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21 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
22 COUNTY OF SANTA CLARA

23 EDEN HOUSING, INC., SUMMERHILL  
24 HOMES, LLC and GROSVENOR USA  
25 Limited,

26 Petitioners,

27 v.

28 TOWN OF LOS GATOS, and DOES 1-V,

Respondents.

CASE NO. 16CV300733

**OPENING BRIEF IN SUPPORT OF  
PETITIONERS' VERIFIED PETITION  
FOR WRIT OF MANDATE**

[Code of Civil Procedure §§ 1085, 1094.5;  
Government Code §§ 65580 et seq. (Housing  
Element Law), 65589.5 (the Housing  
Accountability Act), 65915-65918 (Density  
Bonus Law)]

**Date Filed:** October 6, 2016

**Courtroom:**

**Judge:**

**Trial Date:** March 27, 2017

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1     **I.     INTRODUCTION**

2           California has suffered from a severe housing crisis for more than four decades. In recent  
3 years, the problems resulting from the housing shortage “have become more severe and have  
4 reached what might be described as epic proportions in many of the state’s localities.”  
5 (*California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 441 (“*CBIA*”).) One  
6 of the most significant causes of the housing shortage is local opposition, manifested through  
7 political pressure, to any new housing development. In response, the California Legislature has  
8 enacted a series of laws intended to alleviate the crisis and prevent denial of housing projects  
9 based on local opposition, including the Housing Element Law, the Housing Accountability Act  
10 and the Density Bonus Law.

11           The Town Council of Los Gatos defied each of these State laws by refusing to approve  
12 Petitioners’ application for a new housing development. The Town underwent a complex,  
13 public, multi-year process culminating with the approval and adoption of the North 40 Specific  
14 Plan in June 2015. The North 40 Specific Plan sets forth specific *objective* standards and criteria  
15 for development of the North 40, an approximately 44-acre mostly undeveloped area within the  
16 Town.

17           The Town’s Housing Element as well as State law requires that any application that  
18 complies with the *objective* standards of the North 40 Specific Plan (which also provides the  
19 zoning for the area) *must* be approved. Petitioners’ application proposes developing  
20 approximately 20.7 acres of the North 40 with 320 residential units and neighborhood-serving  
21 retail stores and restaurants. Forty-nine of the units would be designated for seniors and made  
22 affordable to Very Low Income persons (*i.e.*, those earning less than 50% of area median  
23 income).

24           Petitioners’ application complies with every objective standard of the North 40 Specific  
25 Plan. In fact, by March 2016, the Town’s Planning Staff, based on its expert review and that of  
26 multiple Town advisory committees and consultants retained by the Town, determined that the  
27 Project complies with all objective standards under the Town’s General Plan and the North 40  
28 Specific Plan. Therefore, the Town Council was obligated by State law to approve the Project.

1 After Petitioners erected story poles illustrating the Project layout, however, strong public  
2 opposition formed against the density mandated by the North 40 Specific Plan. Bowing to this  
3 public opposition, the Town denied the Project.

4 Because of this refusal to follow its mandatory duty under State law to approve the  
5 Project, the necessary and appropriate remedy is a writ of mandate directing the Town not only  
6 to rescind its denial, but also to approve the Project. (*See* Code Civ. Proc., §§ 1094.5, subd. (f);  
7 1085, subd. (a).)

## 8 **II. BACKGROUND FACTS**

### 9 **A. The State Enacts Housing Laws to Combat California's Housing Crisis: the** 10 **Housing Element Law, the Housing Accountability Act, and the Density** 11 **Bonus Law**

12 The California Legislature has declared that "the availability of housing is of vital  
13 statewide importance," and that providing the necessary housing supply "requires the  
14 cooperative participation of government and the private sector in an effort to expand housing  
15 opportunities and accommodate the housing needs of Californians of all economic levels."  
16 (Gov. Code, § 65580, subds. (a), (b).)<sup>1</sup> Beginning in approximately 1980, the Legislature  
17 enacted a series of laws to facilitate and encourage the construction of housing, including the  
18 three laws at issue in this case: the Housing Element Law (§ 65580 *et seq.*), the Housing  
19 Accountability Act (§ 65589.5), and the Density Bonus Law (§§ 65915-65918). (*See CBIA,*  
20 *supra*, 61 Cal.4th at p. 445.)

21 The Housing Element Law compels each city in the State to provide its fair share of  
22 housing to maximize housing opportunities throughout California. Each city must designate in  
23 the housing element of its general plan sufficient land suitable to accommodate its fair share of  
24 the region's housing needs as determined by the applicable regional governmental organization,  
25 in this case the Association of Bay Area Governments. (§ 65582, subd. (b).) If the city cannot  
26 accommodate its regional housing need on sites designated as available, the city must also  
27 submit, for review and approval by California's Department of Housing and Community

28 <sup>1</sup> All section references herein are to the California Government Code unless otherwise indicated.

1 Development (“HCD”), a multiyear schedule of actions it will take to make additional sites  
2 available—such as zoning land for by-right development—to accommodate its share of regional  
3 housing needs. (§ 65583, subd. (c)(1). *See also CBLA, supra*, 61 Cal.4th at p. 445.)

4 The Legislature enacted the Housing Accountability Act (“HAA”) to ensure that local  
5 opposition does not prevent adequate housing from being built. (*See* § 65589.5.) The HAA  
6 imposes strict limitations on the ability of a city to deny a housing project that complies with its  
7 planning and zoning. The statute imposes “mandatory conditions” limiting a local government’s  
8 discretion to deny housing development projects. (*North Pacifica, LLC v. City of Pacifica*  
9 (N.D.Cal. 2002) 234 F.Supp.2d 1053, 1059.) Specifically, a local government must approve a  
10 housing project that complies with the applicable land use plans and zoning unless it makes  
11 findings supported by substantial evidence that the project would have “specific adverse  
12 impacts” as defined under the statute. The HAA is thus colloquially known as the “‘Anti  
13 NIMBY’ [Not in My Back Yard] law.” (*Honchariw v. County of Stanislaus* (2011) 200  
14 Cal.App.4th 1066, 1068.)

15 Finally, the Density Bonus Law mandates that local governments provide a density  
16 bonus, resulting in an increase in the total number of allowable residential units, on a progressive  
17 scale based on the percentage of affordable housing units included in a housing project. (*See* §  
18 65915, subd. (b)(1); *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1339.) The  
19 statute provides no basis for denying this incentive to qualifying projects, such as this one.<sup>2</sup>

#### 20 **B. Description of the North 40**

21 The North 40 is a 44-acre, largely undeveloped area within the Town of Los Gatos  
22 bounded by Los Gatos Boulevard to the east, State Route 17 to the west, Lark Avenue to the  
23 south, and State Route 85 to the north. (AR000042; AR000559; AR002472; AR002615; *see*  
24 Context Map, AR002614, attached hereto as Appendix A.) The North 40 is one of the largest and  
25 last sites providing opportunity for infill development within the Town. (AR002472.) As a

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26 <sup>2</sup> Under the Density Bonus Law, the Project would be entitled to the maximum 35% density  
27 bonus (*i.e.*, 35% more total units) for providing 11%, or 30 units, of Very Low Income housing.  
28 (§ 65915, subd. (f)(2).) The Project, however, substantially exceeds this minimum threshold by  
supplying 49 such units, plus one Moderate Income unit (for the manager).

1 result, the North 40 has been the subject of discussion for many years in Town planning  
2 documents, including the Town's General Plan, North 40 Specific Plan, and Housing Element.  
3 (See AR000001 [General Plan]; AR002595 [Specific Plan]; AR002336 [Housing Element].)

4  
5 **C. The Town Adopts its General Plan and the North 40 Specific Plan to Allow  
6 for Development of the North 40**

7 In 2010, the Town adopted its 2020 General Plan, which specifically allows up to 750  
8 residential units to be built on the North 40. (AR000042.) The General Plan requires the  
9 preparation of a Specific Plan for the North 40 in order to set forth objective standards for  
10 development. (AR000055.)

11 To implement the General Plan requirement, in 2011 the Town Council formed the North  
12 40 Specific Plan Advisory Committee, consisting of members of the Town Council, Planning  
13 Commission and the community. (AR002597; AR003756.) The Advisory Committee held over  
14 17 public meetings between March 2011 and October 2013, followed by two Planning  
15 Commission public hearings and eight Town Council public hearings. (AR002621; AR003756.)  
16 Petitioners actively participated throughout this lengthy process. (See, e.g., AR006533-34;  
17 AR009729; AR010111-12.) In January 2015, the Town Council certified the Environmental  
18 Impact Report ("EIR") for the North 40 Specific Plan and then adopted the Specific Plan in June  
19 2015. (AR002266; AR002589.) Neither was legally challenged.

20 The North 40 Specific Plan ("Specific Plan") divides the North 40 into three planning  
21 districts: (1) the Lark District, located at the northwest corner of Los Gatos Boulevard and Lark  
22 Avenue, allows for a mix of residential, multi-family housing types; (2) the Transition District,  
23 located in the central portion of the North 40, provides a transition area between the Lark and  
24 Northern districts; and (3) the Northern District, bordered on two sides by Highways 17 and 85,  
25 is designated for commercial and entertainment uses (including hotel and office); residential uses  
26 are allowed but heavily constrained (e.g., only above commercial spaces and subject to a  
27 maximum building height of 35 feet). (AR002629-31.) Various chapters of the Specific Plan  
28 address Land Use Goals and Policies; Design Guidelines; Circulation and Streetscape;  
Infrastructure and Public Facilities; and Plan Implementation, Phasing and Administration. Each

chapter includes general, *subjective* statements of goals and policies (*e.g.*, encouraging “the look and feel of Los Gatos”) followed by certain statements of *objective* standards for implementing those goals and policies (*e.g.*, building heights, percentage open space requirements and the like).

**D. The Town’s Housing Element Requires By-Right Development on the North 40**

Concurrent with the development of the North 40 Specific Plan, the Town began revising the Housing Element to its General Plan. The revision process begins with the Association of Bay Area Governments identifying a Regional Housing Needs Allocation (“RHNA”) for an eight-year period, and allocating the RHNA to its member communities. (AR002418). Each community must then adopt plans that will allow for it to meet its RHNA in a specific time frame. (*Ibid.*) The RHNA for the Town is 619 total housing units for families of various income levels. (*Ibid.*) The State’s Housing Element Law required that the Town designate in its 2015-2023 Housing Element sites that could successfully accommodate the Town’s RHNA number.

The Town formed a Housing Element Advisory Board made up of Town Council members, Planning Commissioners, General Plan Committee members, and residents appointed by the Town Council. (AR005124; AR002340.) After more than 15 meetings and substantial public input, in September 2014, the Town submitted its draft housing element to HCD for review and approval. (AR002343-45; Stipulation Regarding Additional Records for Consideration at Trial (“Stipulation”), Exh. A, p.1.) HCD, however, rejected the draft and required the Town to designate sites to be rezoned for “by-right” housing development at a minimum density of 20 units per acre. (Stipulation, Exh. A, p. 5.)

The Town, in response, selected the North 40 for this by-right development. (AR005125-26.) The Town’s Housing Element adopted in May 2015 thus includes the requirement that the Town prepare a Specific Plan for the North 40 that rezones the North 40 for by-right residential development of a minimum of 270 units (plus density bonus units). (AR002368.) HCD approved the Town’s Housing Element expressly conditioned, however, on the Town’s commitment to rezone the North 40 for this by-right residential development. (AR002587-88.) The Specific Plan adopted by the Town in June 2015 implements this zoning commitment. (See AR002589.)

1           **E.       The Project Proposes Housing that Fully Complies with all Requirements of**  
2           **the General Plan and Specific Plan**

3           In the Project, Petitioners propose to develop 320 residential units of diverse types,  
4 including 49 Very Low Income (affordable to those earning 50% of area median income, see  
5 AR007158), senior affordable apartments to be built by Eden Housing, an affordable housing  
6 specialist. In addition, the Project includes 180 garden cluster and rowhomes, 80 courtyard  
7 condominiums, two live-work lofts and eight one and two-bedroom apartments above retail.  
8 (AR003790-91; AR004295.) The Project also proposes 59,320 square feet of neighborhood-  
9 serving retail stores and restaurants to be located in the Transition District, anchored by a  
10 16,380-square-foot specialty market. (AR004295.) The Project would include a Central  
11 Community park and a network of community gardens and orchard trees, linked together by  
12 paseos and a multi-modal path. (AR004295-97.) The Project contains 39% of open space area,  
13 far exceeding the Specific Plan's requirement of 30%. (AR004296; *see generally* Phase I  
14 Building Key Plan, AR003790, an original copy attached hereto as Appendix B.)<sup>3</sup>

15           The Project complies with all objective standards under the Town's General Plan and the  
16 Specific Plan. (AR009716-27 [Matrix illustrating Project's compliance with Specific Plan];  
17 AR010028-33 [Matrix illustrating Project's compliance with General Plan]; AR003754,  
18 AR003769-71, AR005574, AR005583, AR007160 [Planning Staff reports to Planning  
19 Commission and Town Council].) Consequently, the only public processes required were  
20 architecture and site review and a vesting tentative map, and under State law the Town had a  
21 mandatory duty to approve the Project.

22       ///

23       ///

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24       <sup>3</sup> The Project also provides several additional public benefits. Petitioners voluntarily agreed to  
25 construct over \$10 million in off-site transportation improvements, including: (1) improvements  
26 to the intersection of Lark Avenue and Los Gatos Boulevard; (2) entry ramps to Lark/Highway  
27 17; and (3) a bicycle path over the Highway 17 Bridge on Lark Avenue. (AR005295-97;  
28 AR007150.) Moreover, Petitioners entered into an agreement with the Los Gatos Union School  
District whereby, in addition to paying statutorily mandated fees, Petitioners agreed to: (1)  
acquire two acres of land for the expansion of school facilities; or (2) pay an additional \$23,500  
per market rate dwelling unit. (AR002273-74.)

1           **F.       The Town's Administrative Review and Unlawful Denial of the Project**

2                   **1.       The Town's Development Review Confirms That the Project**  
3                   **Complies With All Objective Requirements of The General Plan and**  
4                   **the Specific Plan**

5           Petitioners submitted their application on November 14, 2013. (AR003773; AR011466.)  
6           Between October 2015 and February 2016, the Project came before the Town's Conceptual  
7           Development Advisory Committee (AR003040, AR003091), Historic Preservation Committee  
8           (AR003138), Bicycle and Pedestrian Advisory Committee (AR003499) and Transportation and  
9           Parking Committee (AR003510) (and later came before the Community and Senior Services  
10          Commission (AR005286), Arts and Culture Commission (AR006788) and Parks Commission  
11          (AR005100)). Petitioners made many revisions to the Project in response to public input, as well  
12          as recommendations from the Town's Staff and consultants. (*See e.g.*, AR004369; AR009711;  
13          AR011044.)

14          On March 30, 2016, Planning Staff submitted to the Planning Commission its report,  
15          which contained a detailed analysis of the Project's consistency with the General Plan and  
16          Specific Plan. Staff concluded: "Based on the analysis provided above, the proposed  
17          applications meet the technical requirements of the North 40 Specific Plan, the goals and policies  
18          of the General Plan, and the Town's Housing Element." (AR003770.) The Town also retained a  
19          consulting architect, Cannon Design Group, to review the Project. Cannon reported that "[t]he  
20          overall plan has remained consistent with the North 40 Specific Plan," and that Cannon has "no  
21          other recommendations for further changes." (AR004373.)

22          The Project encountered little public opposition until Petitioners were required to install  
23          hundreds of "story poles" pursuant to Town policy. (See AR003771). By May 2016, Petitioners  
24          had installed more than 500 story poles with orange netting, which remained in place for  
25          approximately three months. (AR005373-74, AR005376.) The story poles generated  
26          neighborhood opposition to the density of the Project, even though opponents generally  
27          acknowledged it was consistent with the objective standards of the Specific Plan. (*See, e.g.*,  
28          AR005944 ["We are a town, not a city. . . . I have never felt good about the North 40. Now that

1 I see the orange plastic as I drive by on Hwy. 17, I am upset. We have NetFlix to the right and  
2 the North 40 to the left on 17. Our town does not need this. Don't make a forever mistake."].)

3 The Town delayed its consideration of the Project to hold a Joint Special Study Session  
4 with the Town Council, Planning Commission and local school districts regarding the Specific  
5 Plan. (AR005084; AR005097-98.) During the Joint Study Session, the Town's Attorney stated  
6 in response to comments raised regarding the Project's density that the Town may not reduce the  
7 number of proposed units because the Specific Plan authorizes "by-right" development of the  
8 requested units, pursuant to the Housing Element and State law. (AR005232-33.) He explained  
9 further that the Town's discretion in reviewing the Project is limited to confirming its  
10 compliance with Specific Plan standards. (*Ibid.*) Disregarding these instructions, in July 2016  
11 the Planning Commission recommended denial of the Project based on entirely *subjective* criteria  
12 rather than on *objective* standards. (AR006506; AR006691-94; AR007154.)

## 13 2. The Town Council Denies the Project for Purely Subjective Reasons

14 Planning Staff's report to the Town Council for the August 9, 2016 Council hearing  
15 restated Staff's conclusion that the Project complies with all applicable *objective* standards. Staff  
16 explained:

17 The proposed applications went through the Town's development review  
18 process, including review and evaluation by Planning, Building, and  
19 Engineering staff, referrals and evaluations by outside agencies, and review by  
20 the Town's Consulting Architect, Historic Preservation Committee (HPC), and  
21 Conceptual Development Advisory Committees (CDAC)... . [¶] **Based on the  
analysis in earlier reports, the proposed applications meet the technical  
requirements of the Specific Plan. These are: Development Capacity,  
Development Standards, and Design Guidelines.**

22 (AR007159-60, emphasis added.)

23 The Town Council heard extensive public testimony regarding the Project during  
24 hearings on August 9 and 11, 2016. (AR006865-7095; AR010103-264.) During the August 16  
25 Council hearing, Council members moved unsuccessfully both to approve and to deny the  
26 Project. Council Members Jensen and Rennie voted to approve the Project. (AR010549.)  
27 Council Member Jensen stated that the Council was legally required to approve the Project  
28 because it complied with all *objective* standards under the Specific Plan. (AR010592.) Council

1 Member Rennie concurred, adding that the Town would be sued – and would lose the case – if  
2 the Council denied the Project. (AR010580-81.) He proposed, however, approving the Project  
3 subject to nine modest design changes for ministerial approval by the Planning Director.  
4 (AR010549-550; AR010585-90.) This motion was not supported by Council Members Spector,  
5 Sayoc and Leonardis (collectively, the “Majority”) (AR010549-50; AR010601-02.)

6 Council Member Spector then moved to deny the Project based on *subjective* criteria  
7 rather than *objective* standards. (AR010550; AR010603.) She stated that the Project is  
8 inconsistent with “the look and feel [of the Town] based upon what I ... have seen what the  
9 Town looks like.” (AR010577). Council Member Sayoc added that the “biggest reason” why  
10 she could not support the Project was because the “intent” of the Specific Plan was, “at least on  
11 my part, that [the housing] was going to be spread out ... .” (AR010594-95.) Council Member  
12 Spector’s motion, however, also failed because Council Member Leonardis stated that he needed  
13 more information before he could decide. (AR010596-99.) The Council therefore adopted a  
14 motion requesting, *inter alia*, opinions from outside legal counsel and the HCD, and continued  
15 the item to September 1. (AR010550-51; AR010605-12.)

16 On August 25, HCD responded to the Town Council by stating that the Project is subject  
17 to “by-right” development and met the eligibility requirements for the requested density bonus.  
18 (AR011201-02.) The following day, the Town’s outside counsel’s letter to the Town Council  
19 was equally supportive of the Project, rejecting each challenge to the Project raised by certain  
20 Project opponents and concluding that the Project satisfied all Density Bonus Law requirements.  
21 (AR011166-74.)

22 Planning Staff’s report to the Council for the September 1 hearing reminded the Council  
23 of the legal constraints on its review of the Project, particularly in light of the HCD’s and outside  
24 counsel’s responses. Staff explained: “As has been continually stated, the Town can only modify  
25 or deny the project based upon its determination that the application does not comply with  
26 objective North 40 Specific Plan standards and criteria. This conclusion is confirmed by the  
27 correspondence from HCD . . . .” (AR010938.) However, the Majority disregarded Staff’s  
28

1 admonition, along with the advice of the Town's Attorney, the HCD, and the Town's outside  
2 counsel.

3 During the September 1 Council hearing, Council Member Sayoc moved to deny the  
4 Project, supporting her motion with three reasons – none of which are based on any failure of the  
5 Project to comply with any *objective* standard under the Specific Plan. First, she stated that she  
6 has “significant issues” with the layout which “does not make sense to me.” (AR010898-99.)  
7 Second, she stated that in her mind there is ambiguity in the Specific Plan regarding whether the  
8 applicants are entitled to develop all of their proposed residential units within the Lark and  
9 Transition Districts (despite their clear right to do so under the Specific Plan, discussed *infra* pp.  
10 16-17, and the fact that all residential allocations are not exhausted by the Project). (AR010899.)  
11 Finally, she questioned whether a better project may come along. (AR010900.) She stated:  
12 “This may be the only one, but I hesitate to award a project with the majority of the housing  
13 allocation that could disproportionally hurt chances of a better site design in the future.” (*Ibid.*)  
14 The Town Council then by a 3-2 vote denied the Project. (AR010925.)

15 Joining Council Members Spector and Sayoc to deny the project, Council Member  
16 Leonardis also expressed opposition based on *subjective* criteria rather than *objective* standards.  
17 (See AR010816.) His principal objection to the Project was that the Phase 1 Project would  
18 develop only a part of the North 40. He stated: “You had a future promise of commercial,  
19 perhaps a hotel and some other things, but right now what we have is kind of a housing  
20 development, and we have uncertainty moving forward what will actually go in these other  
21 spots,” and “I don’t like that uncertainty.” (AR010885-86.) He ignored the fact that the Specific  
22 Plan expressly states: “It is anticipated that the Specific Plan will be implemented over time and  
23 in more than one phase.” (AR002749.)

24 On September 6, 2016, the Town Council adopted Resolution 2016-046 (the  
25 “Resolution”) denying the Project. (AR011466-73.) The Resolution, however, contained no  
26 findings under the Town's Housing Element, the HAA or the Density Bonus Law, and no  
27 finding that the Project failed to comply with any *objective* standards under the Specific Plan.  
28 Petitioners timely filed this action on October 6, 2016.

1     **III.     ARGUMENT**

2             **A.     Standard of Review**

3             The Court’s review in this case “extends to ‘whether the [Town] has proceeded without,  
4     or in excess of jurisdiction; whether there was a fair trial; and whether there was a prejudicial  
5     abuse of discretion. Abuse of discretion is established if the [Town] has not proceeded in the  
6     manner required by law, the order or decision is not supported by the findings, or the findings are  
7     not supported by the evidence.’” (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329,  
8     1338, *citing* Code Civ. Proc., § 1094.5, subd. (b).)<sup>4</sup>

9             In determining whether a local agency’s actions conform to the procedures required by  
10     law, courts apply the applicable statute or ordinance at issue to the agency’s actions. (*Bright*  
11     *Development v. City of Tracy* (1993) 20 Cal.App.4th 783.) Courts do not grant deference to a  
12     city’s interpretation of State law. (*County of San Diego v. State of California* (1997) 15 Cal.4th  
13     68, 109.)

14                     **1.     The Housing Element Law Requires Approval “By Right” of the**  
15                     **Proposed Housing on the North 40**

16             The Town’s Housing Element includes mandatory requirements that the Town rezone the  
17     North 40 to authorize by-right development of housing projects that comply with *objective*  
18     Design Guidelines. The HCD required the Town to rezone the North 40 for multi-family by-  
19     right housing for a minimum of 270 units (not counting density bonus units) as a condition to  
20     certifying the Town’s Housing Element. (AR002587.)<sup>5</sup> The Town’s Housing Element thus  
21     states that after the Specific Plan is adopted, implementing the required zoning: “[O]wner

22     <sup>4</sup> Petitioners’ claims alternatively sound in ordinary mandamus pursuant to Code of Civil  
23     Procedure section 1085 in that the Town has a mandatory duty to approve the Project. Sections  
24     1085 and 1094.5, subd. (f) are identical, however, in authorizing this court to issue a writ of  
25     mandate to compel the performance of an act “which the law specially enjoins.”

26     <sup>5</sup> Section 65583.2, subd. (i) of the Housing Element Law states in relevant part that: “‘use by  
27     right’ shall mean that the local government’s review of the owner-occupied or multifamily  
28     residential use may not require a conditional use permit, planned unit development permit, or  
   other discretionary local government review or approval that would constitute a ‘project’ for  
   purposes of [CEQA]. Any subdivision of the sites shall be subject to all laws, including, but not  
   limited to, the local government ordinance implementing the Subdivision Map Act. A local  
   ordinance may provide that ‘use by right’ does not exempt the use from design review.  
   However, the design review shall not constitute a ‘project’ for purposes of [CEQA] ... .”

1 occupied or multiple family development will be by-right as defined by not requiring a  
2 conditional use permit or other discretionary approval; however, design review according to  
3 **objective standards** contained in the Specific Plan can occur ... ." (AR002368, emphasis added.)

4 Under the Town's Housing Element, **if a proposed housing project complies with the**  
5 **objective criteria of the Town's Design Guidelines, the Town must approve it.** The Town's  
6 Housing Element states:

7 The Specific Plan would provide certainty regarding **objective** criteria in the  
8 form of development standards and design guidelines that would be  
9 implemented through "by right development" in the consideration of  
10 Architecture and Site applications. This process involves site and architectural  
11 review and if a proposal meets the **objective** criteria in the Design Guidelines,  
12 **then the project is approved . . . .**

13 (AR002357, emphasis added.) The plain meaning of "**objective** standard" is: "A standard that is  
14 based on factual measurements . . . ." (<http://thelawdictionary.org/objective-standard/>)  
15 California courts similarly have described **objective** standards as fixed, measurable or  
16 quantifiable.<sup>6</sup>

17 **2. The Housing Accountability Act Requires Approval of the Project**  
18 **Because it Conforms to the General and Specific Plans (And the Town**  
19 **has the Burden of Proof to Show Otherwise)**

20 The HAA similarly mandates that if a proposed housing project complies with the  
21 **objective** standards of the applicable planning and zoning, the local agency must approve the  
22 project unless it makes findings supported by substantial evidence that it would cause "specific  
23 adverse impacts," as narrowly defined in the statute. Moreover, in any action challenging the

24 <sup>6</sup> (See, e.g., *Sierra Club v. Napa County Bd. of Supr's.* (2012) 205 Cal.App.4th 162, 180  
25 [describing city ordinance conditions for a lot line adjustment that the parcel contain a minimum  
26 of 2,400 square feet, access rights to a public street and be a minimum of 25 feet wide and deep  
27 as "**objective criteria**"; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d  
28 259, 277 [describing city ordinance conditions for a building permit establishing a  
"comprehensive set of precise, quantified criteria – i.e., setbacks must be at least 15 feet,  
buildings may be no more than 3 stories, and no higher than 50 feet" as satisfying CEQA's  
ministerial definition of fixed standards and **objective** measurements]; *Chula Vista v. Pagard*  
(1981) 115 Cal.App.3d 785, 797 [describing "**objective** standards" for measuring overcrowding  
as including "across-the-board minimum floor space per person requirement, per person quantum  
of open space, persons per a bedroom or bathroom ..."].)

1 validity of a city decision disapproving a housing project, the city bears the burden of proof that  
2 its decision has “conformed to all of the conditions specified in [the HAA].” (§ 65589.6.)

3 Section 65589.5, subsection (j), of the HAA applies to the Project<sup>7</sup> and states:

4 (j) When a proposed housing development project complies with applicable,  
5 *objective* general plan and zoning standards and criteria, including design  
6 review standards, in effect at the time that the housing development project’s  
7 application is determined to be complete, but the local agency proposes to  
8 disapprove the project or to approve it upon the condition that the project be  
9 developed at a lower density, the local agency shall base its decision regarding  
10 the proposed housing development project upon written findings supported by  
11 substantial evidence on the record that both of the following conditions exist:

12 (1) The housing development project would have a specific, adverse impact  
13 upon the public health or safety unless the project is disapproved or approved  
14 upon the condition that the project be developed at a lower density. As used in  
15 this paragraph, a “specific adverse impact” means a significant, quantifiable,  
16 direct, and unavoidable impact, based on *objective*, identified written public  
17 health or safety standards, policies or conditions as they existed on the date the  
18 application was deemed complete.

19 (2) There is no feasible method to satisfactorily mitigate or avoid the  
20 adverse impact identified pursuant to paragraph (1), other than the disapproval  
21 of the housing development project or the approval of the project upon the  
22 condition that it be developed at a lower density.

23 (Emphasis added.)

24 Subsection (j) was amended in 1999 to add the term “*objective*” in the first clause, and  
25 the terms “quantifiable, direct” and the clause “based on *objective*, identified written public  
26 health or safety standards, policies, or conditions as they existed on the date the application was  
27 deemed complete.” (See *Honchariw, supra*, 200 Cal.App.4th at pp. 1076-77.) These changes  
28 strengthened the law “by taking away an agency’s ability to use what might be called a  
‘subjective’ development policy . . . to exempt a proposed housing development project from the  
reach of subdivision (j).” (*Ibid.*)

---

<sup>7</sup> The Project falls under the statute’s definition of housing development project because it is a  
“Mixed-use development consisting of residential and nonresidential uses in which  
nonresidential uses are limited to neighborhood commercial uses...” (§ 65589.5, subd. (h)(2).  
See also AR010131-32.)

1                                   **3.     The Density Bonus Law Requires the Project be Approved with the**  
2                                   **Requested Density Bonus**

3           The Density Bonus Law mandates that local governments “shall” provide qualifying  
4 applicants the density bonus authorized under the statute. (§ 65915, subd. (b).) The statute  
5 provides no basis for denying these incentives to qualifying projects. Subdivision (e) further  
6 provides: “In no case may a [Town] apply any development standard that will have the effect of  
7 physically precluding the construction of a development meeting the criteria of subdivision (b) at  
8 the densities . . . permitted by this section.” (§ 65916, subd. (e).)

9                                   **B.     The Town’s Denial Of The Project Violates Its Housing Element, the HAA**  
10                                  **and the Density Bonus Law**

11           The Town had a mandatory duty to approve the Project because it is consistent with the  
12 *objective* criteria of the Specific Plan, and because the Town did not, and cannot, find based on  
13 substantial evidence that the Project would have a “specific adverse impact” as defined under the  
14 HAA.

15           Notably, Planning Staff’s report to the Town Council on August 4, 2016 stated: “Based  
16 upon the Town’s Housing Element, the Town cannot require a Conditional Use Permit, Planned  
17 Unit Development Permit, or other discretionary review or approval for the applications. In  
18 addition, the applications are entitled to ‘by-right’ development. This means that the Town must  
19 only apply the *objective* standards found in the North 40 Specific Plan in its review, analysis and  
20 determination whether to approve or deny the applications.” (AR007156, emphasis added.)  
21 Planning Staff’s report continued: “[T]he Town cannot use subjective criteria and findings to  
22 condition or deny the Planning Applications.” (AR007156.) Disregarding this instruction, as  
23 well as similar admonitions from the Town’s Attorney, the Town’s outside counsel and the  
24 HCD, the Majority denied the Project based on purely *subjective* criteria.

25                                   **1.     The Town’s Denial Violates Its Housing Element**

26           The Town has a mandatory duty under its Housing Element to approve “by right” any  
27 proposed housing project in the North 40 that complies with the *objective* standards of the  
28 Specific Plan (AR002368, AR002372-73.) Because, as shown, the Project fully complies with  
the *objective* standards of the Specific Plan, and the Town made no findings to the contrary

1 (*infra* pp. 16-21), the Town clearly violated its mandatory duty under its Housing Element to  
2 approve the Project.

## 3                   2.       The Town's Denial Violates the HAA

4           The HAA also requires that the Town approve housing projects that comply with the  
5 *objective* standards of applicable planning and zoning requirements, unless it makes findings  
6 supported by substantial evidence demonstrating the project would cause "specific adverse  
7 impacts" as defined in the statute. (§65589.5, subd. (j); *North Pacifica, supra*, 234 F.Supp.2d at  
8 p. 1059 ["Section 65589.5(j) thus imposes mandatory conditions limiting the City's discretion to  
9 deny the permit."]) Moreover, the Town bears the burden in this action of proving that its  
10 decision "conformed to all of the conditions specified in Section 65589.5." (§ 65589.6.) The  
11 Town cannot satisfy this burden of proof because it neither considered nor made findings under  
12 the HAA, and because it denied the Project based on *subjective* criteria, despite the fact that it  
13 complies with all *objective* standards under the General Plan and Specific Plan. (*See infra* pp. 16-  
14 21.)

15           *Honchariw* is instructive. In that case, the court granted a developer's petition for writ of  
16 mandate setting aside the County's denial of a housing project where the County made no  
17 findings under subsection (j) of the HAA, but instead denied the project based on its alleged non-  
18 conformance with County Code provisions regulating subdivision of the Project's proposed lots.  
19 (*Honchariw, supra*, 200 Cal.App.4th at p. 1079.) The court held that the County's denial based  
20 on its local tentative map requirements "does not relieve the County from compliance with  
21 section 65589.5(j) if the threshold compliance standards of that statute are met and if the County  
22 denies approval for reasons other than compliance with 'applicable, *objective* general plan and  
23 zoning standards and criteria, including design review standards, in effect ... .'" (*Ibid.*, emphasis  
24 added.) Like the facts in *Honchariw*, the Town was not relieved from compliance with  
25 subsection (j) of the HAA because: (1) the Project complies with the threshold requirements of  
26 subsection (j); and (2) the Town denied the Project for *subjective* reasons rather than for  
27 "applicable, *objective* general plan and zoning standards and criteria."  
28

1                                   **3.       The Town’s Denial Violates the Density Bonus Law**

2           Petitioners are entitled to a 35 percent density bonus, increasing the maximum base  
3 density from 237 units to 320 units, because the Project includes 49 very low income senior  
4 housing units. (AR006282, AR007158; §65915, subd. (f)(2).) The Project provides many more  
5 Very Low Income units than required to qualify for the requested density bonus. (*See* § 65915,  
6 subd. (f)(2).) Under Section 65915, subdivision (a), local governments have “a mandatory duty”  
7 to provide qualifying applicants the density bonus incentives authorized under the density bonus  
8 statute. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 825.) The  
9 Town thus violated this mandatory duty in denying the Project.

10                                   **4.       The Council’s Purported Findings Relate Only to Subjective Factors;  
11                                   Thus, They Cannot Legally Support the Denial**

12           Although the Council’s reasons for denial were purely *subjective* and in response to  
13 neighborhood opposition, the Staff did propose findings that the Council adopted to attempt to  
14 justify the denial. But since, as the Staff advised the Council, the Project complied with all  
15 *objective* criteria under the General Plan and Specific Plan, none of the purported findings are  
16 based on objective criteria as required by the Housing Element Law and the HAA, nor are they  
17 supported by substantial evidence in the record. We respond to each of the Town’s legally  
18 insufficient findings denying the Project in turn below:

19           Finding a: The proposed project overly concentrates all of the residential units that can  
20 be built pursuant to the North 40 Specific Plan and the General Plan Housing Element on the  
21 southern portion of the North 40 Specific Plan area and is therefore inconsistent with Specific  
22 Plan Section 2.5; Standard 2.7.3; Policy 5.8.2; and the Residential Unit Size Mix and Table set  
23 forth on page 6-14. This negatively affects the site layout and disproportionately hurts the  
24 chances of better site design in the future. (AR011471.)

25           Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
26 not based on any *objective* standard. The Project proposes 193 residential units in the Lark  
27 District and 127 units in the Transition District, which thus allows for 45 additional units to be  
28 built in the future in the Northern District. (AR006500, AR006609.) The Specific Plan has no  
*objective* standard precluding this distribution of residential units or requiring any other  
distribution. The Town’s Community Development Director informed the Town Council of this  
precise fact during the Joint Study Session. (AR005165.) None of the Specific Plan provisions

1 cited in this finding even address, much less impose an *objective* standard regarding the location  
2 or distribution of residential units. Section 2.5 states the Specific Plan goal of offering a  
3 compatible mix of land uses, but does not discuss the location or distribution of residential units.  
4 (AR002636.) Standard 2.7.3 states that the Specific Plan area should accommodate a mix of  
5 residential product types, but it does not address the location or distribution of residential units.  
6 (AR002651-52.) Policy 5.8.2 discusses public schools, but also does not address the location or  
7 distribution of residential units. (AR002744.) The same is true regarding the Residential Unit  
8 Size and Table set forth on page 6-14. (AR002762.)

9  
10 Finding b: The proposed project is inconsistent with North 40 Specific Plan Section 2.3.1  
and its requirements for lower intensity residential uses in the Lark District. (AR011471.)

11 Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
12 not based on any *objective* standard. Section 2.3.1 states the land use policy that “[l]ower  
13 intensity residential and limited retail/office uses are envisioned” for the Lark District.  
14 (AR002629.) It provides no *objective* criteria for measuring “lower intensity.”

15 Nonetheless, the record demonstrates that the Project satisfies even this subjective policy.  
16 The Planning Staff supported its determination that the Project complies with all Specific Plan  
17 development standards by observing, *inter alia*, that development in the Lark District will be less  
18 intense than the maximum allowed under the Specific Plan and in comparison to the Transition  
19 District. Thus, while the Specific Plan only requires that at least 15% of Lark District buildings  
20 be two stories (with the rest being three stories), the Project has 29% (AR009716.); the Lark  
21 District provides 4.79 acres of open space (42.5%), whereas the Transition District provides 3.43  
22 acres (34.6%) (AR009712); lot coverage area of the Lark District at 29.4% is lower than the  
23 Transition District at 33.9% (AR009712); and the anticipated daily vehicular trip generation for  
24 the Lark District of 785 trips also is far less than the 3,034 anticipated daily trips for the  
25 Transition District (AR009712). Finally, the Project’s building heights in the Lark District are  
26 restricted to 25 feet and 35 feet, whereas the Transition District has 45-foot affordable housing  
27 over the Market Hall. (AR010483.)

1        Finding c: The proposed project buildings 18 through 27 are inconsistent with North 40  
2        Specific Plan policy requirement that the Lark District consist of lower intensity residential  
3        development with office, retail, personal services, and restaurants along Los Gatos Boulevard.  
4        (AR011471.)

5        Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
6        not based on any *objective* standard. To the extent the Town restates its “lower intensity”  
7        argument from finding b, Petitioners incorporate their response above. (*Supra* p. 17.) Moreover,  
8        while the Specific Plan permits development of commercial uses along Los Gatos Blvd in the  
9        Lark District, it imposes no requirement to do so. To the contrary, the EIR for the Specific Plan  
10       specifically contemplated and analyzed the potential impacts of residential development along  
11       Los Gatos Boulevard. (AR000801, AR002039.)

12       Finding d: The proposed project buildings 24 and 25 are inconsistent with North 40  
13       Specific Plan Section 4-2 as it eliminates a “fourth access point off of Los Gatos Boulevard  
14       closer to the Lark Avenue intersection;” are inconsistent with North 40 Specific Plan page 3-1,  
15       Section 3.1 Architectural and Site Character Goals and Policies, Policy DG5 Residential Siting  
16       that requires residential development to be located to minimize traffic, noise, and air quality  
17       impacts; and are inconsistent with the Commercial Design Guidelines beginning on page 3-2  
18       which guide site plan development. (AR011471-72.)

19       Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
20       not based on any *objective* standard. The Specific Plan has always required exactly three access  
21       points on Los Gatos Boulevard (*See* Specific Plan District Plan, AR002631, attached hereto as  
22       Appendix C) and does not require a fourth access point. Section 4.2 states only that “[t]here is  
23       also an **opportunity** for a fourth access point off of Los Gatos Boulevard closer to the Lark  
24       Avenue intersection.” (AR002708, emphasis added.) Accordingly, the EIR for the Specific Plan  
25       contemplated and analyzed only three access points along Los Gatos Boulevard. (AR000829-33,  
26       AR001780.) Moreover, the Town’s Public Works Director explained to the Planning  
27       Commission on July 13 that there were numerous engineering concerns associated with adding a  
28       fourth access in the area near Buildings 24 and 25, including queuing and congestion, turn lane  
29       access issues, grade differences between street level and property level, and consequently  
30       Planning Staff recommended against it. (AR006646-48.)

31       Additionally, the Specific Plan does not prohibit residential development of Buildings 24  
32       and 25 located along Los Gatos Boulevard. In fact, the Specific Plan EIR specifically

1 contemplated and analyzed residential development along Los Gatos Boulevard. (AR000801.)  
2 Further, the Town's Public Works Director explained to the Planning Commission that Buildings  
3 24 and 25 are not well-suited for commercial uses because access to these sites is impeded by the  
4 turn lane from southbound Los Gatos Boulevard to westbound Lark. (AR006646-48.)

5 Section 3.1 merely provides "Architectural and Site Character Goals and Policies."  
6 (AR002659.) These include the "Residential Siting" policy of locating "residential development  
7 to minimize traffic, noise and air quality impacts." (AR002659.) The EIR found no such  
8 impacts in this area. (See AR000826-27 [traffic]; AR000799 [noise]; AR000687 [air quality].)  
9 Importantly, the Project complies with the Specific Plan's *objective* residential design guidelines  
10 for Los Gatos Boulevard that implement this policy, which include a minimum of 30-foot  
11 setbacks, 25-foot height restrictions, and landscaping of the setbacks with orchard trees.  
12 (AR002645 [Table 2-5, No. 3].)<sup>8</sup>

13 Finding e: The proposed project is inconsistent with North 40 Specific Plan Policy  
14 Section 2.4 and Appendix C of the Specific Plan as it does not address the unmet housing needs  
for senior and "Gen. Y." (AR011472.)

15 Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
16 not based on any *objective* standard. The Town's Community Development Director informed  
17 the Planning Commission on July 13, 2016 that "[t]here's nothing in the Specific Plan that  
18 requires an Applicant to meet all of the unmet needs of the Town." (AR006674.) Therefore, he  
19 added, "if it does meet one or more of them; then it's clearly meeting unmet needs. There's no  
20 threshold there that's an *objective* standard that says you have to meet the certain *objective*  
21 unmet needs." (AR006675, emphasis added.)

22 The record demonstrates that the Project more than adequately satisfies this policy  
23 objective. Section 2.4 does not provide any *objective* standards but instead lists as permitted  
24 types of residential units: "condominium, cottage cluster/garden cluster housing, live-work flats,  
25 multi-family flats, multiplexes, rowhouses and townhouses," and further provides: "Residential  
26

27 <sup>8</sup> The referenced Commercial Design Guidelines commencing on pages 3-2 are not applicable  
28 because the Specific Plan does not require commercial development of these sites. (See  
AR002660, AR010260.)

1 development is focused on multi-family-housing types and shall be designed to attract the unmet  
2 housing needs of the community.” (AR002632.) Appendix C of the Specific Plan states: “At the  
3 time of this Specific Plan, some of the unmet needs of the Town of Los Gatos include residential  
4 product types that respond to emerging needs of the senior, empty nester, and young adult  
5 population.” (AR002943.) The Project clearly provides the diversity of housing types, including  
6 condominiums, multi-family, live-work, rowhouses and townhouses that the Specific Plan  
7 identifies as responding to the emerging needs of the young adult population. (AR006320.)  
8 With respect to seniors and empty nesters, the Project provides 49 senior affordable residential  
9 units, as well as 10 market-rate apartments with elevator access. (AR003628.)

10 Finding f: The proposed project is inconsistent [with] the Residential Unit Size Mix and  
11 Table Set forth on page 6-14 of the Specific Plan and the Residential Unit Size Mix [and] should  
12 have smaller units to come closer to the income distribution of affordable housing identified in  
the Town’s certified General Plan Housing Element for 156 very low, 84 low, and 30 moderate  
income units. (AR011472.)

13 Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
14 not based on any *objective* standard. The Residential Unit Size Mix and Table at page 6-14  
15 expressly states that it imposes no *objective* requirements: “The Specific Plan encourages a mix  
16 of residential types and sizes but does not specify exact sizes... . A **hypothetical example** of  
17 how the mix of residential uses can be realized is illustrated in the table below. This table is only  
18 intended as an example of how a mix of residential uses could be proposed on the North 40. **It**  
19 **does not represent a target or requirement.**” (AR002762, first emphasis in original, second  
20 emphasis added.)

21 Nonetheless, the record demonstrates that the Project is consistent even with the  
22 foregoing hypothetical examples. The hypothetical Table includes units ranging in size from 500  
23 to 2,350 square feet, whereas the Project’s units range in size from 550 to 1,999 square feet.  
24 (AR006320; AR009712.) Thus, on average, the units proposed for the Project are considerable  
25 smaller than those included in the Table; indeed, the total square footage of the residential units  
26 proposed for the Project is substantially less than the maximum total square footage authorized  
27 by the Specific Plan. (See AR009716, AR002652.)  
28

1 The income distribution of affordable housing units identified in Table 6-1 of the Town's  
2 Housing Element, titled "Summary of Community Strategies to Meet RHNA," similarly does not  
3 impose *objective* standards regulating either the size or pricing of residential units in the North  
4 40. (AR002465.) The HCD confirmed this fact in response to Petitioners' request for  
5 clarification, stating: "RHNA is a housing need 'capacity' *planning* requirement (sites, zoning,  
6 and densities) to accommodate and facilitate housing development, among four income  
7 categories by private sector housing developers; RHNA is not a 'production' requirement."  
8 (AR009697, emphasis in original, *citing* § 65583, subd. (b)(2).) The HCD explained further:  
9 "[T]he Developer can choose to propose a housing project with a different configuration of unit  
10 rent or sale levels for different income categories resulting in some or all of the development not  
11 satisfying the RHNA income category *goals* applicable to a particular site." (AR009697,  
12 emphasis in original.)

13 Finding g: The proposed project, specifically buildings 18 through 27, would result in an  
14 anomaly of residential uses within an existing commercial land use context. (AR011472.)

15 Response: There is *no* evidence in the record to support such a finding; furthermore, it is  
16 not based on any *objective* standard. As shown (*supra* pp. 16-18), the Specific Plan clearly does  
17 not prohibit residential development of buildings 18 through 27. (*See* AR000801.)

18 Finding h: The only promised Below Market Rate housing is the 49 units above Market  
19 Hall and the remainder would have home values estimated at \$900,000 to \$1,500,000 requiring a  
20 20 percent down payment and income of approximately \$130,000 to \$200,000 per year.  
(AR011472.)

21 Response: This finding does not even reference, much less attempt to identify any  
22 purported inconsistency with any *objective* standard in the Specific Plan. It therefore provides no  
23 basis for a Project denial. Moreover, as shown (*supra* p. 3, fn. 2), the Project provides  
24 substantially more Very Low Income units than required to trigger the maximum, 35% density  
bonus under the Density Bonus Law.

## 25 **5. The Subdivision Map Act Does Not Relieve the Town From** 26 **Compliance with its Housing Element, the HAA and the Density** **Bonus Law**

27 The Town's Resolution denying the Project makes no findings under its Housing  
28 Element, the HAA or the Density Bonus law, and instead relies solely on Section 66473.5 of

1 California's Subdivision Map Act ("SMA"), requiring that tentative maps be "consistent" with  
2 general or Specific Plans, to support the Town's denial of the Project based on findings of  
3 alleged "inconsistency" with *subjective* criteria. (AR011471-73.) Thus, although the Town's  
4 Staff, Town Attorney and the HCD repeatedly advised the Town Council that its discretion is  
5 limited because of the Project's "by-right" development status under the Housing Element and  
6 the HAA to a determination of whether the Project complied with the Specific Plan's *objective*  
7 standards, remarkably, the Town's findings solely reference the SMA's plan-consistency  
8 requirement, apparently in an effort to circumvent the tight constraints on the Town's discretion  
9 imposed by its Housing Element and the HAA.

10 The Town's reliance on the SMA in an apparent attempt to circumvent the requirements  
11 of its Housing Element and the HAA, however, lacks legal merit because the denial was not  
12 based on any actual *subdivision* issues, but rather solely on claims that the Project was  
13 "inconsistent" with the Majority's application of *subjective* criteria under the Specific Plan.  
14 (AR011471-73.)

15 Where multiple statutes arguably address the same subject—in this case, a local agency's  
16 authority to review a proposed housing development for consistency with the municipality's  
17 applicable land use plans—"the more specific one will control unless they can be reconciled."  
18 (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1118.) Here, the SMA  
19 can be reconciled with State Housing Law and the HAA. A local agency in reviewing a  
20 proposed housing development may enforce the requirements of the SMA and its local  
21 implementing ordinance. However, in reviewing such housing projects for consistency with  
22 applicable land use plans, notwithstanding the fact that the SMA requires that tentative maps be  
23 "consistent" with such planning documents, the more specific and heightened standards under  
24 the HAA and ordinances adopted pursuant to State Housing Element Law, limiting the Town's  
25 review to a determination of project "compliance" with "*objective*" planning and zoning  
26 standards, must control. (*Ibid*; § 65589.5, subd. (j); AR002368, AR002372 [Housing Element].)

27 Any other interpretation would lead to absurd results, rendering the Legislature's  
28 amendment of subdivision (j) of the HAA in 1999, adding the term "*objective*" to the first clause

1 (see *infra* p. 13) surplusage, contrary to settled rules of statutory interpretation. (*Tuolumne Jobs*  
2 *& Small Bus. Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) It also would  
3 contravene the legislative purposes of the Housing Element Law and HAA to facilitate housing.  
4 (See *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 506 [“It is well established that statutes must  
5 be given reasonable construction that conforms to the apparent purpose and intention of the law  
6 makers ... .”].)

7  
8 **C. The Necessary and Appropriate Remedy Is a Writ of Mandate Directing the  
Town to Approve the Project**

9 A writ of mandate directing the Town to approve the Project is necessary and appropriate  
10 for several reasons.

11 First, Code of Civil Procedure section 1094.5, subdivision (f), expressly authorizes this  
12 remedy. It states in relevant part: “Where the judgment commands that the order or decision be  
13 set aside, [the court] may order the reconsideration of the case in light of the court’s opinion and  
14 judgment and may order respondent to take **such further action as is specially enjoined upon it**  
15 **by law**, but the judgment shall not limit or control in any way the discretion legally vested in  
16 respondent.” (Code Civ. Proc., § 1094.5, subd. (f), emphasis added.)

17 A writ of mandate directing the Town to approve the Project on remand is precisely  
18 “such further action ... specially enjoined upon [the Town] by law.” Specifically, the Town has  
19 a mandatory duty to approve the Project under the clear mandates of its Housing Element, the  
20 HAA and the Density Bonus Law. “Where a statute requires an officer **to do a prescribed act**  
21 **upon a prescribed contingency**, his functions are ministerial. Where a statute or ordinance  
22 clearly defines the specific duties or course of conduct that a governing body must take, that  
23 course of conduct becomes mandatory and eliminates any element of discretion.” (*Lazan v.*  
24 *County of Riverside* (2006) 140 Cal.App.4th 453, 460, emphasis added.) “A ministerial decision  
25 involves only the use of fixed standards or *objective* measurements, and the public official  
26 cannot use personal *subjective* judgment in deciding whether or how the project should be  
27 carried out.” (*Mountain Lion Found. v. Fish & Game Comm’n*, (1997) 16 Cal.4th 105, 117,  
28 emphasis added.)

1 The Town's Housing Element expressly required the prescribed act – “then it is  
2 approved” – upon the prescribed contingency – the Project's consistency with the *objective*  
3 standards under the Specific Plan – as acknowledged by the Town's Staff, the Town's Attorney,  
4 the HCD and the Town's outside counsel. (*Supra* pp. 7, 9-12.) In fact, the HCD informed the  
5 Town Council that because the Project was entitled to by-right development, it actually should  
6 not have been subject to any public hearings. (AR011200-02.) The Town therefore has a  
7 mandatory duty under its Housing Element to approve the Project based on its compliance with  
8 the objective standards of the Specific Plan.

9 The Town likewise has a mandatory legal duty under the HAA to approve the Project  
10 because the Project complies with all *objective* standards under the Specific Plan, and because  
11 the Town has not, and cannot make “specific adverse impact” findings as defined under the HAA  
12 (*supra* pp. 7, 9-10 and 12-14; *North Pacifica, supra*, 234 F.Supp.2d at p. 1059.) The Town also  
13 has a mandatory legal obligation under the Density Bonus Law to grant Petitioners' request for a  
14 density bonus. (AR003596-97; AR007159; *Friends of Lagoon Valley v. City of Vacaville* (2007)  
15 154 Cal.App.4th 807, 825 [Section 65915 imposes a “mandatory duty on local governments”].)  
16 As the HCD informed the Town Council: “Once an applicant meets eligibility criteria, a density  
17 bonus and concessions and incentives are entitled and should, in and of themselves, not require  
18 discretionary action. (GC Sections 65915(f)(5) and (j)(1).) Specifically, no denial process is  
19 available for a density bonus.” (AR011201.)

20 Second, remanding this case for further findings would be an idle act because, as shown,  
21 the Town has a clear, mandatory duty to approve the Project, and because the administrative  
22 record demonstrates that the Project complies with all applicable *objective* standards. (*See*  
23 *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715-716  
24 [lower density project alternative under CEQA not feasible as a matter of law because no  
25 evidence supports the required “specific adverse impact” finding to reduce density]; *Friends of*  
26 *Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 314 [because issuance of  
27 the permit was mandatory, referring the permit application to the board on remand “can serve no  
28 good purpose”].) “The law neither does nor requires idle acts.” (Civ. Code, § 3532.)

1 Finally, remanding this case for further findings inherently threatens the viability of the  
2 Project and thus undermines the public policies underlying “by-right” development rights under  
3 the Town’s Housing Element, the HAA and the Density Bonus Law. (*CBIA, supra*, 61 Cal.4th at  
4 p. 445; §§ 65580, 65589.5, subd. (a), 65589.6, 65915, AR002368; AR002372-73 [Housing  
5 Element]. *See also County of Orange v. Superior Court* (2003) 113. Cal.App.4th 1, 12  
6 [recognizing delay threatens viability of development projects].) The Court therefore may, and  
7 should if necessary, exercise its inherent authority in crafting an appropriate remedy to achieve  
8 justice. (*Del Riccio v. Superior Court* (1952) 115 Cal.App.2d 29, 31 [“In the exercise of  
9 equitable jurisdiction the court undoubtedly has broad discretionary powers to take whatever  
10 action is necessary in the interests of justice in order that its decrees will not fail to accomplish  
11 their purpose.”]. *See also* Code Civ. Proc., § 187.)

12 **IV. CONCLUSION**

13 For all of the foregoing reasons, Petitioners respectfully submit that the Court should  
14 grant this Petition and issue a writ of mandate directing the Town to rescind its unlawful  
15 Resolution denying the Project and further enjoining the Town, pursuant to Code of Civil  
16 Procedure section 1094.5, subsection (f), to approve the Project.

17  
18 Dated: January 12, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

19  
20 By: 

ARTHUR J. FRIEDMAN

21  
22 Dated: January 13, 2017

BERLINER COHEN, LLP

23  
24 By: 

ANDREW FABER

25 Attorneys for Petitioners  
26 Eden Housing, Inc., SummerHill Homes, LLC and  
27 Grosvenor USA Limited  
28

## **APPENDIX A**

### **NORTH 40 SPECIFIC PLAN FIGURE 1-1, CONTEXT MAP**

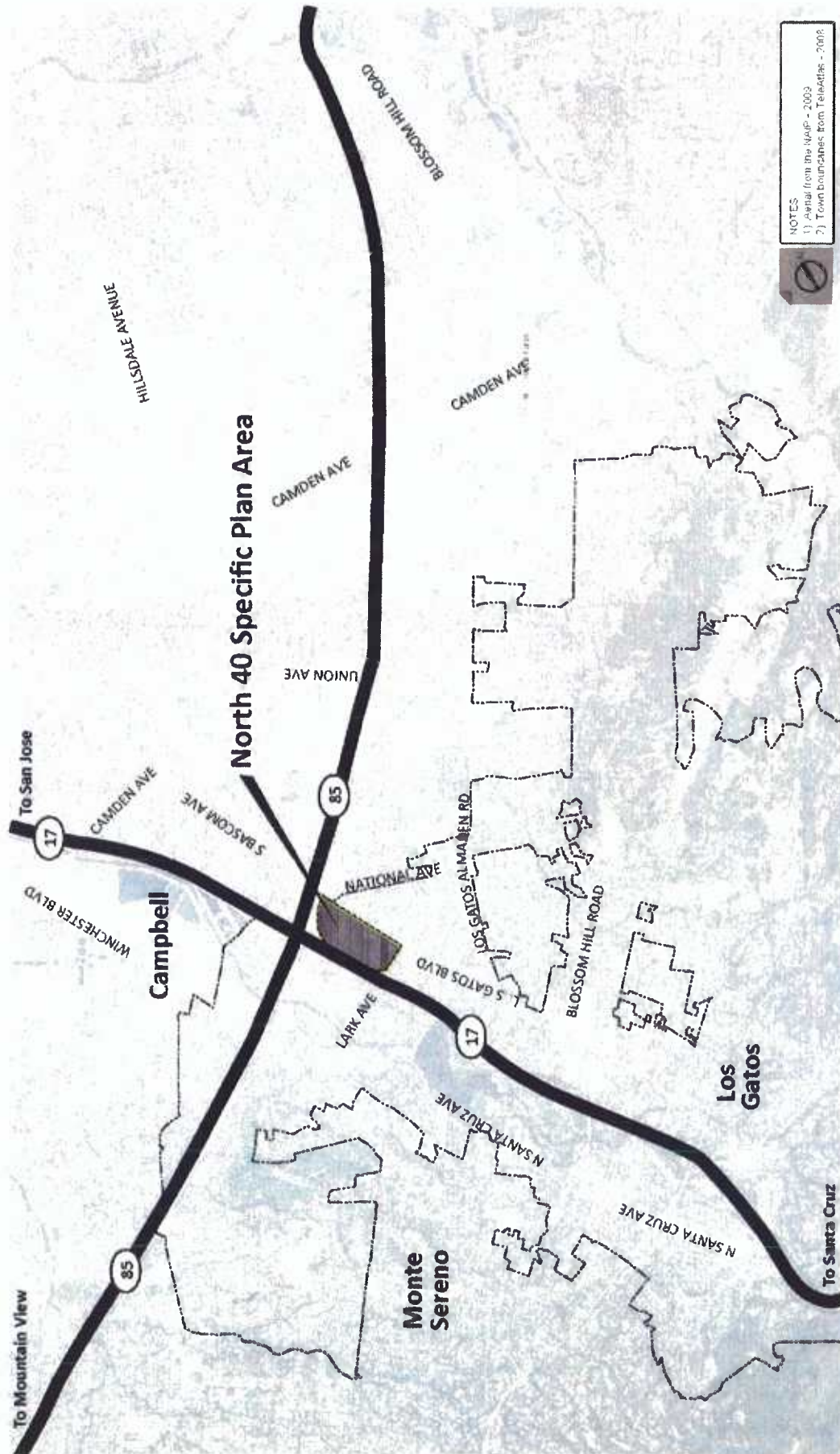


Figure 1-1 Context Map

## **APPENDIX B**

### **PROPOSED DEVELOPMENT PLANS PHASE I BUILDING KEY PLAN**

# Phase I General Project Information Summary

For further tabulation see sheet 1.2a

Total Phase I site area (square feet)	901,193 sqft
Total proposed residential units*	320
Total residential floor area* (see Specific Plan section 2.7.3d)	150,765 sqft
Gross Class, Single Units, Townhomes and Multifamily Units	150,765 sqft
Gross Class, Single Units, Townhomes and Multifamily Units	286,715 sqft
Total existing residential units being retained (Phase 1 and 2)	16 homes in Phase 2
Total cumulative units (Phase 1 and 2)	32 existing homes total (all to be demolished)
* For detail information see sheet 1.2b, 3.23 and 5.5T.14	
Total proposed commercial floor area (Phase 1 only)**	57,522 sqft
Total existing commercial area being retained (Phase 1 and 2)	62,115 sqft
Total cumulative floor area (Phase 1 and 2)	130,106 sqft
** For detail information see sheet 3.22	
Total floor area under the max 25-foot height limit in Lark District***	41,497 sqft
*** For detail information see sheet 5.5T.1	
Total required parking**** (Residential and Commercial)	953
Total provided parking****	1069
- Parking Lot	173
- Off-Street Parallel Parking	111
- Commercial garage parking	281
- Residential garage parking	474
Total handicap spaces provided	25
**** For detail information see sheet 3.22 and 5.5T.14	
Open Space provided (square feet)	358,035 sqft
For detail information see sheet 6.4 and 6.5	
Balance of commercial floor area available per the approved Specific Plan	381,363 sqft
For Heritage tree locations, see the disposition plan - sheet 6.15	
For more information, see vesting Tentative Map Sheets	

## Phase I Building Key Plan

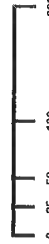


NORTH FORTY | LOS GATOS, CA



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## **APPENDIX C**

### **NORTH 40 SPECIFIC PLAN FIGURE 2-1, DISTRICT PLAN**

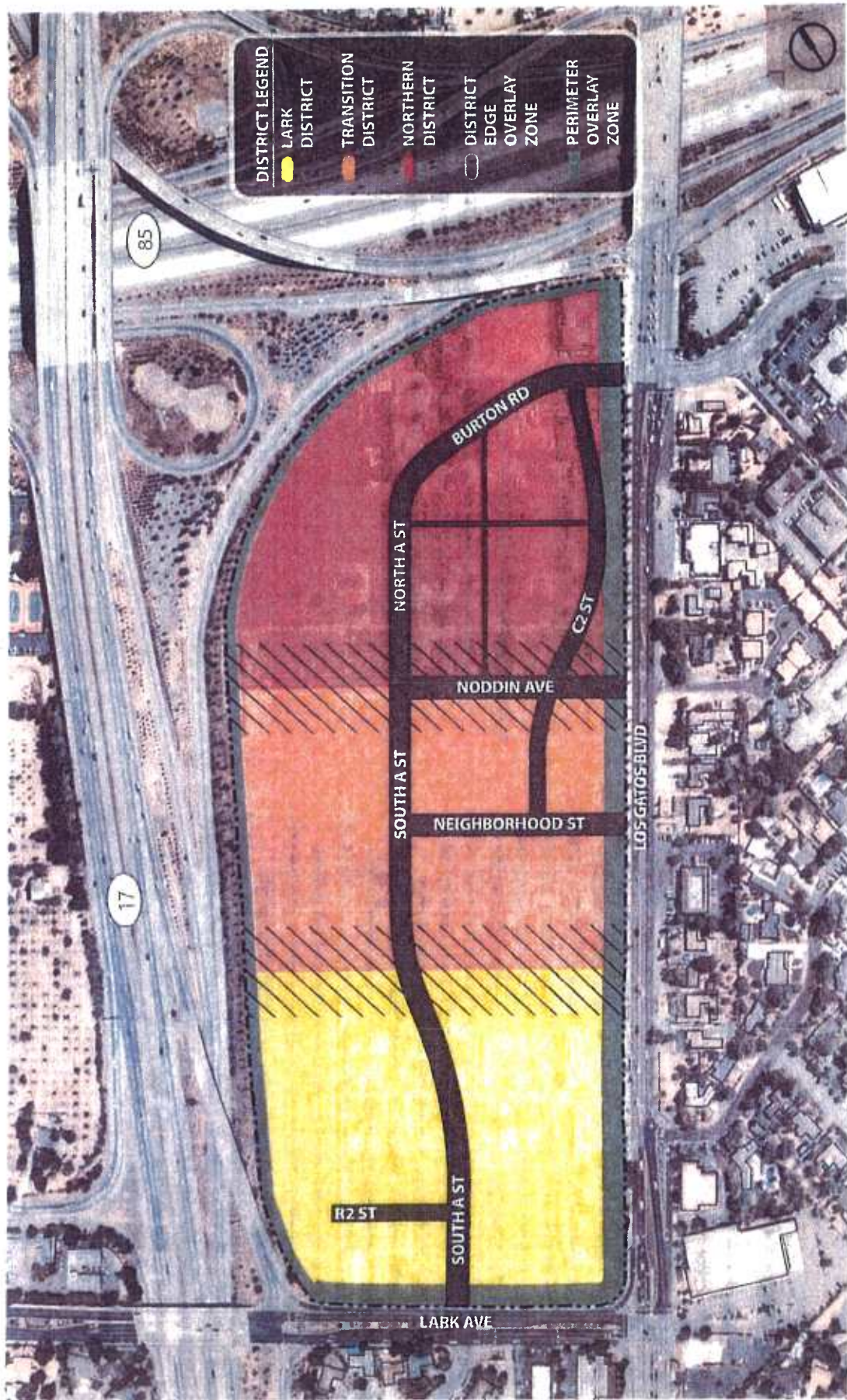


Figure 2-1 District Plan

NORTH 40 SPECIFIC PLAN  
Last Modified: June 17, 2015

3 PROOF OF SERVICE 2017 JAN 13 PM 3:47  
4

5 I, Carol Millwood, declare under penalty of perjury under the laws of the State of California  
6 that the following facts are true and correct:

7 I am a citizen of the United States, over the age of eighteen years, and not a party to the within  
8 action. I am an employee of Berliner Cohen, and my business address is Ten Almaden Boulevard,  
9 Suite 1100, San Jose, California 95113-2233. On JANUARY 13, 2017, I served the following  
10 document(s):

11 **OPENING BRIEF IN SUPPORT OF PETITIONERS' VERIFIED PETITION FOR WRIT  
12 OF MANDATE**

13 in the following manner:

14	<input type="checkbox"/>	by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, from the sending facsimile machine telephone number of (408) 938-2577. The transmission was reported as complete and without error by the machine. Pursuant to California Rules of Court, Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration. The transmission report was properly issued
15	<input type="checkbox"/>	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.
16	<input checked="" type="checkbox"/>	Or by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below, as indicated.
17	<input type="checkbox"/>	by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
18	<input checked="" type="checkbox"/>	by e-mail or electronic transmission. I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was

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I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight

1 mail services, to wit, that correspondence will be deposited with the United States Postal  
2 Service/overnight mail service this same day in the ordinary course of business. Executed on January  
3 13, 2017, at San Jose, California.

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5 Carol Millwood

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