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UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF CALIFORNIA

SPRAWLDEF, et al, Petitioners, vs. CITY OF RICHMOND, et al, Respondents.	Case no. 18-cv-03918-YGR **PETITIONERS' MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS** Hearing: Date: November 24, 2020 Time: 2:00 p.m. Room: 1 **Before the Hon. Judge Yvonne Gonzalez Rogers**

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I. SUMMARY

Petitioners, environmental groups and Richmond city residents, seek a writ of mandate to address violations of California law by the Richmond City Council. The Council, in a closed session, voted to enter into a settlement agreement and stipulated judgment with the Tribe and its associated developer, Upstream Point Molate, in *Guidiville Rancheria of California et al v. United States of America et al*, federal Northern District of California case no. 4:12-cv-01326 ("*Guidiville*").

Long after that fact, the City of Richmond claims it has cured all its violations of California law, both the Brown Act and California Planning and Zoning law. It claims this was achieved by the City Council's approving an "Amended" Judgment in open session.

While the approval of the Amended Judgment may at least have brought the City's deal out into the open, the "amendments"—which amount to changing a couple words and adding a precatory disclaimer paragraph—do not make that judgment compliant with the requirements of California law.

Now, when Petitioners have already proposed a Second Amended Petition and placed it before the Court, the City has moved for judgment on the pleadings on the prior, First Amended Petition. It seeks to dismiss Petitioners' action with prejudice, claiming it is irreparably both untimely and moot. It is neither.

The Court has now consolidated the hearing on the City's Motion for Judgment on the Pleadings with the hearing on Petitioners' Motion for Leave to file a Second Amended Petition. Because the Second Amended Petition is neither untimely nor moot, the Court should deny the City's motion and grant Petitioners'.

II. BACKGROUND

A. PERTINENT FACTS RELATED TO THE PETITION AND STIPULATED JUDGMENT

Petitioners filed their petition on May 21, 2018. (Dkt #1.) As set forth in Petitioners' motion for leave to amend the First Amended Petition, the petition set forth within a single claim for relief that the respondent City had failed to comply with the Brown Act, Government Code §54950 et seq., as well as violating California Planning and Zoning Law. (Dkt #32, paragraphs 43-46.) The Brown Act requires that deliberations leading up to settlement be open to the public. The "Brown Act open meeting

requirements encompass not only actions taken, but also fact-finding meetings and deliberations leading up to those actions." *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 502.

In the Settlement/Judgment, the City locked in Point Molate's future land use without any public participation. Prior to this current effort to circumvent compliance with California planning law, the City's own resolution had directed staff to "…further review the Land Use Designations (LUD's) for Point Molate in the General Plan, and that this should be done in conjunction with public input and an open process through the Planning Commission and City Council." AR 5017 (staff report November 21, 2016); AR 4003-4004. The land use actions taken under the *Guidiville* settlement are zoning and land-use planning of Point Molate, actions which, without the proper public process, circumvent the open, transparent, public process required, by statute, for such decisions.

Paragraph 46 of the First Amended Petition cites the specific state statutes violated: "…the City, its Mayor and Council have reached land use decisions which require open meeting discretionary approvals under California law, including open meetings required under Government Code §§ 65852, 65867.5, 65090, 65091, 65355, 65854 and 65860."

Those state land use planning and zoning statutes require open public decisions, including Government Code § 65852, § 65867.5, § 65090 (public notice of land use plans), § 65091 (public notice for projects), § 65355 (public hearing to amend General Plan), § 65854 (planning commission recommendation) and § 65860 (zoning consistency with General Plan). Further, a development agreement (which the Judgment and Amended Judgment in effect are, even if not so designated) "shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan." Government Code § 65867.5. Further, and perhaps even more important, these land use decisions are legislative actions subject to the constitutional right of referendum. (See, *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141 [referendum of general plan amendment]; *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068 [referendum of rezoning]; *Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689 [development agreement adoption subject to referendum, but it may not be adopted by initiative].)

On October 23, 2018 after the Court had requested the parties to meet and confer in regard to amending the Petition to add in Upstream Molate LLC (Upstream) and the Guideville Rancheria (Tribe), the Petitioners and Respondent City agreed to a First Amended Petition (FAP) that included the two other parties. (Dkt #27, 28, 32.) The Tribe then moved to dismiss on the grounds that it was entitled to sovereign immunity and as a necessary party, the action had to be dismissed. (Dkt #45) On June 19, 2019 the Court denied the Tribe's motion. (Dkt #58.) The Tribe then appealed. (Dkt #60.) While the appeal was pending, the case was on hold because the Court lacked jurisdiction except for certain actions like a motion for a preliminary injunction. In that interim period, the Petitioners moved for a preliminary injunction. As set forth in the Petitioners move for leave to amend the FAP, the court invited the parties to discuss settlement and noted that if there was an issue with the pleadings, the Petitioners would more than likely have a right to amend. (Dkt #78.)

The parties then held a settlement conference. But that conference did not result in a settlement. Instead the Respondents modified the Judgment with cosmetic language that did not alter the planning law violations. This "Amended Judgement" was approved by a single vote of the City Council – in open session – on November 5, 2019. There was no prior consideration by the planning commission, nor true public hearings before the council.

The City then moved for judgment on the pleadings. (Dkt #87.) On December 11, 2019 the Court entered an order finding that it was without jurisdiction to consider the motion pending the Tribe's appeal. It also noted, as set forth in the Petitioners' motion for leave to amend, that even if it were to grant the motion, the Petitioners probably had a right to amend. (Dkt #97.)

B. THE CITY'S ANSWER AND AMENDED ANSWER TO THE PETITION

The City filed an Answer to the Petition, and then an Amended Answer to the Amended Petition. (Dkt #33.) In the Amended answer, which is still the City's operative pleading, it provided several critical admissions.

Paragraph 35 of the amended answer admits that the paragraph 8 of the Judgment "shall allow" a "minimum of 670 residential units," that it allots open space and dictates historic renovations:

> Respondents further admit that the Judgment provides: "Discretionary City Approvals shall allow for a minimum of 670 residential units and further the goals of the Point

> Molate Reuse Plan, including preservation of open space and rehabilitation of the Core Historic District (including Building 6)."

The amended Judgment made no changes to paragraph 8 of the original Judgment.

In paragraph 36 of its amended answer, the City admits "….that City Ordinance No. 16-16, Article 15.04.304.030, provides the following: 'IS-3 includes the Point Molate study area, where the City Council has *initiated a review of appropriate zoning, development standards and related open space for General Plan implementation in the context of the Point Molate Reuse Plan*.'" [Emphasis added.] By so admitting, the City also admitted that it needed to go through a full and open public process involving the City's full discretionary power and authority in accordance with state planning and zoning law in determining and approving the appropriate general plan and zoning designations, through appropriate legislative actions, for the Point Molate Study Area.

Nothing changed those admissions in the "amended" "judgment." Thus, the "amended" Judgment continues to determine a zoning change— allowing housing at Point Molate. The "amended" Judgment also allots open space, where under IS-3 the City was to first review, and then legislatively determine the open space allotment; and the "amended" Judgment requires rehabilitation in the entire Historic District, while development standards were as yet undecided under IS-3.

C. PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

While the City continued to barrel ahead towards approving a Point Molate project as constrained by the Amended Judgment – including a fast-track time line despite the COVID-19 pandemic and its curtailment of public participation, Petitioners subsequently moved for a preliminary injunction and then temporary restraining order. (Dkt #103.) On August 14, 2020, the Court denied Petitioners motion on the ground that, in the context of a motion for preliminary injunction, the Court felt Petitioners were unlikely to succeed on the merits. (Dkt #127.) Since the trial court proceedings were still on hold pending resolution of the Tribe's appeal, Petitioners could not then make a motion for leave to amend the FAP in order to clarify the issues before the court in the Petition.

D. THE NINTH CIRCUIT RULING AND SUBSEQUENT TRIAL COURT MOTIONS

On September 17, 2020 the Ninth Circuit ruled against the Tribe and found that it had waived its immunity. Promptly thereafter, on September 28, 2020, Petitioners moved for leave to amend the FAP. (Dkt #129.) The hearing on that motion was set for November 3, 2020.

Instead of first allowing the Court to rule on that motion, the Respondent City, after waiting until October 16, 2020 – a month after the Ninth Circuit's rejection of the Tribe's appeal – moved for judgment on the pleadings as to the FAP, with a hearing set for November 24, 2020. (Dkt #134.) Petitioners are now required to file an opposition to that motion on October 30, 2020, even though a decision granting Petitioners' motion for leave to amend their Petition would moot Respondent City's motion by allowing Petitioners to file and serve a Second Amended Petition (SAP).

E. THE CITY MOVES FORWARD TO CERTIFY A SUBSEQUENT EIR AND APPROVE A POINT MOLATE PROJECT

Meanwhile, the City continued moving forward and approved a Point Molate development project tailored to fit the requirements of the Amended Judgment, including certifying a Final Subsequent Environmental Impact Report (SEIR) on September 8, 2020. On October 8, 2020 Petitioners SPRAWLDEF and CESP, along with numerous other parties, filed a state court petition for mandate against the City and the developer for that project, Winehaven Legacy, LLC, under the California Environmental Quality Act.[1] That action challenges the certification of the SEIR and approval of the project. A separate group of concerned environmental groups filed a similar state court petition on much of the same bases.[2] Both cases have been assigned to the same judge. By hurriedly moving forward with its approvals, the City has now mired itself in further litigation; litigation that could have been avoided by preserving the *status quo ante*. As set forth in Petitioners' proposed SAP, the City's violations of state planning and zoning law will require rescission of all those approvals.

F. THE JUDGMENT/AMENDED JUDGMENT'S IMPROPER RESTRICTION OF THE CITY'S DISCRETION

As illustrated by the City's approval of the Point Molate Project, the key problem in this case is that both the Judgment and the Amended Judgment contain a sword of Damocles penalty provision that the City itself admits would have created dire economic consequences if the City had not gone forward with approving that project. The Judgment and Amendment would also have called for the City to transfer its

[1] Point Molate Alliance et al. v. City of Richmond et al., Contra Costa County Superior Court Case #MSN20-1474.

[2] North Coast River Alliance et al. v. City of Richmond et al., Contra Costa County Superior Court Case #MSN20-1528.

ownership of 270 acres of public property to Upstream and the Tribe for $300.00 if the project had not been approved. Essentially, the Judgment and Amended Judgment make a mockery of the City's statutory right and duty to exercise its discretion and its independent judgment in deciding whether to certify the Subsequent EIR and approve the Point Molate Project.

III. STATEMENT OF THE CASE IN ITS CURRENT POSTURE.

The land use actions taken under the *Guidiville* settlement are zoning and land-use planning decisions for Point Molate. Made unilaterally by the Council and without public input, they circumvented the open, transparent, public process required, by statute, for such decisions.

In both the FAP and the proposed SAP, Petitioners identify the specific state statutes that were violated: "…the City, its Mayor and Council have reached land use decisions which require open meeting discretionary approvals under California law, including open meetings required under Government Code §§ 65852, 65867.5, 65090, 65091, 65355, 65854 and 65860."

Those state planning and zoning law statutes require an open public process, including Gov. Code § 65852 § 65867.5, § 65090 (public notice of land use plans), § 65091 (public notice for projects), § 65355 (public hearing to amend General Plan), § 65854 (planning commission recommendation) and § 65860 (zoning consistency with General Plan). Further, the decisions made in the Judgment and Amended Judgment commit the City, by contract, to taking certain actions. Under California law, those types of commitment can only be made through a development agreement. Approval of a development agreement, under California law, itself requires an open public process and a development agreement "shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan." Gov. Code § 65867.5. That finding was not and could not be made here. A development agreement also must be approved by ordinance, not resolution, and must be subject to referendum. None of these important and prophylactic procedural requirements were met by the Council's unilateral approval of the Judgment and Amended Judgment.

Furthermore, as set forth in the declaration of Paul Carman filed in support of the motion for preliminary injunction (Dkt #121-1), the City's planning process was constrained by the fact that, according to statements made by the City's own planners, residents and others who attended planning meetings to provide their input could not propose any alternative that did not have housing. Thus, the

city council and planning commission and other discretionary boards and commissions were not allowed to consider a full range of options, including options not including housing. Predictably, the Community Plan alternative, the one alternative identified in the Subsequent EIR that did not include housing at Point Molate, was summarily rejected for not meeting the project's objectives.

In addition, the City advised all involved that even if council members or planning commissioners felt that the City should reject the proposed project, doing so would trigger the Amended Judgment's draconian penalty clause. Implicit was the caveat – don't go there.

IV. STATEMENT OF LAW

Federal Rule of Civil Procedure 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

The motion is granted only when "there is no issue of material fact in dispute." *Fleming v. Pickard* (9th Cir. 2009) 581 F.3d 922, 925. Dismissal should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Turner v. Cook* (9th Cir. 2004) 362 F.3d 1219, 1225.

Whether a complaint states "a plausible claim for relief" involves a "context-specific task" where the Court will "draw on its judicial experience and common sense." *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 679.

"Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and that 'the same standard of review' applies to motions brought under either rule." *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.* (9th Cir. 2011) 637 F.3d 1047, 1055, fn 4. Both permit challenges to the legal sufficiency of the opposing party's pleadings. *Qwest Communications Corp. v. City of Berkeley* (N.D. Cal. 2002) 208 F.R.D. 288, 291.

As with Rule 12(b), then, the Court will "accept the facts as pled by the nonmovant." *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.* (9th Cir. 2011) 637 F.3d 1047, 1053.

"All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party." *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church* (9th Cir.1989) 887 F.2d 228, 230.

Likewise, the Court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Fleming v. Pickard* (9th Cir. 2009) 581 F.3d 922, 925. "In deciding a motion for judgment on the pleadings, the court generally is limited to the pleadings and may not consider extrinsic evidence." *Gallion v. Charter Communications Inc.* (C.D. Cal. 2018) 287 F.Supp.3d 920, 924, aff'd sub nom. *Gallion v. United States ("Gallion II")* (9th Cir. 2019) 772 Fed.Appx. 604.

The Rule 12(c) motion, however, differs from Rule 12(b)(6) in that it is brought after answer to the complaining pleading. Thus, unlike a Rule 12(b)(6) motion, the court will consider the answer in ruling on a Rule 12(c) motion. *Roberts v. Babkiewicz* (2d Cir. 2009) 582 F.3d 418, 419.

Thus, "a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church* (9th Cir. 1989) 887 F.2d 228, 230.

Because Rule 12(c) is decided like a Rule 12(b) motion, courts have discretion both to grant a Rule 12(c) motion with leave to amend, *Carmen v. San Francisco Unified School District* (N.D.Cal.1997) 982 F.Supp. 1396, 1401.

Furthermore, failure to grant leave to amend is error when necessary "to conform the pleadings to the evidence and clarify the complaint with more specific facts as a result of admissions made in discovery and did not prejudice the Defendants." *Edwards v. City of Goldsboro* (4th Cir. 1999) 178 F.3d 231, 241.

Lastly, if the Court is presented matters outside of the pleading, then the Court has the discretion as to whether or not to convert it into a motion for summary judgment. *Yakima Valley Mem .Hospital v. Washington State Dept. of Health* 654 F.3d 919,925 fn. 6 (9th Cir 2011) If not, then those matters must be excluded. But if the court does elect to convert the motion for judgment on the pleadings into a motion for summary judgment, it must provide all parties with the reasonable opportunity to present all the material that would be pertinent to the motion. FRCP 12(d), *Gulf Coast Bank & Trust Co. v. Reder*, 355 F.3d 35, 38 (1st Cir., 2004) Further, the opposing party cannot be prejudiced by the conversion. *Sira v. Morton*, 380 F.3d 57, 68 (2nd Cir. 2004)

V. ARGUMENT

A. THE AMENDED JUDGMENT DOES NOTHING TO REMEDY THE CITY'S VIOLATION OF LAND USE PUBLIC APPROVAL REQUIREMENTS UNDER CALIFORNIA LAW.

Litigation settlement cannot be used to evade the requirement for transparency in land-use planning and entitlement decisions. *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal. App. 4th 172. The City contends that its "amended" Judgment "adds language confirming that it does not grant any entitlements." City brief (Dkt #134 at p. 3:24-25). Construing the FAP to suit its purposes, the City concludes: "These amendments moot Petitioners' Brown Act claim." City brief (Dkt #134 at p. 9:15-16.)

This strawman—that the petition rises or falls on whether entitlements were included in the closed-door *Guidiville* settlement—is not petitioners' allegation. Petitioners have consistently made this point before the Court. Petitioners' First Amended Petition, in paragraphs 37, 38, and 46, pled the facts and legal grounds asserting that Respondent City's settlement agreement violated California's planning laws. While these facts might perhaps have been more clearly pleaded, they nevertheless were pleaded. In the SAP they are set forth more clearly and in greater detail.

The gist of the claims is that a City may not constrain its future discretion regarding land uses, amendments to the general plan, and zoning changes through specific decisions reached unilaterally by the city council, without the required public process, whether in a closed session under the litigation exception to the Brown Act or in an open council meeting. *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal.App.4th 172, 210 (2006); *Accord*, *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056 (9th Cir. 2007) ("'Land use regulations …involve the exercise of the state's police power, and it is settled that the government may not contract away its right to exercise the police power in the future.'")[3]

Indeed, California Planning Laws place specific procedural requirements on approving a zoning change or a development agreement. *City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 563; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 245-246

[3] The development agreement statutes (Government Code §§ 65864 et seq.) provide a tightly limited exception to this rule, which incorporates the public protections of requiring adoption by ordinance and the right of referendum. Those protections were not provided in the settlement and judgment at issue here.

(resolution claiming to affect a rezoning of land invalid for violating procedural requirement.) Yet, the City violated those requirements when it entered into the Judgment. The Amended Judgment did not cure those violations of California planning law, and Petitioners have a right to amend their petition to make clear that the City has violated California's planning law. Those violations were not cured, or even affected, by the council "curing" its closed session action by a re-do in open session.

The City argues that it went through a planning process, apparently trying to show that it somehow complied with the law, but it conveniently failed to mention two key problems with the process it went through. First, the process was tainted because the settlement and Judgment placed stringent limits on what members of the public could propose and what the City had "discretion" to approve. *See, Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138 (in approving development agreement, city committed itself, without prior CEQA review, to the project – so as to preclude otherwise feasible alternatives and mitigation measures.)

Petitioners should be allowed to allege and prove by evidence that the City illegally sidestepped required approval processes. As a result of those illegal actions, during the planning process the City summarily rejected otherwise feasible alternatives and mitigation measures because they were contrary to the settlement agreement and judgment. That evidence includes the City's assertions, at planning workshops held after it had illegally approved the initial "Settlement/Judgment" in closed session, that (1) "The ratio of 30% development areas to 70% open space …must be maintained;" (2) Land uses at Point Molate were not limited to designations identified in the 'Reuse Plan' or in the General Plan 2030 land use maps; (3) a minimum of 670 housing units must be provided… (4) "buildings in the Core Historic District a…could be adaptively reused, but could not be demolished, regardless of their state of disrepair.

Participants in the workshops who sought to propose alternatives without housing were told that they would not be considered because the Settlement Judgment required at least 670 units. The City stated that alternatives that did not have housing, or which had more than 70% open space would violate the Judgment and would not be considered by the City as alternatives for Point Molate.

Second, the Judgment that the City voluntarily agreed to in closed session contained a penalty provision that made a mockery of the City's purported "discretion" in granting its approvals. That

Judgment[4] mandates that if the City fails, by a certain specified date, to approve a project meeting the requirements of: (1) including 70% open space [no more, no less], (2) not tearing down any buildings in the Core Historic District, but adaptively reusing all of them, and (3) including no less that 670 housing units, Respondents Upstream and the Tribe can declare a breach of the agreement and force the City to sell them the three parcels that make up the planning area, totaling 270 acres, for $100 each. (See Amended Judgment ¶25)

The plain text of the City's General Plan and zoning code, IS-3, makes clear that any Point Molate land use requires final zoning and General Plan conformance before development with full discretionary authority to affirm or reject any such zoning changes or general plan amendments. First Amended Petition (Dkt #32, ¶ 36.) Petitioners will show that the City planning bodies considering the "discretionary" approvals were explicitly told that if they did not approve the project as proposed, the City would be in breach of the Judgment and the later Amended Judgment, with the draconian consequences that would entail.

Petitioners have the right to plead and show that the City's purported discretionary authority was illusory, that it had, in fact, through the Judgment (and the Amended Judgment), illegally and improperly bargained away its land use authority through a statutorily unauthorized contractual agreement with the developers – in everything but name, a development agreement, and thus the Judgment (and Amended Judgment) violated California planning law. Petitioners have the right to show through evidence that the City Council, Planning Commission, and other boards or commissions were warned that if they did not choose a proposal that included the required 70% open space, the minimum 670 housing units, and the rehabilitation and adaptive commercial reuse of the entire Winehaven District, the city would be in violation of the Amended Judgment and that the consequence would be, as stated in the Final Subsequent EIR at p.4-3:

> "Pursuant to the judgment in the federal litigation, if the City fails to meet this deadline [approval of a project based on the terms of the Amended Judgment], the other parties to the federal litigation [Upstream and the Tribe] will have the right to purchase Point Molate development parcels [three parcels-270 acres total] as designated in the 1997 Base Reuse Plan, for a nominal low price, [$100

[4] These provisions are unchanged in the Amended Judgment.

> per parcel] which will result in severe economic losses to the City. Accordingly, it is critical that the City meet the September 30, 2020 date. …"

(See Exhibit A to La Force Declaration filed in support of motion for temporary Restraining Order, Dkt #126-1.) Thus, the city had improperly and illegally bargained away its proper discretion.

B. THE AMENDED JUDGMENT DOES NOT CURE THE PLANNING AND ZONING LAW VIOLATIONS.

The *Guidiville* settlement/Amended Judgment still contains the "nonlitigation oriented policy decisions" prohibited by *Trancas* and California Planning and Zoning Law; the ersatz "amended" settlement's disclaimers notwithstanding.

Paragraph 8 of the judgment is still the same in the "Amended" Judgment. It still requires housing at Point Molate, it still dictates an open space ratio reached during closed negotiations with Upstream and the Tribe, it still contains development standards applied to historic and other building renovation, reached without any public process, it still has zoning providing for what goes where in the *Guidiville* master plan – zoning not consistent with the process required under IS-3.

Paragraph 21 still requires that the City will grant its "Discretionary approvals" and then market the property to one or more developers according to the dictates of paragraph 8's policy decisions. Paragraph 25 still requires that the property be sold to the developers under the "Discretionary Approvals" within a fixed timeframe or be faced with mandatory sale of Point Molate to the Tribe and/or Upstream at a "nominal" price of $100 per development area. Since the *Guidiville* settlement, the City has repeatedly pointed to this provision as a mandatory policy enactment.

C. THE CITY HAS CONTINUED TO VIOLATE CALIFORNIA PLANNING LAW BY ADVANCING THE GUIDIVILLE LAND USE DECISIONS.

As already explained, the City has moved forward in lockstep compliance with the Judgment/Amended Judgment, leading up to the certification of a Subsequent EIR and approval of a project that was constrained to meet the requirements of the Judgment/Amended Judgment. Throughout that process, the City has turned a deaf ear to any proposal that didn't fit into the procrustean bed of that Judgment/Amended Judgment. In the process, the City ignored its own citizens and made a mockery of the processes required under state law for planning and zoning decisions.

As a direct result of the City's violations of state law through the Judgment/Amended Judgment, it has approved a Project designed to meet preordained requirements. As a consequence, the City has, in addition to violating state planning and zoning laws, also violated the California Environmental Quality Act, resulting in two new state court lawsuits. Because all of the City's subsequent actions have been tainted by the illegal Judgment/Amended Judgment, all the subsequent actions also need to be undone.

D. LEAVE TO AMEND/SUPPLEMENT SHOULD BE GRANTED IF NEEDED TO ADDRESS THE CITY'S "AMENDED" JUDGMENT APPROVAL AND ACTIONS TAKEN SINCE ITS CLOSED-DOOR APPROVAL OF THE *GUIDIVILLE* SETTLEMENT.

Leave to amend "shall be freely given when justice so requires." FRCP 15(a). This policy is "to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose* (9th Cir. 1990) 893 F.2d 1074, 1079. If the Court finds that additional amendments or supplementation of the Petition is necessary to fully address the situation as it has evolved since the City's approval of the Amended Judgment, it should allow Petitioners to further amend or supplement the Petition as needed.

E. THE CITY HAS NOT MET ITS BURDEN TO SHOW THAT A SECOND AMENDED PETITION IS FUTILE

Ordinarily, courts do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend. *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F.Supp.2d 1081, 1086 (S.D. Ca. 2002) citing *Netbula, LLC v. District Corp*. 212 FRD 534, 549 (N.D. CA 2003). The test for "futility" is whether the proposed amended pleading does not plead sufficient facts to survive a motion under Federal Rules of Procedure, Rule 12(b) (6) to make out a plausible claim for relief. *HSBC Realty Credit Corp. (USA) v. O'Neill*, 745 F.3d 564, 578 (1st Cir. 2014); See, *Krainski v. Nevada ex rel. Bd. Of Regents of Nevada System of Higher Ed.*, 616 F.3d 963, 972 (9th Cir. 2010)

Respondents claim that the amendment is futile because of mootness and because it is time barred. Petitioners have addressed these arguments in their Reply to the City's opposition to the Petitioners' Motion for leave to amend their Petition They will not reargue those points here, but refer the court to their Reply.

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V. CONCLUSION

For the foregoing reasons, Petitioners request that the Court deny Respondent's motion.

DATE: October 30, 2020

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