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TOWN OF LOS GATOS
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Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
J. Lara

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

EDEN HOUSING, INC., SUMMERHILL HOMES, LLC and GROSVENOR USA Limited, Petitioners, vs. TOWN OF LOS GATOS,, and DOES 1 to V, inclusive, Respondents.	Case No. 16CV300733 DECISION AND JUDGMENT GRANTING WRIT OF MANDAMUS

This matter was heard in Department 16 on March 29, 2017. Petitioners, Eden Housing, Inc., Summerhill Homes, LLC and Grosvenor USA Limited, appeared through their attorneys, Arthur J. Friedman, Sheppard, Mullin, Richter & Hampton, LLP, and Andrew L. Faber, Berliner Cohen, LLP. Respondent, Town of Los Gatos, appeared through its attorneys, Robert Schultz, Town Attorney, Town of Los Gatos, and Whitney G. McDonald, Richards, Watson & Gershon, APC.

Hearing was for Petitioners' petition for writ of mandate. Petitioners' opening brief in support of the petition was filed January 13, 2017; Respondent's opposition to Petitioner's opening brief was filed February 24, 2017; and Petitioners' reply brief was filed March 17, 2017.

The petition for writ of mandate concerns Town of Los Gatos Resolution 2016-046. The Resolution, entered by the Town Council on September 6, 2016, denied Petitioners' applications for approval of proposed Vesting Tentative Map and Architecture and Site. The Resolution was signed on September 13, 2016[1], and sets forth findings for the decision.

The matter having been submitted, and after consideration of the evidence in the administrative record, oral and documentary, and application of law, including consideration of burden of proof and argument of counsel, THE COURT ENTERS THE FOLLOWING DECISION AND JUDGMENT:

Preliminary rulings.

The Petition for writ of mandate is filed in the time and manner required by law.

Review of the local agency action falls under administrative mandamus under Code of Civil Procedure §1094.5.

Writ of Mandamus.

The applications for proposed Tentative Map and Architecture and Site are to allow Petitioners' proposed subdivision and development of the North 40 site in Los Gatos, CA ("Project"). The site is identified for development by the Town of Los Gatos ("Town") in its Housing Element. The Town adopted the North 40 Specific Plan which sets forth objective and subjective factors and goals for development ("Specific Plan").

The principal controverted issues are: (a) whether the Town proceeded as required by law in applying the correct legal standards and criteria in its decision to deny Petitioners' applications; (b) whether the findings support the decision; and (c) whether substantial evidence supports the findings.

Standards and criteria to be considered by the local agency. Petitioners contend that the Town's decision to disapprove the Project violates the Housing Element Law, the Town's Housing Element, the Housing Accountability Act, and the Density Bonus Law. Petitioners seek a writ of mandate to set aside the Town's decision and to direct the Town to approve the

[1] The official transcript of the hearing of September 6, 2016 indicates the Resolution passed by 3-2 vote of the Town Council; however, the written Resolution memorializing the action indicates the Resolution is passed and adopted unanimously.

Project. Petitioners contend that the provisions of the cited Acts and laws mandate the Town to approve the Project if it complies with objective criteria of the Town's Housing Element and objective standards of applicable planning and zoning, unless the Town makes findings supported by substantial evidence that the Project would cause specific adverse impacts.[2] The provisions of the Acts and law are intertwined and overlap in their application to the present matter. The decision and judgment that follows is intended to address the Acts and law collectively.

The pertinent statute of the Housing Accountability Act ("HAA") is Government Code §65589.5 (j) which states:

> "(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exists:
>
> (1) The housing development project would have a specific, adverse impact upon the public health and safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies or conditions as they existed on the date the application was deemed complete.
>
> (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density."

Under the HAA and Housing Element Law ("HEL"), discretionary determinations of subjective factors in the General Plan or Specific Plan cannot be the basis for disapproval of a project. The Legislative purpose of the HAA and HEL (and Density Bonus Law ("DBL")) is to alleviate housing shortage and prevent denial of housing projects based on discretion,

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[2] Government Code §65589.5 (j) of the HAA; the Project is within the statute's definition of a housing development project (Government Code §65589.5 (h)(2)).

subjectivity or local opposition. Petitioners contend that "by-right" approval under the HAA applies to all projects within the Act, including projects that require local agency approval of a tentative subdivision map and proposed land use.

Petitioners maintain that the Town has a mandatory duty to approve the Project because it is consistent with the objective criteria of the Specific Plan[3], and because the Town did not and cannot substantiate a finding by substantial evidence that the Project would have a specific adverse impact as defined by the statute. The Resolution has no findings of compliance or lack of compliance with objective standards under the Town's Housing Element or the HAA, and recites only findings of subjective criteria. Petitioners assert that the Town abused its discretion in proceeding in violation of the HAA, HEL and DBL.

Review of the Town's action is complicated by the fact that the applications are considered and enforced by the Town under Government Code § 66473.5 of the Subdivision Map Act ("MA"). This code section directs that no local agency shall approve a tentative map unless it finds that the proposed subdivision, together with its design and improvement, is consistent with the general plan or any adopted specific plan. A proposed subdivision is consistent only if the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in the general plan or adopted specific plan.[4] As applied to the proposed Project, the statute directs the Town to consider objective and subjective factors in the Town's General Plan or Specific Plan. This includes the exercise of discretion in determining whether or not the proposed subdivision and land use are consistent with the policies of the General Plan Housing Element or Specific Plan. Respondent argues that this state law requires local agencies to exercise discretion in reviewing the Project and precludes approval "by-right", notwithstanding the HAA.

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[3] There is substantial evidence in the record to support Petitioners' contention that the Project is consistent with objective standards - had the Town made such a finding.

[4] Government Code §66473.5 of the MA provides in pertinent part that "No local agency shall approve a tentative map ... unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan ... or any specific plan adopted.... A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed division or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan."

Government Code §65589.5 of the HAA and Government Code §66473.5 of the MA address the same subject - the proposed land use of the Project, and both appear applicable for a comprehensive approval or denial of the Project. However, the standards and criteria under each statute are different, and the mandamus petition, in part, seeks a ruling reconciling the apparent conflict and determining the applicable standards and criteria for the Project.

Petitioners contend that the interpretation that is consistent with the Legislative purposes of the HAA and HEL (and DBL) is to find that the local agency shall enforce objective criteria of the MA on subdivision issues only, and apply "by right" objective standards of the HAA and HEL on land use issues. There would be no local agency discretion to consider subjective criteria in the General Plan or Specific Plan for any project under the HAA, notwithstanding provisions of the MA that may apply to a project. It is argued that any other interpretation undermines the purposes of the Legislature in enacting the HAA and HEL (and DBL) of removing barriers to development and facilitating housing.

Respondent cites *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917 wherein the California Supreme Court found that the Legislative history and mandate of the MA reflects acute awareness that subdivisions which are inconsistent with a locality's general plan subvert the integrity of the local planning process. Respondent also points out that not all housing projects under the HAA require subdivision map approval,[5] and approval of such projects is "by-right" under the HAA and HEL. However, if a project requires a tentative subdivision map, additional policies and considerations under the Map Act must be enforced by the local agency and met by the proposed subdivision and land use. Hence, all housing projects under the HAA must comply with the criteria of the HAA and HEL, and projects that require subdivision map approval must also comply with the criteria of the MA. Here, the Town determined that the proposed subdivision map and land use did not meet the criteria of the MA and denied the applications. The Town contends this is an appropriate discretionary decision, supported by findings, and the findings are supported by substantial evidence.

[5] An assertion not challenged by Petitioners.

Petitioners argue forcefully that the Town's position is an affront to State Housing Laws enacted to prevent local agencies from creating barriers to housing development, and that effectively, there will be no by-right development of the North 40 site. Petitioners anticipate on remand that the Town will ignore its responsibilities for housing under the HAA and its Housing Element, and will succumb to local opposition to development. Petitioners expect the Town will use the MA to effectively block by-right housing development.

The California Supreme Court case *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 is instructive in interpretation of statutes that may be in conflict. The primary task is determining Legislative intent to give effect to the law's purpose. Words of the statute are the most reliable indicator of legislative intent. Courts should harmonize statutes to the extent possible, and interpretations that lead to absurd results or render words surplusage are to be avoided. Similarly, an interpretation that renders statutory language a nullity is to be avoided.

Here, there is no reference in either statute to the other, and no indication that the Legislature intended either statute to control the other in any particular circumstance. As noted in *Tuolumne Jobs & Small Business Alliance*, the Legislature is presumed to be aware of all laws in existence when it passes or amends a statute. If the Legislature had intended Government Code §65589.5 of the HAA to prevail over Government Code §66473.5 of the MA, it could have stated so, but did not. Although Government Code §65589.5 is the later enacted statute and contains language more specific to housing development and land use, Petitioners' reconciliation of the statutes impliedly repeals provisions of GC §66473.5 that require the local agency to determine if the subdivision is consistent with the general plan or adopted specific plan.

Tuolomne Jobs & Small Business Alliance indicates that absent an express declaration of legislative intent, implied repeal should be found "only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." "Implied

repeal should not be found unless the later provision gives undebatable evidence of an intent to supersede the earlier."[6]

The reconciliation of the statutes suggested by the Town gives effect to both statutes and does not impliedly repeal either. It retains application of "by-right" approval standards of Government Code §65589.5(j) for all projects under the HAA, and if the project requires approval of a subdivision map, the Project is also subject to the provisions of the Map Act.[7] Determination that Government Code §65589.5(j) is not the *exclusive* standard for all projects under the HAA is not an implied repeal of the section. This constitutes a rational basis of harmonizing the two potentially conflicting statutes. Notwithstanding Petitioners' dire prediction that this will enable the Town to shirk its mandated responsibilities in the face of local pressure, the statutes are not "clearly repugnant, and so inconsistent that the two cannot have concurrent operation." The reconciliation proposed by Respondent is adopted.

The concerns of Petitioners warrant consideration, and are addressed to some extent later in this ruling. However, considering the present status of the statutes, debate appears best reserved for the legislative branch for legislative action, if any. Here, the Court's task is to reconcile the statutes in their present form, pursuant to guidelines under law.

Did the Town fail to proceed as required by law? Although the Town was required by law to apply the criteria under the MA, the MA does not relieve or preclude the Town from the provisions of Government Code §65589.5(j) of the HAA; specifically, to determine whether or not the Project complies with applicable, objective general plan and zoning standards and criteria. The failure to consider the provisions of Government Code §65589.5(j) is a failure to proceed in the manner required by law.[8] Respondent will therefore be mandated to set aside its decision.

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[6] Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1039.

[7] The record does not indicate the proportion of projects that require subdivision map approval to those that do not.

[8] *See, Honchariw v. County of Stanislaus* (2011) 200 CalApp.4th 1066

During the course of reconsideration of the applications, if the Town finds that the Project is in compliance with such objective standards and criteria, and again denies the Project, the Town must provide written findings supported by substantial evidence that the project would have a specific, adverse impact upon the public health or safety unless the project is disapproved, and there is no feasible method to satisfactorily mitigate or avoid the adverse impact other than the disapproval of the project.[9]

Is the Town's decision supported by the findings? The Town's decision fails to determine whether or not the Project complies with applicable, objective general plan and zoning standards and criteria , and if determined in compliance, whether the Project is conditionally approved or denied with written findings supported by substantial evidence under Government Code § 65589.5(j) of the HAA. The Town's decision is therefore incomplete and not supported by all necessary findings. Respondent will therefore be mandated to set aside its decision and issue a decision that includes this determination and if applicable, written findings pursuant to Government Code §65589.5(j).

Are the findings supported by substantial evidence? The Town determined that the proposed Vesting Tentative Map and Architecture and Site are inconsistent with the Specific Plan and General Plan based on eight findings. Each finding is set forth below in *italics* and addressed by the Court as follows:

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

The Specific Plan divides the site into three land use districts, the Lark District, the Transition District and the Northern District. The Specific Plan sets a development capacity for the North 40 site at 270 residential units.[10] Each district has a distinct character, and specific uses and development standards. Each district permits residential development. The Specific

[9] Government Code §65589.5(j)

[10] Plus 50 density bonus units under the Density Bonus Law (49 very low income senior units and 1 moderate income manager unit)

Plan contains subjective goals and policies, and objective standards for implementation. The Lark District is envisioned as a mix of lower intensity residential use and limited retail/office use, with open space considerations. Envisioned land use includes limited retail, office and restaurants along Los Gatos Boulevard.

The Transition District is located in the central portion of the site as a buffer between low intensity, primarily residential character of the Lark District and active retail and entertainment character of the Northern District. The Transition District contemplates a range of uses, including residential.

The Northern District is intended primarily for retail and entertainment uses, but also envisions residential use.

Plaintiffs' proposed Project provides 193 residential units in the Lark District and 127 units in the Transition District. This equates to 60% of the residential units being situated in the Lark District. The Town finds the allocation excessively disproportionate and inconsistent with the Specific Plan for lower intensity residential development of this district, but provides no specifics or guidance. There is no specific allocation requirement in the Specific Plan. This is a discretionary determination of the Town of a subjective policy.

In reviewing factual determinations by the governmental agency, where, as here, a fundamental or vested right is not involved, the standard of review is whether substantial evidence supports the finding. The Court must view disputed facts in a light most favorable to the local agency, giving it every reasonable inference and resolving conflicts in favor of the local agency.

Under this standard of review, the record supports that the discretionary finding of the Town is based on substantial evidence.

> *"b. The proposed project is inconsistent with the North 40 Specific Plan Section 2.3.1 and its requirements for lower intensity residential uses in the Lark District."*

The finding involves the land use policy for the district and is substantially similar to *"a"* above. The finding is a discretionary determination of a subjective policy in the Specific Plan which is supported by substantial evidence.

"c. The proposed project buildings 18 through 27 are inconsistent with North 40 Specific Plan policy that the Lark District consist of lower intensity residential development with office, retail, personal services, and restaurants along Los Gatos Boulevard."

The residential uses envisioned for the Lark District set forth in the Specific Plan include condominium, cottage cluster/garden cluster housing, row houses and townhomes. The description does not include live-work flats (reserved to the Transition and Northern Districts) or residential above commercial (reserved to the Northern District). The record indicates that buildings 18 through 27 are residential above commercial which is technically inconsistent with the identified uses in the Specific Plan for the Lark District. For purposes of the substantial evidence standard, the Town's finding is supported by substantial evidence.

The Town also finds that the proposed location of the buildings is inconsistent with the Specific Plan for location of commercial use buildings on Los Gatos Boulevard closer to the Lark Avenue intersection. The Specific Plan envisions, but does not require, development of commercial uses along Los Gatos Boulevard. This is a discretionary determination of inconsistency with a subjective policy which the record indicates is supported by substantial evidence.

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

The record indicates that the Specific Plan requires three access points on Los Gatos Boulevard, and states that there is a possible fourth access point. The fourth access point is not a requirement. The Environmental Impact Report for the Specific Plan considered three access points along Los Gatos Boulevard. The record does not indicate, and Respondent does not identify, an objective factor or subjective goal or vision which a fourth access is material. Rather, the record indicates engineering issues in adding a fourth access point, including congestion, turn lane access issues and grade differences, and the Town's planning staff

recommended against a fourth access point. It is unclear from the record what information the Town relied on in support of this finding. The finding is not supported by substantial evidence.

> *"e. The proposed project is inconsistent with North 40 Specific Plan Policy Section 2.4 and Appendix C of the Specific Plan as it does not address unmet housing needs for seniors and "Gen Y.""*

Section 2.4 states in pertinent part that "(R)esidential development is focused on mulit-family housing types and shall be designed to attract the unmet housing needs of the community." Appendix C – Young Adult, Senior, and Empty Nester Design Summary describes what members of "Gen Y" desire in living spaces and neighborhoods and what "Baby Boomers" want in retirement housing. There is substantial evidence to support Respondent's finding that the residential housing component of the proposed plan is inconsistent with the Specific Plan goals and policies as expressed in section 2.4 and appendix C. This is a discretionary determination of a subjective policy which the record indicates is supported by substantial evidence.

> *"f. the proposed project is inconsistent with the Residential Unit Size Mix and Table set forth on page 6-14 of the Specific Plan and the Residential Unit Size Mix should 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."*

The table is neither a requirement nor objective standard, but rather, an example how the North 40 site could assist the Town to meet affordable housing needs of the community. The Town's Housing Element, Section 2.4 of the North 40 Specific Plan and appendix C add context to the table. The record identifies North 40 as the largest remaining site in Los Gatos for development. The record indicates that the Project provides for 49 residential units at very low income, one unit at moderate income and 270 units at fair market values well above moderate income.[11]

The Town's General Plan Housing Element suggests that the North 40 site have 156 very low, 84 low, and 30 moderate income units, a total of 270. The Town determined that the Project should have smaller units to increase the number of units that meet these very low, low

[11] Estimated fair market values of $900,000 to $1,500,000.

and moderate income levels. The finding provides no guidance or specifics of what mix of affordable units among income levels is considered consistent. However, under the substantial evidence standard, the facts in the record are sufficient as substantial evidence to support the Town's finding.

> *"g. The proposed project, specifically buildings 18 through 27, would result in an anomaly of residential uses within an existing commercial land use context."*

This finding appears to restate the Town's finding in *"c"* above. Apparently, the anomaly is that the residential above commercial building is a specified residential use envisioned for the Northern District in the Specific Plan, but not for the Lark District. While there is an objective element, it is primarily a subjective policy. There is substantial evidence in the record to support the finding.

> *"h. The only promised Below Market Rate housing is 49 units above Market Hall and the remainder would have home values estimated at $900,000 to $1,500,000 requiring a 20 percent down payment and income of approximately $130,000 to $200,000 per year."*

This finding is substantially the same as the Town's findings in *"e"* and *"f"* above. Respondent adopted its Housing Element in 2015, in part to meet its allocable share of existing and projected housing needs, including very low, low and moderate income households[12]. The housing element identifies the North 40 as the primary site for construction of affordable housing units, with an allocation of 156 units to very low income, 84 units to low income and 30 units to moderate income; a total of 270 units.[13] The record indicates that this is not an objective requirement, but a subjective goal. Petitioners' Project provides for 49 very low income residential units, one moderate income unit, and the balance of 270 units above moderate income level. The 49 very low income units account for a modest percentage of the affordable units identified in the Housing Element. The record indicates that if the Town is unable to meet its share of housing need on the sites identified in its Housing Element, the Town is required to provide proposed actions for additional sites. Because North 40 is the largest site remaining for development in Los Gatos, the Town contends that approval of the

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[12] 201 very low, 112 low, and 132 moderate income units are allocable to the Town in its housing element.

[13] Table H-2 Summary of Community Strategies.

Project with its current allotment of affordable housing will make it difficult to meet the allocation for low-income housing. This finding is supported by substantial evidence.

Accordingly, the Court enters the following decision and judgment:

A. A writ of mandamus shall issue directing Respondent, Town of Los Gatos, to:

1. Set aside Town of Los Gatos Resolution 2016-046 denying the applications for Vesting Tentative Map and Architecture and Site;

2. Reconsider Petitioners' applications and the Project under the additional provisions of Government Code §65589.5, and specifically subsection (j);

3. If, in the course of reconsideration, Respondent determines to again deny the applications and Project, Respondent shall determine whether the Project complies with applicable, objective general plan and zoning standards and criteria.

a. If Respondent determines that the Project does not so comply, Respondent shall specify the applicable, objective criteria which the Project failed to comply.

b. If Respondent determines that the Project does so comply, then Respondent shall make written findings, supported by substantial evidence on the record, that (1) the project would have a specific, adverse impact upon the public health or safety unless the project is disapproved, and (2) there is no feasible method to satisfactorily mitigate or avoid that specifically identified adverse impact other than the disapproval of Petitioners' applications.

B. The Town's findings in *"1. a"* to *"c"* and *"1. e"* to *"h"* of Resolution 2016-046 are supported by substantial evidence.[14]

C. Approval of the proposed project shall require compliance with the applicable provisions of the Map Act and Housing Affordability Act.

Dated: June 9, 2017

Hon. Drew C. Takaichi
Judge of the Superior Court

[14] The Town is encouraged to supplement such findings with objective criteria to enable Petitioners to remedy the inconsistencies identified in the findings.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED
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Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ DEPUTY
J. Lara

June 12, 2017

RE: **Eden housing, Inc., Summerhill homes, LLC vs Town of Los Gatos, and Does 1 to V**
Case Number: **16CV300733**

PROOF OF SERVICE

DECISION AND JUDGMENT GRANTING WRIT OF MANDAMUS was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on June 12, 2017. CLERK OF THE COURT, by Julie Lara, Deputy.

cc: Robert William Schultz, Town Attorney, Town of Los Gatos, Civic Center 110 E. Main St. Los Gatos CA 95030
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