend Table M-4 to add segments of West Lilac Road and Old Highway 395 to the list

of Accepted Road Classifications with Level of Service E/F.

c. California Environmental Quality Act (CEQA)

A Draft EIR was prepared for this project and was circulated for a 45 day public review period from July 3, 2013 to August 19, 2013. As a result of the public comments received, substantial changes were made to the Draft EIR. As required by CEQA, the Revised EIR was recirculated for a 45-day public review from June 12, 2014 to July 28, 2014. The changes included the following:

- Additional details about project design;
- Additional option for fire service;
- Revised conclusion that the project would be growth inducing;
- Additional analysis of cumulative projects including an updated project list;
- Revised traffic analysis resulting in addition of a new direct traffic impact;
- Revised conclusion that the project would result in significant impacts to agricultural resources;
- Additional analysis relating to the project conformance with General Plan Policies LU-1.1 and LU-1.2;
- Revised analysis for greenhouse gases;
- Addition of an energy subchapter in Chapter 3.1 and two new alternatives in Chapter 4.0; and

- A variety of other minor changes and corrections.

The Revised EIR identified significant and unavoidable environmental impacts to Aesthetics, Air Quality, Transportation, Traffic and Noise. The Revised EIR also identified significant and mitigated environmental impacts to Agricultural Resources, Biological Resources, Cultural Resources, Hazards and Hazardous Materials. For more information on the EIR, please see Attachment H, Environmental Documentation.

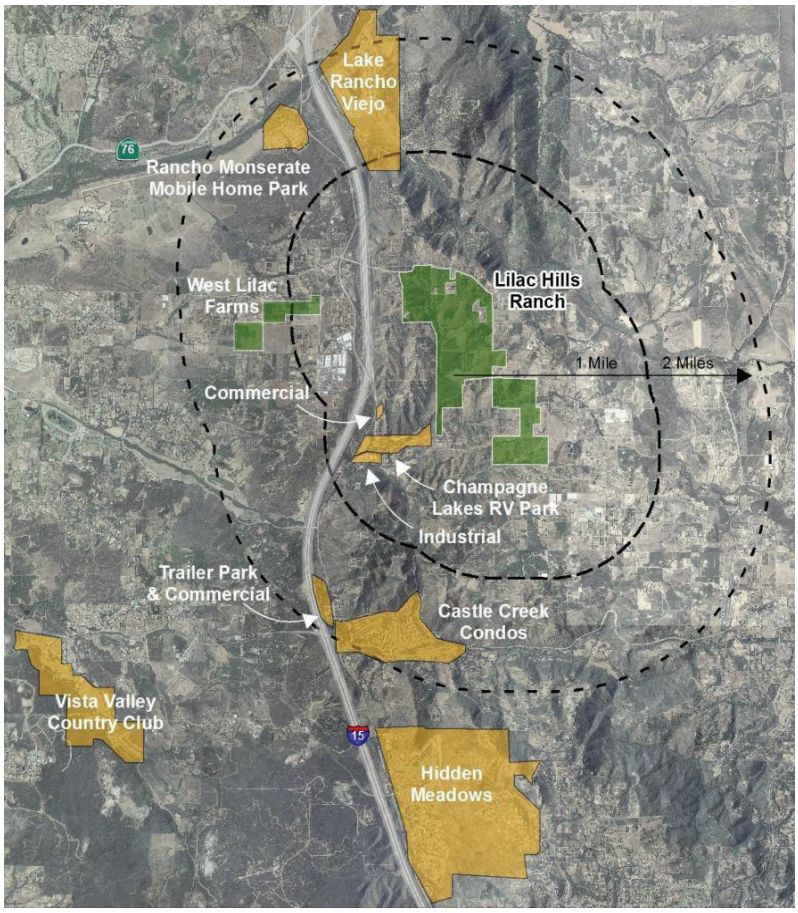
2. Regional Setting and Project Location

The following section describes the regional setting, project location, and a description of the project site.

a. Regional Location and Surrounding Land Uses

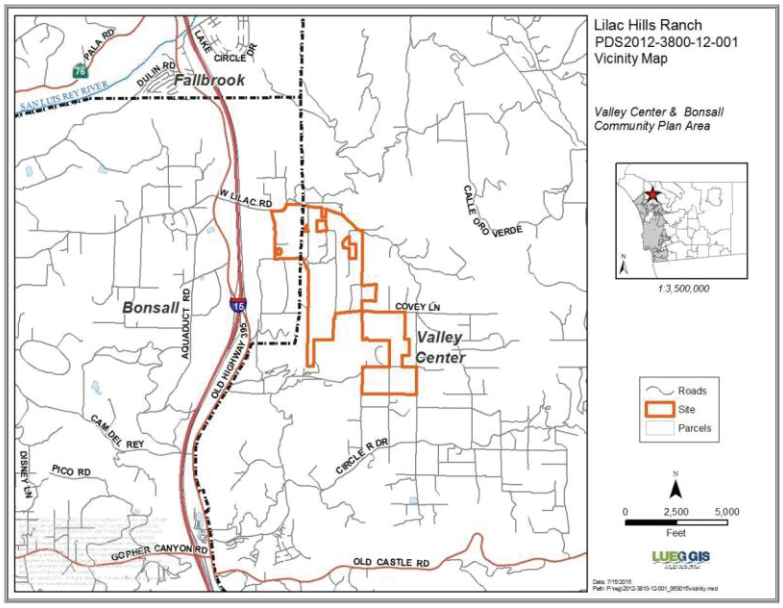
The project site is located in the unincorporated area of northern San Diego County, approximately 10 miles north of Escondido and approximately 0.5 mile east of the Interstate 15 (I-15) corridor and Old Highway 395 as shown in Figure 1. A number of residential communities are located within a 5 mile radius of the project site: Lawrence Welk Village (4.5 miles south), which includes a resort, approximately 512 time shares and two 18-hole golf courses; Rancho Monserate Mobile Home Park (2.5 miles north), which contains approximately 232 mobile homes; Lake Rancho Viejo (2.5 miles north), which contains approximately 816 dwelling units; and Castle Creek Inn and Resort (2 miles south), which contains approximately 63 condominium units and a golf course.

Figure 1: Regional Location Map



The project site is approximately 608 acres and is comprised of 59 parcels in the westernmost portion of the Valley Center Community Plan area (530 acres) and easternmost portion of the Bonsall Community Plan area (78 acres) as shown in Figure 2. The Valley Center and Bonsall communities are located in northern San Diego County approximately 10 miles north of the City of Escondido.

Figure 2: Project Location Map



The surrounding area is characterized by the east-west San Luis Rey river valley along the SR-76 corridor and the north-south I-15 corridor. Both the San Luis Rey River floodplain and the I-15 corridor are flanked by rolling hills which have historically been used for citrus and avocado groves, estate residences, and open space as shown in Figure 3 below.

Residential development near the project site is primarily located along West Lilac Road, Covey Lane, Mountain Ridge Road, and Rocking Horse Road (accessed from Old Highway 395). The surrounding area consists primarily of single-family detached homes on lot sizes ranging from approximately one acre, to farm homes on large parcels (40 acres) with mostly citrus and avocado groves. Typical architectural styles in the area are Mission or Ranch style, and homes are mostly one and two-stories. The land uses closest to the project site include agriculture (primarily

orchards and nurseries, but also row crops), low-density rural residential, and undeveloped land. Other land uses within close proximity to the site include commercial and office buildings, a recreational vehicle park, and an industrial rock manufacturing and concrete batch plant. To the southwest of the project site is Castle Creek Inn and Resort, as well as single-family residential uses and a golf course.

[. . .]

. . . ability to provide potable water service to the project. In addition, the VCMWD also provided a supplemental approval on June 5, 2015 after Executive Order B-29-15 was issued by the State of California, which mandated a statewide 25 percent reduction in potable water use through February 2016. The WSA included a combination of on-site groundwater, reclaimed water and potable water in order to supply water to the project site. All wastewater generated by the project would be reclaimed by the VCMWD. A Major Use Permit is proposed for an on-site wastewater recycling facility. Please see Section C.2.b. of this report for a detailed discussion regarding water and sewer service.

2) Fire and Medical Service

The project is located within the Deer Springs Fire Protection District (DSFPD) and fire and emergency medical services would be provided by the DSFPD and/or CAL FIRE. The DSFPD has provided a Project Facility Availability Form indicating that the project is located within the district and fire and emergency services would be adequate to service the project. However, the DSFPD indicated that their existing fire station is not located within the 5

minute travel time required by the General Plan. A Fire Protection Plan for the project was approved by DSFPD. The plan details the locations and widths of appropriate fuel management zones, road widths, secondary access, water supply, and hydrant spacing, which would comply with the DSFPD standards and County Consolidated Fire Code Standards. The project will be conditioned to meet the County's General Plan five-minute travel time. Please see Section C.2.b. of this report for a detailed discussion regarding fire service.

3) Parks and Recreation

The project is also partially located within the Valley Center Parks and Recreation District (VCPRD) as shown in Figure 11. The County of San Diego Parkland Dedication Ordinance (PLDO) (County Code section 810.101 et seq.), requires that projects that propose more than 50 dwelling units dedicate land for parks, pay PLDO fees or a combination of both. The PLDO requires a total of 15.09 acres of parkland based on the number of dwelling units proposed by the project. The PLDO allows up to half of the parkland dedication to be satisfied through the construction of private parks. The project would provide a total of 25.6 acres (gross) of parks (19.1 acres as defined by PLDO), including a 13.5-acre (net) public park, which exceeds the project's PLDO obligation.

A private recreation facility would also be located within Phase 3 and would provide active indoor and outdoor amenities that may include a swimming pool, gym, basketball courts, and tennis courts. The facility would be privately operated and maintained. Additionally, a smaller private recreation facility would

be constructed in Phase 1 and may include tennis courts, and a multi-use field, a pool, spa, clubhouse, and reception hall. The 13.5-acre public park within Phase 3 would be dedicated to the County of San Diego and would be operated by either the Department of Parks and Recreation or the VCPRD. An interim public park (8 acres) site has been identified in order to meet the PLDO requirements until the 13.5-acre public park is developed in Phase 3. The proposed park plan is shown in Figure 11.

[. . .]

. . . Valley Center Road & SR-76 and/or Escondido Transit Center) through the SANDAG iCommute program until transit service is provided to the site.

b. General Plan Amendment

The County can amend the General Plan pursuant to State Law (Government Code Section 65350). The General Plan (Chapter 1-Implementing and Amending the Plan) establishes the methods and findings for amending the General Plan. The General Plan specifically states that "the General Plan is intended to be a dynamic document and must be periodically updated to respond to changing community needs."

1) General Plan Conformance

The Specific Plan was reviewed to ensure that the proposed General Plan Amendment is in the public interest and would not be detrimental to public health, safety, and welfare. Staff reviewed all of the 473 goals and policies in order to determine those that were applicable to the project and determined it to be consistent except where text revisions have been proposed

(*i.e.* Valley Center and Bonsall Community Plans). Staff reviewed all of the public comments received regarding the Specific Plan's consistency with the General Plan. For a full discussion of consistency with individual General Plan goals and policies, please refer to Attachment C-General Plan Consistency Table and Appendix W, an attachment to the Draft Final EIR.

2) Policy LU-1.2 Leapfrog Development (General Plan)

During the processing of the project, the County received a number of comments addressing Land Use Policy LU-1.2. The main focus of the comments and the staff analysis is provided below:

The overall theme of the Policy LU-1.2 comments assert that the County is precluded by law from approving the project because the project does not comply with General Plan Policy LU-1.2 Leapfrog Development (Policy LU-1.2) and the Community Development Model ("CDM"). Staff has determined that the project is consistent with Policy LU-1.2 and the CDM based on the following information:

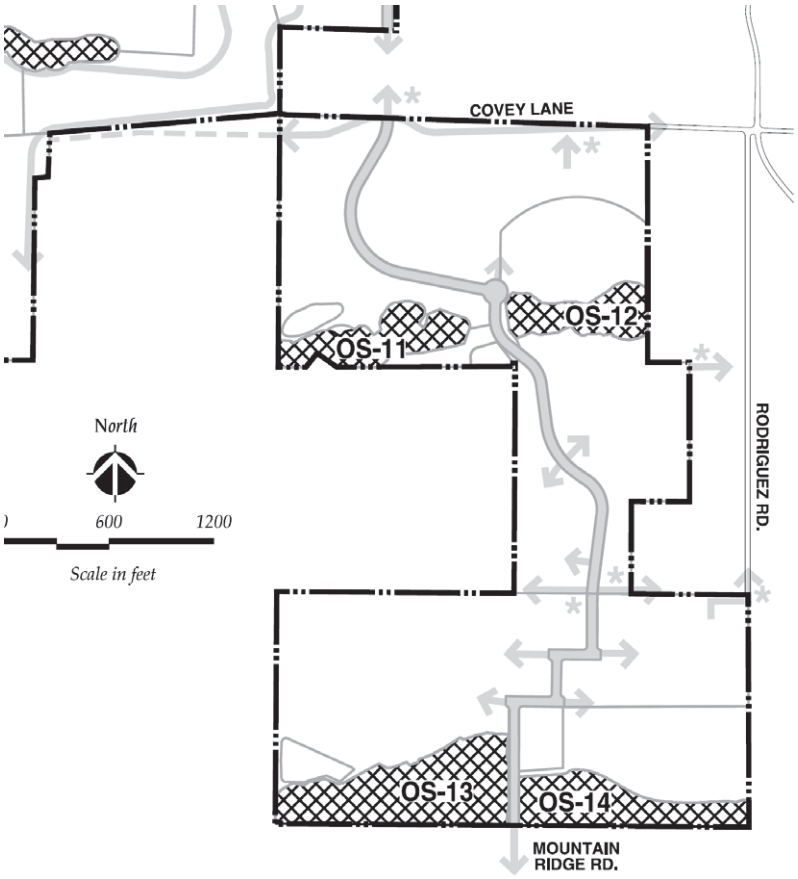
Policy LU-1.2 regulates the establishment of new Village densities, and states the following:

> "Prohibit leapfrog development which is inconsistent with the Community Development Model. Leapfrog Development restrictions do not apply to new villages that are designed to be consistent with the Community Development Model, that provide necessary services and facilities, and that are designed to meet the LEED-Neighborhood Development Certification or an equivalent. For

purposes of this policy, leapfrog development is defined as Village densities located away from established Villages or outside established water and sewer . . . .

[. . .]

Figure 20: Gate Exhibit



b. Facilities and Services

Fire Service

The General Plan requires that project's located within a Village boundary must demonstrate that fire and emergency services can be provided within a 5-minute travel time. Travel time does not represent total response time, which is calculated by adding the travel time to the call processing time and to the turnout/reflex time. Therefore, the project must demon-

strate that the travel time from the closest fire station to the furthest dwelling unit is within 5-minutes.

General Plan Policy S-6.4, Table S-1 establishes a 5-minute travel time. Policy S-6.4 states the following:

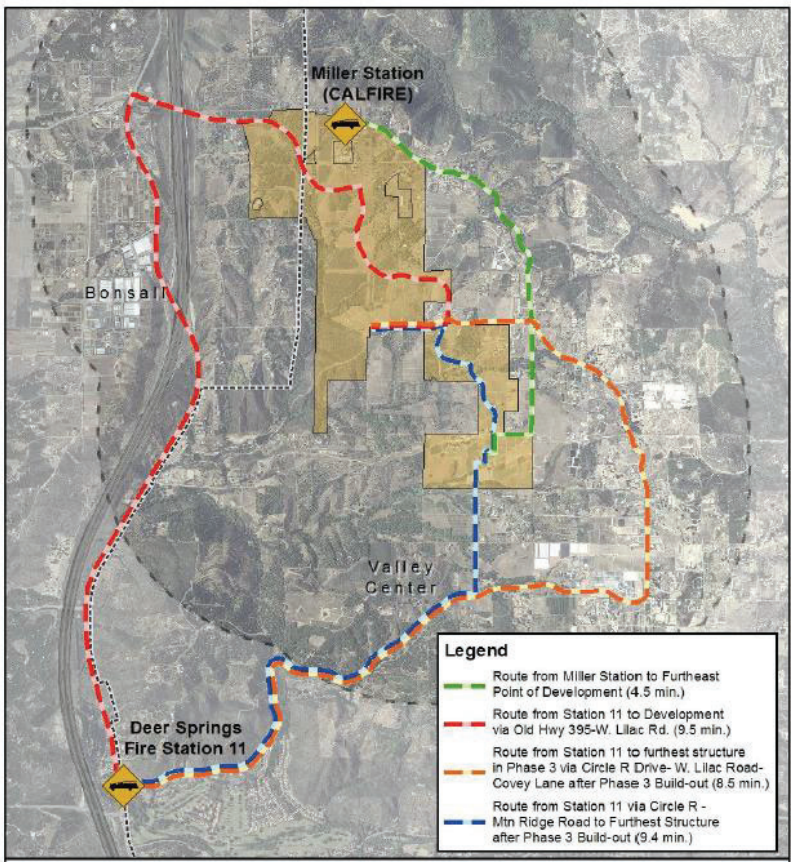
> *"Require that new development demonstrate that fire services can be provided that meets the minimum travel times identified in Table S-1 (Travel Time Standards from Closest Fire Station)." Travel time is calculated from the fire station to the farthest dwelling unit of the development. Fire station is defined under this Policy as a station that is "staffed year-round, publicly supported and committed to providing services" and does not include "stations that are not obligated by law to automatically respond to an incident."*

The project site is located within the Deer Springs Fire Protection District (DSFPD) and it is the Fire Authority Having Jurisdiction ("FAHJ"). DSFPD designated Station 11 as the "primary" station to serve the project and from which to calculate travel times for purposes of determining the Project's compliance with Policy S-6.4. (Project Facility Availability Form provided in Attachment E) Station 11 is owned and operated by the DSFPD and is located at 8709 Circle R Drive, approximately 5 miles from the project site. Based on a travel time analysis, Station 11 could not respond to the entire project within the five minute travel time as required by Policy S-6.4, but would be able to meet the 5-minute travel time for 71 units located within the northwest corner of Phase 1.

A CAL FIRE station (Miller Station) for wildfire prevention and suppression is also located adjacent to

the project site. The County and CAL FIRE are parties to a Cooperative Fire Programs Fire Protection Reimbursement Agreement. Under this agreement, CAL FIRE provides "Schedule A" and "Amador" services to the County. Under the Amador component of this agreement, the County supplements CAL FIRE with approximately $2.6 million annually to keep eight CAL FIRE stations open during the off season to augment the local fire services provided in County Service Area 135. The Miller Station is currently one of the eight stations CAL FIRE keeps open during the off season. This agreement was just recently amended for an additional five year term expiring in 2018. The Miller Station site could serve the entire project within 5-minutes. Please see Figure 21 below for the fire station locations and distances from the project.

Figure 21: Fire Service and Travel Time



Staff has determined that the travel time standard set forth in the General Plan is calculated from the Station 11, the closest DSFPD station, and not from the CAL FIRE Miller Station because the Miller Station is not obligated by law to provide structural fire protection within the DSFPD. As a result, the project includes four fire service options that would provide the project with fire and emergency services in accordance with the 5-minute travel time standard of the General Plan. The four fire service options were

analyzed in the EIR, Fire Protection Plan and Capabilities Assessment and are as follows:

Fire Option 1: Under this option, Deer Springs Fire Protection District (DSFPD) and/or CALFIRE would provide fire and medical emergency services from the Miller Station site to the project within the 5 minute travel time standard pursuant to an agreement as specified herein. The existing Miller Station's location is optimal for serving the entire project site within a 5 minute travel time. This option may involve a collocated facility at the Miller station site, improvements to the Miller Station or another approach that would ensure that emergency services would be provided to the project from the Miller station site consistent with the 5 minute travel time standard. An agreement that is satisfactory to PDS, Deer Springs Fire Protection District, and CAL FIRE that provides assurances that emergency services will be provided to the project within 5 minutes travel will be required.

Fire Option 2: This option would include a separate DSFPD fire station facility on the Miller Station site in order for such a facility to be completely independent from CALFIRE. (Although the new facility would be staffed by CALFIRE personnel under contract with DSFPD). This option would include an agreement between the project applicant, DSFPD and CALFIRE to either remodel Miller Station to collocate and staff a DSFPD Type I paramedic engine on the site within the existing CALFIRE station or the construction of a completely separate DSFPD station. The project will be required to fund the capital expenditures that are needed to provide services to the project, and emergency services will be funded from the project based upon

the ongoing revenues available from property taxes and other assessments.

Fire Option 3: Under this option, DSFPD could agree to build a neighborhood fire station within the community purpose facility site located within Phase 3 of the Lilac Hills Ranch project. A Type I paramedic engine with a 3-person crew and the third position as a reserve firefighter could be added at this station by DSFPD.

Fire Option 4: This option includes a new DSFPD fire station within Phase 5, the southern portion of the project site. This option is identified as the Mountain Ridge Road Fire Station Alternative in the EIR. The Mountain Ridge Road Fire Station Alternative must be adopted under this option with the requirement to provide a fire station within Phase 5.

Staff has determined that the project complies with policy S-6.4 because fire and emergency services will be provided to the project within the 5-minute travel time by conditioning the project to implement one of the four options listed above prior to recordation of a Final Map that creates any lots outside of the 5 minute travel time (71 lots are within the 5-minute travel time in Phase 1). The DSFPD has also provided a Project Facility Availability Form that indicates that the project is located within the district, is eligible for service and facilities are currently adequate to serve the project.

Water Service

The project is located within the boundaries of the Valley Center Municipal Water District (VCMWD) for water service. The VCMWD has provided a Project

Facility Availability Form that indicates that the project is within the district, is eligible for service, and facilities to serve the project are reasonably expected to be available within the next five years (included in Attachment E). In addition, the VCMWD has issued Preliminary Concept Approval and entered into a Pre-Development Agreement for providing water, wastewater and recycled water service. The Preliminary Concept Approval and Pre-Development Agreement are included in Attachment E – Planning Documentation.

[. . .]

d. Adopt the Ordinance titled:

ORDINANCE CHANGING THE ZONING CLASSIFICATION OF CERTAIN PROPERTY WITHIN THE BONSALL AND VALLEY CENTER COMMUNITY PLAN,
REF: PDS2012-3600-12-003 (Attachment K).

e. Adopt the Resolution of Approval for Master Tentative Map PDS2012-3100-5571 which includes those requirements and conditions necessary to ensure that the project is implemented in a manner consistent with State law and County of San Diego regulations (Attachment L).

f. Adopt the Resolution of Approval for Implementing Tentative Map PDS2012-3100-5572 which includes those requirements and conditions necessary to ensure that the project is implemented in a manner consistent with State law and County of San Diego regulations (Attachment M).

g. Grant Major Use Permit PDS2012-3300-12-005, make the findings, and impose the requirements

and conditions as set forth in the Form of Decision (Attachment N).

h. Grant Site Plan PDS2012-3500-12-018 and impose the requirements and conditions set forth in the Site Plan Form of Decision (Attachment O).

j. Direct staff to update the Transportation Impact Fee (TIF) Program to incorporate the Lilac Hills Ranch General Plan Amendment.

Report Prepared By:

Mark Slovick, Project Manager
858-495-5172
mark.slovick@sdcounty.ca.gov

Report Approved By:

Mark Wardlaw, Director
858-694-2962
mark.wardlaw@sdcounty.ca.gov

Authorized Representative: /s/ Mark Wardlaw
Mark Wardlaw Director

APPENDIX Q
LETTER, COUNTY OF SAN DIEGO
(JANUARY 8, 2020)

County of San Diego

Public Safety Group
San Diego County Fire Authority
5510 Overland Ave, Suite 250,
San Diego, CA 92123-1239
www.sdcountyfire.org

HERMAN REDDICK
DIRECTOR
(858) 974-5999

SUSAN QUASARANO
PROGRAM MANAGER
(858) 974-5924
Fax (858) 457-9562

January 8, 2020

Jon Rilling
RANCH CAPITAL, LLC
11452 El Camino Real, Ste 120
San Diego, CA 92130

Mr. Rilling,

This letter includes the County Fire comments from the review of the December 9, 2019 submittal labeled as the Lilac Hills Ranch Wildfire Safety Compendium.

The submittal didn't include enough mitigation and details for County Fire Authority to determine that the fire and evacuation impacts are a less than significant. The following comments are an effort to substantially detail mitigation to result in a final determination:

1. Evacuation Routes: The addition of the 3rd middle ("contingency") lanes on West Lila Road (Old Highway 395 to Main Street) and Circle R Drive (Old Highway 395 to Circle R Court) have value to evacuate residents quicker. Please relabel as a median without cross hatching or straight arrows. These Road Modifications will require acceptance by the Department of Public Works. Colored circles shall be added at the key intersections to the figure to better explain the two-way exit points as well as a chart with the existing and proposed evacuation trips on all routes (Circle R, West Lilac, Nelson Way and Old Highway 395.

2. Nelson Way: This access route has value and shall be improved to private road standards prior to occupancy of the first occupancy of Phase 1. Since Phase 1 will utilize the Miller Station, a road connecting Nelson Way to the Miller Station shall also be required prior to the first occupancy of Phase 1. A graphic shall be added to show the improvements and clearing of Nelson Way and the connecting road.

3. Blind Curves: Please include a graphic showing the locations and a detail of each of the 3

blind curves that will be improved to meet the road standards.

4. Fuel Modification: Although several segment examples were provided to show the edge of the right-of-way (ROW) in relation to the edge of pavement, it is still unclear if enough road clearing can occur. A c:omplete West Lilac aerial is required showing the edge of pavement in relation to the edge of the ROW from Covey Lane to the proposed northwesterly. Also include the property lines of the adjacent properties and the APN's. The amount of clearing that can be accommodated within the ROW is crucial to determine the safety of the project because private property owners' permissions to allow clearing are not assured. Without 20 feet to clear within the ROW beyond the pavement or an easement from the private property owners on the northeast side of West Lilac Road between Covey Lane northwesterly to the proposed project boundary, an alternative an off-site fuel break easement is required that parallels West Lilac, behind the adjacent residences (see attached).

5. Clearing Payment: An initial payment of $250,000 and more for each subsequent occupancy was offered (up to $2 million) to pay for clearing and hardening adjacent residences to Deer Springs Fire Protection District (DSFPD). The payment should be equal to the work proposed. Please complete and submit an appraisal of brush clearance work along the off-site roadways. This will

help determine the appropriate assessment. County Fire may require a developer agreement to collect annual (not per occupancy) funds and administer the program. The details will be worked out once the appraisal is submitted.

6. Miller Station: Since the permanent Deer Springs Station construction is not scheduled until Phase 2, improvements to the Miller Station are required prior to first occupancy. Improvements include hooking up Ito sewer, a storage shed, resurfaced driveway/ parking area, a 3-bay garage facility, enclosing the current garage, and interior improvements.

7. Temporary Safe Refuge: Please add to the writeup that the project will be conditioned to register the park with the County's Department of Animal Services to handle evacuating large animals during an emergency.

8. Gate Access: In addition to providing a 24-hour guard at the Mountain Ridge Road gate, the gate at Nelson Way should be able to be controlled by this guard.

9. Weather Station: The applicant proposed an SDG&E weather station. A condition will require a "RAWS" weather station atg the Miller Fire Station.

10. Cell Tower: The applicant proposed a hardened cell tower with battery backup. This will be required prior to first occupancy and will provide a significant benefit for WEA alerting and first responders.

11. Electronic Signage: The applicant proposed changeable and regular signage along the evacuation routes to disseminate real time conditions. This signage could be used for year-round fire safety messaging, defining evacuation routes, and should be controlled by OES. Hard signage should also be proposed. Specific locations should be proposed in a Figure.
12. Underground Utilities: Please add when each undergrounding would occur by expanding the list on pages 36 and 37.
13. On-Site Walls & Fuel Modification Zones: The applicant proposed to add walls adjacent to internal native fuels as well as increasing the fuel modification zones. These are acceptable to County Fire.

Coordination shall also occur with the DSFPD on these project revisions. County Fire also strongly encourages the applicants to finalize the Fire Service Agreement as soon as possible.

For any questions or to set up a meeting to further understand the comments, please contact David Sibbet at david.sibbet@sdcounty.ca.gov or by phone at (858) 974 5921.

Thanks

/s/ Dave Nissen
Deputy Chief
SAN DIEGO COUNTY FIRE AUTHORITY

APPENDIX R
EMAIL EXCHANGE
(JANUARY 29, 2020)

From: Wardlaw, Mark
To: Larry Hershfield
Cc: Aghassi, Sarah; Millstein, Mel; Mecham, Tony@CALFIRE; Nissen, Dave; Slovick. Mark; Jon Rilling; Sam Hartman
Subject: Re: Follow-up
Date: Wednesday, January 29, 2020 1:17:34 PM

Warning: this message is from an external user and should be treated with caution.

Hi-Ok, meeting today is canceled. Will get back on you points and next steps.

Thanks

Sent from my iPhone

On Jan 29, 2020, at 12:05 PM, Larry Hershfield <lhershfield@ranchcapital.com> wrote:

Dear Mark—

Your email of this morning stated:

"I spoke with Dave Nissen, Deputy Chief, to clarify the information that was requested by County Fire Authority. Chief Nissen confirmed the expectation and information requested of your team: "Roadside clearing along West Lilac road shall be provided by an easement and be instituted from Covey Lane to Old Hwy 395. Further, the clearing shall be for both sides of the road and be inclusive of ALL

PROPERTIES regardless of current vegetation that may be present. Lastly, the improved width of the roadside clearing shall be 20' (feet) on both sides of West Lilac road" (emphasis added).

The requirement that we obtain easements on both sides of West Lilac Road is inconsistent with the letter we received from Deputy Chief Nissen on January 8, 2020 coupled with the subsequent direction provided to us by Fire personnel. The January 8th letter reads in relevant part:

> *"Without 20 feet to clear within the ROW beyond the pavement or an easement from the private property owners on the northeast side of West Lilac Road between Covey Lane northwesterly to the proposed project boundary, an alternative an off-site fuel break easement is required that parallels West Lilac, behind the adjacent residences" (emphasis added). See full letter attached.*

Subsequent to receipt of this letter, my team met with Chief Nissen, Dave Sibbet and Mark Slovick on January 9th, 13th and 14th, and participated in numerous phone calls with Fire personnel regarding this topic. In those meetings and calls, the guidance provided by County was that the clearing requirements were along parcels on the northeast side of West Lilac Road between Covey Lane and the Project's easterly boundary *with flammable vegetation, and not along parcels that have ornamental landscaping,*

privacy walls or agriculture.

It likely makes sense to defer today's meeting to give parties on both sides time to reach clarity on this requirement. In the meantime, we are continuing to satisfy the requests previously provided.

Thank you.

Best, Larry

Lawrence S. Hershfield | RANCH CAPITAL LLC
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www.ranchcapjtal.com

<County Comment Letter-Lilac Hills Ranch-1-8-20.pdf-Adobe Acrobat Professional.pdf>

From: "Wardlaw, Mark"
<Mark.Wardlaw@sdcounty.ca.gov>
Date: January 29, 2020 at 7:52:39 AM PST
To: Larry Hershfield <lhershfield@ranchcapital.com>
Cc: "Aghassi, Sarah"
<Sarah.Aghassi@sdcounty.ca.gov>, "Millstein, Mel"
<Mel.Millstein@sdcounty.ca.gov>, "Tony Mechum"
(Tony.Mecham@fire.ca.gov)"
<Tony.Mecham@fire.ca.gov>, "Nissen, Dave"
<Dave.Nissen@sdcounty.ca.gov>, "Slovick, Mark"
<Mark.Slovick@sdcounty.ca.gov>

Subject: Follow Up to Our Conversation – Lilac Hills Ranch

Hi Larry,

Thanks for calling me yesterday about the purpose of our meeting today, and about clarifying the County's fire safety, fuel management and access requirements along West Lilac Road for the proposed Lilac Hills Ranch project. During our call, you raised a concern that it was not clear where the fuel management and access was expected to be required and that you would like the opportunity to refine specific and more limited locations with County Fire Authority staff members. You also mentioned it was not feasible to acquire easements along the entire length of West Lilac Road. I agreed to contact County Fire Authority to make sure that the requirements and expectations were clear and defined and if additional working meetings should be held.

I spoke with Dave Nissen, Deputy Chief, to clarify the information that was requested by County Fire Authority. Chief Nissen confirmed the expectation and information requested of your team: "Roadside clearing along West Lilac road shall be provided by an easement and be instituted from Covey Lane to Old Hwy 395. Further, the clearing shall be for both sides of the road and be inclusive of ALL PROPERTIES regardless of current vegetation that may be present. Lastly, the improved width of the roadside clearing shall be 20' (feet) on both sides of West Lilac road."

Our collective team believes these requirements are clear. Because the easements have not been secured, and as you mentioned are not likely to be secured, additional meetings with staff members are

not necessary. Based on this information the County will not be recommending approval of the project. Our executive team (PDS, Fire Authority and LUEG) is able to discuss this with you at our meeting scheduled on Wednesday, January 29th at 3-4PM. Please let me know how you would like to proceed.

Regards,

Mark Wardlaw
Director
Planning & Development Services
5510 Overland Ave. Ste 310
San Diego, CA 92123
(858) 694-2962
Mark.Wardlaw@sdcounty.ca.gov

APPENDIX S
DEPOSITION OF MARK SLOVICK, EXCERPTS
(SEPTEMBER 27, 2021)

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

VILLAGE COMMUNITIES, LLC.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO, ET AL.,

Defendants.

Volume 1
San Diego, California

[September 27, 2021, Transcript, p.143]

. . . easements along the entire length of West Lilac Road, do you see that?

A. I do.

Q. All right. At that time January 29, 2020, you knew it wasn't feasible to acquire the easements along the entire length of the West Lilac Road, right?

A. The only reason, just based on this, that's accurate.

Q. But what I am asking you is, apart from this email, as of January 29, 2020, you knew it was not feasible to acquire easements along the entire length of West Lilac Road, right?

A. I don't understand the question. How would I know if it's feasible or not. It would just be based on the applicant.

Q. All right. Okay. Well, for example, you knew there were project opponents who lived along that West Lilac Road segment, right?

A. Correct.

Q. Right. Um, for example, you knew the Western Cactus Farm that existed along West Lilac Road, right?

A. Um, yes, I do.

Q. And they were a vocal opponent of the project, right?

A. Yes, they are.

Q. And they attended scoping meetings, hearings, they submitted adverse comment letters, right?

A. Correct.

Q. And that cactus farm is situated along West Lilac Road in the identified segment, right?

A. I believe so.

Q. Yeah. Maybe take—let's take a look at that one aerial that we have attached to the January 8 letter from County Fire. Can you point out where the Western Cactus parcel is?

A. Yes.

Q. All right. Let's do this. A highlighter?

A. It would be tough to see.

Q. So go ahead, with this blue highlighter, go ahead and circle the western parcel.

A. I believe it's this one. I am sure John or Larry can confirm.

Q. Okay. The witness has put a blue circle around the–

A. I am not entirely sure, it's tough to tell, but I believe it's that one.

Q. And just for the record, that is Exhibit 14, right?

A. Correct, yes.

Q. All right. And the owners of the Western Cactus Farm, is that the British family, Hans and Marcus—Marcos?

A. I believe so, yes.

Q. And they too were vocal opponent of the project?

A. That's right, yes.

Q. And they lived along West Lilac Road, right?

A. They did, yes.

Q. And in the spot you circled, right?

A. I believe that's their house, yes.

Q. How about Mark Wollam, he, too, was a vocal project opponent?

A. Yeah, I remember having conversations with him. I don't specifically remember where he lives, though.

Q. Um, do you know if he resides along West Lilac Road?

A. I do not.

Q. Okay. But you had spoken with him, he attended workshops, hearings, wrote comment letters?

A. I don't remember if he—I mean, he certainly could have. I do remember speaking with him, though.

Q. Okay. And what did you speak to him about?

A. If I recall, it was just general concerns with the project and just wanted to be kept up to date on . . .

[September 27, 2021, Transcript, p.180]

. . . information right.

A. Yes.

Q. And you recognize these emails dated February 27 and 28, 2020, don't you?

A. Yes.

Q. The February 27, 2020 email to Rilling provides the county's revised and approved easement form, correct?

A. That's right.

Q. And you made clear to Rilling in that email that any additional changes will need to be reviewed by staff and counsel, correct?

A. Yes.

Q. And you meant County staff and County counsel, right?

A. Correct. Yes.

Q. And you attached the deed of easement form, right?

A. I don't see it but I would assume that's what I attached, yes.

Q. Before we get to the easement form, um, let's take a look at the February 28 email. Um, you sent that to Rilling on the date shown, February 28, yes?

A. Yes.

Q. And you sent it to confirm that you met with . . .

[September 27, 2021, Transcript, p.182]

Q. All right, Okay Um, let's take a look at the county easement form. That's—that's Exhibit 23 to the Nissen deposition. You recognize this form, don't you?

A. I actually don't, but, but I am assuming this is what I sent—sent to John.

Q. The county did, in fact, review and revise the easement form that John provided to you, right?

A. That's right.

Q. All right. And, um, was that easement form that you provided reviewed by County Fire Authority?

A. Yes.

Q. Was it also reviewed by County Fire Authority counsel?

A. Yes.

Q. That is Suedy Alfaro?

A. Yes.

Q. All right. Was it reviewed by county counsel as well?

A. I believe so, yes.

Q. Who?

A. I couldn't tell you specifically.

Q. All right. Was it—was it reviewed by the county's real estate division?

A. I don't believe so.

[September 27, 2021, Transcript, p.184]

Q. All right. Now, the grantee is the, um—is the project applicant together with successors and assigns, right?

A. That's right.

Q. And the project applicant grantee also has the right to convey the easement to public entities, right? Page 1, paragraph No. 1, under heading entitled Grant of Easement?

A. Yeah, I am looking at that right now. Yes.

Q. And the county is a public entity, right?

A. That's correct.

Q. And the county's intent at this time was to make the easement a condition and then have the applicant convey the easements to the county prior to recording final maps, right?

A. I can't remember specifically how we had kind of set up the process.

Q. Well, I want you to assume that, you know, we had 50 easements here, final easements. Was the intent to make those easements a condition and

then have the applicant convey to the county the easement was the final maps, would that have been the practice?

MR. HEINLEIN: Objection, asked and answered. Go ahead.

THE WITNESS: I can't remember talking through what the process would be and the timing for each of them.

BY MR. DILLON:

Q. Now, the county easement form contemplated that the project applicant as grantee would pay money to the property owners in return for the grant of easements, right?

A. I don't know. Does it say that in here?

Q. Well, take a look at Page 1 under the paragraph, all capital letters, "Now Therefore".

A. Yes.

Q. Yeah, this contemplates grantee paying a sum of money to the property owners in return for their grant of easement, right?

MR. HEINLEIN: Objection, the document speaks for itself. Go ahead.

THE WITNESS: Yes.

BY MR. DILLON:

Q. Yeah. Do you have an estimate of how much money it would have cost the applicant to purchase the roadside fuel modification easements?

A. No.

Q. Did you ever independently determine the estimated cost of the easements?

A. No.

[September 27, 2021, Transcript, p.206]

Q. All right. We will go over that letter.

Was this email from Sibbet the first time you became aware that there were 50 parcels along the identified West Lilac Road segment?

A. I don't remember.

Q. All right. Well, you obviously used a different number in your letter, right, and he's now reading your letter and correcting it to say hey, I counted and there are 50, so you ought to change up your letter to reflect 50?

A. That's what Dave is saying, yes.

Q. All right. And that's what you did, right?

A. I—I don't know.

Q. Okay. Let's return to the Rilling April 2020 letter. The data on the graphic shows that on approximately six of the 32 parcels—and I am going to take you to this page as well as the colored cheat sheet, okay. Um, you are familiar with those pages, right?

A. Yes.

Q. All right. And the data shows that approximately six of the 32 parcels already have a 20-foot wide right-of-way easement, right?

A. That is what this says, yes.

Q. Okay. And, um, the January 8 County Fire Authority letter, um, said that would be okay, right, either get me right-of-way easements that are 20 feet or give me easements, right?

A. That's right.

Q. All right. Um, why did the county still insist on easements over these six parcels that already have a 20-foot wide right-of-way easement?

A. I don't remember. I am not even sure we did.

Q. Are you saying that you told the applicant, um, that those six parcels were a-okay?

A. I don't recall.

Q. Okay. The county had the 20-foot easements over those six parcels, it didn't need the easement, right?

MR. HEINLEIN: Objection; calls for facts not in evidence, calls for speculation. Go ahead.

THE WITNESS:I don't recall specifically, but the request was for 20-foot existing easements, so those were in place, it would have satisfied our request.

BY MR. DILLON:

Q. Okay. Did you ever tell anybody on the Lilac side that those six parcels satisfied your easement condition requirement?

A. I don't remember specifically.

Q. Okay. Isn't it true that despite providing this information, you insisted on 100 percent of the easements?

A. Um, so what's the question exactly?

Q. Isn't it true that you insisted that the applicant obtain 100 percent of the easements along the identified West Lilac Road segment?

A. That was the request, yes.

Q. All right. And they already had 20-foot wide easements over six of the parcels, right?

A. That is what this shows, yes.

Q. All right. Now the data shows another five parcels with existing 15-foot and 20-foot right-of-way easements, right?

A. You mean 15 and 10?

MR. DILLON:15 and 10, what did I say?

THE WITNESS: Yes.

BY MR. DILLON:

Q. The data shows another five parcels with existing 15-foot and 10-foot wide right-of-way easements, right?

A. Yes.

Q. And the 10-and 15-foot wide easements along those five parcels would have helped, right?

MR. HEINLEIN: Objection; calls for . . .

[. . .]

APPENDIX T
SAN DIEGO COUNTY PLANNING COMMISSION, PUBLIC HEARING TRANSCRIPT, EXCERPTS (JUNE 12, 2020)

SAN DIEGO COUNTY
PLANNING COMMISSION MEETING FULL, 6/12/20

Director: We are now live.

Chairman Barnhart: Good morning and welcome to the County of San Diego Planning Commission hearing of June 12, 2020. The Coronavirus public health emergency is changing how the county conducts many of its essential services and programs, including public meetings, planning and development services, director Mark Wardlaw will explain in the context of our meeting.

Mr. Wardlaw: Good morning, chair and members of the commission. On March 17, 2020, California governor Gavin Newsom issued executive order N2920 relating to the convening of public meetings in the state of California in response to the COVID19 pandemic.

The executive order outlined requirements for public meetings to take place telephonically or electronically without the need for public or members of the local legislative body to attend in person.

In response, the county will continue to serve its residents, holding public meetings of the planning commission. These meetings are necessary to perform essential governmental functions.

Although in person participation will be prohibited, members of the public are able to provide comments through teleconference during the meeting and by submitting e-comments and/or written comments prior to the meeting.

The planning commissioners are participating through a video conference and will be able to hear and view the public comments as well as ask any questions they may have. For each item that is called, the chair will ask staff if there are any speakers.

If yes, staff will announce the number of speakers who wish to speak to the item and then identify each individual caller when it is his or her turn to speak. The speaker will have up to three minutes to speak and then the next speaker will be called upon by staff.

The agenda will include the formation of a consent agenda, although in today's meeting there is no consent agenda. Madam Secretary, please explain how public testimony will be accepted at today's hearing.

Madam Secretary: You may view the planning commission hearing live online and provide testimony over the phone when the item you would like to speak to is heard. To provide testimony on an agenda item over the phone, please call 619-343-2539.

Once again, 619-343-2539, and enter the conference ID associated with the item you would like to speak to as provided on the planning commission website. In a moment, I will also read the information into the record, so please

grab a pen and paper and be prepared to note the information I will provide.

[. . .]

Director: Yes, Chairman. At the May 15 planning commission meeting, the commission requested staff add this item to the June 12 agenda regarding the fire safety determination that has been made by staff.

There are both staff and applicant presentations for this item. Typically, staff would bring items to the planning commission for reevaluation when there's a substantial change in the project itself.

In this case, there hasn't been a change to the project. Instead, staff's position has changed in light of the evolution of our understanding of fire evacuation and fire safety based on some recent extreme fires, such as a campfire.

That said, it was my oversight for not to have mentioned this in a director's report that we were bringing this item to the board on June 24. The commission will be able to discuss the matter and can provide recommendations to the board of supervisors, if so desired.

Fortunately, everybody is here. You'll be able to have a full conversation about the fire determination and discuss the matter.

We'll now proceed to the recorded staff presentation.

Mr. Slovic: Good morning, Chairman Barnhart and commissioners. I'm Mark Slovic with Planning and Development Services and I will be presenting

on item number one, which is an update on the county determination that the Lilac Hills Ranch project is unsafe due to the significant fire safety concerns.

Today's item is a request by the planning commission to receive an update on the fire safety determination on Lilac Hills Ranch prior to the board of supervisors hearing on June 24, 2020.

The meeting today will focus on fire safety and will not include a review of the entire Lilac Hills Ranch project. However, the planning commission may make recommendations to the board of supervisors related to the fire safety determination.

This presentation will provide a brief overview of the project and its location and an overview of the fire safety determination.

The Lilac Hills Ranch project is located in the unincorporated area of northern San Diego County, approximately 10 miles north of Escondido and approximately a half mile east of the Interstate 15 corridor and old highway 395.

The project is approximately 608 acres and is located in the westernmost portion of the valley center community plan area and easternmost portion of the Bonsall community plan area, as shown here.

[. . .]

We did not focus on dirt yards or lots where the only nexus with West Lilac Road is a driveway and in fact we're baffled about the all or nothing demand that required easements on lots with no vegetation.

Owners were generally aware of their vegetation management obligations and several wondered why this program was necessary, given the veg management requirements in the code.

But nonetheless, we obtained letters of support to be included in the proposed $2 million vegetation management program from the majority of the properties with vegetation.

I'll now turn the presentation over to Larry Hirschfield, who became the majority owner of Lilac Hills Ranch in 2017.

Mr. Hirschfield: Good day and thank you to the commission for the opportunity to be here today. I'd like to begin with a discussion of the implications you should consider when evaluating staff's positions.

First, county residents have a right, and in fact do, assume that county roads are kept safe. Staff's position is that the county has no guarantee that necessary fire clearing will occur without the county first acquiring easements.

What if, today, absent Lilac Hills Ranch, West Lilac Road was deemed to need clearing to meet fire standards? Or, for that matter, what happens when any county road requires clearing? Is the county telling us that roads cannot be cleared of unsafe vegetation anywhere they do not have an easement?

Are they saying that county roads are unsafe? Like all county residents, board supervisors clearly have the expectation that roads can and must be

made safe, including through the implementation of vegetation management.

Comments from supervisors Desmond and Jacob make that quite clear. Moving on, staff seems to suggest that if, for whatever reason, the Deer Springs Agreement were to end, there could be no certainty that the successor or provider would have the authority to require vegetation management.

Can this really be the case? Shouldn't we reasonably assume that all areas of the county will always have a responsible fire authority bound by the consolidated fire code? It cannot be the case that the ending of an existing agreement for fire protection services puts residents at risk.

Staff's position is that the applicant must obtain an easement from every property owner or staff will recommend project denial. This effectively gives a veto over the building of the entire project to each and every resident along this stretch of road.

If even one project opponent lives here and refuses to grant an easement, the project will be recommended for denial based solely on this property owner's action. Land use decisions should be made by the board of supervisors after a lengthy, open and public review process.

Individual property owners should not be granted vetoes.

Mr. Rilling: With respect to this new proposed policy of requiring offset easements, in truth, getting

easements from any property owner is very difficult.

Most owners are happy to comply with their vegetation management responsibilities, especially if someone else will pay for it, but very few want to burden their deed with new easements. In this applicant's view, it will never be possible to get voluntary easements from all property owners in any area.

In other words, if this is a new allowed policy, namely that the developers may be required to obtain easements from offside property owner in order to get projects approved, it will be the death nail of any new housing in our housing starved county.

The granting of vetoes to individual property owners, combined with the impossibility of fulfilling this requirement, will convince developers that they have no chance of approval.

In summary, the project enhances fire safety for residents along West Lilac Road by providing alternative evacuation routes in the event of an obstruction.

As to the impasse with staff regarding how to ensure vegetation management on West Lilac Road, we believe the requirement to obtain easements is unnecessary. Existing law and policy clearly provide the means to accomplish the vegetation management.

The project will pay for the veg management. And finally, staff's new requirement for easements, if implemented, gives veto power to individual prop-

erty owners and would eliminate the creation of new housing for our working families.

We now present two alternative project conditions to resolve the remaining [inaudible]. Our preferred solution is to recognize that the county already has the legal authority and obligation to implement the consolidated fire code requirements for roadside vegetation management and, with our commitment to provide $2 million in funding, plus project assessments, vegetation management can be accomplished and maintained in perpetuity.

We respectfully request that the project be recommended for approval subject to the condition that the project funds the vegetation management per the previously provided condition.

If this commission agrees with staff that some or all of the subject easements are needed to recommend approval, we request that the project be conditioned on a best efforts obligation to obtain such easements.

[. . .]

My staff and I are also fire service experts. I have 36 years in the fire service. Our collective staff also has 100 years – hundreds of years of fire service experience. We have narrowed down really the issues to three.

The first is the clearance along West Lilac Road and the impact to the existing community brought about by this project. Number two, the fact that the County Fire Authority still has not accepted any of the five evacuation studies provided by the applicant in terms of the capacity and the ability

to evacuate the third – the community. And the third, that we still do not have a signed fire services agreement between the local provider of the Deer Springs Fire Protection District and the applicant.

Although not a Fire Code issue, we still have issues and concerns related to the 200-bed senior care facility, and we need further clarification on how and what the applicant's plan is for evacuating those residents.

Mr. Barnhart: Chief, I have a question. I own a lot of property, and I don't think I own a piece of property that I don't get a letter demanding that I do a fuel modification with the threat that if I do not, it will be done by others. So with that, I'm having a hard time with this demand for easements. I just think that's an overreach, sir.

Do you want to explain why that is, why that you think you can't just enter the property and clear it?

Mr. Mecham: So, Commissioner, we have in state responsibility lands in San Diego County 106,000 dwelling units. Specifically, just within county service area 135, we have 43,000 parcels that we believe abut a county roadway. We do not send letters out. We conduct inspections in person annually. Our stated goal is approximately 25,000 inspections this year. Our focus is on 100-foot defensible space around existing structures.

Mr. Barnhart: Well, you may not, but one of our homes is in Rancho Santa Fe in the unincorporated area and I understand that we have local fire protec-

tion here and they send out the letters. Would not Deer Springs send out those letters?

Mr. Mecham: No. Deer Springs contracts with CalFire for fire protection and the County Fire Authority for fire prevention services. So they are included in that 25,000 total number that we hope to accomplish. We do not routinely enforce clearance along public roadways.

Mr. Barnhart: Yeah. But I think you're avoiding the question. The question is, do you or do you not have the right to enter that property and do fuel maintenance, if you so choose?

Mr. Mecham: I'm going to defer that question.

Mr. Barnhart: It's a simple–

Mr. Mecham: I'm going to defer–

[. . .]

Authority having jurisdiction, but, aside from that, there's–there are concerns about those property–each of those property owners–there are approximately 50 properties.

So each of those property owners can appeal the notice to require clearing, and that would then go to a hearing. And then if the property owner is unhappy with the outcome of that, they can then file a writ in state court. And so it would ultimately be decided by a judge.

So the–we feel that there's too much risk here and that a judge could determine or an independent hearing officer could determine that clearing is not required, and that is insufficient for Fire

Authority. They feel that there's just too much risk in that scenario.

Mr. Barnhart: So what you're saying is the other property owners would disregard any clearing for fire protection that would actually help their property to protect from fire and that you think that one or others may take this into the courts. I wonder how often that happens.

Female Mr. Crowley: It's not a question of whether we think or don't think. We think that there is risk in that scenario, and it doesn't provide the assurance that every year each of those properties-each of those 50 properties can be cleared on an annual basis in perpetuity.

Mr. Edwards: Mr. Chairman, I have one follow-up. Mr. Barnhart: Yes. Go ahead.

Mr. Edwards: Counsel, are you aware of any other project in San Diego County that has been required to obtain off-site easements from private property owners?

Staff: Commissioner Edwards, through the chair, no. We do not have any specific projects that were required to get easements from private property owners. However, with that being said, most of those projects were able to accomplish the necessary clearing along the road because there was existing right of way in place to both construct the road improvements and provide the necessary clearing within the–within the county right of way.

Mr. Edwards: So the answer is no, and the view shot we saw from the experts such as Mr. Windsor

showed that there are in existence a great deal and number of various easements along this road in addition to agreeing to improve Nelson Way to county road standards.

So my next question is, do you agree that Nelson Way is going to be improved to county road standards as part of any approval of this project? The question is very simple. The answer-and the answer is yes.

So I'll defer to the other commissioners here. There's something very odd here about this whole thing to me.

Mr. Barnhart: Commissioner Beck.

Mr. Beck: Yeah. I'd just like to offer some perspective related to context.

[. . .]

At one time we were talking about having a school site provided, and then it morphed into a school being provided. The evacuation plan would obviously have–if there was a school, have to provide consideration at least for evacuating students or mandating that they remain on site in a hardened facility.

What's the status on the school now? Are we–is the applicant intending to purchase–or build a school or simply provide a site for a potential school?

Staff: Commissioner Seiler, through the chair, the project does include a school site. What they've also done is they've incorporated the Planning Commission recommendation from 2015 that

they build a turnkey school. It would either be constructed on the property or at another location, as determined by the school districts. There is no agreement at this point in terms of the location of the school, but that is what the proposal is.

Mr. Seiler: All right. Then that would bring me back to my other–my real concern is, if there is a school on site, all of those children that are in the school would need to be considered in any sort of evacuation plan. They're not going to just jump in their cars and leave. They're going to need school buses, or they're going to need to be–remain on site.

So I would hope the fire evacuation plan considers that specifically. I didn't see it anywhere in their briefing is why I'm bringing that up. Thank you.

Mr. Barnhart: Commissioner Woods.

Mr. Woods: Thank you, Mr. Chairman, for this opportunity. And I'm dumbfounded in listening to testimony relative to this project for fire evacuation. The five evacuation routes and the suggestion that the Deer Springs Fire Department would not take care of their own community, that we have to ensure through easements that it is done for them is just ludicrous.

I don't believe–I think this is a red herring. I have a real concerns about Chief Mecham's position on this that five routes are not enough. We've never had a project with five routes that–in my 24 years that I recall. And, secondly, we've never had a project where we require easements to guarantee safety.

Those are the burdens of the fire departments, both jurisdictionally and locally, to ensure their residents' safety by asking them to clear. And for a resident to say they won't clear, that means they're going to endanger their neighbors? I think it's preposterous. I think we've gone to a level here that is beyond unprecedented. I think we need to take a long, hard look at what we're asking, and is this right? Is this fair for the residents and the applicant because we're above and beyond, in my opinion?

I–and then the last question is Chief Mecham also brought up another issue of the adult community not having a plan. That to me is built into the application when you open up a facility as such. I've been involved in those. They have to have an evacuation plan in order to open up.

So that's part of their process, and they are a community that can stay home during a fire and fire in place.

So all these lead to me to really question what's happening here.

Mr. Barnhart: Well, I couldn't agree more, and the fact that this–suddenly, we have a denial from the staff going right to the Board of Supervisors, no [inaudible] the Board of Supervisors staff. Suddenly, we have to procure easements where any individual property owner can veto the property.

And I understand that the–that there are people in Valley Center that do not want the project, and that's their right to voice those concerns. And it's also the right of the Board of Supervisors to do

what they may do. They may send it to another vote, and it may get voted down. It may be the end of it, and who knows?

But what bothers me here is the lack of fair and consistent process because I think, once we lose that, then we're just into politics on every one of these projects, and I think that's a road we don't want to go down. Anyway, let's–

Mr. Woods: And one final comment, Mr. Chairman. The issue that we've always done any large project as a condition of approval, we ask the applicant to guarantee that certain things are mitigated and then easements are not part of that issue. They–and the fact that they are going to, in perpetuity, pay for that mitigation should satisfy a condition of approval.

And one of the things that stops some of this clearing along these roads is money and either by the owner of the property or the jurisdiction. That is off the table. That is not a consideration. The safety is simply picking up, starting the tractor, or whatever and getting it done. So I'm at a loss.

Mr. Barnhart: If there's no other questions, let's go on to the community groups.

Staff: Jessica, do we have any members of the public–oh, no. Community planning groups. So please call the first chair presentation.

Ms. Jessica: Okay. Would the chair of the Bonsall community sponsor group please press *6 to unmute your line. State your name for the record and begin your comment.

Ms. Chaney: Hello.

Ms. Jessica: We can hear you now, thank you.

Ms. Chaney: Okay. I'm Marjorie Chaney. Last four digits are 7070. I'm chair of the Bonsall sponsor group since 1998 and served as president for two years, on the board of the Vista Fire Protection District, for my 12 year volunteerism. Chairman Barnhart and honorable members of the planning commission, thank you for the opportunity to speak to the Lilac Hills Ranch Project.

[. . .]

Mr. Wood: We can hear you, but we can't see you.

Mr. Barnhart: Hit your–on the left, where you've got the four squares. Hit that.

Mr. Pallinger: I'm on the big screen–

Mr. Barnhart: Well, get off the big screen and go over to–

Mr. Pallinger: I always wanted to be in Hollywood.

Mr. Seiler: Only the chairman can be on the big screen.

Mr. Woods: There he is.

Mr. Barnhart: I've got all of you. So behave. Let's proceed.

Ms. Jessica: Okay. Caller with the phone number ending 2741, I see your line is un-muted. Please state your name for the record and begin your comments.

Mr. Dickers: My name is Bryson Dickers. I just wanted to say that I–yeah, I think that this project is irresponsible for trying to shove so many people in a–in an area that cannot support it, as other people was talking about. You know,

there was–we had the Lilac fires, not even a question of if we're going to have it again, but when. I lost home in that fire. And I–basically I can't imagine trying–my family had such a hard time trying to get out of this area. I can't imagine what would happen if there were a couple thousand extra people here.

The idea that all of these–a lot of the–in the earlier presentation given by the applicant, it–the solutions presented felt like they were kind of acting in a vacuum. Some were alluded to–it's not just necessarily a vacuum, but it does feel like there isn't enough being taken into consideration and both how people react when there's a fire on their doorstep and also how–how many people are going to be going in different areas. People are not very rational creatures.

So I think that to go ahead with this project is essentially just sanctioning more congestion, allowing for more people to be stuck–to cut–leading to more people to lose what they have, because they can't get out, basically. I believe this project should be rejected, denied, what have you. Have a good day.

Ms. Jessica: Thank you. Caller with the phone number ending 8894, please press *6 to un-mute your line. State your name for the record and begin your comment. 8894.

Mr. West: Hello. My name is Kent West. A couple of comments on-regarding the approval process and the EIR. Personally–I have two points to make. The first one is about individual property owners. I don't believe it's reasonable that individual prop-

erty owners should be given vetoes over entire projects as a whole. That's the first point. And then the second point is regarding the EIR recirculation.

[. . .]

Mr. Edwards: Can you hear me?

Mr. Barnhart: I can.

Mr. Edwards: I will try and keep this brief because we need to be focused here. First thing I need to say to everybody involved is there is no one on this Commission that would knowingly approve a project if we thought it was not safe for the anticipated future residents.

The issue here, Mr. Chairman, is more sync than that, and the issue here are the two letters that have been written, one January 8, 2020 and one May 6, 2020. And in looking at this it appears to me to be brief as though the applicant has tried to accommodate everything. Chief Mecham has always had my utmost respect and still does. Sometimes they're just differences of opinion.

But if you take a look at the applicant's upload, Mr. Chairman, I think that staff agrees about 15,000 hours have been put into this project and 40 hours. That's 3,750 days. Someone's going to need to check my math since I went to San Diego State. And the 3,750 days, that's 10 years and two weeks that staff has had the opportunity to read, review, and comment on all of these reports.

That's in addition to the $2.5 million the applicant has spent and then $40,000 being charged to the applicant to take his project to the board for deni-

al or referral back to BATH [ph]. It reminds me of an unpleasant situation where the man who's going to be hung is charged for paying for the rope to stretch his own neck. I just think that's absolutely unconscionable.

So with that said, I note, Mr. Chairman, that the Rohde [ph] Report that apparently is one of the bases of the discussion is dated May 6, 2020. It's 40 pages. Commission Calvo can comment on the reports, but there's a 2000 Firewise Report, a 2015 Firewise Report. There's an August 28, 2019 LL and G capacity of West Lilac Road Report. There's a 2019 Fehr Impact–Fehr and Peers dated March 6, 2019 Evacuation Road Capacity Report. Then, most importantly is the Dudek [ph] Report.

Mr. Chairman, as you know, we both are large consumers of experts and their reports, and I realize that you can find an expert to virtually say whatever you want him or her to say, but this particular Rohde Report was 40 pages long and basically just looked at the other documents. The Dudek Report is possibly one of the most comprehensive reports I've seen in 48 years of the practice of law.

So with respect to staff and Chief Mecham, if you put the reports of the experts on one side and I put Rohde on the other, I'm afraid there's really no contest.

I'm not exactly sure why this has taken so long or why the requirements keep moving and changing, but I think at–with 14 public hearings, the EIR circulated three times already. I'm not sure that

recirculating an EIR for another year and a half and another $250,000 on top of what the applicant has already expended is a wise use of county time or money.

One final comment because I promised you I would keep things brief. You heard the answer there is no other project that's required, Mr. Chairman, easements. This was the only one and is the only one, and I think a lot of us have a lot of combined knowledge on this over the years.

As several of the speakers said, Mr. Chairman, we cannot give other private property owners the right to inversely condemn or prevent a project from going forward like this. And if you have to get 50 easements, you know that the developer's going to simply be extorted. I would too. You want an easement from me? It's going to cost you $50,000. Will he pay that? I don't know.

I think the bit about the fire–the Deer Springs and their country with County Fire, if County Fire doesn't renew that contract, somebody else will. The Deer Valley will. The area's not going to go without fire protection. To me that's facile argument.

So that said, Mr. Chairman, you asked for a motion. I'm not sure what motion we could make. So I will forebear trying to craft one. I know the applicant put forth two until the other commissioners chime in on how they want to proceed and what they want to do. So thank you, Mr. Chairman.

Mr. Seiler: Mr. Chairman, I have a comment, whenever that's available.

Mr. Barnhart: Okay. Let's get to Commissioner Woods first, if you don't mind.

Mr. Woods: Yes. Thank you, Mr. Chairman. I echo a lot of what Commissioner Edwards just said, and there's–one of the speakers spoke very eloquently about what's happened in 4S Ranch. His first name was Eric, I believe, Newhold [ph].

And a properly designed project in today's world of fire safety and fire mitigation and road improvements and five exits in and out of the project and sensitivity to the community is an all-time high in quality. And I believe we are somehow ignoring that. This is not Paradise where the homes were built in 1950 and were matchboxes waiting for a match.

This is San Diego County with a major freeway a mile and a third away, and I just do not understand staff's position on this, requiring easements. And for that reason, I think we should craft a motion from the Commission that supports the project and all of the mitigation measures that they have put on the table and to put a condition of approval that they do put that $2 million towards fire protection or fire mitigation clearing along East Lilac Road so that the fire department can do their job and use that money to ensure that there's not going to be a dangerous evacuation effort.

So I think that's how a motion should be crafted, that this Commission supports the direction of the many, many, many solutions and mitigations to the fire issue.

Mr. Edwards: That's a motion, Mr. Chairman. I'll second it.

Mr. Barnhart: Okay. We have a motion and a second. We'll go into discussion. Yolanda, let me get Michael. Michael, you want to speak?

So I'm going to be supporting staff recommendation. Mr. Barnhart: Commissioner Pallinger.

Mr. Pallinger: Thank you, Mr. Chairman. And I appreciate the comments from my fellow commissioners and, certainly, all the input from the public. Very well articulated.

But if it's really boiled down to clearing along Lilac Road, it seems like the applicant's already secured a number of those easements. And if we can do some clearing along Lilac Road, then it starts to solve this, what people are characterizing as an unconscionable situation, which I guess currently exists. So it's unconscionable that it's been allowed to remain as it is. But this project certainly brings a solution to that one, apparently, final issue.

So it starts to solve the problem, and that's what everyone's talking about. So I can certainly support the motion before us today. And thank you, Mr. Chairman. I appreciate it.

Mr. Barnhart: Okay. Before we vote, I want to make a few comments.

I've lived in San Diego County for 47 years. Yeah. I did move here when I was one-year-old but–no. Forty-seven years when 163 was a two-lane road out in the–out in Poway, and I lived on the east end of Poway. So I watched Rancho Penasquitos.

I watched Scripps Ranch. I watched the west side of Rancho Bernardo. I've seen a lot of these communities that are very fine communities now being built.

I don't make decisions based on what I think a court may or may not do because I can't predict that. So I make decisions on what I think is right. I do recognize the staff's professionalism, and they have every right for their opinions. However, I voiced this to staff in private, and I'll voice it in public. I am disappointed with the lack of transparency on this particular part of this project. I think that it should have been brought back and at least it should have been discussed in the comment section before it went forward and we were-then we got surprised.

The requirement to get easements is a back breaker. It is a no deal. There is no way, as long as I sit on this Commission, that I will support any project that requires a developer to go get easements from other property owners. I just think that's unbelievable. I think that's a hill too steep to climb, and I think it's a terrible, terrible precedent.

I don't know how the project's going to come out, but I will say this. We may be in the unique situation where the staff is recommending one thing to the Board of Supervisors and the Commission is recommending something else. You know what? They're elected. Let them deal with it, if that's the case. I'm going to be supporting the motion.

With that, I think, Madam Secretary, let's call the question.

Mr. Crowley: Chairman, before we take a vote on the motion-this is Justin from the county counsel– could we get the maker of the motion to clarify what the actual motion was so that we can all understand it?

[. . .]

Mr. Pallinger: Well, I agree. I think we should hear from the applicant exactly what they're committing to here, that it is a commitment but not a condition that they get those easements.

Mr. Woods: That is my intention.

Mr. Seiler: This is Seiler. I would agree with that. Yeah. Get a commitment. Then you don't need the easements, but you got to get the commitment. LLC can go away. Then what? It's got to be in the CC&Rs.

Mr. Pallinger: Yeah. Absolutely.

Mr. Seiler: I totally agree with you.

Mr. Pallinger: Absolutely.

Mr. Woods: And that is the intent of my motion. So I would call upon the applicant, Mr. Chairman, if you so agree.

Mr. Crowley: Commissioner Woods, this is County Counsel Justin Crowley [ph]. Maybe I can offer kind of a succinct summary of what I believe the motion is that we're talking about.

Mr. Woods: Thank you.

Mr. Crowley: Recommend that the Board not deny the project based on the fire safety issues when staff brings it before the Board. And then the Planning Commission would also recommend that the Board direct or propose that the applicant's project is conditioned to ensure that funding to establish and maintain vegetation management in perpetuity without the need for easements.

Mr. Woods: That is correct.

Mr. Barnhart: There's a second?

Mr. Edwards: Agree.

Mr. Barnhart: Okay. Let's go ahead and-let's go ahead and vote.

Ms. Jimenez: Okay. Please wait until your name is called to vote. Commissioner Seiler.

Mr. Seiler: I would concur with the motion on-based upon those items.

Ms. Jimenez: So yes? Commissioner Calvo.

Mr. Seiler: That would be a yes.

Ms. Jimenez: Okay.

Ms. Calvo: No.

Ms. Jimenez: Commissioner Pallinger.

Mr. Pallinger: Yes.

Ms. Jimenez: Commissioner Edwards.

Mr. Edwards: Yes.

Ms. Jimenez: Commissioner Beck.

Mr. Beck: No.

Ms. Jimenez: Commissioner Woods.

Mr. Woods: Yes.

Ms. Jimenez: And Chairman Barnhart.

Mr. Barnhart: Yes.

Ms. Jimenez: Let the record show that passes with five yes and two no.

Mr. Barnhart: Okay. Great. Let's move on now to department report.

Staff: Thank you, Chairman. The reportable items today is the–in addition to this item on June 24th the Board will consider your recommendations and the staff recommendations concerning the vehicle miles traveled CEQA guidelines.

And then at the next Planning Commission meeting scheduled for June 26, you now have two items. You have consideration of an appeal for Fallbrook Energy, which is a battery storage facility that was approved by the zoning administrator, and you have Trevi Hill, which is a project–it's a major use permit modification project in an expansion of a winery. That concludes my report.

Mr. Pallinger: Mr. Chairman?

Mr. Barnhart: Yes.

Mr. Pallinger: Typically, on a project of this magnitude and certainly usually included in the director's report would be an appointment of commissioners to represent the Commission at the Board hearing on the 24th. And I would like to strongly suggest that you and Commissioner Woods, who was the chairman at the time of this project, attend on behalf of the Commission.

[. . .]

APPENDIX U
APPELLANTS OPENING BRIEF, EXCERPTS
(SEPTEMBER 29, 2023)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; SHIREY FALLS, LP; ALLIGATOR PEARS, LP; GOPHER CANYON, LP; RITSON ROAD, LP; LILAC CREEK ESTATES, LP; SUNFLOWER FARMS INVESTORS, LP,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

On Appeal from the United States District Court
For the Southern District of California
(Case No. 3:20-cv-01896-AJB-DEB)

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[. . .]

. . . 109, 114-115 (2d Cir. 1999) ("Where it appears *clearly* upon the record that *all of the evidentiary materials that a party might submit* in response to a motion for summary judgment are before the court, *a sua sponte* grant of summary judgment against that party may be appropriate. . . . ") (Emphasis added).

Since no notice of summary judgment was provided, and due to the imminent commencement of the trial, the evidentiary showing in the supplemental brief represented an "illustration/offer of proof' of the evidence. *See* 3-ER-5, n. 3; 3-ER-6, n.4; 3-ER-6, n.5; and 3-ER-8, n.6. (¶ 2);[4] 2-ER-175-176 (¶¶ 12-16). Counsel's declaration also clearly showed that *not all of Appellants' evidence* was before the Court; that Appellants' evidence represented only *"examples of*

[4] At the time of the court's April 18 Order, the parties were 14 days away from commencing trial on May 2, 2023.

the type of evidence Plaintiffs would present" and that *"the full proof . . . will be presented* at the time of *trial."* 3-ER-403 (¶ 2). Therefore, the court knew Appellants had not presented all their evidence and they would present 'full proof' at the time of trial. *Id.*

Moreover, as shown below, *additional* evidence supported Appellants' *initial* evidentiary showing; and the district court was on notice Appellants could indeed *enhance the evidence* supporting their position. *Celotex Corp.,* 477 U.S. at 326; *see also Ramsey,* 94 F.3d at 74. Under *Celotex,* and the Ninth, First, and Second Circuit precedent, the court's grant of summary judgment was clearly erroneous.

B. Appellants Raised a Genuine Factual Dispute as to Whether the Easement Condition Was a Demand for Money Under *Koontz* Precluding Summary Judgment

Appellants' evidence in the supplemental brief on the easement condition as an impermissible demand for money *(see* 3-ER-388, n. 3; 401, 403-404 (¶¶ 5-10), 420-440, and 464, 466-467 (¶¶ 4-6), 470-473), coupled with common sense that all 50 landowners would not give up property interests (easements) without payment, was more than sufficient to preclude summary judgment. Notwithstanding, the district court wrongly stated that Appellants' supplemental brief was "silent" on "what evidence exists of an `extortionate demand for money.'" 1-ER-18. The court then weighed and rejected the evidence Appellants offered, contrary to the established summary judgment review standards.

The evidence demonstrates a genuine factual dispute existed on the issue, and if the district court had desired more evidence as part of the supplemental

briefing, it was not unreasonable for Appellants to expect to be granted a reply or further briefing — *in lieu of* dismissing the 2+ year case on the eve of trial. 2-ER-174-176 (¶¶ 10-16).

(1) The "Illustrative/Offer of Proof" Evidence Raised a Genuine Factual Dispute Precluding Summary Judgment

The district court's grant of summary judgment selectively picked from the testimony offered by former Planning Director Wardlaw and improperly weighed it. 1-ER-18-19. The court also cited Deputy Director Slovick's testimony concerning the County-required "Deed of Easement" — without criticism or comment; and ignored the County's easement form itself as evidence. 1-ER-19. The court also dismissed Deputy Chief Nissen's and Fire Marshall Sibbet's testimony as "speculative" when it was not. *Id.*

Wardlaw Testimony. The County's former Planning Director Wardlaw testified that "the directive" was for Appellants "to acquire easements." *See* 3-ER-424-425. The Wardlaw testimony proved the County's intent was for Appellants to "purchase and secure" the required easements. *See* 3-ER-425-427.

This demand to "purchase and secure" the easements is certainly a "demand for money" under *Koontz*. The district court, however, did not cite or refer to *this* evidence. *See* 1-ER-19. Instead, the court quoted later Wardlaw deposition testimony, wherein Mr. Wardlaw stated that whether the easements were acquired for a fee or not was "not germane to the requirement of the easement." *Id.* The court discarded other Wardlaw testimony and only partially quoted his testimony. *Id.* Mr. Wardlaw also testified that he did

not know "the number of *easements required to be purchased"* and that if the easements were "an expense, *it's a related project expense."* 3-ER-428 (emphasis added). It was improper for the district court to weigh the evidence. At the "summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences form the facts are jury functions, not those of a judge. . . . *" Id.* at 255.

The Wardlaw testimony and the other cited evidence were sufficient to preclude summary judgment. A "dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Long a County of Los Angeles,* 442 F.3d 1178, 1185 (9th Cir. 2006) (citing *Anderson,* 477 U.S. at 248). And the court's selective quote from Wardlaw testimony, which it described as a "clarification" of his testimony, is of no avail. 1-ER-9. Mr. Wardlaw's "clarification" did not recant his "purchase and secure" testimony. Instead, he testified later that his answer remained "yes" with a "caveat." *See* 1-ER-9. He further testified, "how the applicant secured the easements was not of interest to us" and the "key" was that "the applicant had to secure the easement[]." *Id.* Whatever can be said of the Wardlaw testimony, it was either: (i) clear at the outset, (ii) clarified, but without recanting his prior "purchase and secure" testimony, or (iii) inconsistent. In any case, the jury, not the judge, should have been

given the opportunity to weigh the testimony overall, evaluate his demeanor, and resolve the issue.

Slovick Testimony. The testimony of Mark Slovick, the Interim Planning Director and Senior Project Manager (3-ER-388, n.3; 3-ER-433-435) shows he provided Appellants with the County "revised and approved" easement form. 3-ER-449-452. He understood the "County easement form contemplated that the project applicant as grantee would pay money to the property owners in return for the grant of easements." 3-ER-434-435. The court cited the Slovick evidence *without* comment or criticism (1-ER-19), and its *later* order on the new trial motion is silent as to his testimony (1-ER-2-12). The court improperly stripped this evidentiary issue from the jury by ignoring testimony, making credibility determinations, or weighing the evidence. *Bator a State of Hawaii,* 39 F.3d 1021, 1026 (9th Cir. 1994).

The County's "Deed of Easement." Mr. Slovick's testimony is *corroborated* by the County's "Deed of Easement," which is also sufficient on its own to defeat summary judgment. The form is a documentary exhibit, which *explicitly* provides that "Grantor" grants the easement, "*for and in consideration of the sum of [left blank for the monetary amount] . . . paid by Grantee [Project Applicant/Village Communities].*" *See* 3-ER-420-421. The easement contemplated that the project applicant as grantee would pay money in return for the grant of easements, which mirrors Mr. Slovick's testimony. The jury should have considered this evidence and decided if the easement condition was a demand for money.

The Nissen and Sibbet Testimony. As *further* illustrations/offers of proof of a demand for money, the

deposition testimony of Deputy Chief Nissen and Fire Marshal Sibbet (3-ER-388, n.3, 429-432, 437-440) *corroborated* the evidence from Mr. Wardlaw and Mr. Slovick and the County-required easement form. Mr. Nissen acknowledged that "some people would want money" in response to the clear-cut question, "People aren't going to give away their property rights for free." 3-ER-430-431. He also conceded the obvious as to the easement condition giving rise to a demand for money:

> Q. . . . And, you know, in fact, one or more of the West Lilac Road property owners could literally *extort* thousands and thousands of dollars in return for the easement, right?
>
> THE WITNESS: I suppose somebody could do that.
>
> Q. If they knew that the applicant had to get these easements and they knew they could get money for them, *sky's the limit,* right?
>
> THE WITNESS: Conceivably, yes. ECF 125-1, Ex. 5, at pp. 31-32. 3-ER-431-432 (emphasis added).

The Nissen testimony was called speculative (1-ER-7-8), but stating the obvious is hardly speculative to the point of exclusion; at best, the testimony should have been presented to the jury to weigh it.

More Wardlaw Testimony. Appellants also offered Mr. Wardlaw's testimony about the easement condition to be obtained "prior to Board consideration" of the Project "to avoid putting" the County "at risk" of "having to condemn private property or easements because the applicant had not done so." 3-ER-454-457.

Mr. Wardlaw admitted the County would be *required to condemn* the easements if the easement condition was an unfulfilled post-approval condition of approval. 3-ER-457-460. Condemnation requires property valuations and payment of money for property interests (easements). *See* Cal. Gov. Code § 66462.5; and Cal. Civ. Proc. Code § 1230.010, *et seq*. (Eminent Domain law).

This testimony shows that the easement condition was a demand that the applicant "purchase and secure" easements pre-Board decision to avoid having the County pay for the easements as part of the County's condemnation process. The court never referenced this Wardlaw testimony. 1-ER-2-12, 15-19.

Jon Rilling Declaration. The Rilling declaration (3-ER-464, 466-468) in support of Appellants' supplemental brief demonstrates that Appellants spent substantial money in their efforts to obtain the easements. *Id.* at 467-468 (¶¶ 5-10). The easement condition triggered Appellants to expend more than $59,000.00, in researching, surveying, reviewing, and preparing plats to satisfy the condition. *Id.* This evidence should have been referenced by the district court because it evidences Appellants' steps to "purchase and secure" the easements and their understanding that the easements would come at a significant cost. The court's orders are silent as to this evidence. 1-ER-2-12, 15-19.

Kenneth Keagy, MAI appraiser. Mr. Keagy calculated the cost of easement acquisition at a low of $2.5 million or roughly $52,000 per parcel. *See* 15-ER-3884-3889 (¶¶ 1-9; and exhibits). Relatedly, Deputy Chief Nissen testified that "some people would want money," the "sky's the limit" on the sum of money they would demand, and the 50 property owners could

extract as much as $50,000 for each easement, or $2.5 million total, or "higher." 3-ER-429-432. This combined testimony corroborates other County testimony regarding the County requiring Appellants to purchase and secure the easements.

(2) Under *Koontz,* the County's Easement Condition Was a Demand for Money

Despite Appellants' briefing (2-ER-48-49, 2-ER-155-156), the district court never addressed that *Koontz* had *already rejected* the County's groundless claim and the district court's conclusion that no West Lilac Road property owner ever . . . .

[. . .]

The district court also clung to the unsupported notion that Appellants' representative Jon Rilling stated that "no property owner along West Lilac Road ever asked for money in exchange for an easement[.]" 1-ER-9-10. *The evidence is otherwise. See* 2-ER-178-179 (¶¶ 19-21); *see also* 3-ER-464, 466-467, 471-473. Mr. Rilling did in fact ask for easements, and at least one resident stated under oath that he would want a fair price for the easement after talking to an appraiser. *See* 2-ER-179-180 (¶ 22); 3-ER-321-324 (Kelly Kline); *see also* 2-ER-180 (¶ 23), 300, 302 (another resident testifying that "Jon said the County would also want an easement and I said I'd consider it but would want to be paid for it").

(4) The *Additional Evidence* Showed the Easement Condition Was a Demand for Money Precluding Summary Judgment

With their supplemental brief, Appellants submitted some and not all the evidence they intended to present at trial (since no notice was provided that the court was considering granting summary judgment). 3-ER-403 *(¶ 2). Additional* evidence was presented with their new trial motion.

Sarah Aghassi Testimony. Ms. Aghassi, the County's Deputy Chief Administrative Officer and General Manager of the Land Use and Environmental Group, admitted, "the County insisted on 100 percent of the easements from the private property owners along that identified segment of West Lilac Road." 2-ER-180 (¶ 24), 182-186. And as to the *purchase* of the required easements, she testified:

> *"Q. Those easements, would have to be purchased, right?*
>
> *A. Yes."*

Id. at 182-186 (emphasis added).

There was no "speculation" objection by the County *(id.),* and the district court ignored this evidence. 1-ER-2-12.

Planning Commissioner Michael Edwards. Commissioner Edwards oversaw the Planning Commission June 12, 2020, public hearing on the Project. 2-ER-180 (¶ 25), 189, 218, *252-253.* He remarked as to the County's easement condition and associated costs, by raising the obvious extortion concern:

> "As several of the speakers said, Mr. Chairman, we cannot give other private property owners the right to inversely condemn or prevent a project from going forward like this. *And if you have to get 50 easements, you know that the developer's going to simply be extorted. I would too. You want an easement from me? It's going to cost you $50,000.* Will he pay that? I don't know."

Id. at 253 (emphasis added).

This evidence (and all the other evidence) should have been weighed by the jury — and not decided by the district court *sua sponte*.

West Lilac Road Residents' Testimony. The residents were on Appellants' witness lists. 2-ER-176-177 (¶ 17). Appellants' trial brief referenced West Lilac Road residents' anticipated testimony. 3-ER-522. And as part of their new trial motion, Appellants offered four signed declarations from the residents to rebut the erroneous assertion that no West Lilac Road resident ever asked for money in exchange for an easement. *E.g.,* 2-ER-176-180.[5]

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[5] Per the Rilling Declaration in support of Appellants' supplemental brief, such a claim misstated his prior deposition testimony. *See* 3-ER-466 (¶¶ 3-4); *see also* 6-ER-1256-1262, and specifically 1261-1262 (¶¶ 10-13). This evidence also raised a genuine factual dispute sufficient to withstand summary judgment.

Kelly Kline. Kelly Kline, a former West Lilac Road resident, told Mr. Rilling "he would not give an easement without talking to an appraiser and getting a fair price" and Mr. Rilling "understood." 3-ER-321-324 (¶¶ 7-9). Mr. Kline added

[. . .]

APPENDIX V
APPELLANTS REPLY BRIEF, EXCERPTS
(DECEMBER 29, 2023)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VILLAGE COMMUNITIES, LLC; SHIREY FALLS, LP; ALLIGATOR PEARS, LP; GOPHER CANYON, LP; RITSON ROAD, LP; LILAC CREEK ESTATES, LP; SUNFLOWER FARMS INVESTORS, LP,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO,

Defendants-Appellees.

No. 23-55679

On Appeal from the United States District Court
For the Southern District of California
(Case No. 3:20-cv-01896-AJB-DEB)

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[. . .]

. . . Appellants' evidence was before the court (3-ER-403, ¶ 2; *see also* 2-ER-175-176, ¶¶ 14-16). In sum, Appellants' *initial* evidentiary showing was illustrative and more than adequate to preclude summary judgment, and the district court was on notice that Appellants could *enhance* the evidence (which, in fact, occurred and would further occur at trial).

Moreover, the County's opposition does not detract from the fact that the district court abused its discretion in excluding all West Lilac Road resident testimony. Appellants also did not waive this argument on appeal.

Additionally, the County glosses over how the district court abused its discretion by using the final Pre-Trial Conference Order (PTO) to bar Appellants' two other takings theories, namely (1) the County's plan to require Appellants to assign and convey the easements (another extortionist demand for property), and (2) the County's pre-decision easement condition (not satisfied), resulted in staff refusal to process the Project and its denial. These two other takings theories were *embraced* within the PTO. OB at 37-46. Accordingly, the court abused its discretion in denying Appellants' motion to alter or amend the judgment and in not considering its related motion for leave to amend the PTO on "mootness" grounds.

Finally, reassignment remains appropriate.

II. The District Court Erred in Granting Summary Judgment — Appellants Presented Evidence Showing the County's Easement Condition Was a Demand for Money or Property Under *Koontz*.

The district court erred in granting summary judgment when confronted with Appellants' evidence that established a genuine issue of material fact as to the County's easement condition. As the County does not dispute it imposed the easement condition on Appellants, the legal question is limited to whether Appellants' extensive evidence establishes a genuine issue of material fact as to whether the condition was a demand for money or property.

A. The Correct Standard of Review on Appeal Is *De Novo.*

This Court "reviews *de novo* a district court's grant or denial of summary judgment" and the "district court's grant of summary judgment *sua sponte is* reviewed for abuse of discretion." *Arce a Douglas,* 793 F.3d 968, 975-976 (9th Cir. 2015) (a case the County repeatedly cites without disclosing the dual standard of review [AB at 18, 20, 22-23, *25]); see also Shavlik a City of Snohomish, 776* Fed.Appx. 536, 537 (Mem) (9th Cir. 2019). The Sixth Circuit explained this dual standard of review as follows:

> "'When a district court grants summary judgment *sua sponte,* its decision is *subject to two separate standards of review.* The substance of the district court's decision is reviewed *de novo* under the normal standards for summary judgment. The district court's procedural decision to enter summary judgment *sua sponte,* however, is reviewed for abuse of discretion.'"

Bennett a City of Eastpointe, 410 F.3d 810, 816 (6th Cir. 2005) (emphasis added).

In conducting *a de novo* review, the lower court's findings and conclusions are not entitled to deference. *Ornelas a United States,* 517 U.S. 690, 705 (1996) (Justice Scalia, dissenting) ("in *de novo* review, the `weight due' to a trial court's finding is zero"); *Liberty Lobby, Inc. v. Rees,* 852 F.2d 595, 598 (9th Cir. 1988); *Heiniger v. City of Phoenix,* 625 F.2d 842, 843-844 (9th Cir. 1980).

Despite this authority, the County incorrectly relies on the more deferential abuse of discretion

review standard (AB at 35) and urges this Court to defer to the district court's findings.

B. *Koontz* Establishes the Showing Required — A Demand for Money or Property and Nothing More.

Before delving into the extensive evidence of the County's easement condition, Appellants ground that discussion in the correct and applicable standard for unconstitutional conditions cases under *Koontz* — specifically, what proof *Koontz* does and does not require.

[. . .]

. . . Appellants to purchase and secure the easements. *Id.* at 28-32, 34-37. When Appellants refused, and in any event, could not satisfy County staff due to the impossibility of acquiring all 50 offsite easements (14-ER-3718-3719), staff refused to process the Project and recommended denial, and the Board followed suit denying the Project for one reason, namely, Appellants had "failed" to satisfy the County's easement condition. 5-ER-906-908, 1059-1062; 6-ER-1242-1243.

C. The Evidence and Inferences Therefrom — Viewed in the Light Most Favorable to Appellants — Were More Than Sufficient to Preclude Summary Judgment.

The *lone* legal issue that prevented this case from proceeding to a jury trial is straightforward. It was error for the district court to rule as to Appellants' first takings theory, based on the County's incorrect assertion, that "Plaintiffs fail to provide evidence that

Defendants [County] . . . ever demanded that Plaintiffs pay money for the easements." 1-ER-18. To the contrary, Appellants' evidence was more than sufficient to defeat the grant of summary judgment. OB at 27-37.

(1) Appellants' Evidence *and* Common Sense Preclude Summary Judgment.

The district court sided with the County's broad-brush claim (AB at 32) that the evidence of the easement condition *plus* common sense that all 50 offsite West Lilac Road landowners would not give up property interests (easements) without payment were "speculative." 1-ER-7, 18-19. The court went further, stating Appellants were "silent" as to what evidence exists of an "extortionate demand for money." 1-ER-18.

First, both the County and district court incorrectly conflate Appellants' evidence and the common-sense reference. Appellants made a conjunctive argument — the evidence + common sense.

Second, Appellants' common-sense showing is *not* speculative. Instead, under Rule 56, Appellants' evidence, coupled with *reasonable inferences,* viewed in the light most favorable to Appellants, was enough for a jury to conclude that 50 offsite landowners, some of whom oppose the Lilac Hills Ranch project (6-ER-1180-1182; 13-ER-3244), would not willingly give up property interests (easements) that encumber title to their real property without payment, let alone provide 100 percent of the easements "for free." 2-ER-42;[2] *see*

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[2] Mr. Wardlaw knew that the easement condition was a "difficult, challenging, and an 'unlikely to achieve' demand." *See* 13-ER-

also 6-ER-1302, 1362 [¶ 18], 1373 [¶ 16], 1396 [¶ 22]; and *S.R. Nehad v. Browder,* 929 F.3d 1125, 1132 (9th Cir. 2019) (for summary judgment legal standards); *Arce,* 793 F.3d at 976 (relying on Rule 56 standards); *Martino v. Santa Clara Valley Water Dist.,* 703 F.2d 1141, 1145 (9th Cir. 1983).

In sum, Appellants' evidence (OB at 28-31, 34-37) plus reasonable inferences therefrom (*i.e.*, common sense) demonstrate that a genuine issue of material fact precluded summary judgment. *Stegall v. Citadel Broadcasting Co.,* 350 F.3d 1061, 1065 (9th Cir. 2003) (the "evidence of the [nonmoving party] is to be believed, and all reasonable inferences . . . from the facts . . . must be drawn in the light most favorable" to the nonmoving party).

(2) Mr. Rilling's Testimony Does Not Assist the County.

The County argues Appellants' contention that the County's easement condition was a demand for money is contradicted by Mr. Rilling's deposition testimony. AB at 34. However, both the County and the district court misstate Mr. Rilling's testimony — he did not state that *"no property owners along West Lilac Road ever asked for money in exchange for an easement."* AB at 34; 1-ER-10:3-9; 22-23; 3-ER-474-475 (court orders); 562-563 (County's *in limine* motion).

Instead, Mr. Rilling's testimony states that "the contract process never advanced to the easement price negotiations." *Compare* 1-ER-10, 1-ER-23, *and 3*-ER-

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3254-3255; 14-ER-3723-3725; *see also* 14-ER-3718-3719 (easement condition an "impossible task," a "fool's errand" and why).

563 (same quote). Appellants also pointed out that the following two statements are not synonymous:

"The contract process never advanced to the easement price negotiations."

and

"No property owner along West Lilac Road ever asked for money in exchange for an easement."

2-ER-178-179 (emphasis added); *see also* 3-ER-466-467 (¶¶ 3-4), 471-473; 6-ER-1256-1262.

Accordingly, this Court's *de novo* review, without deference to the district court, will show the County misstated Mr. Rilling's actual deposition testimony (6-ER-1261-1262 (¶¶ 11-13)), inviting error.

(3) The District Court Selectively Picked from Appellants' Evidence.

As Appellants have shown, it was error for the district court to selectively pick from testimony, improperly weigh or ignore it, or label it speculative. *See* 1-ER-18-19; *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009) ("A judge must not grant summary judgment based on his determination that one set of facts is more believable than another").

"Exhibit 1" of the district court's improper application of the summary judgment requirements is the deposition testimony of the County's former Planning Director Mark Wardlaw. OB at 28-30. The district

court picked the testimony favorable to the County, weighed it to determine its "truth," and ignored contradicting testimony cited by Appellants. *Id.* at 28-29.

The district court also cited — without criticism or adverse comment — the deposition testimony of the County's Deputy Director Mark Slovick concerning the County-required "Deed of Easement." 1-ER-19. This testimony *and* the documentary evidence (the easement form) expressly contemplate that the "Grantor[s]" — the West Lilac Road residents —would grant the easements and be "paid by Grantee" [Project Applicant/Village Communities]. 3-ER-420-421. Indeed, the district court's own summary of the "Deed of Easement" shows that the County's easement form contemplated the payment of money in exchange for the grant of easements:

> "Deposition of Mark Slovick, Doc. No. 125-1 at 35 (stating the county easement form contemplated that Plaintiffs would pay money to the property owners in exchange for the grant of easements)"

1-ER-19; *see also* OB at 30.

Moreover, the testimony of Mr. Slovick *corroborates* the "Deed of Easement" language. OB at 30. The district court cited Mr. Slovick's testimony twice — without criticism, or explanation on why the easement form itself was insufficient. *See* 1-ER-8, 19. Indeed, the court ignored the "Deed of Easement" form. *Id.* It, alone, was sufficient to preclude summary judgment.

The County also refers to the testimony of its own Deputy Chief Nissen and Fire Marshal Sibbet as speculative. *See* AB at 35 (though there is no County

citation to the actual evidence). Their deposition testimony *corroborated* the statements by Mr. Wardlaw (3-ER-425-426), Ms. Aghassi (2-ER-180 (¶ 24), 186) Mr. Slovick (3-ER-435), and the County-required easement form. 3-ER-420-421; *see also* OB at 30-31.

The County stops there. *See* AB at 34-35. *It does not respond to any of Appellants' other evidence.* OB 28-32, 34-37. Instead, the County applies a broad brush and relies on the wrong review standard. AB at 35.

(4) Appellants' *Other Additional Evidence* Also Precludes Summary Judgment.

Wardlaw Testimony. The Wardlaw testimony proves the County's intent was for Appellants to "purchase and secure" the required easements. 3-ER-4254-26. Further, the district court incorrectly asserts that Mr. Wardlaw "clarified" his testimony. 1-ER-9. Not so.

Mr. Wardlaw later testified the applicant would "have to purchase" the easements ("yes with a caveat"), and the so-called caveat emphasized the "purchase" could have been an "option," a "purchase," that "they had to secure acquire . . . that was the intent . . . ," and that "they had to secure the easement[s]." *See* 2-ER-99-100. Mr. Wardlaw made no "corrections" to his deposition testimony; and he did not recant it. At worst, Mr. Wardlaw's sworn statements are later inconsistent statements made under oath and not clarifications; and at best, the testimony goes to the weight a jury should give to it, and not to its exclusion. *U.S. v. Matta-Ballesteros, 71* F.3d 754, 766-767 (9th Cir. 1995). The County largely ignores this Wardlaw evidence. AB at 32-36.

Additional Wardlaw Testimony. Additionally, Mr. Wardlaw admitted that the County's easement condition was a demand for money because the County would have to pay for them if it had to condemn them. He repeatedly emphasized that the easements needed to be acquired *pre-Board consideration* to avoid putting the Board "at risk" of having to "condemn" the easements as a post-project condition of approval under the Subdivision Map Act, Gov. Code § 66462.5, if Appellants were not successful in securing the easements.

Mr. Wardlaw, as planning director, knew about the Subdivision Map Act requirements, and was protecting his Board by insisting that Appellants secure the easements pre-project approval. Mr. Wardlaw testified:

> "Because the requirement of the easement *prior to a board consideration* . . . was necessary to avoid putting the county into a situation of once approved, without the easements in hand by the applicant, could place the county at *risk of having to condemn private property or easements* because the applicant had not done so. *And that was a risk that we always elevated to the Board* in any project where that situation might arise.
>
> BY MR. DILLON:
>
> Q. The county had eminent domain power for public purposes like that, right?
>
> . . .
>
> Q. Yes or no to that question?
>
> A. Yes.

See 3-ER-455, 457-458 (emphasis added).

Mr. Wardlaw further testified the easements were not "free" because if not obtained, the County would have to exercise its eminent domain powers to acquire them or waive the condition:

> THE WITNESS: *Yes. I stated before, to avoid a condemnation situation if the board went to approve the project.*
>
> BY MR. DILLON:
>
> *Q. Did you ever tell Mr. Hershfield, Mr. Rilling, or anybody from the applicant side that the easements were required to avoid condemnation?*
>
> *A. Yes,* because this was a similar situation with the road that was located in the center of the property . . . in which there was multiple property owners, and the expansion of that road or securing the right-of-way that was required with the project. If it didn't occur . . . , then that situation which was similar to this in terms of right-of-way, *all parties knew* that . . . *would have required condemnation if it wasn't secured or waiving of the condition.*
>
> Q. You said that you specifically told them that the easements were required to avoid condemnation. Who did you tell that to and when?
>
> *A. Jon Rilling* was very aware of that situation, . . . I'm sure, because *it was a well-known subject* associated with the project.

3-ER-459-460 (emphasis added).

The above testimony shows Mr. Wardlaw knew — indeed, "all parties knew" — that if the 50 offsite easements were not secured, the County, post-project approval, would have been required by law to secure them itself by "condemnation" or risk waiving the easement condition. *Condemnation is not a process whereby property interests (easements) are obtained "for free."* The County's condemnation requirements and state law mandate payment of money (fair market value) for condemned easements. The County's opposition is *silent* as to this evidence; and the court's orders *do not* mention it. *See* 1-ER-2-10, 15-19.

Additional Rilling Testimony. Further, Mr. Rilling provided testimony showing Appellants spent substantial money in their efforts to secure the easements. 3-ER-467-468 (¶¶ 5-10). These costs were foundational to satisfying the County's easement condition. 3-ER-468 (¶ 10). The evidence was offered to prove that Appellants understood the County's easement condition required them to purchase and secure the easements, and they could not begin to do so without first paying for the basic legal descriptions, ownership information, and surveyor plat maps needed for each easement. 2-ER-318, 328. Appellants' pre-litigation understanding of the County's easement condition is relevant. Neither the County nor the district court mentions such evidence.

Keagy Testimony. Mr. Keagy, MAI, calculated the estimated costs of acquiring the easements (a low of $2.5 million), and the County's Fire Chief Nissen testified in corroboration that "some people would want money," that the *"sky's the limit"* on the sum of money they would demand, and that 50 property

owners could extract as much as $50,000 each or $2.5 million or "higher." Additionally, Mr. Cook, a West Lilac Road resident, said to Mr. Rilling, "I won't give you an easement," but "be careful buying easements around here because once people know that you're buying easements, the *price is going to skyrocket."* This is not speculation. It is all *corroborating* evidence that should have withstood the grant of summary judgment. *See* 15-ER-3884-3888, 3895-3905 (Keagy Dec. ¶¶ 1-9, and cited exhibits); *see also* 3-ER-430-432, 471, 474. The County makes no mention of this evidence. *See* AB at 32-36.

Aghassi Testimony. Sarah Aghassi, the Deputy Chief Administrative Officer and General Manager, testified without objection that the easements *"would have to be purchased."* 2-ER-180 (¶ 24) (emphasis added), 184-186. The County fails to address this testimony. AB at 32-36. Her testimony, alone, is sufficient to withstand summary judgment, but it was ignored by the district court. *See* 1-ER-2-10.

Planning Commissioner Edwards. Commissioner Michael Edwards commented at an open, public hearing that the "developer's going to simply be extorted . . . [y]ou want an easement from me? It's going to cost you $50,000." 2-ER-180 *(*¶ 25*),* 253; *see also* 2-ER-45. The County fails to address this testimony. AB at 32-36. The district court did the same. 1-ER-2-10.

Additionally, Mr. Edwards' public comments are reminiscent of the Supreme Court's primary concern in *Koontz,* 570 U.S. 595. The Supreme Court stated it makes no difference that no property was actually taken. *Id.* at 606-607. The Court explained that:

"Extortionate demands for property in the

> land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."

Id. at 607 (emphasis added).

The Supreme Court explains it makes no difference that the water district might have been able to deny Koontz's application outright without giving him the option of securing a permit by improving public lands. *Id.* at 607-608. It is settled that the unconstitutional conditions doctrine applies even when the government threatens to withhold a "gratuitous governmental benefit." *Id.* at 608; *see also Nollan v. Cal. Coastal Comm.,* 483 U.S. 825, 837 (1987) (imposing nexus requirement in land use permit context to avoid a regulation that was "an out-and-out plan of extortion").

West Lilac Road Residents. The West Lilac Road resident declarations refute the County's unsupported assertion that "no property owners along West Lilac Road ever asked for money in exchange for an easement." *See* AB at 34. Easements were discussed; the residents expected to be paid for the easement; appraisers would have a role; and some residents would *not* give over the easement, rendering it impossible to satisfy the County's required condition. *See* OB at 35-36. The resident testimony is undisputed, admissible testimony that a jury must weigh and decide. *E.g.,* 2-ER-300-307, 309-318; 3-ER-321-329, 331-342; *see also* 2-ER-176-180 (¶¶ 17-23) (summarizing resident testimony). The County fails to address the residents' sworn statements. AB at 32-36.

Larry Hershfield Testimony and Letter. Owner representative's sworn declaration provided his pre-litigation understanding that the County's easement condition required Appellants to purchase and secure the easements, and he wrote to the Board offering a solution whereby the "costs of acquiring the easements would be determined by an MAI appraiser." *See* OB at 37; *see also* 2-ER-264-269, 274-276; and 2-ER-47-48, 165-166. The County fails to address Mr. Hershfield's sworn statements. AB at 32-36. The court also fails to mention this evidence. 1-ER-2-10.

The evidence is considerable and sufficiently raised a genuine dispute for the jury to decide. It should not have been stripped away from the jury after 2+ years of costly litigation on the eve of trial after Appellants withstood the County's failed motion to dismiss and its summary judgment motion.

[. . .]

APPENDIX W
DEPOSITION OF MARK WARDLAW, EXCERPTS
(SEPTEMBER 8, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF

VILLAGE COMMUNITIES, LLC.,

Plaintiff,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 3:20-cv-01896-BEN-DEB

County of San Diego Office
San Diego, California 92101

[September 8, 2021, Transcript, p. 87]

. . . applicant should have discerned when he got this letter, right?

A. Yes.

Q. All right. Now, it's your understanding, isn't it, that the applicant attempted to acquire the 20-foot wide easements, correct?

MR. HEINLEIN: Objection. Calls for speculation. Go ahead.

THE WITNESS:I do not believe they attempted to acquire. I think they contacted people if they were interested. I do not believe they made offers to purchase easements.

BY MR. DILLON:

Q. That was the directive, right?

A. To acquire easements.

Q. Well, to make offers to purchase the easements, right?

A. No. The intent of this is to obtain an easement. Not to make an offer to. It's to secure an easement.

Q. The intent was to purchase the required fuel modification roadside easements. Fair statement?

A. Purchase —

MR. HEINLEIN: Objection. Go ahead.

BY MR. DILLON:

Q. Yes, right?

A. Purchase and secure the easements.

Q. Right?

A. Yes.

Q. Thank you. And the applicant could have purchased the easements and then get a project denial leaving them holding those easements, right?

A. Whatever the disposition would be. I cannot conject what it would be.

Q. Well, can you think of any scenario where the applicant purchased from private property owners along the identified West Lilac Road segment got project denial and then had a use for those easements?

MR. HEINLEIN: Objection. Calls for speculation. But go ahead.

THE WITNESS: I don't know what the purchase offers and instruments of securing can be. Perhaps they were an irrevocable offer. I have no idea. Which is not even germane. Which is the fact that the easement is required before consideration and approval by the board.

BY MR. DILLON:

Q. That was the directive, right?

A. Yes.

Q. And based on the January 8th letter do you know

[September 8, 2021, Transcript, p. 93]

Q. Okay. The applicant could have purchased the off-site easements and still not receive county staff's recommendation for the board to approve the project, correct?

A. I would say yes with a caveat, in that how the applicant secured the easements was not of interest to us. It could have been an option. It could have been a purchase. It could have been an agreement that gives me the access rights and I'll go trim your weeds, whatever it was. We didn't specify that they had to purchase. They just had to secure acquire. I think that was the intent of the communication.

Q. So let me drill down a little bit on that. It was of interest how they were going to acquire the off-site easements. You required it to be on a county-approved easement form, right? Just to be clear, right?

A. I don't know the instrument that we would have needed to actually verify the legal security of the easement. I mean, there's probably a number of ways to do it.

Q. Didn't county PDS direct the applicant to use a county-approved easement form?

A. Yeah, I don't know what's in that form, unfortunately. Sorry.

Q. So you don't know one way or another whether the county insisted on a particular instrument to acquire these, correct?

A. Yes.

Q. And earlier you testified pretty clearly that the applicant would need to purchase those off-site easements, right?

A. I did, but I should clarify that that was too general of a comment for me, so I didn't mean to misconstrue. The key is that the applicant had to secure the easement in order to enable the maintenance and clearing of the vegetation.

Q. All right. We'll get back to that. Let's go ahead and take a look at Exhibit 16 to the Sibbet deposition. And while that's being provided to you I'll just say–oh, wait. Excuse me. Did I say 16?

MS. RIDGE: You want 17?

MR. DILLON: I don't want 16. Sorry, 17 is what I meant to say. Exhibit 17 from the Sibbet deposition. It's a January 29, 2020 email from you to Mr. Hershfield, right?

(Exhibit No. 17 marked for identification)

A. Yes.

Q. And you recognize this email, right?

A. Yes.

[September 8, 2021, Transcript, p. 111]

A. We had regular updates on the project. I'm sure it was, you know, it was frequent. It was periods. And so there were numbers of them. I can't tell you a count, but there were—we had plenty of meetings.

Q. Were they strategy sessions?

A. Our meetings were to discuss the current status. The situation. Our approach to project evaluation, developing options and recommendations, and then how to approach particular issues or questions that we could anticipate, and our determinations. Period.

Q. By January 29 the county had not yet provided the county-approved easement form the applicant was required to use, had they?

A. I do not know that.

Q. Assuming that January 8th was the first time the applicant knew it needed to get easements, was 21 days sufficient time in your view to acquire easements from the private property owners along the identified segment of West Lilac Road?

MR. HEINLEIN: Objection. Lacks foundation. Calls for speculation. But go ahead.

THE WITNESS: I don't know how long it would take to acquire or secure an easement. I think the willingness of the applicant to do so was at question. And so it was in some ways, regardless of the time, perhaps moot to the discussion. Because the requirement of the easement prior to a board consideration of the item was necessary to avoid putting the county into a situation of once approved, without the easements in hand by the applicant, could place the county at risk of having to condemn private property or easements because the applicant had not done so. And that was a risk that we always elevated to the Board in any project where that situation might arise.

BY MR. DILLON:

Q. The county had eminent domain power for public purposes like that, right?

A. The county —

Q. Yes or no to that question?

A. Yes.

MR. HEINLEIN: Go ahead.

BY MR. DILLON:

Q. All right.

A. However, it is a policy decision for the county board of supervisors, and we would always make them aware of the implication of a condition that may require some subsequent action that the board did or did not want to pursue in the future.

BY MR. DILLON:

Q. And the prospect of using condemnation for road improvements, that's often a post-project approval condition, correct?

A. Right. And if not selected by the board and it was waived, then the condition would be moot and the purpose of the condition would not be fulfilled.

Q. In your January 29 email Deputy Chief Nissen also required that the roadside clearing be inclusive of all properties regardless of current vegetation may be present, yes?

A. Yes.

Q. Did you explain to Deputy Chief Nissen when you spoke to him that you or somebody from your staff had already told the applicant that the roadside easements did not have to be in areas with no combustible vegetation such as driveways, ornamental non-flammable vegetation and irrigated agriculture areas?

A. I don't recall having that level of detail discussion with Deputy Chief Nissen.

Q. Do you recall having discussions with Mark Slovick where Mark asked you, hey, we don't really need the easements in areas where there's no combustible vegetation, do we?

A. I don't recall that. We may have. I just don't recall.

Q. All right. As you sit here today, doesn't make . . . .

[September 8, 2021, Transcript, p. 123]

. . . apparently an estimate of 50 easements.

BY MR. DILLON:

Q. And the county required the applicant to secure those 50 easements prior to board consideration of the project, right?

MR. HEINLEIN: Objection. Asked and answered, but go ahead.

THE WITNESS: Yes. I stated before, to avoid a condemnation situation if the board went to approve the project.

BY MR. DILLON:

Q. Did you ever tell Mr. Hershfield, Mr. Rilling, or anybody from the applicant side that the easements were required to avoid condemnation?

A. Yes, because this was a similar situation with the road that was located in the center of the property and exited to the south in which there was multiple property owners, and the expansion of that road or securing the right-of-way that was required with the project. If it didn't occur within, then that situation which was similar to this in terms of right-of-way, all parties knew that that would have required condemnation if it wasn't secured or waiving of the condition.

Q. You said that you specifically told them that the easements were required to avoid condemnation. Who did not tell that to and when?

A. Jon Rilling was very aware of that situation, and his cohort Sam, I'm sure, because it was a well-known subject associated with the project.

Q. The county required the easements as a condition to the final map, right? That was the idea, right?

A. Not to this. Right? Was it in the map? I don't recall if it was the map, but the intent was to have it secured before board consideration. Because if it was subsequent to board approval then they weren't secured. Then as already stated, would either have to be secured by the county or waived.

Q. But when the county provided the county-approved easement form the intent at that time was for the applicant to acquire the easements, and then the county would force the applicant as a condition of the typical map to convey those easements to the county, right?

MR. HEINLEIN: Objection. Assumes facts not in evidence. Calls for speculation. But go ahead.

THE WITNESS: I don't recall if it was going to be county's obligation to maintain, or if it was going to be the applicant's obligation to maintain the brush removal along those easements.

BY MR. DILLON:

Q. You don't recall one way or another?

[. . .]

APPENDIX X
DECLARATION
KENNETH KEAGY, EXCERPTS
(FEBRUARY 18, 2022)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC, ET AL.,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 3:20-cv-01896-AJB-DEB

Before: Hon. Anthony J. BATTAGLIA,
U.S. District Judge.

Complaint Filed: September 22, 2020
Second Amended
Complaint Filed: August 24, 2021

Hearing Date: May 26, 2022
Time: 2:00 p.m.
Dept.: 4A

DECLARATION OF KENNETH A. KEAGY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; PLAINTIFFS' EXHIBIT COMPENDIUM PART 3

I, Kenneth A. Keagy, MAI, declare as follows:

1. I am an appraiser and member of the Appraisal Institute since 1990, and a state-licensed and certified general real estate appraiser. I am qualified, and have qualified in court as an expert, to perform valuations of real property, including easements. As the sole proprietor of a real estate appraisal and consultation business, I have more than 40 years of experience as a professional appraiser. Attached hereto and incorporated by reference as Exhibit 67 is a true and correct copy of my qualifications.

2. I offer my declaration in support of Plaintiffs' motion for partial summary judgment. Plaintiffs, through their counsel, retained my services as an appraisal expert witness in this case in approximately June 2021. I have visited the Lilac Hills Ranch project site and vicinity; reviewed voluminous project-related documents; consulted with Plaintiffs and their counsel; completed two detailed appraisal reports in this case, both of which have been provided to County Counsel for Defendants County of San Diego (County) and its Board of Supervisors; and provided deposition testimony.

3. My declaration herein is limited at this time to my valuation and provisional estimated budget for Plaintiffs' potential post-approval acquisition of 48 offsite fuel modification easements, all of which is addressed in my pre-decision appraisal report in this case.

4. Based on the County's demand that 20-foot-wide fuel modification easements be acquired along West Lilac Road from Covey Lane to the northwest boundary of Lilac Hills Ranch, I researched public records and determined that there were 52 parcels not owned or controlled by the Plaintiffs along that segment of public roadway. (The record in this case shows that Plaintiffs thought 32 offsite fuel modification easements were required; and that County staff insisted on 50 such easements. I believe that my parcel analysis is the most accurate — 52 easements total.)

5. Attached hereto and incorporated by reference as Exhibit 68 are County Assessor colorized parcel maps identifying these 52 parcels by number. Of the 52 parcels, 4 parcels have sufficient existing right-of-way/IOD (irrevocable offer to dedicate) width to accommodate the required 20-foot fuel modification without the necessity of acquiring an easement, leaving 48 parcels subject to the County easement acquisition requirement. (Again, the record shows that County staff insisted on 100% compliance irrespective of rights-of-way/IODs; however, in my opinion, there should be no easement requirement for those parcels with 20-foot-wide rights-of-way/IOD; therefore, my analysis did not assume easements for all 52 parcels; only 48, as I explain herein.)

6. In my pre-decision appraisal report, at pages 132-133, I developed a detailed spreadsheet summarizing my calculation of the provisional estimated budget for Plaintiffs to acquire 48 offsite fuel modification easements as a post-approval condition with use of the County's eminent domain authority as necessary. True and correct copies of pages 132-133 of my pre-

decision appraisal report are attached hereto as Exhibit 69 and incorporated herein by reference.

7. Twelve of the 48 parcels have small easement areas and/or no landscaping, so compensation was nominal ($3,000 or less). Of the remaining 36 parcels, estimated compensation ranged from about $4,000 to $65,000 with an average of about $22,000 per parcel. My spreadsheet includes a column that roughly calculates the market value of each property using a per-square-foot of living area metric as a point of reference. Where there is moderate to high quality landscaping, the compensation figures typically ranged from about 2% to 7% of the market value of the properties, but in two outlier cases as high as 10% and 12%. This estimated compensation as a percentage of market value is reasonable.

8. The total provisional budget for the fuel modification easement acquisitions is $2,500,000 or roughly $52,000 per parcel for 48 parcels. In my opinion, all of the 48 fuel modification easements could not be acquired without use of the County's eminent domain authority due to likely opposition of one or more property owners to the Lilac Hills Ranch project. Further, without the County's eminent domain authority, my valuation does not account for the high likelihood that easement acquisition costs would substantially exceed my estimated budget ($2.5 million) once one or more property owners along West Lilac Road became aware of the "developer" need for such easements. Without the threat of easement acquisition by condemnation, those property owners would likely demand much more money per easement than estimated in my provisional budget.

9. As stated, my report was made available to County Counsel in this case; my report was subjected to examination during my deposition; and the County did not question me about my easement valuations or dispute my opinions regarding value, as outlined herein.

10. My declaration was executed on February 18, 2022, at La Mesa, California. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

/s/ Kenneth A. Keagy

[. . .]

Plaintiffs' Exhibit Compendium Part 3-Index

Exhibit 69

PRE-DECISION APPRAISAL REPORT

FOR

MCKINLEY LLP

OF

LILAC HILLS RANCH PROPERTY PRIOR
TO BOARD OF SUPERVISORS JUNE 24, 2020
DECISION TO DENY PROJECT SAN DIEGO
COUNTY

DATE OF VALUATION
JUNE 24, 2020

DATE OF REPORT
DECEMBER 15, 2021

BY

KEAGY REAL ESTATE
8321 LEMON AVENUE
LA MESA, CALIFORNIA 91941
(619) 462-4350
FAX (619) 462-2156

{ Spreadsheet Data Omitted }

APPENDIX Y
DEPOSITION OF DAVID NISSEN, EXCERPTS
(AUGUST 5, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC.,

Plaintiff,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 3:20-cv-01896-BEN-DEB

9:08 a.m.

1600 Pacific Highway, San Diego, California
Debbie K. Wood, CSR No. 6515

[August 5, 2021, Transcript, p. 181]

. . . speaks for itself.

THE WITNESS: Yes.

BY MR. DILLON:

Q. That's the idea, right? People aren't going to give away their property rights for free, right?

MR. HEINLEIN: Objection. Lacks foundation. Calls for speculation. Overbroad.

BY MR. DILLON:

Q. Go ahead.

A. It seems like some people would want money.

Q. Right. And, you know, in fact, one or more of the West Lilac Road property owners could literally extort thousands and thousands of dollars in return for the easement, right?

MR. HEINLEIN: Objection. Assumes facts not in evidence. Incomplete hypothetical. Calls for speculation. Also argumentative.

THE WITNESS:I suppose somebody could do that.

MR. DILLON: Yeah.

BY MR. DILLON:

Q. If they knew that the applicant had to get these easements and they knew they could get money for them sky's the limit, right?

MR. HEINLEIN: Same objections.

THE WITNESS: Conceivably, yes.

BY MR. DILLON:

Q. Do you know the math on 50,000 times 50 easements?

A. 2.5 million.

Q. It's a big ass number. I don't know. Let's just run it.

Did you do that off the top of your head?

A. Yeah.

Q. That's pretty good.

A. Was I right?

Q. We're going to find out in a minute. Damn. That's pretty good.

A. Yeah.

Q. So if those property owners extract— extracted $50,000 and there were 50 of them, it would cost the project applicant $2.5 million?

MR. HEINLEIN: Objection. Assumes facts not in evidence. Calls for speculation.

Go ahead.

BY MR. DILLON:

Q. Right?

A. If you named your price, which—yeah, . . .

[. . .]

APPENDIX Z
DEPOSITION OF SARAH AGHASSI, EXCERPTS
(SEPTEMBER 10, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VILLAGE COMMUNITIES, LLC.,

Plaintiff,

v.

COUNTY OF SAN DIEGO; BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO; and DOES 1–20,

Defendants.

Case No. 3:19-CV-00760-H-DEB

[September 10, 2021, Transcript, p. 92]

. . . gosh, I think it was policy advisor, coordinator advisor. Ultimately became director of public policy for the San Diego Regional Chamber. And then December 2005, came to the County.

Q. So you first started work at the County in 2005?

A. Yes.

Q. And what was your position and how long did you hold it? From when to when?

A. Sure. So December 2005 to November 2010, I was director—well, first I was assistant director of the office of strategy and intergovernmental affairs. And then December 2006, I became director of that office.

Q. And were you promoted from that position?

A. Yes.

Q. To what position?

A. To the position I'm in now, the general manager for LUEG.

THE REPORTER: General manager of—

THE WITNESS: The Land Use and Environment Group, LUEG, L-U-E-G.

THE REPORTER: Thank you.

THE WITNESS: Uh-huh.

BY MR. DILLON:

Q. Are you also deputy chief administrative officer?

A. Yes, we have both titles.

Q. Okay.

MR. HEINLEIN: I didn't realize that.

THE WITNESS: It's so long ago.

BY MR. DILLON:

Q. And who is the chief administrator—

A. Helen Robbins-Meyer.

Q. —administrative officer? Okay.

What departments do you oversee as deputy chief administrative officer and general manager?

A. Planning and Development Services, Public Works, Parks and Rec, Agricultural Weights and Measures, Environmental Health and Quality, and Libraries.

Q. What was your role on the land—on the Lilac Hills Ranch project?

A. I would receive briefings from the team, status updates, and then work on getting items prepared to go to our Board of Supervisors.

Q. And you've never worked as a lawyer in the County Counsel's office, right?

A. No.

[September 10, 2021, Transcript, p. 158]

. . . opponents to the project. But as far as whether they would provide easements or not, I wouldn't know that.

Q. Those easements, they would have to be purchased, right?

A. Yes.

Q. Yeah. Did you ask anybody to run a calculation of the estimated cost those easements?

A. I don't believe so.

Q. Okay.

A. No.

Q. In any case, the County insisted on 100 percent of the easements from the private property owners along that identified segment of West Lilac Road, right?

A. That is—that—yes, that's what's here.

Q. Yeah. All right. And—and one of the purposes of this e-mail was for Wardlaw to report back and get clarification from County Fire as to the easement requirements—

A. That's right.

Q. — right?

And he did that in the second paragraph, right?

[. . .]