

## INTRODUCTION

Simply put, the Project, as structured, is an elaborate attempt to unlawfully circumvent Art. XXXIV by invoking Health & Safety Code §§37000 *et seq.* and is invalid.

### I. BURDEN OF PROOF/PRESUMPTION

*In re Bunker Hill*, 61 Cal.2d 21, 37-40 (1964) deals with whether the independent judgment rule or the substantial evidence rule applies. The Court found that the latter is applicable. The Court does not discuss whether the redevelopment agency's acts are presumed valid.

The cases cited by the City/Agency rely on Evidence Code §664 which provides that there is a presumption that official duty has been regularly performed. But, Interested Persons respectfully submitted that the presumption does not preclude judicial review of the question of whether or not the determinations made by the City/Agency comply with the applicable statutes: Specifically, H. & S. Code § 33433 and Govt. Code § 54222, among others. Upon a showing of invalidity, the burden of going forward with the evidence shifts to Plaintiffs and they cannot simply rely on a presumption. Under *Morris v. Williams*, 67 C.2d 733 (1967 and its progeny, the Plaintiffs have the burden.

In *Meany v. Sacramento Housing and Redevelopment Agency*, 13 Cal.App.4<sup>th</sup> 566, 578-579 (1993). regarding a conclusive presumption, the Court of Appeal states:

“This conclusion, however, does not preclude judicial review of the procedures followed by the agency and the local legislative body in making the determinations or of the question whether the determinations comply with section 33445.”

In *Leach v. City of San Marcos*, 213 Cal.App.3d 648, 660 (1989) the court cited the presumption, but still found that plaintiff Leach had shown that the property in question was not blighted and was included for the purpose of capturing tax increments. The issue that the city won on was lack of irreparable harm.

Therefore, because Interested Persons have made a *prima facie* case, the burden shifts to plaintiffs.

## **II. THE PROJECT IS A HOUSING PROJECT FOR PERSONS OF LOW-INCOME PURSUANT TO BOTH CONS'T. ART. XXXIV AND H. & S. §§ 37000 ET SEQ.**

### **A. Statutory and Constitutional Low-Income.**

The definition of persons of low-income is exactly the same in both Article XXXIV and Health & Safety Code § 37000. A vote of the public for approval of the Project is required under California Constitution, Art. XXXIV, which states in pertinent part:

“For the purpose of this article only, ‘persons of low income’ shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them **without financial assistance** to live in decent, safe and sanitary dwellings, without overcrowding.” (Emphasis added.)

Health & Safety Code § 37000 states that:

“The terms ‘state public body’ and ‘**persons of low income**’ as used in this part have the same meaning as in Article XXXIV.” (Emphasis added.)

In *Calif. Housing Fin. Ag. v. Patitucci*, 22 Cal.3d, at p. 173-174 the California Supreme Court, discussing *California Housing Fin. Ag. v. Elliott*, 17 Cal.3d 575 (1976), referring to certain Agency resolutions states:

“These resolutions defined ‘mixed income’ developments as those in which not more than 75 percent of the units would be made available **to those persons deemed unable to pay the rental rates offered by unassisted private enterprise** for safe, decent, and sanitary housing. The project is clearly a low- and moderate-income housing project.”

In both *Elliott* and *Petitucci*, moderate income residents were those who were able to pay the rental rates offered by unassisted private enterprise, as opposed to “persons and families of low or moderate income” (*Elliott, supra*, 17 Cal.3d at p. 590.) “Mixed-income”

projects/developments were those with residents whose rent was both assisted and unassisted. (*Elliott, supra*, 17 Cal.3d at p. 593; *Petitucci, supra*, 22 Cal.3d175-176.)

In the Project, 100% of the units will be provided for statutory person of low-income.

Plaintiffs City/Agency's senior Housing Project is an affordable housing project for "families of low or moderate income". It is not a "mixed-housing" project/development. As a result the entire Senior Housing Project is for persons of low income under Article XXXIV, and does not qualify under Health & Safety code § 37001(a)(2).

**B. Plaintiffs City/Agency Admit That Without H. & S Code §§ 37000 *Et Seq*, A Vote Of The Public Is Necessary.**

At AR XII, Tab 176, p. 3732, Plaintiffs' Agenda Report, Attachment 9, states that "Since both items (1)<sup>1</sup> and (2)<sup>2</sup> of California Health and safety code §37001(a) would be satisfied, the proposed project would be exempt from the Article 34 voter approval."

At AR XII, Tab 176, p. 3536 the City/Agency Agenda Report states that for 2005 the cap on a moderate one-bedroom apartment was \$1,212.75 and for a moderate two-bedroom apartment it was \$1,364.00.

In the Agenda Report at AR XII, Tab. 107, p. 3736 it states that the:

"Average monthly rents in Los Angeles County and Orange County in 2005 were \$1,400, up from \$1,200 in 2001."

Further, while there was an increase in average monthly rents, there was no increase in "Affordable Monthly Rents" for this same period. It should also be noted that between 2002 and August of 2006 the average home price had risen from \$297,000 to \$700,000, or an average of \$6,015 per month, and \$72,000 per year. Increased rental rates obviously followed for the years 2006 and 2007.

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<sup>1</sup> Owned and operated by a private non-profit corporation.

As a result, each of the residents is receiving assistance to enable them to live in decent, safe and sanitary dwellings, without overcrowding.

Interested Persons did not address the alleged *Patitucci* argument because it was clear that Plaintiffs realized that they have a low-income project, and had to figure out some way to get around need for a vote of the public.

They did so by creating a corporation that is private in name only.

### **III. CUESTA VILLAS HOUSING CORPORATION DOES NOT FALL WITHIN HEALTH & SAFETY CODE §§ 37000 ET SEQ.**

From a review of H&S §37000, the Legislature sought to improve upon the architecture, design and location standards as well as the level of amenities of the previous federally subsidized public housing projects. The legislature found, in essence, that involving the private sector in such forms of housing assistance would allow for mixed-income occupancy in development representative of and competitive with similar market-rate developments provided by the private sector. In other words, removal from government-created and constructed projects. This clearly does not exist with respect to Plaintiffs City/Agency's Senior Housing Project.

At 54 Ops. Cal. Atty. Gen. 168 (1971) the Attorney General stated:

“However, we do not wish to stated that conceivably there could be no unusual local government participation in a ‘private development which could in substance be tantamount to their conducting or to their developing or acquiring the project in question.’”<sup>3</sup>

Here there is unusual local government participation.

In 81 Ops. Cal. Atty. Gen. 281, 290 it is stated that subdivision (c) of Govt. Code section 54952 includes within the definition of “**legislative body**” the governing board of a

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<sup>2</sup> Not more than 49% of the units are occupied by persons of low income.

private corporation created by the Agency's legislative body to exercise authority delegated by the Agency or which receives funds from the Agency and the Agency members sit as a voting directors of the Corporation. Such is the case here so long as members of the Cerritos City Council and Redevelopment Agency Board sit as members of the Board of Directors of Cuesta Villas. At pp. 290-291, the Attorney General found that the non-profit corporation was:

- Subject to the Ralph M. Brown Act
- Required to comply with acquisition requirements
- Required to comply with relocation requirements
- Required to comply with public bidding statutes
- Required to comply with prevailing wage statutes

Until the Senior Housing Project is completed and the units are occupied, all of Cuesta Villas' funds and assets will be supplied by the City or Agency. As stated in Plaintiffs' Complaint For Validation and throughout their Trial Brief:<sup>4</sup>

- The construction of the Senior Facilities will be financed by a loan from the Agency to Cuesta Villas in the amount of \$46,000,000. (Construction Loan)
- If necessary, Cuesta Villas may supplement the construction Loan with additional funding requests under a procedure set forth in the Financing Agreement. (§ 6.8)
- The construction Loan will be funded by the Agency with LIM funds, with supplemental loans from the city to the Agency, (and then to Cuesta Villas), and with any other available and appropriate sources of funds.

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<sup>3</sup> Plaintiffs City/Agency argue that this Opinion is before *Patitucci*, and the adoption of Health & Safety Code §§ 37000 *et seq.* But, neither expands the definition of privately owned.

<sup>4</sup> See Complaint For Validation at p. 14, lines 19-20, and Article 6 of the Agreement beginning at AR XV, Tab 193, p. 4766 *et seq.*

Cuesta Villas will make ground lease payments to the District from rental payments received from the Senior Housing. But the payments will be **guaranteed by the Agency's** LMI Funds. As a result, unlike a private corporation, Cuesta Villas will never be concerned about creditors or going into Chapter 7 or 11 of the Bankruptcy Act. (See AR XV, Tab 193, p. 4734, § 3.1.3(a).)

The fact that the City Council/Agency Board members do not differentiate themselves from being Cuesta Villas' Board members is highlighted by the fact that the corporate meeting of Cuesta Villas was never noticed. The document at AR XV, Tab 188, p. 4658, is a Notice of Public Hearing. Not a notice of the meeting. There is nothing about the corporate meeting. C/A Reply p. 17 lines 27-28 fn. 11.

Plaintiff City/Agency argue that the Cuesta Villas' Bylaws require that the City Council/Agency Board members resign after certain preliminary tasks are complete. But this overlooks the fact the these members adopted the Bylaws and can amend them at their pleasure. And, like the challenge to the premature purchase of the 166<sup>th</sup>/Moore Street Properties, there is no outside entity or person that has standing to enforce them.

Interested persons respectfully submit that so long as its counsel and board members sit as directors of Cuesta Villas that the City/Agency are developing and constructing the Senior Housing Project. This being the case it does not fall within the exceptions of Health & Safety Code §37001.5.

So long as the Council/Board members sit as directors, each of the factors under the doctrine of Essential Control exists.<sup>5</sup>

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<sup>5</sup> The six considerations are (1) substantial municipal control over agency operations, revenues or expenditures, (2) municipal ownership or control over agency property or facilities, (3) coterminous physical boundaries, (4) common or overlapping governing boards, (5) municipal

So long as the Council/Board members sit as directors, each of the factors under the doctrine of Incompatibility of Office exists

The transition of the Cuesta Villas directors from City Council/Agency board member to members of the public will likely occur shortly after the construction of the Senior facilities and the initiation of its operation.

Accordingly the corporation is a shell.

#### **IV. THE DEVELOPMENT OF NEW SCHOOL DISTRICT FACILITIES IS AN IMPROPER USE OF LMI FUNDS**

In *Craig v. City of Poway*, 28 Cal.App.4<sup>th</sup> 319 (1994), LMI Funds were used for a road project. In *Lancaster Redevelopment Agency v. Dilbey*, 20 Cal.App.4<sup>th</sup> 1656 (1993), the LMI Funds were used for an overpass. In *Craig v. City of Poway*, 28 Cal.App.4<sup>th</sup> at 325 the Court of Appeal states that LMI funds must “be set aside in a separate housing fund to be spent exclusively to improve and increase affordable housing opportunities.” The question is, is there a *nexus* between the District’s new administrative, kitchen and warehouse facilities, or are they to remote.

Interested Person’s respectfully submit that they are too remote and that Plaintiffs City/Agency knew they would be.

Why did the City of Cerritos ask Senator Lowenthal, by letter, to introduce a bill to the State Senate that would allow Redevelopment Agencies to transfer up to 25% of their LMI Funds directly to their local school districts to allow those districts to construct new school facilities? Perhaps they were aware of the *Craig* and *Lancaster* cases and questioned the use of

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involvement in the creation or formation of the agency, (6) agency performance of functions customarily or historically performed by municipalities and financed through levies of property taxes.

LMI Funds for school district facilities. Having found it to be illegal, they created this Project in an unlawful attempt to channel LMI Funds to the District.

This raises the question, why doesn't the Agency build affordable housing at 166<sup>th</sup>/Moore Street properties that the city now owns?

- The City purchased the 166<sup>th</sup>/Moore Street Properties with LMI Funds.
- The Agency will remodel the 166<sup>th</sup>/Moore Street Properties for the District with \$4,000,000 of LMI Funds.
- The Agency will relocate the District from its current facilities to its new facilities with up to \$1,000,000 of LMI Funds.

The Lowenthal letter is relevant because here LMI Funds were used to purchase the property for the school district. LMI Funds will be used for relocating the school district. LMI Funds will be used to remodel the Administration Offices, Kitchen facilities, and a warehouse at the 166<sup>th</sup>/Moore Street Properties. All this in a situation where affordable housing could be built inside the Redevelopment Project Area in accordance with the legislative intent.

Referring to the language at the bottom of page 26 in plaintiffs City/Agency's Reply, the fact that "the City and Agency freely admit that the City is expending the Agency's LMI Funds" doesn't make it legal. The fact is that the City now owns the property (the 166<sup>th</sup>/Moore Street Properties) necessary to construct low- and moderate-income housing. This being the case, the construction of new facilities for the District does not increase affordable housing. Further, a senior center, while convenient, does not increase affordable housing.

**V. THE DISTRICT MUST COMPLY WITH GOV'T CODE § 54222, OR THE CITY AND AGENCY DO NOT HAVE THE BENEFIT OF H. & S. CODE §§37000 *ET SEQ.***

Under 54222 any agency of the state and any local agency **disposing** of surplus land **shall**, prior to disposing of that property, send a written offer to sell or lease the property as follows:

(a) A written offer to sell or lease for the purpose of developing low-and moderate-income housing shall be sent to any local public entity ...

54222 Continues on with a number of other requirements.

There is no dispute that the District has not taken the actions as specified in 54222.

At page 35, Lines 9-24 of their Opening Brier, the City/Agency state that the argument that the transaction is a lease “is a red herring, for it is well settled that ownership of a lease-hold interest for a substantial period of time (in this case it will be for 55 years (see AR 4859 [Ground Lease § 3.1], 3628-3629)) constitutes an “ownership” interest in the property itself. (See, e.g. *Conway, supra*, 127 Cal.App.3d 330, 336)”

What is so important about this distinction is that the City/Agency relies on Health and Safety Code Section 37001, to avoid an Article 34 vote of the electorate on the project. And Section 37001(a)(1) requires “private ownership”. This means the “private corporation” must own the property to qualify for the exception in Section 37001

Interested Persons respectfully submit the 55 year lease **is** a disposition of property for the purpose of developing low-and moderate-income housing, and 54222 applies.

Conversely, the District argues that Gov’t. Code §54222 doesn’t apply because the transfer is a lease. In fact the District states with clarity in their Reply Brief on page 4 Lines 25-27 that the transfer of the property is a lease. In section 9.1 Of the Affordable Housing Agreement. But, at page 66 of the Agreement (ABC00793) it states that:

“District shall not:...(ii) make a total or partial transfer or assignment of all or any portion of District’s right, title, and interest in the Norwalk

Boulevard property or the Ground Lease Parcels without the prior written consent of the City, Agency *and* Corporation;” (Emphasis added.)

In this section, The District completely gives up the right to alienate the surplus property on which the development is proposed to be built for **55 years**.

If the District has not sold the property to the Agency/City, then Section 37001(a)(1) of the Health and Safety Code doesn't apply. If Section 37001(a)(1) doesn't apply, then Article 34 applies and there must be a vote of the electorate on the project.

If the District has sold, or more accurately *disposed* of the property to the City/Agency Then Government Code § 54222 applies to the District. As stated above the District does not even claim to have met the requirements under Government Code § 54222 for the sale of the property.

Either the District or the City/Agency is mistaken. Either way the project cannot go forward. There either must be a vote of the electorate; or the project is blocked by the Districts failure to perform the requirements of Government Code § 54222.

All parties signed the same agreement. They cannot have it both ways.

### **CONCLUSION**

The Project started with 47% very low- and low- income units.<sup>6</sup> Even though this number was reduced to 16%, nothing changed; all Project residents receive assistance, and Health & Safety Code §37001(a)(2) does not become applicable. However, it the Court rules that it does, then there has been a sale, and Government Code § 54222 is applicable. Either way, the Project is invalid.

Respectfully submitted.

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<sup>6</sup> AR VII, Tab 107, p. 2206.