



**environmental**  
DEFENSE CENTER

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ENVIRONMENTAL LAW

December 10, 2021

Santa Barbara County Board of Supervisors  
123 E. Anapamu Street  
Santa Barbara, California 93101  
*By email to sbcob@co.santa-barbara.ca.us*

**RE: Appeal of Director Determination re: Santa Barbara Ranch Inland Development Agreement Periodic Review**

*Dear Chair Nelson and Honorable Supervisors:*

On behalf of the Environmental Defense Center (“EDC”), the Surfrider Foundation, by and through the Santa Barbara Chapter (“Surfrider Foundation”), and the Gaviota Coast Conservancy (“GCC”) (collectively “Appellants”), we urge the Board of Supervisors to uphold the groups’ appeal of the Planning and Development Director’s determination that the Santa Barbara Ranch developer complied with the terms of the Inland Development Agreement (“IDA”). The IDA was approved in 2008 as part of the final action allowing development on the coastal and inland portions of Santa Barbara Ranch and Dos Pueblos Ranch. Development Agreements are an optional add-on to a subdivision approval that lock in the rules as of the date of approval in exchange for additional “public benefits” that are the consideration, or quid pro quo, of the contract. The prior developer abandoned the coastal project before obtaining final entitlements, and the Board terminated the Coastal Development Agreement. The IDA, however, remained in effect.

The IDA grants SBRHC, represented by Standard Portfolios, LLC (“Developer”), the vested right to develop the inland portion of the Santa Barbara Ranch Project under the County rules and regulations in effect on October 21, 2008, for a period of at least 20 years. IDA § 3.01 (Board Letter Attachment 5). Due to a tolling period that occurred during litigation, the 49-unit Inland Santa Barbara Ranch Project – the largest subdivision ever approved on the Gaviota Coast – could be developed based on rules that predate the Gaviota Coast Plan until 2034.

In exchange, the Developer is required to provide two public benefits: creek restoration planning and implementation (described in more detail below), and an agreement to mitigate all impacts regardless of cost in the event any culturally significant resources are encountered during project construction. IDA § 2.02(a and b). The Developer has failed to meet the specific deadlines identified in the IDA for implementing creek restoration, which is the IDA’s key public benefit, and has failed to provide all reasonable assistance to accomplish such restoration.

Our joint appeal challenges Planning & Development Director Lisa Plowman's March 30, 2021, determination that the Santa Barbara Ranch Developer is in good-faith compliance with the IDA (*see* Board Letter, Attachment 3). The failure to achieve any actual restoration in the initial five years, when the Developer managed to lose the cooperation of Dos Pueblos Ranch landowners and thereby lose access to Dos Pueblos Creek (making restoration there impossible), and then insufficient and tardy actions to use the last two years to complete an alternative restoration project, reflect inadequate compliance with the IDA and abandonment of the public benefits contemplated by the IDA.

We request that the Board uphold the appeal, find that the Director's Determination of good faith compliance with the IDA was not supported by substantial evidence and begin procedures to terminate the IDA.

### **I. Effectuating Creek Restoration Is the IDA's Key Public Benefit.**

The first benefit, identified as "Creek Corridor, Open Space and Watershed Protection," was the primary benefit to the County, in that it facilitated on-the-ground restoration of Dos Pueblos Creek or an alternative creek on the Gaviota Coast. Dos Pueblos Creek and other creeks on the Gaviota Coast support numerous rare species<sup>1</sup>, contain year-round flows<sup>2</sup>, and support healthy riparian vegetation,<sup>3</sup> making them important public resources. However, they suffer from numerous forms of environmental degradation, including water pollution<sup>4</sup>, water extraction<sup>5</sup>,

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<sup>1</sup> Santa Barbara County Planning and Development Department, *Gaviota Coast Plan Final Environmental Impact Report*, at 4.6-13, Table 4.6-4 *Federally and State-designated Endangered and Threatened Wildlife Species Known to Occur in Plan Area* listing three endangered bird species, one threatened amphibian species, and two endangered fish species which occur in creeks and riparian habitats on the Gaviota Coast (November 8, 2016); *See also* Santa Barbara Land Trust, *Discover the Wonders of Nature Explore Arroyo Hondo Preserve with Your Family* at 53 and 55-58 listing federally endangered southern California steelhead (*Oncorhynchus mykiss*), federally threatened California red-legged frog (*Rana aurora draytonii*), and California Species of Concern California newt (*Taricha torosa*) which occurs in Arroyo Hondo and other Gaviota Coast creeks available at <https://www.sblandtrust.org/wp-content/uploads/2020/05/Nature-of-Arroyo-Hondo-2020.pdf> (undated); *See also* California Department of Parks and Recreation, *California Coastal Trail IS/MND Gaviota State Park* at 44 listing federally endangered tidewater goby (*Eucyclogobius newberryi*), and California Species of Concern two-striped garter snake (*Thamnophis hammondi*) and southwestern pond turtle (*Emys marmorata pallida*) available at <http://www.parks.ca.gov/pages/980/files/gct-dmnd-part1.pdf> (July 2007).

<sup>2</sup> United States Department of Interior Geological Survey and California Department of Water Resources, Tajiguas Quadrangle Map and Gaviota Quadrangle 7.5 Minute Series Topographic Map depicting numerous blue-line streams (Photorevised 1954)..

<sup>3</sup> Google Earth aerial photographs (Imagery dates July 27, 2021).

<sup>4</sup> State Water Resources Control Board 303(d) List of Impaired Water Bodies listing Gaviota Coast Creeks as impaired by/for the following: Boron, Chloride, Sodium, Arsenic, Copper, Lead, Nickel, Selenium, Toxicity, Dissolved Oxygen, Specific Conductivity, Total Dissolved Solids, Escherichia Coli (E. Coli) (partial list) available at [https://www.waterboards.ca.gov/water\\_issues/programs/water\\_quality\\_assessment/2020\\_2022\\_integrated\\_report.html](https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2020_2022_integrated_report.html) (December 9, 2021).

<sup>5</sup> Dudek, *Dos Pueblos Creek Restoration, Maintenance, and Monitoring Plan* at 11 (June 2015) ("Dudek (2015)"); *See also* Hugo A. Loáiciga (Ph.D., P.E., D.WRE) and Derek Booth (Ph.D., P.E, P.G.), *Hydrologic Analysis of the Las Cruces Spring and Neighboring Streams, Gaviota State Park, Santa Barbara County, California* at 20 (November 1, 2021).

road crossings<sup>6</sup>, non-native vegetation<sup>7</sup>, and impediments to migration of endangered southern California steelhead.<sup>8</sup> (Figure 1)

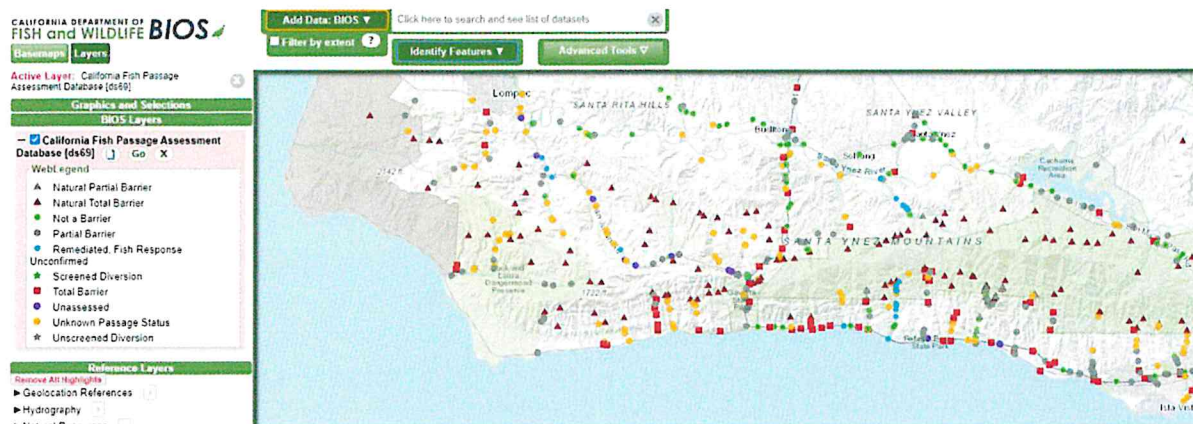


Figure 1. California Department of Fish and Wildlife Passage Assessment Database showing numerous barriers to steelhead migration in creeks on the Gaviota Coast.

Reversing these impairments as envisioned by the County when including implementation of creek restoration in the IDA would accrue numerous public benefits. For example, the Dos Pueblos Creek Restoration, Maintenance, and Monitoring Plan (“Restoration Plan”) set forth the following “objectives and restoration opportunities”:

The Project proposes... to restore channel morphology with improved creek flow... provide better flow connectivity,... fish passage, remove existing creek berming and barriers, and restore appropriate native riparian vegetation.

[R]oad crossings... will be replaced with free span bridges... to help restore the natural creek bed conditions and to allow for better fish passage. [N]on-native exotic vegetation... will also be removed.

A road crossing... will be modified to provide a water quality bio-retention basin...

Modifications to the creek channel are proposed under the Hwy. 101... to eliminate the vertical barrier to fish passage and to provide resting pools for upstream fish passage.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 13 – 14.

<sup>8</sup> California Department of Fish and Wildlife, *BIOS and Passage Assessment Database* available at <https://apps.wildlife.ca.gov/bios/?al=ds69> (December 9, 2021); See also Matt W. Stoecker and Conception Coast Project, *Steelhead Assessment and Recovery Opportunities in Southern Santa Barbara County, California* at 265 – 404 available at [https://www.conceptioncoast.org/all\\_steelhead\\_report\\_final2002-06-21.pdf](https://www.conceptioncoast.org/all_steelhead_report_final2002-06-21.pdf) (June 2002).

[P]ortions of the creek channel that have historically been armored with concrete... will be modified... to improve the creek bed surface... to improve the creek... for fish passage...

The Project... proposes to restore the natural creek... removal of non-native invasive... species and restoration... with appropriate native riparian species...

[T]he project also includes the removal of sediment accumulated in various creek bed locations to help... restore and improve creek bed habitat...<sup>9</sup>

The actions proposed by the Creek Restoration Plan would have provided important benefits to the environment, but in the event restoration on Dos Pueblos Creek proved infeasible, the IDA also provided a contingency plan, as follows:

Developer shall condition the payment of the foregoing sums [\$300,000] to the non-profit organization to require the non-profit organization to: (i) expend the funds for creek restoration elsewhere on the Gaviota Coast in the event that the Creek Restoration Plan is not implemented within five (5) years of the Effective Date for any reason, (ii) obtain the County's written consent as to the alternative creek restoration project prior to expending said funds, and (iii) complete the alternative creek restoration project with[in] seven (7) years of the Effective Date.

IDA § 2.02(a) (underline added).

## **II. The Developer Failed to Comply with the IDA.**

Despite the clear requirements of the IDA, the Developer failed to effectuate a creek restoration plan. In 2018, the Developer entered into an agreement with the California Association of Resource Conservation Districts (“CARCD”) to carry out creek restoration on Dos Pueblos Creek, consistent with the terms of IDA Section 2.02(a). (Letter from Glenn Russell, Ph.D., Director of Planning and Development, to Stanley Lamport (March 1, 2018)). CARCD then retained Cachuma Resource Conservation District (“CRCD”) and South Coast Habitat Restoration (“SCHR”) for assistance with implementation of the restoration. (Letter from Dianne Black for Lisa Plowman, Director of Planning and Development, to Stanley Lamport (March 28, 2019)).

During the time period of 2017-2019, communications took place between owners of Dos Pueblos Ranch North and South and representatives of the non-profits and the Developer; however, in mid-2019, the Developer determined that the owners of Dos Pueblos Ranch would *not* agree to allow restoration work to be conducted on their property. (See Board Letter Attachment, Letter from Stanley Lamport to Lisa Plowman, Director (Feb. 7, 2020)). The five-

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<sup>9</sup> Dudek (2015) at 13 – 15.

year deadline to complete a restoration project on Dos Pueblos Creek had already passed on April 8, 2019, and as of sometime in mid-2019, the Developer and its consultant knew that restoration there was no longer feasible<sup>10</sup>, however, it was not until February 7, 2020, that the Developer's representative notified the County of that fact, as follows:

At the time of last year's compliance review, the Developer informed the County that discussions were continuing between Standard Portfolios, on behalf of the Developer, and Dos Pueblos Creek Owners regarding items i through iv under Section 2.02(a) of the IDA that are required to occur prior [sic] implementation of the Creek Restoration... the owners of Dos Pueblos Ranch North informed Standard Portfolios that it does not consent to the implementation of the Dos Pueblos Creek Restoration, Maintenance and Monitoring Plan on its property... accordingly due to the requirement of Section 2.02(a) that implementation shall not occur without Dos Pueblos Ranch consent with respect to activities occurring on Dos Pueblos Ranch, and as a result CARCD has been unable to implement the *Dos Pueblos Creek Restoration, Maintenance and Monitoring Plan* at this time. *Id.*

Standard Portfolios then requested the County's "consent to use the remaining funds for alternative restoration in accordance with the terms of IDA Section 2.02(a) and the Creek Restoration Implementation Funding Agreement." *Id.* The request identified four alternative locations on the Gaviota Coast where the funds could be expended for alternative creek restoration:

- (i) Jalama Creek - Fish passage & Riparian Restoration
- (ii) Gaviota Creek- Fish passage work in collaboration with CalTrans (currently ongoing),
- (iii) El Capitan Creek- Riparian Restoration, and
- (iv) Arroyo Hondo – Riparian Restoration. *Id.*

One year later, on January 29, 2021, the Developer requested the County's Periodic Review for 2020. (Letter from Stanley Lamport to Lisa Plowman, Director (January 29, 2021)). This letter does not report actual progress on an alternative creek restoration project on the Gaviota Coast, mentioned in Mr. Lamport's letter of the year before, nor does it acknowledge the upcoming deadline of April 8, 2021, for completion of that project, only a little more than two months from the date of his letter. *Id.* The Developer's letter indicates only that it had "assisted CARCD to formalize a request for the County's consent to use the remaining funds for alternative restoration in accordance with terms of the IDA Section 2.02(a) and the Creek Restoration Implementation Funding Agreement" and vaguely refers to CARCD working with the County since that time. *Id.* This letter does not identify an alternative creek restoration project, reports no County approval of an alternative restoration project, nor does it report completion or progress on such a project. *Id.*

The County's latest written determination of good-faith compliance dated March 30, 2021, and the subject of this Appeal, determined that the Developer had offered reasonable

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<sup>10</sup> *Id.* at 5.

assistance to implement the Creek Restoration Plan and provided a list of the Developer's actions as support for that assertion. (Letter from Lisa Plowman, Director, to Stanley Lamport (March 30, 2021)). However, with perhaps one exception, that list contains items pertaining solely to restoration on *Dos Pueblos Creek*, which was determined to be infeasible in mid-2019.<sup>1</sup> *Id.* The record does not show that the Developer offered reasonable assistance to implement the alternative creek restoration plan as the IDA requires.

Moreover, Ms. Plowman's letter indicates that CARCD, CRCD, and SCHR had already expended \$268,000 of the \$300,000 funding slated for creek restoration by the time of her letter. *Id.* at 2. The organizations spent those funds on site visits, communication with team members and interested parties, landowners/managers, grant research and writing, surveying, mapping, modeling, and concept-level planning. *Id.* at 2. There is no evidence to suggest that any project was identified or that any plan was developed, much less that any on-the-ground restoration work had been done to date.

The IDA required implementation of a creek restoration project to achieve public benefits such as the objectives set forth in the Restoration Plan. However, as a result of the Developer's failure to implement a creek restoration project on Dos Pueblos Creek or any other creek on the Gaviota Coast, none of these objectives were fulfilled and none of these intended public benefits were realized.

### **III. The Director's Determination of Compliance Undermines the Purpose and Intent of the IDA.**

The Board Letter recommending denial of this Appeal urges an interpretation of the IDA that does not require *any actual* creek restoration, but instead requires only that the Developer pay \$300,000 to a non-profit to implement a project on Dos Pueblos Creek, and offer all reasonable assistance to implement the project there, or at an alternate site if restoration on Dos Pueblos Creek proved infeasible. The Board Letter relies on certain actions of the Developer to show that it made good faith efforts to offer reasonable assistance to implement the Dos Pueblos Creek Restoration Plan, but notably, fails to mention any actions taken in furtherance of restoration at an alternate site after the Developer knew in mid-2019 that restoration on Dos Pueblos Creek would not be feasible. The Board Letter opines that because the County is not a party to the contract between the Developer and the non-profit, it does not have authority over the performance of the creek restoration itself.

We strongly disagree with the Board Letter's interpretation that the Developer has abided by the terms of the plain language of the IDA, and that the County's hands are tied as to implementation of the creek restoration project on the Gaviota Coast because the result of this interpretation would eviscerate the primary intent and purpose of the IDA, from the County's and public's point of view.

The primary purpose of development agreements, from a municipality's point of view, is to obtain benefits for the public. *N. Murrieta Cmty., LLC v. City of Murrieta* (2020) 50 Cal. App. 5th 31, 36; also see *Santa Margarita Area Residents Together v. San Luis Obispo Cty.* (2000) 84 Cal. App. 4th 221, 231. The plain language of the IDA shows that the primary benefit of the

bargain to the County and the public, beyond what was already required by the California Environmental Quality Act, was the *creation and implementation of the Creek Restoration Plan*.<sup>11</sup> IDA § 2.02. The heading for Section 2.02 of the IDA, which discusses the restoration of Dos Pueblos Creek, is “*Public Benefits*” with subsection (a) titled “Creek Corridor, Open Space and Watershed Protection.” *Id.* (emphasis added).

Moreover, subsection 2.02(a) of the IDA indicates that *both* individual components of the creek restoration held importance by calling for two separate payments, one for planning and one for restoration. *See* IDA § 2.02(a). Here, the Board of Supervisors clearly expected that the second payment of \$300,000 would be spent on creek *restoration* on Dos Pueblos Creek or at an appropriate alternate site, not on planning, nor on overhead of the contracted non-profit. Both the creation of a restoration plan and restoration implementation were clearly important and “essential” to the bargain from the County’s perspective. The Board contemplated what would occur if restoration of Dos Pueblos Creek became infeasible, by providing an alternative site to be approved, and providing an additional two years in which to fund creek restoration at a different location. *Id.*

Although Appellants believe that the plain language of the IDA imposes on the Developer the obligation to ensure completion of a creek restoration project within a seven-year timeframe, the result is the same if the language is found to be ambiguous. Where a legislative action, such as a development agreement, is deemed to contain ambiguous language, courts will apply an interpretation that is consistent with the legislative intent. In doing so, the purpose of the statute, legislative history, and public policy should be considered. *Sierra Club v. Superior Court* (2013) 57 Cal.4<sup>th</sup> 157, 166 (“If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purposes, legislative history, and public policy.”).

In this case, the legislative history confirms that the most important consideration to the County in entering the IDA was the commitment the Developer made to restore Dos Pueblos Creek. *See* Board of Supervisors’ Agenda Letter for the 2008 approval hearing, which stated that “*Most notable among the concessions* recommended by the Planning Commission are the Developer’s obligations to: (i) *institute restoration of Dos Pueblos Creek with a minimum contribution of \$400,000...*” (Board of Supervisors’ Agenda Letter on Santa Barbara Ranch Project Deliberation, Santa Barbara County, at 18 (Sept. 23, 2008) (emphasis added).) Clearly, the Board would not have approved the IDA, freezing the County’s regulations for a minimum of twenty years, without some benefit to the County. That benefit – in fact, the only net benefit to the County and the environment - was the creek restoration project.

If the Developer simply had to pay \$400,000 and set up meetings with landowners, the IDA would have said so, and it would have been clear that the County may not actually receive

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<sup>11</sup> When County Supervisors and County staff considered the IDA, they made several references to anticipated public benefits of the IDA. The IDA itself outlines how the agreement confers public benefits such as a reduction of the overall development potential of legal lots, configuration of development to make it less visible from the highway, sewage treatment instead of individual septic units, long term preservation of agricultural land, among others. IDA Recitals § I at 4. However, these benefits flow from California Environmental Quality Act requirements and land use consistency review, and were already required.

the benefit of creek restoration as a result of the agreement. However, the IDA's clear purpose was to ensure that creek restoration occurred. In fact, if a project could not be completed on Dos Pueblos Creek within five years, the Developer was provided an additional two years to obtain County approval and complete an alternative project, reinforcing the expectation that creek restoration must occur even if it proves to be infeasible on Dos Pueblos Creek. IDA § 2.02(a). There was no contemplation, or intent, that the Developer could simply pay some money without completing a creek restoration project. Such interpretation flies in the face of the clear intent of the IDA.

Public policy also compels this interpretation. If developers can negotiate agreements to escape compliance with future policies, ordinances, and regulations by simply paying a fee for a project and not following through with implementation, cities and counties throughout the state will risk relinquishing their police power and land use authority without achieving any material benefit. In this case, the County did not even receive the \$400,000; it was paid to other entities who spent most of the money without receiving approval of a project or implementing any restoration whatsoever. It is contrary to public policy to allow the Developer to receive the benefit of the IDA – more than twenty years of vesting – without providing the County with the benefit of a creek restoration project. If the Board does not enforce the terms of the IDA, the public, by and through the County, receives *no* benefit from the agreement with the Developer whatsoever. Meanwhile, the Developer will continue to enjoy vested rights to build the largest residential development project ever on the Gaviota Coast, under the land use rules in place in 2008 and without complying with the Gaviota Coast Plan.

**IV. The Director's Determination Was Not Based on Substantial Evidence that the Developer Had Complied in Good Faith with the IDA.**

The IDA required that “[a]t the conclusion of the Periodic Review, the Director of Planning and Development shall make written findings and determinations, *on the basis of substantial evidence*, as to whether or not Developer has complied in good faith with the terms and conditions of this Agreement.” IDA § 10.04 (d) (emphasis added). Moreover, California law requires administrative agencies to issue findings in support of their adjudicatory decisions and requires that substantial evidence exists in the record to support those findings. *Topanga Assn. for a Scenic Cmty. v. Cty. of Los Angeles* (1974) 11 Cal. 3d 506, 515; *see also* Cal. Civ. Proc. Code § 1094.5. A court's inquiry will look to whether there was a prejudicial abuse of discretion. *Id.* An administrative order or decision that “is not supported by the findings, *or* the findings are not supported by the evidence” is an example of “abuse of discretion.” *Topanga Assn.* at 515 (emphasis in original) (internal citations omitted). The *Topanga* court went on to state: “abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.” *Id.*, *citing Zakessian v. City of Sausalito* (1972) 28 Cal.App.3d 794, 798. If findings are not supported by facts, they must be found to be invalid. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 522 (finding that impacts to air quality would be adequately mitigated lacked factual basis).

In this case, the Planning and Development Director was required to determine whether the Developer had complied with Section 2.02(a) of the IDA to: “(i) expend the funds for creek restoration elsewhere on the Gaviota Coast in the event that the [Dos Pueblos] Creek Restoration



Plan is not implemented within five (5) years of the Effective Date for any purpose, (ii) obtain the County's written consent as to the alternative creek restoration project prior to expending said funds, and (iii) complete the alternative creek restoration project with [sic] seven (7) years of the Effective Date." IDA § 2.02(a).

The Director's decision to issue a Compliance Determination for the Periodic Review for the period of March 27, 2020, to March 29, 2021 is not supported by substantial evidence because all or substantially all of the evidence cited in the March 30, 2021 letter, and in the other documents the County used to complete the review, pertains to actions taken related to restoration at Dos Pueblos Creek prior to the landowners there backing away. The compliance finding is based on assistance the Developer offered specific to the Dos Pueblos Creek Restoration Plan, which was determined to be unviable in mid-2019. There is no substantial evidence in the Director Determination, the documents it references, or in the Board Letter and its attachments showing the Developer provided "all reasonable assistance" to complete the *alternative restoration project* by April 8, 2021.

The evidence instead shows that the Developer waited to inform the County that restoration at Dos Pueblos Creek was not feasible until *nine months after* the April 8, 2019, deadline to complete a restoration on Dos Pueblos Creek had passed (*see* Letter from Stanley Lamport to Lisa Plowman, Director (Feb. 7, 2020), which left just over one year to secure County consent to the alternative restoration project, to secure the necessary permissions and/or permits to perform the restoration, and to complete the restoration work. The Developer's experienced counsel is well aware that projects undertaken in the County's Coastal Zone require a detailed review and approval process that can span many months, and compliance with conditions that can pause construction activities for extended periods during the rainy season and/or when sensitive species are present. The Developer's actions, however, show indifference to this reality and a lack of good faith effort to comply with the IDA's clear deadlines.

The only reference to the Developer action's during this 2020 review period is that "the Developer responded to inquiries from Santa Barbara County Planning and Development and made themselves available as a resource to CRCDD and SCHR." (Compliance Determination, p. 3). There is no evidence that the Developer ensured the following: (i) funds were expended on restoration on the Gaviota Coast, (ii) the County's written consent was obtained for an alternative creek restoration project, or (iii) the restoration project at an alternate site was completed within the seven-year deadline. As such, there is no evidence to support the Director's finding of compliance that the Developer provided "all reasonable assistance" to complete the alternative restoration project. The utter failure to complete the required alternative project demonstrates the Developer's failure to comply with the IDA.

Moreover, Ms. Plowman's letter indicates that CARCD, CRCDD, and SCHR had already expended \$268,000 of the \$300,000 (90% of the funding slated for creek restoration) by the time of her determination, creating a significant barrier to accomplishing any kind of alternative creek restoration project. (See Letter from Lisa Plowman, Director, to Stanley Lamport (March 30, 2021), at 2.) There is no evidence showing that the Developer offered any financial assistance to enable CRCDD and SCHR to pursue a viable alternative Gaviota Creek restoration project. The Creek Restoration Implementation Funding Agreement contemplates that "all reasonable

assistance” could include additional monetary contributions provided the Developer consents in writing. (Board Letter, Attachment 9, ¶ 3 (“SBRHC shall offer all reasonable assistance to accomplish this outcome, provided that such assistance shall not include further monetary contributions to CARCD or any third-parties unless agreed to in writing by SBRHC.”) Given the clear lack of adequate funding to plan, implement, and complete an alternative creek restoration project, the Developer should have provided further monetary assistance in order to offer reasonable assistance to aid in the accomplishment of its restoration obligation under the IDA.

The Board Letter takes the position that the “IDA does not require the Developer to complete an alternative creek restoration project by April 8, 2021, to remain in good faith compliance with the terms of the IDA” and that providing “all reasonable assistance” to complete the restoration work is sufficient (Board Letter, pp. 7-8). Discussed above in the context of IDA interpretation, the purpose of the IDA was to require completion of a creek restoration project. However, even assuming the Board Letter is correct that the question is whether the Developer provided all reasonable assistance to complete the restoration work, the Director’s finding of compliance is still deficient.

**V. Remedies under the Law and IDA Are Available to the Board to Enforce the Terms of the Contract.**

A development agreement is an enforceable contract between a municipality and a developer. *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal. App. 4th 435, 442. Accordingly, general contract principles, including “material breach” and “substantial performance” govern the IDA. For a breach of contract to be material, it must “go to the root” or “essence” of the agreement between the parties or defeat the “fundamental purpose of the contract.” *See* 23 Williston on Contracts § 63:3 (4<sup>th</sup> ed.) (2020); *also see Karz v. Department of Professional and Vocational Standards* (1936) 11 Cal.App.2d 554, 557; *also see Wylar v. Feuer* (1978) 85 Cal.App.3d 392, 404. Using the contract law test for material breach, the creek restoration project was clearly the “essential” and “fundamental” benefit to the public and the County in the IDA. Without a completed restoration project by the deadline, as described in the IDA, that sole benefit of the bargain to the public fails, and the Developer and its contractor are in breach of the agreement.

Moreover, general contract law principles also provide a remedy for third party beneficiaries of a contract in certain circumstances, although the County has its own administrative remedies available to it under the IDA’s language.

**A. As a Third Party Beneficiary, the County Has the Right to Enforce the Contract Between the Developer and its Contractor.**

In the Board Letter, Staff states that the County is not a party to the contract between the Developer and the contractor it hired to complete creek restoration work (CARCD),<sup>12</sup> and CARCD’s obligation to implement the creek restoration work is beyond the scope of the County’s annual Periodic Review of the Developer’s good faith compliance with the IDA. The

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<sup>12</sup> Board Letter at 5.

result of this interpretation would be that the County has no ability to ensure that any creek restoration actually occurs on the Gaviota Coast, in spite of clear intent in the IDA that it does. Such a position in and of itself would nullify the IDA's provisions requiring the implementation of creek restoration, making the benefit of the bargain to the County in the IDA meaningless.

For over a century, "...virtually all American courts applying contract law principles have recognized that it is appropriate *under some circumstances* to permit an individual or entity that is not a party to a contract to bring an action to enforce the contract." *Goonewardene v. ADP, LLC* (2019) 6 Cal. 5th 817, 828 (emphasis in original) (internal citations omitted). Under the second Restatement of Contracts, whether a third party can enforce a contract turns on the question of whether the "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the [contracting] parties." *Id.* at 829, citing Rest.2d Contracts § 302(1).

Under California's third party beneficiary doctrine, a third party may be entitled to bring a breach of contract action against one party to a contract if the third party establishes the following: 1) that the third party is likely to benefit from the contract, 2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and 3) that permitting the third party to bring its own breach of contract action is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. *Id.* at 830. With regard to this last element, the California Supreme Court made clear that the contracting parties are not required to actually consider remedies during contract negotiation, but allowing a third party to bring the proposed breach of contract action must still be consistent with the contract's objectives and the contracting parties' reasonable expectations. *Id.*

Here, the County (and, in turn, the public) meets the first element because it was the party meant to benefit from the substance of the contract between the Developer and CARCD, with its central goal to obtain a completed creek restoration project, either at Dos Pueblos Creek or an alternative site. (See IDA § 2.02(a).) Secondly, the "motivating purpose" of the contract between the Developer and CARCD was to complete creek restoration to benefit the County, a third party. The IDA clearly contemplates the completion of a restoration project as "the motivating purpose" and primary benefit to the County in the bargain. The third element is met because the enforcement of the terms of the contract between the Developer and CARCD (i.e., a completed creek restoration project) would be "consistent with the objectives of the contract and reasonable expectations of the contracting parties." Without the ability to enforce the contract, for whom it is the sole beneficiary, the County is left with a meaningless IDA with the Developer that cannot be enforced to obtain the substantive benefit of the bargain of the IDA itself.

**B. The County Has the Authority to Remedy the Failure to Complete the Creek Restoration Project Under the Terms of the IDA.**

In addition to the remedy provided to the County under contract law, California Government Code Section 65864 lays out the procedures for modifying, terminating, or canceling a development agreement. Cal. Gov't Code § 65864 *et seq.* Under that law, the Board may modify or terminate an agreement if it finds, "on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with terms or conditions

of the agreement.” Cal. Gov’t Code § 65865.1. The Board must provide notice in order to amend or cancel any portion, and must hold a public hearing. Cal. Gov. Code §§ 65868, 65867.

Mirroring that law, the IDA itself contains procedures for declaring a default (breach) or terminating the agreement. It provides that any failure by a party to perform a duty under the IDA, if it remains uncured for thirty days after notice of such failure from the other party, is a default. IDA § 10.01. When a default occurs, the non-defaulting party may institute legal proceedings to enforce the agreement or, if there is a material default, terminate the agreement. *Id.*; see also IDA §10.02.

As discussed above, the Director’s Determination was not based on substantial evidence of good faith compliance with the terms of the IDA because after the restoration project at Dos Pueblos Creek became infeasible, the Developer did not notify the County until nine months after the deadline had passed for completion of a project at that location. Furthermore, there is scant evidence in the record of the Developer taking any actions to offer reasonable assistance in furtherance of creek restoration at an alternative site, and *no* evidence that an alternative creek restoration project was approved by the County or completed within the required seven years, as required by the IDA, nor did the Developer offer additional funding, which was clearly needed to effectuate an alternative creek restoration project. IDA § 2.02(a).

The remedy we seek on appeal is that the Board of Supervisors find that the Director’s Determination is not supported by the evidence. Consequently, the Board should find that the Developer has failed to comply with the IDA and should give notice of its intent to terminate the IDA. IDA § 10.04(d). The Board should then hold a hearing to review the performance under the IDA to determine whether there is substantial evidence that a material default has occurred, and if so, the Board should terminate the agreement. IDA § 10.02.

## **VI. Conclusion and Request for Relief**

The October 21, 2008, IDA clearly contemplated that the public would benefit from a creek restoration on the Gaviota Coast in exchange for vesting of development rights for the Developer. Indeed, that was *the* central benefit of the agreement to the County and public. The IDA included firm deadlines for completion of a creek restoration project, whether at Dos Pueblos Creek or an alternative site, providing extra time for completion of a restoration project at an alternative site, if restoration on Dos Pueblos Creek proved infeasible. The deadline for completion of that project was April 8, 2021, which has now passed.

The Director’s Determination acknowledges that a creek restoration project is still required (Board Letter, Attachment 2 at 5), yet in finding that the Developer is in good faith compliance with the IDA and that the County may not enforce the terms of the contract between the Developer and its contractor, the County is left in an untenable position with virtually no recourse to actually obtain any kind of creek restoration on the Gaviota Coast.

Because the Developer did not offer reasonable assistance as it pertains to the alternative creek restoration, once Dos Pueblos Creek was deemed infeasible, the Director’s Compliance

Determination of March 30, 2021 was not based on findings supported by substantial evidence and was an abuse of discretion.

Therefore, we request the Board of Supervisors find there is no evidence to support a determination of compliance, and direct staff to seek to terminate the agreement with the Developer.

Sincerely,



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