

Attachment I

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MEMORANDUM

OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY

DATE: April 29, 2015

TO: Honorable Chair and Members of the Board of Supervisors

FROM: Wendy S. Strimling, Senior Deputy County Counsel

SUBJECT: Legal Analysis of Public Resources Code section 30614 as it pertains to the application to modify the affordability restriction on homes in the Moro Cojo subdivision

INTRODUCTION

At the April 14, 2015 Board of Supervisors' meeting, during the time for public comment on matters not on the agenda, Ms. Jane Haines called for "an investigation of County staff's handling" of the April 8, 2015 meeting of the County's Housing Advisory Committee. Ms. Haines' allegations pertain to the following item on the HAC's April 8 agenda:

"Make a recommendation to the Board of Supervisors on a request from CHISPA on behalf of 161 owners of single family homes in the Moro Cojo subdivision to reduce the duration of affordability on their homes from "permanent" to fifteen years."

One of Ms. Haines' principal contentions is that staff presented a "prejudicially biased presentation resulting from staff withholding relevant information from Committee members, including the fact that a State law would require the California Coastal Commission to overturn any approval of the application, and an April 6 letter from Coastal Commission staff citing that law." (Quotation from written "transcript," transmitted to by Ms. Haines to the CAO.) The state law to which Ms. Haines is referring is Public Resources Code section 30614.

County Counsel's legal opinion is that Public Resources Code section 30614 is inapplicable to the CHISPA request. The Board in the exercise of its discretion may or may not approve the CHISPA request, but Public Resources Code section 30614 is not itself a constraint on the exercise of that discretion.

QUESTION PRESENTED

1. Does Public Resources Code section 30614 prohibit the County from modifying the affordability restriction on the single family homes in the Moro Cojo subdivision from "permanent" to a term of fifteen years?

ANSWER

1. Public Resources Code section 30614 is not applicable to the 161 homeowners' application to modify the term of the affordability restriction on their homes. The statute does not legally prevent the County from amending the affordability restriction on the Moro Cojo homes. The statute also would not require the Coastal Commission to overturn a decision by the Board of Supervisors to modify the restriction, if the Board were ultimately to approve the modification.

FACTUAL BACKGROUND

On December 20, 1994, the Board of Supervisors approved an application by CHISPA (Community Housing and Improvement Systems and Planning Association, Inc.) for a Combined Development Permit for the "Moro Cojo Standard Subdivision Development," which included a Coastal Development Permit for a vesting tentative map to subdivide 125.6 acres into 177 lots and a Coastal Development Permit for two clustered developments of 90 multi-family rental units. The Board of Supervisors accepted the final map on September 30, 1997.

Condition of approval number 99 of the Combined Development permit requires "that all the units in the Moro Cojo Inclusionary Development Projects (SH 93001 and SH 93002) be affordable to very low, low and moderate income households as defined in Section 50093 of the California Health and Safety Code." As a result of a lawsuit on the project brought by The Alliance to Enforce Mandates Governing Project Review Procedures and Water and Traffic Standards and David Green, the parties entered into a settlement agreement that interprets Condition 99 to mean that the 175 single family homes are for low income households (80% of median income) and requires that Condition 99 "shall be a permanent deed restriction" on the properties. (Settlement Agreement and Stipulation for Judgment ("Settlement Agreement"), filed November 28, 1995 in *Alliance to Enforce Mandates Governing Project Review Procedures and Water and Traffic Standards, et al v. County of Monterey, et al*, (Monterey Superior Court Case No. 102344).) A deed restriction which recited the condition of approval was recorded on the property. (Document 9759925, recorded October 13, 1997.)

In 2005, CHISPA obtained a court order clarifying that Condition 99 and the recorded deed restriction "allow for and permit the resale of any and all of the Project Units to persons and families of very low, low, or moderate income." (Order After Hearing Granting Motion for Clarification of Stipulated Settlement Entered as Judgment Pursuant to CCP §664.6, filed November 4, 2005, in *Alliance to Enforce Mandates v. County of Monterey*, supra.) This clarification enables resale of the single family homes to moderate income households, but the court order did not alter the duration of the affordability restriction, which remains permanent.

A request to amend the Combined Development Permit is now before the County. Specifically, 161 homeowners, represented by CHISPA, have filed an application to modify the duration of the affordability restriction from "permanent" to a term of fifteen years on their homes. The Settlement Agreement does not prohibit them from making this request. The Settlement Agreement does prohibit the County from initiating any modification of any condition of approval, but allows an applicant to request a modification, provided that the applicant has "the burden of producing substantial evidence to support its request for modification" and that "any

proposed change shall receive an initial review of its environmental effects” where appropriate under CEQA.

Staff is processing the application following normal procedures. Planning staff prepared an Initial Study/Notice of Intent to Adopt a Negative Declaration (IS/ND). The public review period for the IS/ND was March 6, 2015 to April 6, 2015. Comment letters were due on April 6, 2015. The application was heard by the County’s Housing Advisory Committee on April 8, 2015 for the HAC to make a recommendation on the application. The HAC held a public hearing at which all persons wishing to testify were heard; and, after much deliberation and several tie votes, the HAC voted to continue the hearing to May 27, 2015 to enable staff to present alternatives other than either 15 years (applicants’ proposal) or permanent (existing restriction). The application will also be heard at public hearings at the Planning Commission and the Board of Supervisors, with the Board of Supervisors designated as the appropriate authority to take the final County action on the application. At the request of the HAC, the Planning Commission hearing will not be scheduled until at least sometime after the May 27, 2015 continued HAC hearing. A Board action approving the application would be appealable to the Coastal Commission.

ANALYSIS

Our legal research indicates that Public Resources Code section 30614 does not apply to the application by 161 Moro Cojo homeowners to amend the affordability restriction of the Combined Development Permit. The statute does not curtail the County’s discretion to act on the application.

Public Resources Code section 30614 provides, in its entirety:

“ (a) The commission shall take appropriate steps to ensure that coastal development permit conditions existing as of January 1, 2002, relating to affordable housing are enforced and do not expire during the term of the permit.

(b) Nothing in this section is intended to retroactively authorize the release of any housing unit for persons and families of low and moderate income from coastal development permit requirements except as provided in Section 30607.2.¹”

Ms. Haines argues that subsection (a) prohibits the County from amending the term of the affordability restriction in CHISPA’s coastal development permit. She contends this section of state law is fatal to the application of the 161 homeowners. Ms. Haines also seems to imply that staff intentionally withheld this information from the HAC and from the public in the Initial Study. For example, her *Monterey Bay Partisan* article states, “By never mentioning the state law, county staff keeps alive the illusion that the 1994 coastal development permit condition requiring permanent affordability can be amended.” (“Special ‘rules’ are being used to end Moro Cojo’s affordability status,” by Jane Haines, *Monterey Bay Partisan*, April 13, 2015, and distributed to the Board of Supervisors on April 13, 2015.)

¹ Section 30607.2 applies to coastal development permits issued prior to January 1, 1982 which contain conditions for families and persons of low and moderate income.

The Coastal Commission staff also quotes Public Resources Code section 30614 in its April 6, 2015 comment letter on the Initial Study/proposed Negative Declaration (IS/ND). Coastal Commission staff submitted the letter to the Planning Department on April 6, 2015, the last day of the public comment period on the IS/ND. Quoting section 30614, Coastal Commission staff states the "Coastal Act requires the Commission 'to ensure that coastal development permit conditions existing as of January 1, 2002, relating to affordable housing are enforced and do not expire during the term of the permit'." Ms. Haines's charge of "highly irregular proceedings" of the April 8 HAC meeting and her call for investigation appears based, in large part, on the fact that County Housing staff did not initially distribute this Coastal Commission letter to the HAC.²

Our legal research indicates that Ms. Haines' reading of section 30614 is, simply put, wrong. To the extent that Coastal Commission staff's letter implies that section 30614 would prohibit amendment of the affordability restriction, Coastal Commission's staff is also wrong on the law. Public Resources Code section 30614 does not, in fact, apply to this application. The legislative history of section 30614 reveals that section 30614 applies only in Orange County.

Section 30614 was added to the Coastal Act in 2002, via Assembly Bill 2158 (Lowenthal). The bill was approved by the Governor on August 28, 2002. The Senate Floor analysis explains:

"This bill applies only in Orange County, which is the only county where the Commission had an affordable housing program." (Senate Floor Analysis, dated June 24, 2004, emphasis added.)

The Senate Floor Analysis explains that "[t]he Coastal Act no longer authorizes the Commission to impose conditions relative to affordable housing in permits. An Orange County program continues to have unfulfilled affordable housing commitments. This bill requires the Commission to take appropriate steps to ensure that those permit conditions are implemented." The Senate Analysis goes on to explain the particular history of the Coastal Commission's program of affordable housing in Orange County and the concern that "through a series of misadventures," the affordable units that were in that program were in danger of losing their resale controls. (A copy of the Senate Floor Analysis is attached to this memo).

This Senate Floor Analysis is dated June 24, 2002, when the bill's wording was in its final form and the bill was on its way unchanged to final readings in the Senate and Assembly. We have located no published case interpreting section 30614 and no legal authority contesting the Senate Floor Analysis.

The plain language of the statute also indicates that Public Resources Code section 30614 is directed at the Coastal Commission, not Monterey County. The plain language of the statute itself directs "the commission"—meaning the Coastal Commission—to take appropriate steps. Ms. Haines argues that this language would require the California Coastal Commission to overturn any approval of the application; this assertion is both premature and incorrect.

² The letter was sent to the Planning Department. The Planning Department is the point of contact for comment letters on the IS/ND. The letter was a comment on the CEQA document and the letter arrived on the last day of the public comment period, which was two days before the HAC hearing. Housing staff did not have a copy of the letter. Ms. Haines pointed out in testimony at the HAC's April 8 meeting that the HAC did not have that letter. The HAC then promptly recessed on the advice of staff so that staff could make copies of the letter and provide it to the HAC members. The HAC members had the letter before them before they deliberated on the 161 homeowners' request.

First, the Coastal Commission may never hear this application. Under the County's certified Local Coastal Program, the County is the appropriate authority to render a decision on the application. The application would come before the Coastal Commission only if the Board approves the application and only if such approval were appealed to the Coastal Commission.

Second, as discussed above, the statute applies to a unique situation that apparently arose in Orange County. It is applicable only to Coastal Commission actions in relation to a program in Orange County. It does not limit the County's discretion or the Coastal Commission's discretion in regard to the application of the 161 homeowners to amend their Combined Development Permit. We trust that the Coastal Commission attorneys would so advise the Coastal Commission if the application is ever before the Coastal Commission. The Coastal Commission letter was authored by staff, not its attorneys. The Coastal Commission staff's letter also comes relatively early in the application process, before the process has had a chance to work to resolve issues. The letter was submitted at the close of the public comment period on the Initial Study/Negative Declaration, only two days before the HAC meeting and before Planning Department staff had the opportunity to review comment letters received and confer with Coastal Commission staff about its comments. The HAC meeting is an early step in the processing of the application; one of the purposes of the public process is to provide an opportunity for agencies and the public to identify issues and for staff to resolve issues raised. Planning Department staff typically provides responses to issues raised in CEQA comment letters as part of staff reports to the Planning Commission and Board of Supervisors. With the benefit of the full hearing process and opportunity for County staff to respond to the Coastal Commission's comments, we expect Coastal Commission staff would agree with our office's analysis that section 30614 is inapplicable.

While Public Resources Code section 30614 is not applicable to the application, the proposed amendment is subject to the County's certified Local Coastal Program (LCP). We expect that staff will fully analyze the issues of consistency of the application with the LCP and will present that analysis to the decision-makers, and the Board of Supervisors will, as part of its decision on the application, be required to determine whether the 161 homeowners' proposed amendment is consistent with the County's Local Coastal Program.


WENDY S. STRIMLING
Senior Deputy County Counsel

WSS:dv

ATTACHMENT: Bill Analysis

BILL ANALYSIS

SENATE RULES COMMITTEE	AB 2158
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-8614 Fax: (916)	
327-4478	

THIRD READING

Bill No: AB 2158
 Author: Lowenthal (D)
 Amended: 4/18/02 in Assembly
 Vote: 21

SENATE NATURAL RES. & WILD. COMMITTEE : 6-3, 6/11/02
 AYES: Kuehl, Alpert, Bowen, Ortiz, Sher, Torlakson
 NODS: Oiler, Johannessen, Monteith

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

ASSEMBLY FLOOR : 45-29, 5/20/02 - See last page for vote

SUBJECT : Coastal development permits: affordable housing requirements

SOURCE : California Coastal Commission

DIGEST : This bill requires the California Coastal Commission to ensure that coastal development permit conditions relating to affordable housing not expire during the term of the permit.

ANALYSIS : The Coastal Act no longer authorizes the Commission to impose conditions relative to affordable housing in permits. An Orange County program continues to have unfulfilled affordable housing commitments. This bill requires the Commission to take appropriate steps to ensure that those permit conditions are implemented.

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This bill requires the Commission to "take appropriate steps to ensure that coastal development permit conditions relating to affordable housing are enforced and do not expire during the term of the permit." The bill also prohibits housing units that were constructed as part of the affordable housing program from being "released" to other purposes except as allowed by existing law.

Background :

This bill applies only in Orange County, which is the only county where the Commission had an affordable housing program. In the late 1970's and early 1980's, nearly 1,200 affordable housing units were constructed or required to be built. The Orange County Board of Supervisors terminated the county's involvement in this program in 1984. A non-profit group stepped in briefly to administer the program, followed again by the Coastal Commission. Through a series of misadventures, the affordable housing commitment is in danger of being substantially diminished if not lost altogether, according to the author.

In 1990, another non-profit, Civic Center Barrio Housing, agreed to administer the program, which by then had only 416 units. For a variety of reasons, these units will lose their resale controls within the next 12 years under the existing terms of the attachments to the grant deeds. These conditions expire at different times depending on when they were begun, and whether they were re-negotiated while they were in effect.

Until 1981 the Coastal Act had specific language supporting the provision of affordable housing. When repealed, the replacement section of law authorized the demolition of affordable housing units. Local governments were to construct replacement homes within 3 miles of the coastal zone within the same city or county.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
 Local: No

SUPPORT : (Verified 6/24/02)

California Coastal Commission (source)

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California Association of Homes and Services for the Aging
California Rural Legal Assistance Foundation
Western Center on Law and Poverty
Congress of California Seniors

ARGUMENTS IN SUPPORT : The California Rural Legal Assistance Foundation and the Western Center on Law and Poverty support the bill because it ensures "that existing affordable housing provisions will be enforced in the coastal zone." It argues that the cost of constructing new units is prohibitive, and that the bill is therefore timely and vitally necessary.

The California Association of Homes and Services for the Aging states that the bill will ensure "that projects intended to provide affordable housing in coastal regions [that were] built using state subsidies adhere to restrictions already in place."

ASSEMBLY FLOOR :

AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dickerson, Dutra, Firebaugh, Flores, Frommer, Goldberg, Havice, Horton, Jackson, Keeley, Kehoe, Koretz, Liu, Longville, Lowenthal, Matthews, Migden, Naton, Negrete, McLeod, Oropeza, Papan, Pavley, Reyes, Salinas, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Wayne, Wiggins, Wright, Wesson

NOES: Anestad, Ashburn, Bates, Bogn, Briggs, Bill Campbell, John Campbell, Cogdill, Cox, Daucher, Harman, Hollingsworth, Kelley, La Suer, Leach, Leonard, Leslie, Maddox, Maldonado, Mountjoy, Robert Pacheco, Rod Pacheco, Pescetti, Richman, Runner, Strickland, Wyland, Wyman, Zettel

CR:jkc 6/24/02 Senate Floor Analysis

SUPPORT/OPOSITION: SEE ABOVE

*** END ***

