APPENDIX B

Mutual Aid Agreement and Pending Court Case Information

CALIFORNIA DISASTER AND CIVIL DEFENSE

MASTER MUTUAL AID AGREEMENT

This agreement made and entered into by and between the STATE OF CALIFORNIA, its various departments and agencies, and the various political subdivisions, municipal corporations, and other public agencies of the State of California;

W I T N E S S E T H :

WHEREAS, It is necessary that all of the resources and facilities of the State, its various departments and agencies, and all its political subdivisions, municipal corporations, and other public agencies be made available to prevent and combat the effect of disasters which may result from such calamities as flood, fire, earthquake, pestilence, war, sabotage, and riot; and

WHEREAS, It is desirable that each of the parties hereto should voluntarily aid and assist each other in the event that a disaster should occur, by the interchange of services and facilities, including, but not limited to, fire, police, medical and health, communication, and transportation services and facilities, to cope with the problems of rescue, relief, evacuation, rehabilitation, and reconstruction which would arise in the event of a disaster; and

WHEREAS, It is necessary and desirable that a cooperative agreement be executed for the interchange of such mutual aid on a local, county-wide, regional, state-wide, and interstate basis;

NOW, THEREFORE, IT IS HEREBY AGREED by and between each and all of the parties hereto as follows:

1. Each party shall develop a plan providing for the effective mobilization of all its resources and facilities, both public and private, to cope with any type of disaster.

2. Each party agrees to furnish resources and facilities and to render services to each and every other party to this agreement to prevent and combat any type of disaster in accordance with duly adopted mutual aid operational plans, whether heretofore or hereafter adopted, detailing the method and manner by which such resources, facilities, and services are to be made available and furnished, which operational plans may include provisions for training and testing to make such mutual aid effective; provided, however, that no party shall be required to deplete unreasonably its own resources, facilities, and services in furnishing such mutual aid.

3. It is expressly understood that this agreement and the operational plans adopted pursuant thereto shall not supplant existing agreements between some of the parties hereto providing for the exchange or furnishing of certain types of facilities and services on a reimbursable, exchange, or other basis, but that the mutual aid extended under this agreement and the operational plans adopted pursuant thereto, shall be without reimbursement unless otherwise expressly provided for by the parties to this agreement or as provided in Sections 1541, 1586, and 1587, Military and Veterans Code; and that such mutual aid is intended to be available in the event of a disaster of such magnitude that it is, or is likely to be, beyond the control of a single party and requires the combined forces of several or all of the parties to this agreement to combat.

4. It is expressly understood that the mutual aid extended under this agreement and the operational plans adopted pursuant thereto shall be available and furnished in all cases of local peril or emergency and in all cases in which a STATE OF EXTREME EMERGENCY has been proclaimed.

5. It is expressly understood that any mutual aid extended under this agreement and the operational plans adopted pursuant thereto, is furnished in accordance with the "California Disaster Act" and other applicable provisions of law, and except as otherwise provided by law that: "The responsible local official in whose jurisdiction an incident requiring mutual aid has occurred shall remain in charge at such incident including the direction of such personnel and equipment provided him through the operation of such mutual aid plans." (Sec. 1564, Military and Veterans Code.)

6. It is expressly understood that when and as the State of California enters into mutual aid agreements with other states and the Federal Government that the parties to this agreement shall abide by such mutual aid agreements in accordance with law.

7. Upon approval or execution of this agreement by the parties hereto all mutual aid operational plans heretofore approved by the State Disaster Council, or its predecessors, and in effect as to some of the parties hereto, shall remain in full force and effect as to them until the same may be amended, revised, or modified. Additional mutual aid operational plans and amendments, revisions, or modifications of existing or hereafter adopted mutual aid operational plans, shall be adopted as follows:

(a) County-wide and local mutual aid operational plans shall be developed by the parties thereto and are operative as between the parties in accordance with the provisions of such operational plans. Such operational plans shall be submitted to the State Disaster Council for approval. The State Disaster Council shall notify each party to such

operational plans of its approval, and shall also send copies of such operational plans to other parties to this agreement who did not participate in such operational plans and who are in the same area and affected by such operational plans. Such operational plans shall be operative as to such other parties 20 days after receipt thereof unless within that time the party by resolution or notice given to the State Disaster Council, in the same manner as notice of termination of participation in this agreement, declines to participate in the particular operational plan.

(b) State-wide and regional mutual aid operational plans shall be approved by the State Disaster Council and copies thereof shall forthwith be sent to each and every party affected by such operational plans. Such operational plans shall be operative as to the parties affected thereby 20 days after receipt thereof unless within that time the party by resolution or notice given to the State Disaster Council, in the same manner as notice of termination of participation in this agreement, declines to participate in the particular operational plan.

(c) The declination of one or more of the parties to participate in a particular operational plan or any amendment, revision, or modification thereof, shall not affect the operation of this agreement and the other operational plans adopted pursuant thereto.

(d) Any party may at any time by resolution or notice given to the State Disaster Council, in the same manner as notice of termination of participation in this agreement, decline to participate in any particular operational plan, which declination shall become effective 20 days after filing with the State Disaster Council.

(e) The State Disaster Council shall send copies of all operational plans to those state departments and agencies designated by the Governor. The Governor may, upon behalf of any department or agency, give notice that such department or agency declines to participate in a particular operational plan.

(f) The State Disaster Council, in sending copies of operational plans and other notices and information to the parties to this agreement, shall send copies to the Governor and any department or agency head designated by him; the chairman of the board of supervisors, the clerk of the board of supervisors, and County Disaster Council, and any other officer designated by a county; the mayor, the clerk of the city council, the City Disaster Council, and any other officer designated by a city; the executive head, the clerk of the governing body, or other officer of other political subdivisions and public agencies as designated by such parties.

8. This agreement shall become effective as to each party when approved or executed by the party, and shall remain operative and

effective as between each and every party that has heretofore or hereafter approved or executed this agreement, until participation in this agreement is terminated by the party. The termination by one or more of the parties of its participation in this agreement shall not affect the operation of this agreement as between the other parties thereto. Upon approval or execution of this agreement the State Disaster Council shall send copies of all approved and existing mutual aid operational plans affecting such party which shall become operative as to such party 20 days after receipt thereof unless within that time the party by resolution or notice given to the State Disaster Council, in the same manner as notice of termination of participation in this agreement, declines to participate in any particular operational plan. The State Disaster Council shall keep every party currently advised of who the other parties to this agreement are and whether any of them has declined to participate in any particular operational plan.

9. Approval or execution of this agreement shall be as follows:

(a) The Governor shall execute a copy of this agreement on behalf of the State of California and the various departments and agencies thereof. Upon execution by the Governor a signed copy shall forthwith be filed with the State Disaster Council.

(b) Counties, cities, and other political subdivisions and public agencies having a legislative or governing body shall by resolution approve and agree to abide by this agreement, which may be designated as "CALIFORNIA DISASTER AND CIVIL DEFENSE MASTER MUTUAL AID AGREEMENT." Upon adoption of such a resolution, a certified copy thereof shall forthwith be filed with the State Disaster Council.

(c) The executive head of those political subdivisions and public agencies having no legislative or governing body shall execute a copy of this agreement and forthwith file a signed copy with the State Disaster Council.

10. Termination of participation in this agreement may be effected by any party as follows:

(a) The Governor, upon behalf of the State and its various departments and agencies, and the executive head of those political subdivisions and public agencies having no legislative or governing body, shall file a written notice of termination of participation in this agreement with the State Disaster Council and this agreement is terminated as to such party 20 days after the filing of such notice.

(b) Counties, cities, and other political subdivisions and public agencies having a legislative or governing body shall by resolution give notice of termination of participation in this agreement and file a certified copy of such resolution with the State Disaster Council, and this agreement is terminated as to such party 20 days after the filing of such resolution.

IN WITNESS WHEREOF this agreement has been executed and approved and is effective and operative as to each of the parties as herein provided.

/signed/ EARL WARREN
GOVERNOR
On behalf of the State of California and all its Departments and Agencies

ATTEST:
November 15, 1950

/signed/ FRANK M. JORDAN
Secretary of State

(GREAT SEAL)

-- -- -- -- -- -- -- -- -- -- --

NOTE:

There are references in the foregoing agreement to the California Disaster Act, State Disaster Council, and various sections of the Military and Veterans Code.

Effective November 23, 1970, by enactment of Chapter 1454, Statutes 1970, the California Disaster Act (Sections 1500 ff., Military and Veterans Code) was superseded by the California Emergency Services Act (Sections 8550 ff., Government Code), and the State Disaster Council was superseded by the California Emergency Council.

Section 8668 of the California Emergency Services Act provides:

(a) Any disaster council previously accredited, the State Civil Defense and Disaster Plan, the State Emergency Resources Management Plan, the State Fire Disaster Plan, the State Law Enforcement Mutual

Aid Plan, all previously approved civil defense and disaster plans, all mutual aid agreements, and all documents and agreements existing as of the effective date of this chapter, shall remain in full force and effect until revised, amended, or revoked in accordance with the provisions of this chapter.

In addition, Section 8561 of the new act specifically provides:

"Master Mutual Aid Agreement" means the California Disaster and Civil Defense Master Mutual Aid Agreement, made and entered into by and between the State of California, its various departments and agencies, and the various political subdivisions of the state, to facilitate implementation of the purposes of this chapter.

Substantially the same provisions as previously contained in Section 1541, 1564, 1586 and 1587 of the Military and Veterans Code, referred to in the foregoing agreement, are now contained in Sections 8633, 8618, 8652 and 8653, respectively, of the Government Code.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

MERCED CITIZENS FOR RESPONSIBLE PLANNING, a California non-profit unincorporated association, and VALLEY ADVOCATES, a California non-profit public benefit corporation,

Plaintiffs and Petitioners,

vs.

CITY OF MERCED, a California municipal corporation, and MERCED CITY COUNCIL, a body politic,

Defendants and Respondents,

BELLEVUE RANCH-MERCED, L.P., a California limited partnership; CROSSWINDS AT BELLEVUE RANCH NORTH, LLC, a California limited liability company; CROSSWINDS BRE II, LLC, a California limited liability company; CROSSWINDS HOMES AT BELLEVUE, LLC, a California limited liability company; ENVISION HOMES, LLC, a California limited liability company; GRUPE INVESTMENT COMPANY, INC., a California corporation; KB HOME CENTRAL VALLEY, INC., a California corporation;

Case No. 150872

RESPONDENTS' DEMURRER TO PETITONERS' SECOND AMENDED PETITION-DECISION

KIMBALL HILL BELLEVUE RANCH, LLC, a California limited liability company; L.J. STEINER, LLC, a California limited liability company; MERCED PASEO, LLC, a California limited liability company; MERCED RENAISSANCE, L.P., a California limited partnership; MERCED SANCASTLE L.P., a California limited partnership; RYLAND HOMES OF CALIFORNIA, INC., a Delaware corporation; SUMMERTON HOMES, LLC, a California limited liability company; WOODSIDE PRAIRIES, INC., a California corporation; WAL-MART REALTY COMPANY, an Arkansas corporation; and DOES 1 through 50, inclusive,

Real Parties in Interest.

Mr. Harriman, counsel for Petitioners, states that the City of Merced has a mandatory duty not to authorize builders to erect homes and improvements which are in excess of 1.5 miles distant from the nearest fire department station. The court finds, however, that the second amended petition does not sufficiently plead such a mandatory duty upon Respondents.

The Court also finds that other pleading impediments have been conceded or were not addressed by Petitioners: the bar of 90-day statute of limitations and lack of standing (exhaustion of administrative remedies).

The demurrer to the second amended Petition is sustained without leave to amend.

DATED: June 23, 2008

GLENN A. RITCHEY, JR.
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MERCED

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Case No. 150872

RESPONDENTS' REPLY TO PETITIONERS' UNTIMELY OPPOSITION TO CITY'S DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDAMUS

Hearing:
Date: June 20, 2008
Time: 8:15 a.m.
Courtroom: 4

Date Action Filed: December 17, 2007
Trial Date: None

company; MERCED PASEO, LLC, a California limited liability company; MERCED RENAISSANCE, L.P., a California limited partnership; MERCED SANDCASTLE, L.P., a California limited partnership; RYLAND HOMES OF CALIFORNIA, INC., a Delaware corporation; SUMMERTON HOMES, LLC, a California limited liability company; WOODSIDE PRAIRIES, INC., a California corporation; WAL-MART REALTY COMPANY, an Arkansas corporation; and DOES 1 through 50, inclusive,

Real Parties in Interest.

I. INTRODUCTION.

Petitioners' "opposition" to the City's demurrer was filed without explanation or permission **three days late**. It essentially concedes the points in the City's demurrer, and asks for leave to file a ***fourth*** pleading because the need to do so is "clear in light of the effect of Defendants' Memorandum of Points and Authorities." Reply, p. 2. This mirrors the "no effort" response that Petitioners filed in "opposition" to the second demurrer, except for the fact that response was only two days late.

Consistent with the "three strikes" warning the Court gave Petitioners at the last hearing, no future leave should be granted.

This Reply is being submitted one court day late. This was unavoidable since the City did not receive the opposition until the afternoon of June 12. Due to other hearing commitments by the City's co-counsel, she was unable to complete the reply papers until this weekend. The City apologizes to the Court for this delay.

II. PETITIONERS WAIVED THE RIGHT TO OPPOSE THE CITY'S DEMURRER BY FAILING TO FILE A TIMELY OPPOSITION.

Once again, Petitioners refuse to play by the rules. Petitioners' opposition to the demurrer was required to be filed and served by June 9th. (Code Civ. Proc. § 1005(b).) Without explanation or permission from this Court, Petitioners did not file or serve their opposition until June 12th, three court days beyond the statutory deadline. Petitioners' dilatoriness cannot be explained-away by any Herculean efforts required on their part, as their papers consisted of a mere five pages of text consisting mostly of headings and quotations of irrelevant statutes, and which, at least initially, concedes that as is the pleading is defective.

The California Rules of Court expressly provide that the Court, in its discretion, may refuse to consider these late-filed oppositions. (CRC Rule 3.1300(d); *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 622-625.) In addition, the Merced County Superior Court Rules expressly provide:

> Failure to file a memorandum of points and authorities by the filing deadline . . . is **a waiver of the memorandum**. . . . (Rule 3(c), emphasis added.)

Consequently, Petitioners' opposition papers should be deemed waived and should not be considered by the Court. Moreover, because of Petitioners' cavalier treatment of judicial resources and the opportunities already afforded them, the City's demurrer should be sustained without leave to amend.

III. EVEN IF PETITIONERS' UNTIMELY OPPOSITION IS CONSIDERED, IT ONCE AGAIN CONCEDES THAT THE CITY'S DEMURRER SHOULD BE GRANTED AND OFFERS NO GLIMMER THAT THE NEXT PETITION WOULD STATE A CLAIM.

Petitioners begin their late opposition with the following incomplete thought:

> Based on the Defendants' Memorandum of Points and Authorities ("MPA") in Support of their Demurrer to the Second Amended Petition ("SAP"), (sic) seek leave of Court to file a Third Amended Petition which will amend the relief sought to seek relief solely under the provisions of Government Code (Govt. C.) sections 66499.33 and 66499.36.

The suggestion that Petitioners can retool their fire service allegations as causes of action under these Government Code sections misses the mark. Sections 66499.33 and 66499.36 have no relevance to Petitioners' fire service claims.

Section 66499.33 creates no rights. It states only that the Subdivision Map Act will not bar any legal rights an aggrieved person might have to enjoin an attempted subdivision of property in violation of the Subdivision Map Act or the local ordinance enacted thereto. There is no allegation in the Second Amended Petition or in the opposition of a violation of the Subdivision Map Act or of Title 18 of the Merced Municipal Code dealing with subdivisions (Merced Municipal Code § 18.04 *et seq.*).[1]

Nor is section 66499.36 any closer to the mark. It requires a local agency, if it obtains knowledge that a property has been subdivided in violation of the Subdivision Map Act or the local agency's subdivision ordinance, to issue a notice and hold a hearing on the violation.

Again, no violation of the Subdivision Map Act or of Title 18 of the Merced Code has

[1] Petitioners seem to be confusing the City's Subdivision Ordinance, enacted as Title 18 of its Municipal Code, with a Planning Commission Resolution which also has no bearing on Petitioners' fire service claims.

been alleged or identified in the opposition. Instead, Petitioners appear to desire a City Council hearing on the issue of whether issuing a water or sewer connection is a discretionary act. That is not authorized, let alone mandated, by section 66499.36, and is nonsensical to boot.

As best the City can discern from Petitioners' muddled opposition papers, Petitioners want to amend their pleadings to attack subdivision maps that have been finalized under a theory that the City's processing of those final maps somehow violated a mandatory fire service standard that left the City Council no choice but to disapprove the final maps. This proposition is wholly without merit. As explained in the City's moving papers, General Plans do not state specific mandates or prohibitions. Rather, they state "policies," and set forth "goals." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378 [attached to moving papers].) Because these policies reflect a range of competing interests, the public entity must be allowed to balance the General Plan's policies when applying them, and it has broad discretion to construe its policies in light of the Plan's purposes. (*Id.* at 386.)

The documents relied upon by Petitioners to purportedly create a mandatory duty clearly reflect the *discretionary nature* of the City's provision of fire services to its residents. Simply because these documents set forth goals of responding to fires within a certain timeframe and providing for fire stations within a certain distance of residential areas, does not convert these goals into mandates that must be met before development can occur. (*See, e.g.,* [Exhibits to the Second Amended Petition] Exhibit A - 1982 Mitten Report, pp. 2, 6-7, 9-10 [described itself as a "policy guide" for managing fire services in the community, setting forth "goals and objectives" and "targets" in order "to give the fire department an opportunity to direct the community toward a reasonable level of fire protection **within the allocated local resources**;" expressly recognized that "[a] certain level of losses from fire must be accepted as tolerable **simply because of the limited resources of the community**;" Exhibit B- the Master Plan, pp. 2, 7, 9 described "reflex time" not as a mandatory requirement, but as "an important aspect in **policy issues when considering an adequate service level**;" Exhibit C, the 1987-2002 Facilities Study, pp. 2, 5, discussed "average response distance," "priorities" and expressly recognized that "due to the complexities associated with projected growth and development and the major expenditures

associated with [a fire facilities] program, that the time frames of providing facilities "be considered **general in nature**. . . .;" Exhibit D - the 1990 Service Level Report, pp. 2, 3 described "recommendations" and "goals;" Exhibit E - the 1992 Strategic Plan, pp. 3, 7, discussed "objectives," "strategy," and "standard criteria;" and Exhibit F, -the 1997 Strategic Plan, p. 2, talked of "goals and objectives," not mandates.)

Most importantly, the General Plan sections set forth as Exhibits to the Petition unambiguously illustrate the discretionary nature of the City's fire protection services. Exhibit G describes what the City "should" (not "shall") do in terms of fire protection; Exhibit H discusses the "goal of maintaining" a certain response time (p. 4); and Exhibits I, J, K, and M all talk of "goals' and "policies" and "targets," and what the City "may" or "should" do.

The General Plan's policy related to fire protection services is Policy P-2.1 and is found in Goal Area P-2 of Section 5.4. Not only is this provision clearly labeled as simply a "policy" rather than a mandate, but by its express terms it *qualifies* the need to provide fire services:

> The City is committed to assuring that facilities, equipment and staffing levels of its fire and police service units meet the highest standard **that can be accommodated within the resource constraints of the City.**

(SAP, 14:8-10, and Ex. K, p. 2, emphasis added.) Thus, the General Plan standard regarding fire protection facilities is specifically limited by the ability of the City (financially or otherwise) to actually provide such facilities.

Petitioners' claims are completely undercut by Exhibit N to the Petition, which is an Administrative Report ("Report") approved by the City Council in 2007. The Report established "priorities" for the development of fire stations in the City. Moreover, the Report discusses the relocation of two fire stations and the construction of four new stations **in a 20-year time frame,** and provides that the fire stations "are to be constructed **as growth occurs," not prior to growth occurring**. (SAP, Ex. N, p. 3.) By approving the Report, the City **expressly determined that it was currently unable to provide the requested fire stations within its financial resource constraints**:

> Existing balances and expected revenues in fire-related impact fee funds **are not sufficient to build a new fire station in the coming**

> **three fiscal years**. If a station is to be constructed in that time frame, it is likely that **the Council would need to authorize transfers from other impact fee funds**, provided that the other funds have money available.

(SAP, Ex. N, p. 6, emphasis added.) Thus, far from establishing a mandate, the City Council, in its legislative discretion, determined that (i) the City lacked sufficient funds to construct a new fire station within the City until 2010 at the earliest; and (ii) it would need to authorize a transfer of money from other funds (perhaps the quintessential exercise of legislative discretion) to do that. Thus, Petitioners' allegation that the City is violating the General Plan by allowing residential development prior to the construction of certain fire stations is **directly contradicted** by Petitioners' own allegations, and therefore entirely without merit.

Petitioners' opposition fails to explain away the fundamental problem Petitioners face in seeking a writ to force the City to construct certain fire stations and enjoining development until those stations are open - they are asking the Court to interfere with, and reverse, the City Council's exercise of legislative discretion in determining the timing of construction of its fire stations, as well as the availability of funding therefor. As outlined in the moving papers, the courts are unanimous in refusing to countenance such gross interference with the exercise of legislative discretion. (*Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330, 334 [attached to moving papers] [decisions regarding fire protection services are within the policy-makers' absolute discretion]; *Cal. Slurry Seal Assn. v. Dept. of Indus. Relations* (2002) 98 Cal.App.4th 651, 662 [mandamus may not compel a public agency with discretionary power to act in a particular manner]; *Pipe Trades Dist .Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1468-1469 [rule against judicial interference "is subject to even more rigorous adherence when what is involved is . . . legislative discretion"]; *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 624-626 ["judicial power relative to legislative acts is severely circumscribed"].) The prohibition on interference with legislative discretion is especially strong here, where Petitioners fail to allege any mandatory City duty.

Petitioners' opposition fails to even address this issue.

IV. NO LEAVE TO AMEND SHOULD BE GRANTED.

As the City pointed out in the last round of pleadings, Petitioners had treated the first two rounds of pleading as nothing more than a "warm up" exercise. They have done the same thing once again. Petitioners insist on not playing by the rules at the very same time they are requesting an extension of the game.

In the face of three successive demurrers by the City, Petitioners have yet to file a single timely response to any of the City's pleadings, and in Petitioner's two late responses (including this round's tardy response) Petitioners have taken the unusual tack of admitting that the demurrers are well grounded and should be sustained.

By way of example, in round two, although Petitioners were indisputably on notice of the vagueness defects in their pleadings from the first Demurrer, their First Amended Petition contained the same meaningless allegations regarding unnamed approvals for unspecified residential development projects. Indeed, after the City demurred to the that version of the Petition, Petitioners admitted in their *untimely* opposition that *they had not even attempted* to address those deficiencies. (Plaintiffs' Opposition to Demurrer, 2:5-7 ["**Plaintiffs concede that the demurrer should be granted** with leave to amend, **because there is a lack of specificity in the allegations** which support the claims alleged in their First Amended Petition...."].)

Not surprisingly, the Court sustained the City's second demurrer, noting that Petitioners were improperly attempting to interfere with the discretion of the City Council. Although Petitioners urged the Court to give them extra time to amend their pleadings, the Court recognized that Petitioners were not treating the litigation seriously and gave Petitioners only 14 days leave to amend, stating that it was giving leave to amend only because it believed in giving parties three chances (essentially warning Petitioners, "three strikes and you're out").

On June 10th, the Court attempted to hold the Case Management Conference in this case. There were no appearances. Mr. Harriman had apparently disregarded the Court's order to notify the City of the Conference.

With regard to this third Demurrer, Petitioners opposition was filed three days late, and once again concedes that the demurrer is well founded and again requests leave to file a **fourth**

pleading, disregarding the "three strikes" admonishment the Court gave at the last hearing. *Id.*, ¶ 17.

Petitioners proposed new claims under Government Code section 66499.33 and 66499.36 completely miss the mark. Those sections deal with property subdivided in violation of the Subdivision Map Act. That has nothing to do with Petitioners' fire service claims.

In light of circumstances outlined above, no further leave should be granted.

V. CONCLUSION.

Unlike Petitioners, the City does not view these proceedings as a meaningless exercise. Petitioners have tacitly admitted that their litigation is frivolous by the cavalier manner in which they have proceeded, continuously acting as if state statutes and this Court's local rules and admonitions do not apply to them. Although given repeated chances to plead their case, they have failed to even attempt to do so in any serious way.

The time to put an end to this litigation has come. The City respectfully requests that the Court deny Petitioners' request and bring this matter to conclusion.

Dated: June 16, 2008

RUTAN & TUCKER, LLP
M. KATHERINE JENSON
ROBERT S. BOWER

By: _____
M. Katherine Jenson
Attorneys for Respondents/Defendants
CITY OF MERCED and MERCED CITY COUNCIL

Dated: June 16, 2008

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By: _____
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Exempt From Filing Fee Pursuant to Government Code § 6103

FILED
MERCED COUNTY
2008 MAY 28 PM 1:18
CLERK OF THE SUPERIOR COURT
BY TAWNA STEPHENS
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MERCED

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Case No. 150872

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS AND RESPONDENTS' DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDAMUS

Hearing:
Date: June 20, 2008
Time: 8:15 a.m.
Courtroom: 4

Date Action Filed: December 17, 2007
Trial Date: None

company; MERCED PASEO, LLC, a California limited liability company; MERCED RENAISSANCE, L.P., a California limited partnership; MERCED SANDCASTLE, L.P., a California limited partnership; RYLAND HOMES OF CALIFORNIA, INC., a Delaware corporation; SUMMERTON HOMES, LLC, a California limited liability company; WOODSIDE PRAIRIES, INC., a California corporation; WAL-MART REALTY COMPANY, an Arkansas corporation; and DOES 1 through 50, inclusive,

Real Parties in Interest.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners filed this action last year, seeking a court order that, among other things, would shut down all residential development in the City of Merced ("City") until such time as fire stations are constructed and operating within 1.5 miles of said development. The City demurred successfully to Petitioners' pleadings on two occasions. Most recently, on April 21, 2008, the Court sustained the City's demurrer in its entirety, granting Petitioners 14 days leave to amend.

Petitioners have now filed a Second Amended Petition for Writ of Mandate ("SAP"). The SAP remains fatally defective, principally because it is still based on the misconception that the City's General Plan mandates that before residential construction can proceed in the City, a fire station must be operating within 1.5 miles of the development. Because the General Plan contains no such mandate, the Petition, in effect, requests that the Court reverse the City Council's determinations regarding the timing of construction of its fire stations, as well as the availability of funding therefor. Because judicial interference in the exercise of legislative discretion is prohibited as a matter of law, the SAP fails to state facts sufficient to constitute a cause of action.

The SAP also fails to cure the other key defects that the Court found to exist in the first two petitions, in that: (i) Petitioners' claims are barred by applicable statutes of limitation; (ii) the SAP is impermissibly uncertain with regard to what specific approvals are purportedly illegal; and (iii) Petitioners fail to allege facts that would establish their standing to bring this action.

II. STANDARD OF REVIEW FOR DEMURRER

"A demurrer tests the sufficiency of the allegations in a complaint as a matter of law." (*Mez Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 864.) The burden is on the plaintiff to plead facts sufficient to establish "every element of each cause of action" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43), and a demurrer is properly sustained where the plaintiff fails to plead facts sufficient to show the existence of each element of a cause of action (Code Civ. Proc., §§ 430.10, 430.30). A demurrer also should be sustained where a complete defense appears from the face of the complaint. (Code Civ. Proc. § 430.30, subd. (a); *Guardian North Bay v. Superior Court* (2001) 94 Cal.App.4th 963, 971-972.)

III. ALLEGATIONS OF THE PETITION

The SAP's claims proceed along the following mistaken line of reasoning:

1. The conditions of approval in unidentified pre-annexation development agreements and for unidentified development projects in the area north of Cardella Road and in areas of south Merced (SAP, ¶¶ 4, 32) (the "Development Projects") allegedly contain a standard condition that provides "[a]ll other applicable codes, ordinances, policies, etc. adopted by the City of Merced shall apply." (SAP, ¶¶ 20, 22.)

2. This standard condition purportedly requires that all building permits, certificates of occupancy, sewer connections, water service connections, and other development entitlements (the "Ministerial Permits") issued in connection with the Development Projects must comply with the City's General Plan. (SAP, 1:16-25; ¶¶ 34.)

3. The City's General Plan purportedly **mandates** that before residential development in the City can proceed, a fire station must be operating within 1.5 miles of that development, and thus this mandate applies to the Development Projects. (SAP, 1:13-14; ¶¶ 22, 24-27, 29, 33.)

4. Because the City has not constructed certain planned fire stations, the Development Projects are, or will be, in violation of the purported mandate of the General Plan. Therefore, the Court should order the City to stop issuing all Ministerial Permits, shutting down all development within the Development Projects, until the requisite fire stations are constructed. (*Id.*.)

IV. BECAUSE THE FIRE PROTECTION PROVISIONS OF THE GENERAL PLAN ARE NOT MANDATORY, THE PETITION IMPERMISSIBLY REQUESTS THE COURT TO CONTROL THE CITY'S EXERCISE OF ITS DISCRETION

Even were Petitioners' challenge not barred as explained in Sections V, VI, and VII herein, the Petition fails to state a cause of action because the provisions of the General Plan regarding time and distance standards for fire stations are mere goals and objectives; they are **not** mandatory, and thus there is no requirement that certain fire protection facilities be constructed before residential development can occur.

General Plans do not state specific mandates or prohibitions. Rather, they state "policies," and set forth "goals." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*

(2001) 91 Cal.App.4th 342, 378 [attached].) Because these policies reflect a range of competing interests, the public entity must be allowed to balance the General Plan's policies when applying them, and it has broad discretion to construe its policies in light of the Plan's purposes. (*Id.* at 386.) General Plan policies relate to disparate issues, and most projects involve trade-offs. Such flexibility does not equate to "inconsistency." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1268-69 [in upholding an approval against a General Plan inconsistency challenge, the court stated, "We are not dealing with assaying of minerals here. Balance does not require equivalence, but rather a weighing of pros and cons to achieve an acceptable mix"].)

A governing body's conclusion that a particular project is consistent with the relevant General Plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion. (*Napa Citizens, supra,* 91 Cal.App.4th at 357; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) A court may neither substitute its view for that of the agency, nor reweigh conflicting evidence presented to the agency. Courts accord great deference to a local agency's determination of consistency with its own General Plan, recognizing that the body which adopted the General Plan policies in its legislative capacity has unique competence to interpret those policies when applying them in particular situations. A reviewing court's role is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677-78.)

Here, the City's determination that the Development Projects are consistent with its General Plan is entitled to that same deference. Indeed, the issue is not even close, as the various documents relied upon in the Petition, including the General Plan, clearly reflect the *discretionary nature* of the City's provision of fire services to its residents. Simply because these documents set forth goals of responding to fires within a certain timeframe and providing for fire stations within a certain distance of residential areas does not convert these goals into mandates that must be met before development can occur. For example, Exhibit A to the Petition, the 1982 Mitten Report, described itself as a "policy guide" for managing fire services in the community (SAP, Ex. A, pp.

2, 6), setting forth "goals and objectives" and "targets" (*id.*, pp. 5, 7, 10) in order "to give the fire department an opportunity to direct the community toward a reasonable level of fire protection **within the allocated local resources**" (*id.*, p. 7). Indeed, the Report expressly recognized that "[a] certain level of losses from fire must be accepted as tolerable **simply because of the limited resources of the community.**" (*Id.* at 9.)

Similarly, Exhibit B, the Master Plan, described "reflex time," the concept so heavily relied upon by Petitioners, not as a mandatory requirement, but as "an important aspect in **policy issues when considering an adequate service level.**" (SAP, Ex. B, p. 2.) Indeed, the Plan was simply a series of recommendations to establish a standard, not a mandatory requirement in and of itself. (*Id.*, pp. 7, 9.)

Exhibit C, the 1987-2002 Facilities Study, discussed "average response distance" (SAP, Ex. C, p. 2) and "priorities" (*id.*, p. 5), and expressly recognized that "due to the complexities associated with projected growth and development and the major expenditures associated with [a fire facilities] program, that the time frames of providing facilities "be considered **general in nature**. . . ." (*Id.*, p.5.)

Similarly, Exhibit D, the 1990 Service Level Report, described "recommendations" and "goals" (SAP, Ex. D, pp. 2, 3); Exhibit E, the 1992 Strategic Plan, discussed "objectives," "strategy," and "standard criteria" (SAP, Ex. E, pp. 3, 7); and Exhibit F, the 1997 Strategic Plan, talked of "goals and objectives," not mandates (SAP, Ex. F, p. 2).

Most importantly, however, the General Plan sections set forth as Exhibits to the Petition unambiguously illustrate the discretionary nature of the City's fire protection services. Exhibit G describes what the City "should" (not "shall") do in terms of fire protection; Exhibit H discusses the "goal of maintaining" a certain response time (p. 4); and Exhibits I, J, K, and M all talk of "goals' and "policies" and "targets," and what the City "may" or "should" do.[1]

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[1] Even where a statute uses the word "shall," it is not always obligatory rather than permissive. Other factors can indicate "that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion." (*Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, 411 [attached], quoting *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910-11, n. 6 [the *Cochran* court expressed doubt that city code sections that used "shall" with regard to fire protection activities were mandatory rather than discretionary].) In the case at bar, where "should" is used, there can be no doubt that the provisions are discretionary.

The General Plan's policy related to fire protection services is Policy P-2.1 and is found in Goal Area P-2 of Section 5.4. Not only is this provision clearly labeled as simply a "policy" rather than a mandate, but by its express terms it *qualifies* the need to provide fire services:

> The City is committed to assuring that facilities, equipment and staffing levels of its fire and police service units meet the highest standard **that can be accommodated within the resource constraints of the City**.

(SAP, 14:8-10, and Ex. K, p. 2, emphasis added.) Thus, the General Plan standard regarding fire protection facilities is specifically limited by the ability of the City (financially or otherwise) to actually provide such facilities.

The complete undoing of Petitioners' claims is then provided in Exhibit N to the Petition, an Administrative Report ("Report") approved by the City Council in 2007. The Report established "priorities" for the development of fire stations in the City. "Priorities," however, are not mandates, as they merely establish the order of preference for competing alternatives. Moreover, the Report discusses the relocation of two fire stations and the construction of four new stations **in a 20-year time frame,** and provides that the fire stations "are to be constructed **as growth occurs," not prior to growth occurring**. (SAP, Ex. N, p. 3.) Finally, by approving the Report, the City **expressly determined that it was currently unable to provide the requested fire stations within its financial resource constraints**:

> Existing balances and expected revenues in fire-related impact fee funds **are not sufficient to build a new fire station in the coming three fiscal years**. If a station is to be constructed in that time frame, it is likely that **the Council would need to authorize transfers from other impact fee funds**, provided that the other funds have money available.

(SAP, Ex. N, p. 6, emphasis added.) Thus, far from establishing a mandate, the City Council, in its legislative discretion, determined that (i) the City lacked sufficient funds to construct a new fire station within the City until 2010 at the earliest; and (ii) it would need to authorize a transfer of money from other funds (perhaps the quintessential exercise of legislative discretion) to do that. Thus, Petitioners' allegation that the City is violating the General Plan by allowing residential development prior to the construction of certain fire stations is **directly contradicted** by

Petitioners' own allegations, and therefore entirely without merit.

In seeking a writ ordering the City to construct certain fire stations and enjoining development until those stations are open, the SAP asks this Court to interfere with, and reverse, the City Council's exercise of legislative discretion in determining the timing of construction of its fire stations, as well as the availability of funding therefor. The courts are unanimous in refusing to countenance such gross interference with the exercise of legislative discretion. (*Cairns v. County of Los Angeles* (1997) 62 Cal.App.4th 330, 334 [attached] [decisions regarding fire protection services are within the policy-makers' absolute discretion]; *Cal. Slurry Seal Assn. v. Dept. of Indus. Relations* (2002) 98 Cal.App.4th 651, 662 [mandamus may not compel a public agency with discretionary power to act in a particular manner]; *Pipe Trades Dist .Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1468-1469 [rule against judicial interference "is subject to even more rigorous adherence when what is involved is . . . legislative discretion"]; *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 624-626 ["judicial power relative to legislative acts is severely circumscribed"].) The prohibition on interference with legislative discretion is especially strong here, where Petitioners fail to allege any mandatory City duty.

V. PETITIONERS' CLAIMS ARE BARRED BY THE 90-DAY STATUTE OF LIMITATIONS OF GOVERNMENT CODE SECTION 66499.37

Even if Petitioners could control the City Council's discretion, their claims would be barred by the 90-day statute of limitation. If Petitioners believed the Development Projects were approved in violation of the Subdivision Map Act because they were not within 1.5 miles of a fire station as purportedly mandated by the City's General Plan, Petitioners had **90 days from the approval of the tentative tract maps to file and serve** any challenge to the approvals. (Gov. Code § 66499.37; *Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102, 1108-10 [limitations periods to be strictly enforced because "litigation involving the Subdivision Map Act must be resolved as quickly as possible consistent with due process"].)

The Subdivision Map Act (Gov. Code §§ 66410 *et seq.*) vests the authority to control the design and improvement of subdivisions in the legislative bodies of local agencies. (Gov. Code § 66411.) It requires an agency to approve both a *tentative* tract map and a *final* tract map. (Gov.

Code § 66426.) A tentative map is made for the purpose of showing the "design and improvement" of a proposed subdivision. (Gov. Code § 66424.5.) It is at this stage that the local agency exercises discretion in conditioning the project and in requiring certain public improvements be constructed (fire stations, roads), dedications made (schools, parks), and fees paid, so as to ensure consistency of the project with the agency's General Plan. (Gov. Code §§ 66418, 66419.) Indeed, approval of the tentative map **depends on** a determination by the agency that the map **is consistent with the agency's** plans and ordinances, including the **General Plan**. (Gov. Code §§ 66473, 66473.5, 66474(a), 66474.2; *Woodland Hills Residents Assn. v. City Council* (1979) 23 Cal.3d 917, 936.)

The final adjudicatory administrative decision with regard to determining General Plan consistency is the action approving the *tentative* map, and the statute of limitations for initiating a judicial challenge to a project approval runs from that date. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22 and n. 11.) Thus, any challenge by Petitioners here to the Development Projects based on their purported inconsistency with the City's General Plan had to be filed and served within 90 days of the approval of the tentative maps thereon.[2]

Moreover, once the legislative body finds a final map to be in substantial compliance with the previously approved tentative map, the final map must be deemed to be consistent with the General Plan in effect at the time of tentative map approval, since the tentative map was determined at its approval to have been consistent with the General Plan. (Gov. Code § 66473.5) That consistency finding is conclusive unless challenged within the limitations period set forth in section 66499.37. (*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 358-59 [attached] [although trial court correctly ruled county had adopted an inadequate General Plan, and it was thus appropriate to invalidate three tract maps that had been timely challenged, trial court's order enjoining the approval of *any* final maps was overbroad; county could approve final maps and

[2] In contrast to the discretionary approval of a tentative map, approval of a *final* map merely depends on a determination that the final map is in substantial compliance with the previously approved tentative map. (Gov. Code §§ 66474.1, 66442.) Approval of a final map is ministerial (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1199), and the agency has no discretion to disapprove it or to redetermine matters. (Gov. Code § 66474.1.)

allow projects to proceed where tentative maps had not been timely challenged, even though the county's General Plan was admittedly deficient at the time of tentative map approvals].)

Here, Petitioners seek to shut down the City's approvals of the Development Projects until such time as certain fire stations have been constructed even though there is no express condition requiring such construction as a prerequisite to development. In effect, Petitioners are claiming the map approvals were *inconsistent* with the General Plan even though the City specifically found that the Projects *were consistent*, a fact that is now conclusively presumed because Petitioners failed to challenge that determination under Government Code section 66499.37. (*Camp, supra,* 123 Cal.App.3d at 358-59.)

Petitioners attempt to evade the bar of section 66499.37 by seeking to stay the issuance of the Ministerial Permits, rather than by challenging the underlying development approvals. Such a backdoor challenge to the City's previous land use approvals is precluded for two reasons:

First, a General Plan consistency challenge is foreclosed at the permit stage. Although such a challenge may be made with reference to a discretionary land use decision or zoning decision, it is not allowed with regard to a ministerial approval, such as a building permit. The law simply does not does not prohibit issuance of building and other ministerial permits that are inconsistent with the General Plan if the permits are consistent with underlying zoning and land use approvals. (*Camp, supra,* 123 Cal.App.3d at 358-59; *Elysian Heights Residents Assoc. v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 29, 32 [petitioner argued building permits were void because the zoning was inconsistent with the general plan; court rejected this argument because building permits were consistent with then-existing zoning laws, and thus valid, even though inconsistent with the General Plan]; *Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586, 594-95 [no requirement that permits issued pursuant to county code be reviewed for consistency with the General Plan].) Thus, a consistency challenge must be made to the discretionary land use or zoning approval, and if such a challenge is not made, a party may not challenge an underlying ministerial permit on consistency grounds even if the underlying land use decision or zoning ordinance is not consistent with the General Plan.

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Second, the stated intent of establishing short statutes of limitations periods in the land use context is to give governmental land use decisions certainty, to permit land use decisions to take effect quickly, and to give property owners the necessary confidence to proceed with approved projects. (See, *e.g.*, Gov. Code, § 65009(a).) Failure to comply with these short time periods is **fatal**, and all persons are forever barred from any further challenge. (Gov. Code § 65009(e).) It would exalt form over substance to allow a challenge to a particular permit to be used as a vehicle for an untimely collateral attack on a project. (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 528 [attached] [challenge to building permit barred because the attack on the building permit was nothing more than an untimely challenge to a previously approved variance]; *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648-649 (*ALARM*) [action challenging EIR as inconsistent with general plan barred since challenge constituted "an untimely collateral attack on the city's general plan itself"].)

Here, Petitioners never bothered to challenge any of the subdivision approvals for the Development Projects or any other discretionary approvals. They now attempt to mount a backdoor challenge to these unchallenged projects (which are now unchallengeable because of the passage of time), and request that this Court order the City to cease issuance of building and other ministerial permits "in those areas which are not in compliance with the City's General Plan fire protection standards. . . ." (SAP, ¶ 34.) Petitioners seek to avoid the bar of section 66499.37 by arguing that they are merely seeking to enforce approval conditions, not the approvals themselves. As *ALARM* and *Honig* make clear, this is an inappropriate attempt to exalt form over substance. The attack on the Ministerial Permits is, in reality, nothing more than a challenge to the underlying Project approvals because the Ministerial Permits' alleged defects are entirely dependent on the Projects' alleged defects. This challenge comes too late under section 66499.37.

VI. THE PETITION REMAINS IMPERMISSIBLY UNCERTAIN

The petition in a mandamus proceeding both frames and limits the issues before the Court. (*Comm. on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 212 [superseded by statute on other grounds].) It also limits the extent of the writ of mandate this Court may issue.

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(Code Civ. Proc. § 1086; *Dormax Oil Co. v. Bush* (1940) 42 Cal.App.2d 243, 244-245 [court denied writ for failing to allege sufficient facts that would entitle them to the relief sought].)

Accordingly the petition must allege **specific** facts showing the invalidity of the challenged action. Plaintiffs, "to state a cause of action warranting judicial interference with the official acts of defendants, must allege much more than mere conclusions of law; they **must aver the specific facts** from which the conclusions entitling them to relief would follow." (*California State Psychological Assn. v. County of San Diego* (1983) 148 Cal.App.3d 849, 861 ("*CSPA*"); *Perry v. Chatters* (1953) 121 Cal.App.2d 813, 815 ["In order to state a cause of action the petition for writ of mandamus must set forth facts showing that plaintiff is entitled to the relief he seeks"]; *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 330.)

In *CSPA*, the petitioner nonprofit corporation alleged that the county had adopted a local mental health program that did not comply with state law. (148 Cal.App.3d at 851-852.) The county demurred on the ground that the petitioner failed to plead facts with adequate specificity. The court granted the county's demurrer, holding that the "first amended complaint fails to set out facts or law establishing a mandatory duty upon the County." (*Id.* at 858.) Instead, the "petition contain[ed] only conclusory allegations," and failed to allege any facts in support thereof. (*Id.* at 858-859.) Moreover, the petition had only alleged a failure to comply with "permissive statutes and regulations" (*i.e.*, those permitting the county to exercise its discretion). (*Id.* at 860.) The petition was therefore not sufficient to withstand demurrer. (*Id.* at 860-861.)

As in *CSPA*, the SAP once again fails to allege with any degree of specificity the facts central to its claims, and contains only conclusory allegations. Petitioners fail to allege any facts, specific or otherwise, establishing that the City is allowing the violation of any conditions of approval to any subdivision map, development agreement or annexation agreement – they seek to enforce "the standard TSM Conditions of Approval incorporating City General Plan Goals, Policies, Objectives, and Implementing Actions, and other adopted development standards, including the City's Fire Protection Master Plan, Subdivision Map Conditions of Approval, and Development Agreement Conditions of Approval...." (SAP, 1:16-25; 2:20-26; ¶¶ 27, 29, 33; Prayer, 1, 2.)

However, the SAP utterly fails to specify which subdivision maps, development agreements or annexation agreements the City is allegedly allowing to violate City laws and would therefore be at issue. Instead, Petitioners merely name sixteen Real Parties in Interest, along with a reference to the area of the City where these entities allegedly own property and an Assessors Parcel Number Book and page number. These vague and conclusory allegations provide no guidance whatsoever as to objects of their challenge. In this respect, the SAP is similar to the insufficient petition in *CSPA*, as Petitioners have alleged a violation of law (failure to abide by conditions of approval), but have not alleged **any facts** to support these conclusory allegations. And, it is entirely unclear what has been violated – Petitioners have not alleged what conditions of approval were imposed on which project, when they were imposed, what entitlements are currently at issue and being challenged in which project, and how the specific entitlements purportedly violate the law. Thus, not only is the SAP devoid of specific facts to support its conclusory allegations, but the conclusory allegations themselves are insufficient to provide any guidance as to what Petitioners challenge. The SAP neither frames nor limits the issues to be litigated in this matter, and as such, fails as a matter of law.

VII. PETITIONERS HAVE NOT CURED THEIR LACK OF STANDING

The Court has already granted demurrers to Petitioners' earlier pleadings based on lack standing to maintain their claims. Petitioners have failed to cure the stated defects in the SAP.

A. Petitioners Are Not Beneficially Interested Parties And Do Not Possess The Attributes Of "Citizen Litigants"

The only new allegations in the SAP related to standing are that: (i) Richard Harriman, counsel for Petitioners, and one Kamila Young, are now the only identified members of MCFRP (one of Petitioners) and they are residents who live one mile from a City fire station (SAP ¶ 1); and (ii) students, faculty, and administrators at Merced Community College and UC Merced may buy or rent homes in areas "underserved" by current fire stations (SAP 2:8-19, ¶ 37). These new allegations fail to bestow standing on Petitioners.

"Standing is a jurisdictional issue. . . . In order to pursue a cause of action, the plaintiff's standing must be established in some appropriate manner." (*Waste Management of Alameda*

County v. County of Alameda (2000) 79 Cal.App.4th 1223, 1232.) Generally, a writ of mandate may only be issued to a "beneficially interested" party. (*Ibid.;* Code Civ. Proc. § 1086.) A beneficially interested party is an individual who will be directly harmed and whose interest is "over and above the interest held in common by the public at large." (*Waste Mnmt., supra,* 79 Cal.App.4th at 1233.) Since Petitioners are currently within one mile of a fire station, they are not parties beneficially interested in the construction of new fire stations.

The major exception to the beneficial interest standard is "citizen standing," which applies if the challenged issue involves a public right or duty. (*Waste Mnmt., supra,* 79 Cal.App.4th at 1236.) Several factors must be satisfied for a "nonhuman entity" such as Petitioners to qualify for "citizen standing." The foremost factor in qualifying for citizen standing is that the right or duty in issue must be one that impacts the **public as a whole**, and not just select individuals; indeed, it must be a "public right" or "public duty." (79 Cal.App.4th at 1236-1237; *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Hoffman v. Warren* (1948) 32 Cal.2d 351, 357 [citizen standing upheld because issue affected "entire city and county of San Francisco"]; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252 [nonprofit organizations had standing because issue (the state's correctional facilities system) was of statewide concern][overruled on other grounds in *Englemann v. State Board of Education* (1991) 2 Cal.App.4th 47].)

Even if a nonhuman entity establishes that the issue is of broad public concern, it must still "demonstrate it should be accorded the attributes of a citizen litigant." (*Waste Mnmt., supra,* 79 Cal.App.4th at 1237.) A key factor in this determination is whether beneficially interested persons "would find it difficult or impossible to seek vindication of their own rights." (*Id.* at 1238.)

Under these factors, Petitioners lack standing to maintain the SAP as a "citizen's action." The first factor alone precludes any standing argument Petitioners may make, as the issue being litigated is not of broad public concern. Petitioners claim the Development Projects do not comply with the City's fire protection standards because they are up to 3.2 miles from a fire station, as opposed to 1.5 or 2 miles. (SAP ¶ 29.) As such, Petitioners' challenge seeks to vindicate the rights of the few – those residents of the Development Projects – and not those of the City as a whole. This is a far cry from the broad public duties at issue in *Hoffman, supra,* 32

Cal.2d at 357 [issue affected "entire city and county of San Francisco"] and *American Friends* [issue was of statewide concern].

Even if vindication of the alleged rights of a limited number of individual homeowners and academicians were somehow deemed a broad public right, Petitioners fail to demonstrate that they should be "accorded the attributes of a citizen litigant," as Petitioners fail to allege why the individual homeowners and academicians actually affected "would find it difficult or impossible to seek vindication of their own rights." (*Waste Mnmt., supra,* 79 Cal.App.4th at 1238.)

B. **There Is No Threat Of Liability To Residents Based On The City's Provision Of Fire Protection Services**

Petitioners attempt to assert standing by alleging that they are suing on behalf of the incoming students, faculty, and administrators of Merced Community College and the UC, Merced, who are described as "business invitees." (SAP, 2:8-19; ¶¶ 25, 37.) This is an obvious, but futile, attempt to assert that the City owes a higher duty of care to these people due to some sort of "special relationship." If they could be considered the business invitees of anyone, however, these students, faculty, and administrators would be the invitees of the state community college and UC systems, not the City.

The SAP also alleges there is "a substantial public interest to all residents and taxpayers of the City of Merced, because of the significant potential threat of legal liability to the City of Merced and to the taxpayers in the event of property damage and/or personal injury or death caused by inadequate fire safety services." (SAP, 2:17-19; see ¶¶ 26, 31, 38.) Such allegations are disingenuous, for the City has no statutory or common law duty to provide fire protection services whatsoever, and has absolute immunity from liability for any services it does provide. (Gov. Code §§ 850, 850.2.) Thus, these allegations fail to provide standing for Petitioners.

For example, under the California Tort Claims Act, a public entity is liable only if a statute so provides, and even so, specific immunity provisions will prevail over all statutes imposing liability. (Gov. Code § 815; *Cairns v. County of Los Angeles, supra,* 62 Cal.App.4th at 334.) Thus, even were the City under a mandatory duty to provide a certain level of fire protection service (which it is not), the City would be immune because a specific immunity applies. (*Ibid.*)

Government Code section 850 provides that "[n]either a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection services." Further, Government Code section 850.2 provides that "[n]either a public entity that has undertaken to provide fire protection service, nor an employee of such a public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities." As was stated by the court in *Cairns*, and which is particularly pertinent to the case at bar regarding the discretionary nature of the City's policies:

> Whether fire protection should be provided at all, and **the extent to which fire protection should be provided, are political decisions which are committed to the policy-making officials of government.** To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those **politically responsible** for making the decisions.

(*Cairns, supra,* 62 Cal.App.4th at 335, citations omitted, emphasis added.)

In *Cairns*, homeowners brought an action for fire damage, alleging the city's failure to repair and reopen a closed public roadway for purposes of a fire road constituted a dangerous condition or a nuisance, resulting in fire trucks being unable to respond to their fires. A demurrer was sustained without leave to amend, and the court of appeal affirmed the judgment for the city, stating that the decision regarding the road was "precisely the sort of decision left to the policy-makers' absolute discretion by the broad immunity of section 850 regarding 'failure . . . otherwise to provide fire protection service.'" (62 Cal.App.4th at 335; see, also, *Heieck and Moran v. City of Modesto* (1966) 64 Cal.2d 229, 232-34 [there is no statutory or common law duty owed by city to prevent destruction of property by fire]; *People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072, 1078 [Gov. Code §§ 850 and 850.2 "preclude an action against a public entity for 'failure to arrive at a fire in a timely manner,' even where that failure is caused by the firefighters' negligence or willful misconduct"]; *City and County of San Francisco v. Superior Court* (1984) 160 Cal.App.3d 837, 842 [plaintiff's home burned down when members of fire engine company located 300 feet from plaintiff's property were away at unauthorized social gathering and thus did not timely respond to the fire; court affirmed summary judgment for the city, holding that even though "getting to the fire quickly is of the very essence of firefighting,"

city was immune under the failure "to provide fire protection service" provisions of Gov. Code § 850]; *Cochran v. Herzog Engraving Co., supra,* 155 Cal.App.3d at 411-13 [even if the city had a mandatory duty to abate the hazardous conditions that caused a worker's death during a fire, city was still immune from liability under Gov. Code §§ 850 and 850.2]; *New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 305-06 [city's adoption of Uniform Fire Code that required all fire-protective systems to be "maintained in operative condition at all times," did not impose a mandatory duty of care toward persons or property within city so as to provide a basis of civil liability where a city water valve was left closed, preventing water from reaching the fire].)

Because the City would be absolutely immune from liability for any failure to provide fire protection services consistent with an adopted response standard or goal, Petitioners have failed to establish any standing to bring this action on behalf of the City's taxpayers.

VIII. CONCLUSION

By seeking an order to shut down development until the City constructs certain fire stations, Petitioners ask this Court to dictate the discretion of the City Council, something the Court cannot do as a matter of law. Moreover, Petitioners have failed to allege sufficient facts to establish standing to maintain their claims, have mounted an untimely backdoor challenge to underlying discretionary land use approvals, and have not alleged any facts in support of their claims that the City has violated conditions of approval to unknown land use approvals. As these deficiencies are incurable, the demurrer should be sustained without leave to amend.

Dated: May 27, 2008

RUTAN & TUCKER, LLP
M. KATHERINE JENSON
ROBERT S. BOWER

By: _____
M. Katherine Jenson
Co-Counsel for Respondents/
Defendants CITY OF MERCED and
MERCED CITY COUNCIL

MERCED CITY ATTORNEY'S OFFICE
GREGORY G. DIAZ
JEANNE SCHECHTER

By: _____
Gregory G. Diaz
Co-Counsel for Defendants and
Respondents CITY OF MERCED,
and MERCED CITY COUNCIL

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Attorneys for Defendants and Respondents
CITY OF MERCED, and MERCED CITY COUNCIL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MERCED

MERCED CITIZENS FOR RESPONSIBLE PLANNING, a California non-profit unincorporated association, and VALLEY ADVOCATES, a California non-profit public benefit corporation,

Plaintiffs and Petitioners,

v.

CITY OF MERCED, a California municipal corporation, and MERCED CITY COUNCIL, a body politic,

Defendants and Respondents.

BELLEVUE RANCH-MERCED, L.P., a California limited partnership; CROSSWINDS AT BELLEVUE RANCH NORTH, LLC, a California limited liability company; CROSSWINDS BRE II, LLC, a California limited liability company; CROSSWINDS HOMES AT BELLEVUE, LLC, a California limited liability company; ENVISION HOMES, LLC, a California limited liability company; GRUPE INVESTMENT COMPANY, INC., a California corporation; KB HOME CENTRAL VALLEY, INC., a California corporation; KIMBALL HILL BELLEVUE RANCH, LLC, a California limited liability company; L.J. STEINER, LLC, a California limited liability

Case No. 150872

DEFENDANTS AND RESPONDENTS' NOTICE OF DEMURRER AND DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDAMUS

Hearing:
Date: June 20, 2008
Time: 8:15 a.m.
Courtroom: 4

Date Action Filed: December 17, 2007
Trial Date: None

company; MERCED PASEO, LLC, a California limited liability company; MERCED RENAISSANCE, L.P., a California limited partnership; MERCED SANDCASTLE, L.P., a California limited partnership; RYLAND HOMES OF CALIFORNIA, INC., a Delaware corporation; SUMMERTON HOMES, LLC, a California limited liability company; WOODSIDE PRAIRIES, INC., a California corporation; WAL-MART REALTY COMPANY, an Arkansas corporation; and DOES 1 through 50, inclusive,

Real Parties in Interest.

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 20, 2008, at 8:15 a.m., or as soon thereafter as the matter may be heard in Courtroom 4 of the above-captioned Court, located at 627 W. 21st Street, Merced, California, Respondents and Defendants City of Merced and Merced City Council ("Respondents") will and hereby do demur to the entirety of Petitioners and Plaintiffs Merced Citizens for Responsible Planning and Valley Advocates' ("Petitioners") Second Amended Petition for Writ of Mandate ("Petition"), on the basis that (1) the Court has no jurisdiction of the subject of the cause of action alleged because the Petition impermissibly requests the Court to control the City's exercise of its legislative discretion; (2) the Petition fails to state a claim against Respondents due to the fact that the each cause is barred by the 90-day statute of limitations (Government Code sections 65009 and 66499.37) and by Petitioners' lack of standing; and (3) the Petition is uncertain. Therefore, Respondents are entitled to judgment as a matter of law as to the Petition and all causes of action therein. The Demurrer is brought pursuant to Code of Civil Procedure Section 430.10(a), (e) and (f).

Respondents request that their demurrer be granted without leave to amend.

This Demurrer is based on this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities attached hereto, the pleadings, papers and records on file in this action, any

matters of which the Court may take judicial notice, and on such other evidence and argument as may be presented at or prior to the hearing on the demurrer.

Dated: May 27, 2008

RUTAN & TUCKER, LLP
M. KATHERINE JENSON
ROBERT S. BOWER

By: _____
M. Katherine Jenson
Attorneys for Respondents/Defendants
CITY OF MERCED and MERCED CITY COUNCIL

Dated: May 27, 2008

MERCED CITY ATTORNEY'S OFFICE
GREGORY G. DIAZ
JEANNE SCHECHTER

By: _____
Gregory G. Diaz
Co-Counsel for Defendants and Respondents
CITY OF MERCED, and MERCED CITY COUNCIL

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Dated: May 27, 2008

RUTAN & TUCKER, LLP
M. KATHERINE JENSON
ROBERT S. BOWER

By: _____
M. Katherine Jenson
Attorneys for Respondents/Defendants
CITY OF MERCED and MERCED CITY COUNCIL

Dated: May 27, 2008

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GREGORY G. DIAZ
JEANNE SCHECHTER

By: _____
Gregory G. Diaz
Co-Counsel for Defendants and Respondents
CITY OF MERCED, and MERCED CITY COUNCIL

DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDAMUS

Respondents and Defendants City of Merced and Merced City Council ("Respondents") demur to Petitioners and Plaintiffs' Merced Citizens for Responsible Planning and Valley Advocates' ("Petitioners") Second Amended Petition for Writ of Mandate ("SAP") for the following reasons:

DEMURRER TO SAP AS IMPERMISSIBLY REQUESTING THE COURT TO CONTROL THE CITY'S EXERCISE OF ITS DISCRETION

1. The SAP impermissibly requests the Court to control the City's exercise of its legislative discretion. The Court does not have jurisdiction to do so, and the cause of action fails to state facts sufficient to constitute a cause of action. (Code of Civ. Pro. §§ 430.10(a) and (e); *Conroy v. Civil Service Com.* (1946) 75 Cal.App.2d 450, 457; *Cal. Slurry Seal Ass'n v. Dep't of Indus. Relations* (2002) 98 Cal.App.4th 651, 662; *Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1468-1469; *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 624-626.)

DEMURRER TO SAP AS BARRED BY STATUTE OF LIMITATIONS

2. The SAP is barred because its claims are barred by the 90-day statute of limitations of Government Code sections 65009 and 66499.37. (Code Civ. Pro. § 430.10(e); *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 358-59; *Elysian Heights Residents Assoc. v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 29, 32; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 528.)

DEMURRER TO THE SAP AS IMPERMISSIBLY UNCERTAIN

3. The SAP is impermissibly uncertain. (Code Civ. Pro. § 430.10(f); *California State Psychological Association v. County of San Diego* (1983) 148 Cal.App.3d 849, 861; *Perry v. Chatters* (1953) 121 Cal.App.2d 813, 815; *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 330.)

DEMURRER TO THE SAP FOR LACK OF STANDING

4. The SAP is barred because Petitioners do not have standing. (Code Civ. Pro. § 430.10(e); *Waste Management of Alameda County v. County of Alameda* (2000) 79 Cal.App.4th

1223.)

Respondents request that the Court sustain the demurrer without leave to amend as the above deficiencies are incurable.

Dated: May 27, 2008

RUTAN & TUCKER, LLP
M. KATHERINE JENSON
ROBERT S. BOWER

By: _____
M. Katherine Jenson
Co-Counsel for Respondents/Defendants
CITY OF MERCED and MERCED CITY COUNCIL

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PROOF OF SERVICE BY OVERNITE EXPRESS

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On May 27, 2008, I served on the interested parties in said action the within:

DEFENDANTS AND RESPONDENTS' NOTICE OF DEMURRER AND DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDAMUS

by depositing in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated below, with fees for overnight delivery provided for or paid.

Richard L. Harriman, Esq.
Law Offices of Richard L. Harriman
191 West Shaw Avenue, Suite 205-B
Fresno, CA 93704-2826

Counsel for Plaintiffs/Petitioners

Telephone: (559) 226-1818
Facsimile: (559) 226-1870

Executed on May 27, 2008, at Costa Mesa, California.

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

Lauren Ramey
(Type or print name)

(Signature)