

# Attachment E

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# NOTICE OF APPEAL

**Monterey County Code**  
**Title 19 (Subdivisions)**  
**Title 20 (Zoning)**  
**Title 21 (Zoning)**

RECEIVED  
MONTEREY COUNTY

2020 OCT 26 AM 11:43

CLERK OF THE BOARD

*Julian Lorenzana*  
DEPUTY

JULIAN LORENZANA

*No appeal will be accepted until a written decision is given. If you wish to file an appeal, you must do so on or before October 26, 2020 (10 days after written notice of the decision has been mailed to the applicant). Date of decision September 30, 2020.*

1. Please give the following information:

- a) Your name Anthony Lombardo
- b) Phone Number 751-2330
- c) Address 144 West Gabilan City Salinas Zip 93901
- d) Appellant's name (if different) Leonard McIntosh

2. Indicate the appellant's interest in the decision by checking the appropriate box:

- Applicant
- Neighbor
- Other (please state) \_\_\_\_\_

3. If you are not the applicant, please give the applicant's name:

\_\_\_\_\_

4. Indicate the file number of the application that is the subject of the appeal and the decision making body.

- |                           | File Number | Type of Application          | Area        |
|---------------------------|-------------|------------------------------|-------------|
| a) Planning Commission:   | PLN 170765, | Combined Development Permit, | Laguna Seca |
| b) Zoning Administrator:  | _____       |                              |             |
| c) Subdivision Committee: | _____       |                              |             |
| d) Administrative Permit: | _____       |                              |             |

5. What is the nature of the appeal?

a) Is the appellant appealing the approval  or the denial  of an application? (Check appropriate box)

b) If the appellant is appealing one or more conditions of approval, list the condition number and state the condition(s) being appealed. (Attach extra sheets if necessary).

18 - Inclusionary Housing Requirements

19 - Deed Notices

6. Check the appropriate box(es) to indicate which of the following reasons form the basis for the appeal:

- There was a lack of fair or impartial hearing; or
- The findings or decision or conditions are not supported by the evidence; or
- The decision was contrary to law.

You must next give a brief and specific statement in support of each of the bases for appeal that you have checked above. The Board of Supervisors will ***not*** accept an application for appeal that is stated in generalities, legal or otherwise. If the appellant is appealing specific conditions, you must list the number of each condition and the basis for the appeal. (Attach extra sheets if necessary).

See attached letter

7. As part of the application approval or denial process, findings were made by the decision making body (Planning Commission, Zoning Administrator, Subdivision Committee or Director of Planning). In order to file a valid appeal, you must give specific reasons why the appellant disagrees with the findings made. (Attach extra sheets if necessary).

See attached letter

8. You are required to submit stamped addressed envelopes for use in notifying interested persons that a public hearing has been set for the appeal. The Resource Management Agency – Planning will provide you with a mailing list.

9. Your appeal is accepted when the Clerk of the Board's Office accepts the appeal as complete on its face, receives the filing fee (Refer to the most current adopted Monterey County Land Use Fees document posted on the RMA Planning website at [http://www.co.monterey.ca.us/planning/fees/fee\\_plan.htm](http://www.co.monterey.ca.us/planning/fees/fee_plan.htm)) and stamped addressed envelopes.

APPELLANT SIGNATURE

*[Handwritten Signature]*

DATE 10/26/2020

ACCEPTED

(Clerk to the Board)

DATE \_\_\_\_\_

# ANTHONY LOMBARDO & ASSOCIATES

A PROFESSIONAL CORPORATION

ANTHONY L. LOMBARDO  
KELLY MCCARTHY SUTHERLAND  
JOSEPH M. FENECH  
CODY J. PHILLIPS

144 W. GABILAN STREET  
SALINAS, CA 93901  
(831) 751-2330  
FAX (831) 751-2331

October 26, 2020

Our File No: 5080.001

Mr. Chris Lopez, Chair  
Monterey County Board of Supervisors  
168 West Alisal  
Salinas, CA 93901

RE: Appeal of Leonard McIntosh (PLN1707650)

Dear Chair Lopez and Members of the Board of Supervisors

We have filed an appeal to your Board from the Planning Commission action on Leonard McIntosh's application to construct 15 apartment units in the Laguna Seca Office Park (LSOP). Mr. McIntosh has spent 3 years attempting to obtain approval for this small but much needed housing project. In the time this project has been in the approval process, the cost of constructing these units has increased by approximately 10 % or over \$1,000,000.00.

Mr. McIntosh agrees with the decision of the Planning Commission except for the requirement to attempt to impose the 35% inclusionary housing requirement fund in the County General Plan DES policy and Condition 19. This requirement renders the project financially infeasible as detailed in the attached letter which was provided to the Planning Commission.

By this appeal, Mr. McIntosh is asking that the Supervisors approve an amended condition which:

- require a 20% inclusionary contribution and grant a financial incentive waiving the in-lieu fee for 0.8 units; OR
- approve payment of an in-lieu fee for the project at the applicant's option at the time building permits are to be issued; and,
- Delete Condition 19.

As a preliminary matter, we do not believe this project would be subject to the DES if it were adopted. The policy is clear that it is intended to "be established to provide a systematic, consistent, predictable, and quantitative method for decision-makers to evaluate developments of

five or more lots or units and developments of equivalent or greater traffic, water, or wastewater intensity.” The impact of the Laguna Seca Office Park (LSOP) on traffic, water and wastewater was addressed and fully mitigated with the approval of the LSOP. The application at issue in this appeal has been shown to not exceed the water, wastewater and traffic parameters of the LSOP and is not an intensification of those uses over that which was anticipated in the LSOP EIR. Furthermore, the traffic, water and wastewater impacts of the proposed 15 units in this application has been demonstrated to be less than the office building which was previously approved on Lot 5. There is no evidence to the contrary. As a result, the DES policy (and therefore the 35% inclusionary requirement) would not apply to this project.

There is substantial inconsistency in the County inclusionary housing regulations and policies. The County’s current inclusionary housing ordinance requires that 20% of the units be inclusionary. The inclusionary requirement can be met by on-site units, off-site units, payment of an in-lieu fee or a combination of those options. At 20%, the 15 units would be required to contribute 2.8 affordable units (the County ordinance credits the existing lot so the net number is 20% of 14 new units) or pay an in-lieu fee for those units.

Policy LU-2.13 of the 2010 General Plan requires that the inclusionary ordinance be amended to require “25% of new housing units be affordable to very low, low, moderate, and workforce income households. The Affordable Housing Ordinance shall include the following minimum requirements:

- a) 6% of the units affordable to very low-income households
- b) 6% of the units affordable to low-income households
- c) 8% of the units affordable to moderate-income households
- d) 5% of the units affordable Workforce I income households.”

At 25%, the 15 units would be required to contribute 3.5 (25% of 14) affordable units.

Policy LU-1.19 of the 2010 General Plan, the DES policy, would require as part of the yet to be approved DES program, a 35% contribution. At 35% the 15 units would be required to contribute 4.9 (35% of 14) affordable units.

The applicants developed the following chart which shows the expected revenue and cost at the 20%, 25% and 35% contribution levels. Even with the 20% scenario, there is still a negative cash flow for the first three years.

20 Year Cash Flow Snapshot Every 5 Years					
SHOWING 2% INCREASE IN RENTS AND OP EX					
20 % INCLUSIONARY	Year 1	Year 5	Year 10	Year 15	Year 20
<b>(1VL, 1 MOD)</b>					
ANNUAL GROSS RENTS	\$ 619,128	\$ 683,369	\$ 769,361	\$ 849,437	\$ 937,847
OPEX + Vacancy Factor	\$ 198,500	\$ 214,863	\$ 237,226	\$ 261,917	\$ 289,177
ESTIMATED NET OPERATING INCOME	\$ 420,628	\$ 468,506	\$ 532,135	\$ 587,520	\$ 648,670
DEBT SERVICE @ 70% FINANCING	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476
ESTIMATED CASH FLOW	\$ (33,848)	\$ 14,031	\$ 77,660	\$ 133,045	\$ 194,194
<b>25% INCLUSIONARY</b>					
<b>(1VL, 2 MOD)</b>					
ANNUAL GROSS RENTS	\$ 607,074	\$ 657,116	\$ 725,510	\$ 801,021	\$ 884,392
OPEX + Vacancy Factor	\$ 198,500	\$ 214,863	\$ 237,226	\$ 261,917	\$ 289,177
ESTIMATED NET OPERATING INCOME	\$ 408,574	\$ 442,254	\$ 488,284	\$ 539,105	\$ 595,215
DEBT SERVICE @ 70% FINANCING	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476
ESTIMATED CASH FLOW	\$ (45,902)	\$ (12,222)	\$ 33,808	\$ 84,629	\$ 140,740
<b>35% INCLUSIONARY</b>					
<b>(1VL, 2 MOD, 1 Wfii)</b>					
ANNUAL GROSS RENTS	\$ 603,930	\$ 653,713	\$ 721,752	\$ 796,873	\$ 879,812
OP EX + Vacancy Factor	\$ 198,500	\$ 214,863	\$ 237,226	\$ 261,917	\$ 289,177
ESTIMATED NET OPERATING INCOME	\$ 405,430	\$ 438,850	\$ 484,526	\$ 534,956	\$ 590,635
DEBT SERVICE @ 70% FINANCING	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476	\$ 454,476
ESTIMATED CASH FLOW	\$ (49,046)	\$ (15,625)	\$ 30,051	\$ 80,481	\$ 136,159
<b>NOTES</b>					
1. Expenses stay constant and are not dependent on the income but are increased by 2% annually					
2. Debt Service is at 70% of the cost of construction at 4.5% amortized over 25 years					
3. Both income and expenses are increased annually by 2% for each year					
4. This shows that in both the 25% and 35% scenario the project will not be able to sustain itself.					
5. At 20% more housing units will be built which will help be part of the solution to the local housing problem.					
6. The market rate units are essentially not significantly higher than comparable WF II Housing units.					

The 35% inclusionary housing requirement renders the project not only financially infeasible but also unfinanceable. Steve Wotherspoon of Pinnacle Bank confirmed (email attached) that a project with a 35% inclusionary housing requirement is not financeable.

Mr. McIntosh's proposal for onsite inclusionary units provides for 7% of the project to be for Very Low income. That entitles the project to a 25% density bonus, per the table set forth in Section 65915 (f)(2), as well as one financial incentive or concession per Section 65915 (d)(2)(A). Despite being entitled to a 25% density bonus (3 additional market rate units), Mr. McIntosh is only requesting that the County agree to waive the in-lieu fee for the 0.8 fractional remainder unit as the incentive to which it is entitled under state law. Mr. McIntosh is sensitive to the traffic and water supply issues in this area. He is not pursuing a density bonus but has instead proposed the apartment project at a density that does not exceed the impacts of the office building previously approved for development on this parcel.

Per Section 65915 (d), the County may only deny Mr. McIntosh's incentive request (waiving the in-lieu fee for 0.8 units) if it makes a finding, based upon substantial evidence that, 1) the concession /incentive does not result in identifiable and actual cost reductions to provide for affordable housing costs or 2) that the incentive/concession would have a specific, adverse impact on public health and safety or 3) the concession/incentive would be contrary to state or federal law. In this case, the waiver of the in-lieu fee clearly results in an identifiable cost reduction as it reduces the financial obligation of the applicant in constructing the overall

housing project of which the inclusionary units are a part. Further, the waiver of the fee will not result in any adverse impacts on public health and safety and is not in conflict with state or federal law.

We believe that the County's 35% inclusionary obligation, as stated in its DES policy (although the Procedural Guide recommended by the Planning Commission and staff requires 45%), is overly burdensome and is contrary to the statewide housing policies. The state has made it very clear in recent legislation, including 2019's AB 330, that local governments need to remove impediments to housing development projects, as opposed to creating impediments. This is best demonstrated in the language in the preamble of Govt Code 65589.5 which provides:

“(K) The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California’s communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, **or render infeasible housing development projects** and emergency shelters. That intent has not been fulfilled.”

The County through the DES policy, which makes projects such as this financially infeasible, has created a significant impediment. And, based on statements made by Commissioners, did so intentionally.

This principle, that housing shall not be unduly burdened or constrained in California, is also reflected in Govt. Code Section 65850.01, which relates to ordinances requiring 15% or more inclusionary units in a housing development project at income levels of 80% of median income or less. Section 65850.01(b) authorizes the state to require that the local government provide, evidence that its inclusionary ordinance does not unduly constrain the production of housing by submitting an economic feasibility study that meets specified standards. While in this specific case, 65850.01 does not directly apply because the County DES would require 12% of the housing be below 80%, it is clear that the effect of the County's DES policy is exactly what the state was striving to avoid.

The applicant has clearly demonstrated in its cashflow analysis that the County, by requiring a 35% inclusionary contribution, is effectively preventing the development of any housing development projects. As that analysis demonstrates, a 35% inclusionary obligation renders such housing projects economically infeasible. This is further confirmed in the aforementioned letter from Pinnacle Bank which provides that the institution would not provide a loan on the applicant's project with a 35% inclusionary housing obligation.

It is clear that the proposed DES “penalty” language mandating 35% + inclusionary housing which was intentionally drafted, based on statements from the Planning Commission and staff, to discourage development outside community areas (Pajaro, Castroville, Chualar, Bradley and San



Ardo) is inconsistent with California law. The County through the DES policy, which makes projects such as this financially infeasible, has created a significant impediment.

County staff has taken the position that the applicant's proposed 20% inclusionary obligation would render the project incompatible and inconsistent with the County's General Plan because it is below the 35% DES requirement. In fact, it is a well-established principle of California law that a project need not be in perfect conformity with the policies of a general plan in order to be deemed "consistent" with that plan. This principle is succinctly laid out in the case of *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563:

“ “An action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.” [Citation.] [Citation.] **State law does not require perfect conformity between a proposed project and the applicable general plan.** ... [Citation.]” (Friends of Lagoon Valley, supra, 154 Cal.App.4th at p. 817, 65 Cal.Rptr.3d 251.) In other words, “it is nearly, if not absolutely, impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan. ... **It is enough that the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan.** [Citations.]”

In the case of the McIntosh project and the proposed 20% inclusionary obligation, there is no question that the project is “compatible with the objectives, policies, general land uses and programs” specified in the County's General Plan. For example, the objective of the County's inclusionary housing ordinance and the housing element of the General Plan is to encourage housing developments in Monterey County and to ensure the provision of inclusionary housing units in new housing development projects. Perfect conformity with the General Plan (i.e. providing 35% inclusionary) would actually be incompatible with these objectives as the DES policy essentially discourages housing development projects and the provision of inclusionary housing across large swaths of the County.

Furthermore, the DES requirement of 35% creates an internal inconsistency with the housing element of the County's General Plan, which is prohibited by state law [“[T]he general plan is required to be consistent within itself.” (*Sierra Club v. Kern County Board of Supervisors* (1981) 126 Cal.App.3d 698, 703.)]. The housing element repeatedly refers to the 20% obligation as required by the County's inclusionary housing ordinance and makes no reference to the 35% obligation required by the DES policy. The inconsistency is not limited to just the percentage required for the inclusionary contribution; as demonstrated above, it creates an inconsistency in the actual goals and objectives of the General Plan to promote housing projects and the provision of inclusionary housing units which is completely contradicted by the unachievable 35% obligation set out in the DES policy.

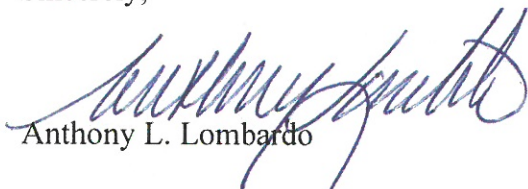
As to Condition 19, it is unnecessary and redundant in that Condition 2 already requires the recording of a Notice of the Approval of the General Development Plan and Use Permit. The purpose of Condition 19 was to assure that future buyers of properties in the Laguna Seca Office Park covered by the General Development Plan would be made aware of the County's action through a preliminary title report or similar search. Condition 2 will accomplish the same goal as Condition 19 by recording a single notice rather than recording fourteen separate notices. We have confirmed with Chicago Title that by listing the assessor's parcel numbers on the notice required by Condition 2, the record of County's action will be appear on subsequent title reports for those all of those parcels.

The owners of the referenced properties have already provided letters to the RMA stating they were in agreement with the General Development Plan approved by the Planning Commission. Public notice was provided by newspaper, posting and direct mailing to all owners in the LSOP and for several hundred feet around the LSOP. Additional notice was provided by a separate letter from the RMA to all owners in the Laguna Seca Office Park.

Based on the foregoing, Mr. McIntosh asks that the Board grant his appeal and:

- Require a 20% inclusionary contribution and grant a financial incentive waiving the in-lieu fee for 0.8 units; OR
- Approve payment of an in-lieu fee for the project at the applicant's option at the time building permits are to be issued; and,
- Delete condition 19.

Sincerely,



Anthony L. Lombardo

Enclosure

cc: Client  
Carl Holm  
Brandon Swanson  
Jaime Guthrie  
Wendy Strimling

**From:** [Steve Wotherspoon](#)  
**To:** [Tony Lombardo \(tony@alombardolaw.com\)](mailto:tony@alombardolaw.com)  
**Subject:** Inclusionary housing requirements for apartment project  
**Date:** Friday, September 25, 2020 9:54:43 AM

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Dear Mr. Lombardo,

My name is Steve Wotherspoon. I am the senior vice president and commercial real estate and construction loan manager for Pinnacle Bank. I have been provided with a copy of the financial analysis for the proposed McIntosh 15 unit apartment project in the Laguna Seca office park. Neither Mr. McIntosh nor any of his family are clients of our lending institution.

Based on the summary analysis received, I believe that the financial analysis is an accurate estimation of the cost of constructing the project and the revenue that it will likely generate. Based on my experience and the lending policies of our institution we would not be able to finance this project with over 20% inclusionary housing because the project is not financially feasible and would not meet our minimum underwriting standards. Even at the 20% level, the project would require higher than typical cash injection from the developer to avoid the early year(s) negative cash flow.

Sincerely,

**Steve Wotherspoon**  
**SVP/Senior Relationship Manager**

**Pinnacle Bank**  
1276 South Main St.  
Salinas, CA 93901  
**W:** 831.751.2956 **F:** 831.225.0091

[steve.wotherspoon@pinnacle.bank](mailto:steve.wotherspoon@pinnacle.bank)

NMLS #1146321

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OFFICIAL RECEIPT

# COUNTY OF MONTEREY

McIntosh  
RECEIVED FROM

October 26 2020  
DATE

940 McIntosh Dr.  
STREET

Monterey, CA 93940  
CITY

Notice of Appeal  
FOR

PLN: 170765

Check # 1105

OFFICE	MAIL	FIELD	CASH	CHECK	OTHER
PREVIOUS BALANCE				AMOUNT PRESENTED	3,540 00
AMOUNT PAID				AMOUNT OF PAYMENT	
NEW BALANCE				CHANGE REFUNDED	
ON ACCOUNT NO.			THE AMOUNT OF \$ 3,540 00		

CENTRAL VALLEY BUSINESS FORMS - (559) 651-3595

505431

REC'D. BY

FORM #111-71