THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

DATE: May 31, 2019 | **DEPARTMENT: 39**
JUDGE: Edward G. Weil | **CLERK: Denese Johnson**
UNREPORTED

OAK HILL PARK COMPANY & ZEKA RANCH ONE, LLC.,
Petitioner(s),
vs.

THE CITY OF ANTIOCH,
Respondent(s).

Case No.: MSN18-2228
MSN18-2229
MSN18-2231
MSN18-2232

ORDER AFTER HEARING MAY 2, 2019

These four related cases, two each from two petitioners, concern the development of particular property in a roughly 1800-acre western portion of the Sand Creek Focus Area in the City of Antioch. In this ruling, the Court decides those issues presented in "Phase 1" of the briefing, as well as six separate pleading challenges to the four petitions.

I. Background

In July and August, 2018, the City Council approved two separate initiatives concerning the Sand Creek Focus Area. The first, approved in July, was the "West Sand Creek Tree, Hillside, and Open Space Protection, Public Safety Enhancement, and Development Restriction Initiative" (Richland Initiative). The second, approved in August, was the "Let Antioch Voters Decide" Initiative (LAVD Initiative).

The two initiatives were not identical, at least as concerned the roughly 550 acres within the Sand Creek Focus Area owned by Richland Communities, Inc. The Richland Initiative would have permitted Richland to develop that parcel for certain higher-density residential use, while barring such development in the neighboring parcels. The Richland Initiative also included a Development Agreement between the City and the owner of Richland's land. The LAVD Initiative, on the other hand, would have barred all but rural, high-acreage development on any portion of the Sand Creek Focus Area including Richland's property.

Operative California law gives the City Council the option – when presented with an initiative petition with the required signatures – to either place the measure on the ballot, adopt it on its own, or send it back for further analysis and thereafter either put it on the ballot or adopt it. (See generally, Elec. Code § 9215; § 9212 [delineating categories of information for further report/analysis from staff].) The City Council adopted the Richland Initiative on July 24, 2018, by a 5-0 vote. At the same meeting, it considered the LAVD Initiative, but elected to further evaluate it. On August 28, 2018, when it reconsidered the LAVD Initiative and had the Elections Code section 9212 analysis, the City Council adopted the LAVD Initiative as well, though on a narrower 3-1 vote with one member absent.

The Administrative Record reflects the City Council and staff concern about potential conflicts between the two initiatives. Ultimately, the City concluded that the Richland Initiative overrode the land use designations in the LAVD Initiative to the extent it allowed development on the Richland parcel. (See Administrative Record, pp. AR_130 – 138.) In part, this appeared to be because the Richland Initiative contained a provision that, after 30 days from approval (which would have been roughly August 23, 2018), the Development Agreement contained therein (allowing Richland's development of its parcel) was "immune from modification by subsequent ballot initiatives or City Council action." (AR_133.) Thus, enacting the LAVD Initiative could not change the already-approved designations for the Richland property.

Perhaps unsurprisingly, litigation followed. There are four cases involving two neighboring-landowner petitioners who each challenge both initiatives. The nonprofit group Save Mount Diablo has intervened in all actions, as it organized the LAVD Initiative. Richland, as well as its member and affiliated entities, are real parties in interest.

a. Oak Hill Cases (18-2228 and 18-2229)

Petitioner in the first two cases is Oak Hill Park Company. In MSN18-2228, Oak Hill challenges the Richland Initiative. In MSN18-2229, it challenges the LAVD Initiative. Oak Hill owns roughly 419 acres in three parcels neighboring the Richland property. Its property was designated for a golf course and senior housing in the 2003 General Plan. It claims to have received neither notice of the LAVD Initiative, nor mailed notice of either the July or August, 2018, City Council meetings which considered the initiatives. Adoption of the initiatives deleted those land-use designations and re-designated the Oak Hill property to rural, drastically reducing the development potential.

b. Zeka Ranch Cases (18-2331 and 18-2332)

Plaintiffs in MSN18-2231 (challenging the LAVD Initiative) and MSN18-2232 (challenging the Richland Initiative) are: 1) five related LLCs (Zeka Ranch One, Two, etc.), collectively "Zeka Ranch"; and 2) Zeka Group, a California corporation and the manager of Zeka Ranch. Zeka Ranch owns 640 acres of land in the Sand Creek Focus Area in five contiguous parcels, which Zeka Group purchased in 1989. Prior to purchase,

the City's planning development manager, Raymond Vignola, assured Zeka Group that the property was and would continue to be designated for residential development of 1000+ units. The City's 2003 General Plan called for 4,000+ units in the Sand Creek Focus Area, and Zeka Ranch was to develop the executive housing stock. Zeka Ranch alleges that it spent $25 million+ in purchasing the property, paying property maintenance fees, and developing plans for the property. Much as with Oak Hill, the result of *either* initiative is to prevent residential development on the Zeka Ranch property beyond large-lot, rural homes.

II. Writ Petitions

At the suggestion of the parties, the Court has separated certain issues into a "Phase 1" evaluation of the writ petitions. Phase 1 includes two related issues concerning the LAVD Initiative:

1) The first causes of action in 18-2229 and 18-2231, both of which concern the same fundamental topic: whether the City Council could properly adopt the LAVD Initiative a month after approving the Richland Initiative; and
2) The 10th cause of action in 18-2229 for declaratory relief under Cal. Const., art. II, § 10, and Election Code section 9221 confirming that the LAVD Initiative conflicts with the Richland Initiative and the Richland Initiative is enacted, having received more City Council votes, while the LAVD Initiative is void.

Additionally, the Court intended to resolve the various demurrers and motions for judgment on the pleading simultaneously with its Phase 1 evaluation, to the extent its determination of the above two issues did not resolve them. As will become clear, because certain of those motions also concern the Richland Initiative, the Court must decide another threshold issue: whether the Richland Initiative is itself void for improperly including the Development Agreement and, as a result, failing to comply with the California Environmental Quality Act (CEQA).

a. The Richland Initiative improperly includes the Development Agreement, but whether that agreement may be severed and the remainder of the Richland Initiative given effect requires further briefing.

    i. The Development Agreement cannot be approved by initiative and requires compliance with CEQA.

The Legislature exclusively delegated to local governing bodies the authority to enter into development agreements. Because the exercise of initiative power would be inconsistent with this exclusive power, a city cannot enter into such an agreement through initiative. (*Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 699; see Government Code § 65867.5, subd. (a).) *Moreno Valley* is recent and is the only case on the issue, but it binds this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every

division of the District Courts of Appeal are binding upon ... all the superior courts of this state..."].) The Development Agreement could not be adopted by initiative.

Nor could the City rely on the general exception to CEQA for voter initiatives. (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1036.) Even development agreements sent to a vote must still go through CEQA review, because passage would commit the City to the agreement. (See *Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1218.) That commitment is even clearer here, since the City adopted the Richland Initiative and Development Agreement outright.

ii. The Court defers a decision on whether the Development Agreement may be severed from the remainder of the Richland Initiative for further briefing in Phase 2.

"When an initiative provision is invalid, the void provision must be stricken but the remaining provisions should be given effect if the invalid provision is severable. ... Where, as here, the initiative contains a severability clause, the invalid provision is severable if it can be separated grammatically, functionally, and volitionally." (*Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, 585-586.) Section 14.A and 15 of the Richland Initiative provide for severability. (See AR_506.)

The Court's initial thoughts were that the Development Agreement was severable, such that the changes to the Richland parcel in the Richland Initiative (e.g., zoning designations) may go into effect while the Development Agreement does not. The Development Agreement is a separate exhibit to the Richland Initiative and is therefore grammatically severable. (See AR_530 *et seq.*) Volitional severability looks to whether the voters would have enacted the statute irrespective of the validity of any other part. (*Pala, supra,* 54 Cal. App. 4th at 586.) The Richland Initiative so states. (See AR_506, at §§ 14.A, 15.)

Functional severability concerns independent application of the Richland Initiative without the related Development Agreement. "A provision is functionally severable if it is capable of independent application," meaning the provisions "remaining must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations." (*MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1393, internal quotations and citations omitted.) *"The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions."* (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714-715.)

Here, the Richland Initiative *could be* independently enacted without the Development Agreement. The Richland Initiative amended the General Plan and zoning designations to allow for the development of the Richland property. (See generally AR_ 432 *et seq.*; AR_530-531 [recitals in Development Agreement concerning effect of

Richland Initiative].) Those authorizations ultimately grant the approvals necessary for the Development Agreement, but they do not depend upon the Development Agreement's existence. The City Council could have enacted the initiative independently (or sent it to a public vote), and then drafted, executed, and properly reviewed a development agreement in this or another form after the initiative's approval.

At the hearing, however, counsel for Oak Hill and Richland argued that severability should be an issue for Phase 2, so that certain parties could direct the Court to particular facts in the administrative record to suggest that the Development Agreement is not so easily severable. The Court has the administrative record, but agrees that this was not technically an issue for Phase 1 (though the demurrers to some extent raise it). Further directed briefing on what portions of the administrative record indicate that severability either is or is not appropriate would be of benefit. In that briefing, the parties should address the Court's initial conclusions above.

b. The City Council improperly adopted the LAVD Initiative, since it amends the Richland Initiative, and the LAVD Initiative must go to a vote of the people.

The next question is whether the LAVD Initiative amended the Richland Initiative such that the City Council could not adopt the LAVD Initiative. The Court concludes that it did. Under Elections Code section 9217, the City could not adopt the LAVD Initiative on its own. A vote of the people was required. And because an election was the only possible option the City had at the time it considered the LAVD Initiative, a writ properly issues to compel the City Council to hold that election.

Elections Code section 9215 allows a city, upon receipt of a petition satisfying signature requirements, to either: 1) adopt the ordinance without alteration; 2) submit it unaltered to the voters; or 3) order a report under section 9212 and, after it is submitted, either adopt the initiative or order an election. But Elections Code section 9217 provides:

> ...No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

The resulting statutory scheme is both logical and sound from a public policy perspective. A city council is free to adopt a voter initiative on its own, but once it does so, any repeal or amendment must go to a public vote. In that case, Section 9217 removes one of the options that section 9215 would otherwise grant. No longer may a city approve the second initiative on its own. It must order an election ("by a vote of the people"), or first order a section 9212 report and then order an election. The Legislature easily could have used parallel language to allow one ordinance proposed by initiative petition and adopted by the legislative body to be modified by another ordinance adopted through the same process, but it did not. Instead, it quite specifically required a matter

proposed by initiative, even where adopted by the legislative body and not the voters directly, to be amended only *by a vote of the people*. Thus, section 9217 protects an approved initiative from being disturbed by anything but a public vote.

No case law directs a contrary conclusion. The Supreme Court has held that voter-approved initiatives, passed simultaneously, may be reconciled if they are complimentary but not if they are conflicting. (Compare *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744, 769-770 [where two competing initiatives pass, one with higher greater affirmative votes enacted] with *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 981 [where complimentary initiative passes with fewer votes, its non-conflicting measures were enacted].) But neither case involved a *later* amendment to an initiative. *Tuolumne, supra,* 59 Cal.4th at 1036, addressed the entirely different issue of whether a local government must comply with CEQA before adopting an initiative, not whether voter approval would be required for a subsequent amendment. Indeed, the closest case is *Mobilepark West Homeowners Association v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43, which held that section 9217 prohibited a legislative amendment to a *voter-approved* initiative.

Here, the LAVD Initiative amended the previously-approved Richland Initiative, in that it provided a different designation for the Richland property than the Richland Initiative itself. An amendment is " '. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form . . .' [Citation.]." (*Id.* at 40, quoting *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776-777.) The Court is aware that the efforts to enact the LAVD Initiative began before the Richland Initiative. But the latter became law first. And while independent in form, the LAVD Initiative is irreconcilable with the Richland Initiative in its treatment of the Richland property. It designates it differently, provides more restrictive development protocols, and otherwise forbids the very use the Richland Initiative permits. That it treats *other* properties in the general Sand Creek Focus Area similarly does not alter the conflict. The amendment need not impact the entire area to qualify as "*any* change of the scope" of the Richland Initiative. (*Id.*, emphasis added.)

The Richland Initiative contained a provision addressing conflicts with other measures. (See Administrative Record, p. AR_505.) Section 11B provides that if one or more conflicting initiatives are adopted "by the City Council at the same public hearing or by the voters at the same election" then the measure that receives the greatest vote of City Councilmembers or of the electorate shall control in its entirety and the other measure(s) become void. But because adoption of the two initiatives did not occur at the same meeting, this clause cannot decide the issue. (Compare Elec. Code § 9221 ["If the provisions of two or more ordinances *adopted at the same election* conflict, the ordinance receiving the highest number of affirmative votes shall control."], emphasis added.)

Next, the validity of the City Council's decision to adopt the LAVD Initiative *does not* depend on whether or not the Court upholds the Richland Initiative. In

evaluating whether the City Council's adoption of the LAVD Initiative was proper, the Court must look to the conditions as the City Council faced them – that is, with an already-adopted Richland Initiative. Put another way, at the time the LAVD Initiative was adopted, Elections Code section 9217 protected the Richland Initiative from City Council-adopted amendment, regardless of whether a Court might later overturn the Richland Initiative.

In conclusion, the City Council improperly adopted the LAVD Initiative, and that action is void. As a result of this ruling, all pleading challenges in the LAVD Initiative cases are **moot**. But there is no dispute that the supporters of the LAVD Initiative achieved the required signatures to place the initiative on the ballot. Since the LAVD Initiative amends the Richland Initiative, the City had no choice but to put the LAVD Initiative before the voters. It would be manifestly unfair to the supporters of the LAVD Initiative to start the process over because the City instead adopted it. The Court is not persuaded that the Richland Initiative is somehow immune from challenge by initiative amendment. (See, e.g., Elec. Code §9222 [city council can submit amendment, repeal, or enactment of any ordinance to voters without petition].) Nor would a writ compelling an election impermissibly infringe upon the City Council's legislative authority, because an election was the *only* option available to the City Council under the statute.

A writ shall issue voiding the act of the City Council to approve the LAVD Initiative, and ordering that the City Council place that measure on the November, 2020, ballot.

III. Challenges to the Richland Initiative

The Court now turns to the remaining challenge to the Richland Initiative. In many cases, the arguments substantially overlap with the issues already decided.

a. Richland's Demurrer to Oak Hill Petition (N18-2228)

Richland demurs to Oak Hill's petition on several grounds. First, to the extent the Development Agreement is unenforceable under *Moreno Valley, supra,* 26 Cal.App.5th at 699, it may be severed, rendering the 1st, 2nd, 3rd, 4th, 5th and 8th causes of action subject to demurrer. Next, since CEQA review is not required for initiatives, the 9th, 10th, and 11th cause of action must fail. Additionally, since the City could adopt the measures by resolution, the 2nd, 6th, 7th, and 12th cause of action fail. Finally, injunctive relief is a remedy, not a cause of action.

i. Development Agreement

The Court defers decision on the severability of the Development Agreement as stated above. Accordingly, the demurrers to those causes of action challenging the Development Agreement – the 1st through 4th and the 8th – are **overruled without prejudice** to their being raised in the briefing on severability.

ii. Improper Subject Matter

The 5th cause of action speaks to the impropriety of the Development Agreement as well, but Oak Hill also alleges that the overall Richland Initiative exceeded the scope of initiative and referendum by: 1) restricting the City Council from implementing already-approved legislative policies in the General Plan; and 2) requiring ministerial approval of particular actions (e.g., permits) rather than allowing the City to retain appropriate discretion over such approvals. On those points, the demurrer is **sustained with leave to amend**.

To the first point, this claim is nearly identical to claims raised by other parties that the Richland Initiative (which includes amendments to the General Plan) is inconsistent with the prior General Plan. It fails for the same reasons. (See discussion, *infra* at section III(c)(iv) [granting leave to amend].)

To the second point, it is difficult to reconcile Oak Hill's argument with *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 365, 378, which upheld a voter initiative even though it specifically restricted a board of supervisors and local airport authority from making discretionary changes to an initiative for mixed-use development of a 131-acre property. Instead, it provided that the initiative was subject only to a specific set of "express, objective standards and ministerial actions that cannot be changed by subsequent discretionary actions or interpretations ...." (*Id.* at 365.) "[T]he people's power of initiative is greater than the power of legislative bodies because the people may bind future legislative bodies." (*Id.* at 378.) This is in clear conflict with Oak Hill's position yet goes unaddressed in opposition.

iii. CEQA

As set forth above, CEQA review was required for the Development Agreement, though not the remainder of the Richland Initiative. Were the Development Agreement to be severed, the remainder of the Richland Initiative could be adopted by the City Council without CEQA compliance. (*Tuolumne, supra,* 59 Cal.4th at 1036.) Thus, a decision on this issue must await a determination of severability. The demurrers to the 9th, 10th, and 11th causes of action are therefore **overruled without prejudice** to their being raised as part of the severability briefing.

iv. Ordinance vs. Resolution

Richland challenges the 2nd, 6th, 7th and 12th causes of action, all brought on the basis that the City properly adopted the Richland Initiative by resolution as opposed to ordinance.

Richland argues that when the Elections Code speaks of an "ordinance," in, e.g., section 9215 (City Council may "adopt the ordinance"), it refers to the voter-sponsored initiative *itself.* Otherwise the provision in section 9215, subd. (b), requiring the City Council to submit "the ordinance, without alteration" to the voters would make no sense.

This is consistent with other law using the term "initiative" and "ordinance" interchangeably. (Compare Gov. Code §65356, subd. (a) [requiring General Plan amendment by "resolution"], with *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 787, fn. 9 ["[I]t is well established that any legislative act may be enacted by initiative and may be subject to referendum, regardless of whether that act is denominated an 'ordinance" or 'resolution.'"].)

Whether a voter initiative may adopt an ordinance or resolution is a slightly different question than whether the City Council may adopt an initiative by ordinance or resolution. And, in terms of the City's choice between the two for enactment, they are not identical: An ordinance typically describes a local law regulating conduct, while a resolution is something "less formal." (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 979.) But "in the absence of statutory or charter provisions to the contrary, a municipality can take legislative action by either resolution or ordinance. For many purposes the terms are equivalent." (*Id.* at 979-980.) While an ordinance does not take effect until 30 days after its passage, a material distinction from a resolution, one exception is if the ordinance concerns an election, in which case it takes effect immediately. (See Gov. Code § 36937.)

As to the Development Agreement itself, Government Code section 65867.5, subd. (a), states that such an agreement "shall be approved by ordinance and is subject to referendum." So it may not be adopted by initiative; the local governmental entity must authorize it, subject to the voter's later referendum power. (See *Moreno Valley, supra,* 26 Cal.App.5th at 699.) But this does not mean that the local government's adoption of the agreement by an act labeled "resolution" as opposed to "ordinance" voids the action, given the interchangeable nature of the terms. (*DeVita, supra,* 9 Cal.4th at 787, fn. 9; *Del Norte, supra,* 71 Cal.App.4th at 979.)

In sum, a holding that the City's enactment of a resolution, as opposed to an ordinance, vitiates the entire Richland Initiative would elevate form too far over substance. Accordingly, the demurrers to these causes of action are **sustained without leave to amend**.

v. Injunctive Relief

The 16th cause of action for injunctive relief states a remedy, not a cause of action. The demurrer is substantively unopposed; Oak Hill pleads the remedy elsewhere. The demurrer is **sustained without leave to amend.**

b. City's Demurrer to Petition of Zeka Ranch (N18-2232)

The City demurs to the 8th and 9th causes of action, showing that the agreement underlying these claims was rescinded. Zeka Ranch filed a non-opposition. The demurrers are therefore **sustained without leave to amend.**

c. EPC Holdings 820, LLC's and American Superior Land, LLC's Demurrer to Petition of Zeka Ranch (N18-2232)

Two Richland-related real-parties-in-interest (collectively, EPC) bring these demurrers.

i. First Cause of Action – Development Agreement

The demurrer is **overruled without prejudice** to the arguments being raised as part of the briefing on the severability of the Development Agreement.

ii. Second Cause of Action – Single Subject Rule

The demurrer is **sustained without leave to amend.**

Article II, section 8, subdivision (d), of the California Constitution contains the "single-subject rule": "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." The First District Court of Appeal comprehensively described the rule in the context of a land use measure in *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1255:

> ... An initiative measure does not violate the single subject rule if, despite its varied collateral effects, all its parts are reasonably germane to each other and to the initiative's general purpose or objective. (*Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157 (*Jones*).) The rule does not require each provision of a measure, in effect, to interlock in a functional relationship. (*Ibid.*) The various provisions must simply have a reasonable relationship to a common theme or purpose. Courts uphold initiative measures if they fairly disclose a reasonable and commonsense relationship among their several components in furtherance of a common purpose. (*Ibid.*) Courts are also obligated to resolve any reasonable doubts in favor of the exercise of the right of the initiative. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.)

Shea Homes concluded that the measure at issue – which both re-designated certain land from urban to rural development and changed certain solid waste and landfill management practices – did not violate the single-subject rule. (*Id.* at 1256.) The landfill management changes were germane to the purpose of the measure to enhance and protect open space. (Contrast *Chem. Specialties Mfrs. Ass'n v. Deukmejian* (1991) 227 Cal.App.3d 663, 666 ["Right to Know Act" included disparate topics related to household products, senior assisted living, senior health insurance, truth in advertising relating to initiatives, and anti-apartheid disclosures].)

Here, the alleged violations are stated in vague and conclusory terms. Zeka Ranch pleads that the provisions are not reasonably germane to one another or to the purpose of the initiative, see Petition, ¶ 64, and that the initiative contained 164 pages of small text designed to prevent a voter or City Councilmember from understanding its effects. (*Id.*, ¶ 65.) In opposition, Zeka Ranch additionally argues that changing the permanency of the Urban Limit Line is unrelated to any purpose because the entire affected property is inside the existing line.

The Court is unconvinced that the Richland Initiative violates this rule. It ultimately concerns the use of the western Sand Creek Focus Area, part of which would be developed for higher-density residential use. Assuredly, this involves changes to General Plan language, zoning of the affected area, etc. But if these violated the single-subject rule, voters would be all but powerless to enact initiatives governing land development. Changing the permanence of the Urban Limit Line has the ostensible purpose of altering it later for alternative developmental goals, which is not so outside the purpose of the initiative as to render it completely ungermane.

Amendment cannot cure the defect in this cause of action because the plain language of the Richland Initiative shows its parts are reasonably germane to one another under *Shea Homes*. The initiative's common theme is to allow for particular development in the Sand Creek area subject to its terms, and alterations to the General Plan or Urban Limit Line have a "reasonable and commonsense" relationship to that purpose. (*Shea Homes, supra,* 110 Cal.App.4th at 1255.) The Court need not look beyond the four corners of the initiative to see that it does not cover unrelated topics that violate the single-subject rule, as in *Chem. Specialties*.

iii. 4th Cause of Action – Spot Zoning

The demurrer is **sustained without leave to amend.**

Spot zoning refers to restricting rights of a small parcel relative to the surrounding property – e.g., limiting a single lot in the center of a commercial zone to residential purposes. (See *Arcadia Development v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536.) Here, Zeka Ranch alleges "spot zoning" because its parcel cannot be developed while Richland's can.

But the Zeka Ranch property is over 600 acres. "Not only is there no support in the case law to find spot zoning in this case, but to define spot zoning to include zoning of parcels of this size would paralyze urban planners, who under certain circumstances need to draw lines and differentially zone much smaller areas of land than this." (*Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1237 [concerning 17 acres].)

Zeka Ranch argues that there is no maximum size for a spot zoning claim and the Court must still conduct a fact-based inquiry as to the discriminatory nature of the

zoning. But the rule refers to zoning for a "small parcel." (*Arcadia, supra.*) Reasonable minds may differ about the meaning of "small", but it does not include hundreds of acres.

iv. 5th Cause of Action – General Plan Inconsistency

The demurrer is **sustained with leave to amend**.

Zeka Ranch alleges that the Richland Initiative "makes numerous amendments to the City's General Plan .... [which] do not, and cannot, resolve the inconsistencies" since the Richland Initiative is fundamentally at odds with the General Plan. Prior paragraphs incorporated into this cause of action allege that the original General Plan called for much more comprehensive development in Zeka Ranch's property to meet the 4,000-unit goal of the General Plan. (See Petition, ¶¶ 28-31.) The Richland Initiative altered this, and a reasonable implication from the pleading is that the revisions compromise the City's ability to meet the goals outlined in the General Plan. (Petition, ¶¶ 45-46.)

EPC argues that inconsistency before the amendment and after cannot state a claim, because the General Plan is always subject to amendments. Those amendments may well be "inconsistent" with the prior plan. (Gov. Code, § 65358 ["If it deems it to be in the public interest, the legislative body may amend all or part of an adopted general plan."].) To the extent Zeka Ranch pleads that the amended General Plan conflicts with the prior General Plan, this does not state a claim.

The petition leaves it unclear what other claim Zeka Ranch intends to raise. If it seeks to plead vertical inconsistency – that is, that the Richland Initiative's changes to the General Plan conflict with existing zoning regulations – then it must so state and indicate what provisions conflict. (But see Gov. Code § 65860, subd. (c) ["In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan ... the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended."].) If it seeks to plead horizontal inconsistency – that is, that the amended General Plan is inconsistent within itself – then, again, it must so state and indicate the inconsistencies.

EPC also argues that the requirement to show inconsistency is that no reasonable person would agree with the agency's conclusion of consistency. (See *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 696; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816–817.) But this speaks to *proof*, not to *pleading*. The only issue before the Court is whether Zeka Ranch has stated a claim; the Court does not consider how difficult it may be to prove that claim. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.)

Finally, EPC argues that *Shea Homes, supra,* 110 Cal.App.4th at 1270-1272, compels sustaining the demurrer here, since it held that vague allegations of general plan inconsistency were insufficient to state a claim. A ruling on this point would be premature until Zeka Ranch clarifies the nature of the conflict in an amended pleading.

v. 6th Cause of Action – Government Code § 65913.1

The demurrer is **overruled**.

"A city may not adopt ordinances and regulations which conflict with the state Planning and Zoning Law." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 547; see generally, Gov. Code §65900 *et seq.*) Government Code section 65913.1 provides that a city "shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs for all income categories as identified in the housing element of the general plan."

Zeka Ranch claims, on information and belief, that the Richland Initiative violated the code by restricting development in a manner that makes it impossible to meet the City's housing needs allocation, particularly for the kind of executive housing Zeka Ranch was to build. EPC contends that Zeka Ranch's property was not identified as a future housing site, to satisfy the housing needs allocation. (See *Shea Homes, supra,* 110 Cal.App.4th at 1261.)

In *Shea Homes*, the Court of Appeal held that section 65913 did not apply where "the housing element of the County's general plan, … specifically excluded the 'development potential' of the unincorporated area of East County, which includes North Livermore, from its inventory of land suitable for residential development. Although Measure D will reduce the amount of vacant land in unincorporated North Livermore that is available for residential use, the housing element did not identify this area as land to be used to meet the County's housing needs." (*Id.* at 1260-1261.)

While it is not clear that the Zeka Ranch land was ever specifically designated a part of the housing needs allocation, the City has not *specifically excluded* it from the land inventory suitable for development. (Contrast *id.* at 1260.) In fact, Zeka Ranch pleads that the General Plan called for allocation of one-to-two units per developable acre and contained a housing element specifically calling for residential development appropriate for executives of businesses seeking relocation to the City. (Petition, ¶¶ 30, 33, 34.) Accepting this as true, Zeka Ranch properly pleads this claim.

vi. 7th Cause of Action – Estoppel

Zeka Ranch has **withdrawn** this cause of action.

IV. Amendment

Amended pleadings of any kind shall be filed on or before **June 24, 2019**.

V. Conclusion

The Court concludes that the LAVD Initiative amends the Richland Initiative and must be approved by the voters. A writ of mandate shall issue voiding the City Council's adoption of the LAVD Initiative and requiring that the LAVD Initiative be put to a vote of the public in the November, 2020 election. The Court defers the issue of severability of the Development Agreement, and related challenges to the Richland Initiative that are not resolved in the demurrer orders, to Phase 2 briefing.

DATED: May 31, 2019

Hon. Edward G. Weil
Judge of the Superior Court