Nos. 18-16105; 18-16141

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC
Plaintiff-Appellee,

vs.

CITY OF OAKLAND
Defendant-Appellant,

and

SIERRA CLUB and SAN FRANCISCO BAYKEEPER
Intervenor-Defendants-Appellants

Appeal From The United States District Court
For The Northern District of California
Case No. 3:16-CV-07014-VC

Amicus Brief of the League of California Cities and East Bay Regional Park District in Support of Defendant-Appellant City of Oakland's Petition for Rehearing or Rehearing En Banc

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the League of California Cities is an association of California cities. It has no parent corporation and no publicly held corporation that owns ten percent or more of any stock. Accordingly, a corporate disclosure statement is not required by the Federal Rules of Appellate Procedure Rules 29(a)(4)(A) and 26.1.

Amicus Curiae East Bay Regional Park District is a special district operating in California. Accordingly, a corporate disclosure statement is not required by the Federal Rules of Appellate Procedure Rules 29(a)(4)(A) and 26.1.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTRODUCTION

In this case, a divided panel upheld the district court's determination that the City of Oakland breached a development agreement—a type of agreement authorized by California law—with Oakland Bulk and Oversized Terminal, LLC ("OBOT") by imposing new regulations on the storage and handling of coal within its jurisdiction. In doing so, the panel cast significant doubt on the ability of California cities and counties to effectively protect public health and safety, especially in the face of new information or changing circumstances.

The League of California Cities and the East Bay Regional Park District submit this amicus brief in support of Oakland's petition for rehearing and request for certification of questions to the California Supreme Court. Such reconsideration is necessary to address important state law questions of first impression regarding the scope of development agreements and the exercise of local agency police power. Otherwise, the panel's decision will force cities either to forego an important, legislatively authorized development tool, or to cede their police power authority to protect the public against health and safety risks.

The panel's decision undermines a core purpose of local government—to protect its residents from emerging public health and safety threats. The Oakland City Council acted, in its legislative capacity, to ban bulk storage and handling of coal within its jurisdiction. It then determined—based on extensive analysis and testimony from scientific experts and after multiple public hearings—that such storage and handling would be "substantially dangerous" to the health and safety of vulnerable residents near OBOT's facilities, and sought to apply the ban to OBOT's terminal. In making this determination, the City Council took into account the systemic issues facing the adjacent community, including disproportionate incidences of health problems and respiratory ailments and significant, existing pollution.

Rather than deferring to the City Council's determination regarding the significant risks to public health and safety—a standard of review long supported in California law—the district court made an *independent* determination about the potential impacts of coal storage and handling after receiving new testimony from OBOT's expert witnesses—witnesses and testimony OBOT had chosen not to present to

the City before it reached its decision. In upholding the district court's decision, the panel sanctioned a proceeding that stripped the City Council of its ability to effectively receive evidence, assess credibility, and make a determination regarding an emerging public health threat. The Opinion upsets the traditional balance of power between cities and developers and eliminates Oakland's benefit of the bargain it struck with OBOT regarding the procedure the City would use to exercise its police power.

The Opinion significantly undermines the ability of local agencies to effectively regulate land use and protect their residents. As a matter of California law, cities and counties cannot contract away their police power. The state legislature, however, created an exception to this general rule to allow developers to "lock-in" land use designations via development agreements in order to facilitate complex development projects. As a result, cities rely on development agreements—like the one at issue in this case—to secure necessary community benefits in conjunction with nearly all major development projects in the state.

If cities are not permitted to effectively retain the ability to impose new regulations in the face of new urgent threats—as implied by the

Opinion—cities will be faced with an impossible choice: they either forgo the community benefits of well-crafted development agreements or they risk being unable to protect their residents in the face of emerging threats, like deteriorating air quality, wildfire, flooding, or COVID-19. The League and the Park District urge this Court to grant Oakland's petition to address this important and widespread issue or to allow the California Supreme Court to do so.

STATEMENT OF INTEREST

The League of California Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The East Bay Regional Park District is a special district operating in Alameda and Contra Costa Counties that maintains and operates a

system of 73 regional parks. For nearly two decades, the Park District has planned for parks and outdoor recreation facilities directly adjacent to OBOT's terminal. The Bay Bridge Path, a bicycle and pedestrian amenity on the south side of the Bay Bridge, is located within 1,000 feet of the terminal. ER846. Judge John Sutter Regional Shoreline is a shoreline park that ultimately will connect the Bay Bridge Path to the Mandela Parkway in West Oakland; components of this park, including the Bridgeyard Building, are already open. ER1082, fn. 186.

The Park District supported the City's adoption of the Ordinance at issue in this case. *E.g.*, ER 81784-85 (Letter from Park District Director to Oakland Mayor Schaaf); ER 81788-89 (Park District Resolution supporting coal ban). The Park District is deeply concerned about OBOT's intention to handle and store coal products directly adjacent to these recreational amenities. The Park District also has a more general interest in ensuring that cities within its jurisdiction have the continued ability to effectively protect park users. As the Park District does not have land use authority, it relies on cities and counties to adopt necessary regulations affecting the safety and functionality of its parklands.

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a); Cir. Rule 29-2(a) .

ARGUMENT

The City Council of Oakland, exercising its police power, made a determination that storage and handling of coal at the OBOT facility would pose a "substantial danger" to the adjacent city residents. The district court effectively substituted its own judgement for this determination, in part by allowing new evidence and making judgment calls on expert credibility. In upholding this decision, the Opinion gravely threatens the ability of cities to continue to effectively and decisively act in the face of emerging threats. It also undermines the California legislature's intent in authorizing development agreements.

As a result, it is clear that this case meets the tests for both certification of questions to the California Supreme Court and for rehearing en banc. This Court has held that certification of questions is appropriate when "the question presents 'important public policy ramifications' yet unresolved by the state court" or when "the issue is new, substantial, and of broad application." *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc) (citation omitted).

Likewise, rehearing en banc is appropriate when a proceeding involves "a question of exceptional importance." Fed. R. App. P. 35(a)(2). As explained further below and in Oakland's petition, this case clearly meets these standards.

I. Cities Frequently Rely on Development Agreements to Effectively Plan and Manage Development Projects.

Development agreements, like the one at issue in this case, are an important tool created by California law. While they constitute binding agreements (Cal. Gov't Code § 65865.4; *N. Murrieta Community, LLC v. City of Murrieta*, E072663, 2020 WL 3046093, at *7 (Cal. Ct. App. June 8, 2020)), they differ significantly from proprietary or other contracts that a city might enter into due to the history and intent of development agreements.

In 1976, the California Supreme Court held that a property developer that had commenced construction work and expended a considerable sum of money, but did not have a building permit, did not acquire a vested right under common law. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Com.*, 17 Cal. 3d 785, 797 (1976). As a result, the city could continue changing land use and other requirements, even if it would disrupt the project already begun. *Id.* at 795. This decision sent

shockwaves through the development community, which sought certainty in the regulatory process.

In response, the California legislature enacted the Development Agreement Statute (Cal. Gov't Code §§ 65864–65869.5) "to address the uncertainty that resulted from late vesting and its adverse impact on development." *Ctr. for Cmty. Action & Envtl. Justice v. City of Moreno Valley*, 26 Cal. App. 5th 689, 696 (2018) ("*CCAEJ*"); *see also id.* 704 (noting that the *Avco* decision had created a "statewide impediment to land use development"). Specifically, the Development Agreement Statute establishes a mechanism by which cities and developers can negotiate for mutual benefits when contemplating large-scale development projects. For developers, the Development Agreement Statute provided a fix for *Avco*'s late vesting rule: "the statute allows a city or county to freeze zoning and other land use regulation applicable to specified property to guarantee that a developer will not be affected by changes in the standards for government approval during the period of development." *Santa Margarita Area Residents Together v. San Luis Obispo Cty. Bd. of Supervisors*, 84 Cal. App. 4th 221, 226-27 (2000); *see also* Cal. Gov't Code § 65866.

For cities and counties, the Development Agreement Statute provides a mechanism by which they can negotiate for conditions and concessions to ensure that proposed projects provide benefits to the community. *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 443-44 (2010) (noting, for example, that cities can "extract promises from the developers concerning financing and construction of necessary infrastructure"). Development agreements routinely ensure that developers build community improvements like fire stations, transportation infrastructure, and school facilities, or that developers contribute funding to alleviate the project's potential impacts. They also often ensure that projects are developed in an orderly and thoughtful way.

Given this mutual benefit to developers and local agencies, development agreements are commonly used by California cities and counties. By 1990—only 10 years after the Development Agreement Statute became effective—cities and counties had already entered into over 500 development agreements. *See* Ted Taub, Development Agreements, 42 Land Use L. & Zoning Dig. 3, 3 (1990). Their importance has only increased since that time. Some of the state's

largest development projects have relied on development agreements to memorialize and implement negotiated compromises between local agencies and developers, such as redevelopment of Treasure Island, Apple's new campus, virtually all new stadiums, and the Sacramento Railyards project. And even for smaller or more straight-forward projects, development agreements are routinely used to provide both developer certainty and community benefits.

II. The Development Agreement Statute Strikes a Careful Balance between Providing Certainty and Allowing Local Agencies to Retain Police Power.

One of the crucial functions of a development agreement is to provide developers with long-term certainty about the application of *new* land use regulations to the property. Consequently, the development agreement statute provides that:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement.

Cal. Gov't Code § 65866. However, this restriction on the future exercise of local agency authority over a project is not absolute. Rather, it is necessarily limited in two key ways.

First, cities and counties retain the ability to impose new requirements to prevent nuisance or address an imminent threat to public health and safety. *See Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 423 (2016) ("a vested right . . . may be impaired or revoked if the use . . . constitutes a menace to the public health and safety or a public nuisance") (internal citation omitted); *Davidson v. Cty. of San Diego*, 49 Cal. App. 4th 639, 649 (1996) ("the local agency may apply subsequent regulations . . . if it determines failure to do so would create a condition dangerous to the public health or safety").

Indeed, California courts have made clear that local agencies may not contract away their right to exercise the police power in the future. *Laurel Hill Cemetery v. City & Cnty. of San Francisco*, 152 Cal. 464, 475 (1907), aff'd, 216 U.S. 358 (1910) (finding a city's police power "cannot be bargained or contracted away"); *Cotta v. City & Cnty. of San Francisco*, 157 Cal. App. 4th 1550, 1557–58 (2007) (finding that an

agreement that contracts away the agency's right to exercise its police power in the future is "invalid as against public policy"); *Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal. App. 4th 172, 182 (2006) (holding invalid a settlement agreement that abrogated the city's police power). Thus, while development agreements may lock-in requirements related to permitted uses, density, design, improvement, and construction standards, they cannot impair the ability of cities or counties to otherwise exercise their police power. *CCAEJ,* 26 Cal. App. 5th at 704 n.11 (development agreement statutory requirements "ensur[e] that development agreements do not lead to surrender of the police power").

More importantly, and relevant here, the Development Agreement Statute specifically allows the parties to negotiate terms that allow the local agency to impose new rules, regulations, and policies in certain circumstances. Cal. Gov't Code § 65866. That negotiation is exactly what happened here. In section 3.4.2 of the development agreement, Oakland and OBOT specified both when and how the City would be permitted to exercise its police power. ER1970.

In considering this language, the panel erred in two fundamental ways. First, it interpreted section 3.4.2 to afford the City no deference in its determinations regarding public health and safety—a result contrary to both the intent of the parties and the preservation of police powers intended in the Development Agreement Statute. Opinion at 12-13. Second, to the extent the Opinion suggests development agreement terms establishing the level of deference and standards of judicial review to be applied to a city's exercise of its police power are *never* permissible (*see* Opinion at 14), such conclusion is flatly contrary to important aspects of state law.

Moreover, the panel's opinion would require a significant shift in how cities and counties approach development agreements. Development agreements routinely include language allowing the local agency to impose new laws that are necessary to protect public health and safety. *See, e.g.*, Ex. A[1] (City of Cupertino development agreement

[1] The attached portions of example development agreements are subject to judicial notice. *See* Fed. R. Evid. 201(b); *Indep. Living Ctr. of S. California v. City of Los Angeles*, 205 F. Supp. 3d 1105, 1110 n.2 (C.D. Cal. 2016) (court may take judicial notice of matters of public record, including official city records).

provides that city can impose "[n]ew City Laws that are necessary to protect the physical health and safety of the public" (§3.4.5)); Ex. B (City of Orinda development agreement states that city can apply new regulations "if such application is required to protect the physical health and safety of existing or future residents or occupants of the Project Site, or any portion thereof or any lands adjacent thereto" (§3.2.2)); Ex. C (County of Placer agreement provides that county can apply "any growth limitation ordinance, resolution, rule or policy that is adopted by the County to eliminate placing residents of the development in a condition which is imminently dangerous to their health or safety, or both" (§2.6.1)). State courts have recognized the statutory authorization and enforceability of such provisions. *N. Murrieta*, 2020 WL 3046093, at *1 (development agreement explicitly allowed city to impose new fees on development to mitigate newly discovered impacts).

If anything, the development agreement at issue in this case was negotiated to provide even more certainty to both parties. Rather than simply allowing the Oakland to apply new regulations that are "required" or "necessary" to address public health threats, the

development agreement in this case spelled out *how* Oakland was to evaluate whether to impose new laws to protect public health threats—"City determines based on substantial evidence" whether a threat to public health will occur. ER1970. Given the history of the Development Agreement Statute and California courts' treatment of such agreements, the panel should have granted deference to this negotiated process, rather than ignoring the right of the City to make its own determination regarding public health and safety.

III. The Opinion Threatens the Ability of Cities and Counties to Effectively Preserve Their Police Power and Protect the Health and Safety of Their Residents.

Addressing public health and safety risks is one of the most necessary and longstanding powers of local government. *Fourcade v. City & Cty. of San Francisco*, 196 Cal. 655, 662 (1925); *Miller v. Bd. of Pub. Works of City of Los Angeles*, 195 Cal. 477, 485 (1925). Consequently, California courts have afforded local agencies with significant latitude to make the needed empirical and predictive policy judgments about how to best protect health and safety. *San Francisco Tomorrow v. City & Cty. of San Francisco*, 229 Cal. App. 4th 498, 515-16 (2014).

The Opinion, however, effectively eliminates the power of local governments to enter into development agreements that are sufficiently protective of public health and safety—and to include language establishing that the city's public health and safety determinations as they relate to the development agreement are subject to the substantial evidence standard of review. Rather than allowing local governments to set forth the process for imposing new rules to respond to emerging threats—an approach explicitly authorized by Government Code section 65866—the Opinion essentially mandates that local governments will *only* be able to apply new rules if they can prove, in a trial setting, that such rules are necessary. Opinion at 19. The Opinion thereby strips local governments of the traditional deference afforded to them by the courts, deference that would clearly exist absent the development agreement.

The Opinion, if allowed to stand, has important public policy ramifications that will lead to unfair and inefficient results. In order to impose new rules, local governments will still be required by state law to undertake lengthy public hearings and build administrative records to support their decisions. However, by eliminating the possibility of

substantial evidence review, the Opinion allows developers to hold back on submitting their information in the administrative process. As the dissent correctly noted, this approach will "subvert[] the public proceedings of governmental entities and make[] their hearings a mere warm-up for when the heavy artillery is brought out in a trial." *Id*. at 45 (Piersol, J., dissenting).

Finally, the Opinion creates sufficient uncertainty and thus will reduce the likelihood that cities will enter into development agreements, to the detriment of developers and the public. Lacking a clear ability to address emerging public health and safety impacts without exposing cities to breach of contract claims and extensive litigation, cities will likely hesitate to provide developers with long-term certainty through development agreements. Such a result threatens to significantly hamper development in California and undo the Legislature's intent post-*Avco* to provide a mutually beneficial mechanism for cities and developers to engage in long-term project planning.

This is not an instance where the California legislature could resolve the Opinion's confusion with how to interpret development

agreements. Any legislative attempt to make even more explicit the ability of the parties to negotiate how and when cities can invoke their police power—including by establishing a standard of review—would run afoul of the Opinion's insistence that "contracting parties cannot dictate to a federal court the standard of review that governs a case." Opinion at 14. Further judicial review of this new, unsupported limitation on the rights of cities and developers to manage land use is both warranted and important.

CONCLUSION

This case raises a novel state law question of first impression with important public policy implications for all cities and counties throughout California. For the foregoing reasons, the League and the Park District urge this Court to grant the City of Oakland's petition for rehearing and certification of questions to the California Supreme Court.

DATED: July 17, 2020 SHUTE, MIHALY & WEINBERGER LLP

By: s/Tamara S. Galanter
TAMARA S. GALANTER
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Attorneys for Amici Curiae the League of California Cities and East Bay Regional Park District

Certificate of Compliance

In accordance with Federal Rules of Appellate Procedure Rule 32(a)(7), I certify that this brief complies with the length limit of 4,200 words specified in Circuit Rule 29-2(c)(2). This Brief contains 3,338 words, as determined by the word count of the computer used to prepare this brief.

DATED: July 17, 2020

SHUTE, MIHALY & WEINBERGER LLP

By: s/Tamara S. Galanter
TAMARA S. GALANTER

EXHIBIT A

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202
Attention: City Manager

Record for the Benefit of
The City of Cupertino
Pursuant to Government Code Section 27383

Space Above Reserved for Recorder's Use Only

DEVELOPMENT AGREEMENT

FOR THE DE ANZA HOTEL PROJECT

BY AND BETWEEN

CITY OF CUPERTINO

AND

NORTHWEST PROPERTIES
a California Limited Partnership

Effective Date: _____

3.3.4 a rooftop lounge and/or bar; and

3.3.5 rooms suitable for meetings, conferences, banquets and similar uses.

The details for each component are subject to the Project and Agreement amendment processes as set forth in Sections 8.2 and 8.3 herein. In the event of a conflict between the Existing Approvals and the terms of this Section 3.3, the Existing Approvals shall govern.

3.4 Applicable City Regulations. The laws, rules, regulations, official policies, standards and specifications of City applicable to the development, use and operation of the Property and the Project shall be (collectively, "**Applicable City Regulations**"):

3.4.1 Those rules, regulations, official policies, standards, and specifications of the City set forth in the Project Approvals and this Agreement;

3.4.2 With respect to matters not addressed by and not otherwise inconsistent with the Project Approvals and this Agreement, those laws, rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing permitted uses, building locations, timing and manner of construction, densities, intensities of uses, maximum heights and sizes, design, set-backs, lot coverage and open space, parking, landscaping, requirements for on- and off-site infrastructure and public improvements and Exactions, in each case only to the extent in full force and effect on the Effective Date;

3.4.3 Except as may be addressed in the Project Approvals, New City Laws that relate to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure imposed at any time, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties, and such procedures are not inconsistent with procedures set forth in this Agreement;

3.4.4 New City Laws that revise City's uniform construction codes, including City's building code, plumbing code, mechanical code, electrical code, fire code, grading code and other uniform construction codes, as of the date of permit issuance, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties;

3.4.5 New City Laws that are necessary to protect the physical health and safety of the public, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties;

3.4.6 New City Laws that do not conflict with this Agreement or the Project Approvals, provided that such New City Laws are uniformly applied on a City-wide basis to all substantially similar types of Development Projects and properties; and

3.4.7 New City Laws that do not apply to the Property and/or the Project due to the limitations set forth above, but only to the extent that such New City Laws are accepted in writing by Developer in its sole discretion.

EXHIBIT B

RECORDING REQUESTED BY
AND WHEN RECORDED, RETURN TO:

City of Orinda
P.O. Box 2000
Orinda, California 94563
Attention: City Manager

CONTRA COSTA Co Recorder Office
STEPHEN L. WEIR, Clerk-Recorder
DOC- 2005-0221295-00
Friday, JUN 17, 2005 09:52:32
FRE $0.00
Ttl Pd $0.00 Nbr-0002751439
lrc/R9/1-176

(Space Above This Line for Recorder's Use Only)
Exempt from recording fee per Gov. Code § 27383

SECOND AMENDMENT AND RESTATEMENT OF THE

DEVELOPMENT AND PRE-ANNEXATION AGREEMENT

FOR

GATEWAY VALLEY

BETWEEN

CITY OF ORINDA

AND

ORINDA GATEWAY, LLC

Approved: March 15, 2005

Surviving Obligations. Upon expiration of the Term, Orinda Gateway, LLC shall thereafter comply with the provisions of all Improvement Agreements (including provisions with respect to Security), all Surviving Obligations, and all City Regulations and Laws then in effect or subsequently adopted with respect to the Project Site and/or the Project, except that expiration of the Term (including as a result of Termination of this Agreement) shall not affect any right vested under Laws (absent this Agreement), or other rights arising from City Approvals granted by the City for development of all or any portion of the Project.

ARTICLE III

GENERAL REGULATION OF DEVELOPMENT OF PROJECT

3.1. Project Development; Control of Development.

Orinda Gateway, LLC shall have the right to develop the Project within the Project Site in accordance with the terms and conditions of the Conceptual Development Plan, and the City shall have the right to control development of the Project Site in accordance with the provisions of the Conceptual Development Plan. Except as otherwise specified in this Agreement, the Applicable City Regulations shall control the overall design, development and construction of the Project, and all on- and off-site improvements and appurtenances in connection therewith. In the event of any inconsistency between the Applicable City Regulations and this Agreement, this Agreement shall control, except that if the inconsistency cannot be reconciled by application of this rule of construction, the provision which best gives effect to the purposes of the Conceptual Development Plan shall control.

3.2. Applicable City Regulations.

Except as otherwise specified in this Agreement and in this Section 3.2, the Existing City Regulations shall govern the development of the Project Site and all subsequent City Approvals with respect to the Project. The City shall have the right, in connection with any further City

Approvals, to apply City Regulations as Applicable City Regulations in accordance with the following terms, conditions and standards:

3.2.1. Future City Regulations.

The City shall have the right to apply City Regulations (including amendments to Existing City Regulations) adopted by the City after the Adoption Date if such City Regulations (i) are not materially inconsistent or materially in conflict with intent, purposes, terms, standards or conditions of this Agreement; (ii) do not materially interfere with the uses, height, density and intensity of development specified in the Existing City Regulations, or with the timing, phasing, or rate of development of the Project under this Agreement; (iii) do not materially interfere with or diminish the ability of a Party to perform its obligations hereunder or materially expand, enlarge or accelerate Orinda Gateway, LLC's obligations hereunder; and (iv) apply City-Wide.

3.2.2. Regulation for Health and Safety.

Notwithstanding the provisions of Section 3.2.1, the City shall have the right to apply City Regulations (including amendments to Existing City Regulations) adopted by the City after the Adoption Date, in connection with any City Approvals, or deny, or impose conditions of approval on, any City Approvals, if such application is required to protect the physical health and safety of existing or future residents or occupants of the Project Site, or any portion thereof or any lands adjacent thereto.

3.2.3. Construction Codes.

Notwithstanding the provisions of Section 3.2.1, the City shall have the right to apply those City-Wide City Regulations pertaining to or imposing life safety, fire protection, engineering and architectural integrity requirements with respect to the design and construction of buildings and improvements in effect at the time of the approval of any City Approval thereunder.

3.2.4. Term of Certain City Approvals.

The term of any Tentative Map relating to the Project Site shall be extended pursuant to Government Code section 66452.6 (a) for the longer of the Term or the term of the Tentative Map otherwise allowed pursuant to the SMA. The term of any discretionary City Approvals (such as use permits and Land Use Permits but excluding variances) applicable to the Project Site shall be extended for the longer of (i) the Term, (ii) the term of such City Approval, or (iii) the term of a Tentative Map relating to that portion of the Project Site which is the subject of such City Approval.

3.2.5. Specification of Conflict.

For purposes of this Section 3.2, to the extent applicable, a City Regulation shall not be deemed materially inconsistent or in conflict with the Existing City Regulations if (i) Orinda Gateway, LLC consents in writing to the application of the City Regulation to the Project and the City is not requiring such consent as a prerequisite to Orinda Gateway LLC obtaining a City Approval consistent with this Agreement; or (ii) the City Regulation establishes procedures of City-Wide application for making applications for and processing Approvals, and public notices and public hearings (other than procedures specifically established in this Agreement, which procedures may only be amended or modified as specified in this Agreement); or (iii) the City Regulation is adopted or undertaken by the City as reasonably required to comply with any Laws, subject to the provisions of Section 7.2.

3.3. City Fees.

Except as otherwise provided in Article IV of this Agreement, Orinda Gateway, LLC shall be subject to and pay City Fees in accordance with the provisions of this Section 3.3.

EXHIBIT C

Before the Board of Supervisors
County of Placer, State of California

In the matter of: AN ORDINANCE ADOPTING A DEVELOPMENT AGREEMENT FOR THE PROPERTY COMPRISING THE PLACER RANCH SPECIFIC PLAN

Ordinance No. _____

The following ordinance was duly passed by the Board of Supervisors of the County of Placer at a regular meeting held _____, 2019, by the following vote:

Ayes:

Noes:

Absent:

Signed by me after its passage.

_____
Chairperson, Board of Supervisors

Attest:

_____
Clerk of said Board

WHEREAS, on November 21, 2019, the Placer County Planning Commission ("Planning Commission") held a noticed public hearing pursuant to Placer County Code Chapter 17, Article 17.58, Section 17.58.240 and Article 17.60, Section 17.60.140 to consider the Placer Ranch Specific Plan ("Specific Plan"), including a development agreement by and between the County of Placer and Placer Ranch, LLC, the landowner owning the property within the boundaries of the Specific Plan, and pursuant to Placer County Code Chapter 17, Article 17.58, Section 17.58.240(A)(3) and Article 17.60, Section 17.60.090(C), the Planning Commission has made written recommendations to the Board of Supervisors ("Board") related thereto; and

WHEREAS, notice of a public hearing was given in compliance with Placer County Code Chapter 17, Article 17.58, Section 17.58.240 and Article 17.60, Section 17.60.140, and on _____, 2019, the Board held a noticed public hearing pursuant to Placer County Code Chapter 17, Article 17.58, Section 17.58.240(B) and Article 17.60, Section 17.60.090(D) to consider the recommendations of the Planning Commission and to receive public input regarding the approval of the Development Agreement and this ordinance; and

WHEREAS, having considered the recommendations of the Planning Commission, having reviewed the Development Agreement and the Placer Ranch Specific Plan and related entitlements, having received and considered the written and oral comments submitted by the public thereon, and having adopted

The vesting of the Entitlements shall not supersede or affect rights otherwise vested by operation of law, including but not limited to, the Subdivision Map Act and/or other provisions of state or local zoning law.

2.3 Project Phasing. Except as otherwise provided in this Agreement, Developer, or its successor(s) in interest, shall develop and construct the infrastructure necessary to serve the Project in Phases 1, 2, 3 and 4 consistent with the phasing set forth in **Exhibit E** and Backbone Infrastructure requirements as set forth in **Exhibit F**. Changes to the phasing do not constitute an amendment to this Agreement. Details regarding the requirements for each phase are discussed in Section 4.1

2.4 Development Timing. It is the intention of this provision that Developer be able to develop the Property in accordance with Developer's own schedule; provided, however, that to the extent phasing is required by the Entitlements and this Agreement, such provisions shall govern. No future modification of the County Code or any ordinance or regulation which limits the rate of development over time shall be applicable to the Property.

2.5 Residential Unit Transfer. The number of residential dwelling units planned for the different parcels within the Project may be transferred to other parcels within the Project, subject to compliance with the conditions for such transfer as set forth in the Specific Plan. Any remaining unused units must be transferred prior to County approval of the last small lot tentative subdivision map for the Property or are thereafter forfeited. This provision shall only apply to the Community Property.

2.6 Rules, Regulations and Official Policies.

2.6.1 Conflicting Ordinances, Moratoria or Inconsistency. Except as provided in Sections 2 and 3 hereof, and subject to applicable law relating to the vesting provisions of development agreements, so long as this Agreement remains in full force and effect, any change in, or addition to, the Applicable Rules including, without limitation any change in the General Plan, County Code, applicable fee program or other rules and policies adopted or becoming effective after the Effective Date, including, without limitation, any such change by ordinance, County Charter amendment, initiative, referendum (other than a referendum that specifically overturns the County's approval of the Entitlements), resolution, policy, ordinance or legislation adopted by the County or by initiative (whether initiated by the Board of Supervisors or by a voter petition) shall not directly or indirectly limit the rate, timing, sequencing, or otherwise delay or impede, development of the Property in accordance with the Entitlements and this Agreement. Notwithstanding anything to the contrary above, Developer shall be subject to any growth limitation ordinance, resolution, rule or policy that is adopted by the County to eliminate placing residents of the development in a condition which is imminently dangerous to their health or safety, or both, in which case County shall treat Developer in a uniform, equitable and proportionate manner with all other properties that are affected by said condition.

To the extent any future resolutions, rules, ordinances, fees, regulations or policies applicable to development of the Property are not inconsistent with the Entitlements, rate or timing of construction, maximum building height or size, or provisions for reservation or dedication of land under the Entitlements, or under any other terms of this Agreement, such rules, ordinances, fees, regulations or policies shall be applicable. Developer shall also be subject to any such changes regarding construction and engineering design standards or building standards in the event such changes are adopted in response to a natural disaster as found by the Board such as floods, earthquakes, and similar disasters.

2.6.2 Application of Changes. Nothing in this section shall preclude the application to development of the Property of changes in County laws, regulations, plans or policies, the terms of which are specifically mandated and required by changes in State or federal laws or regulations. To the extent that such changes in County laws, regulations, plans or policies prevent, delay or preclude compliance with one or more provisions of this Agreement, County and Developer shall take such action as may be required pursuant to Section 7.1 of this Agreement to comply therewith.

2.6.3 Title 24 California Code of Regulations. Unless otherwise expressly provided in this Agreement, the Project shall be constructed in accordance with the provisions of the California Building, Mechanical, Plumbing, Electrical and Fire Codes set forth in Title 24 of the California Code of Regulations in effect at the time of approval of the appropriate building, grading, encroachment or other construction permits for the Project. To the extent that such changes in Title 24 prevents, delays or precludes compliance with one or more provisions of this Agreement, County and Developer shall take such action as may be required pursuant to Section 7.3 of this Agreement to comply therewith.

2.6.4 Authority of County. Nothing in this Agreement shall be construed to limit the authority or obligation of County to hold necessary public hearings, or to limit discretion of County or any of its officers or officials with regard to rules, regulations, ordinances, laws and entitlements of use which require the exercise of discretion by County or any of its officers or officials, provided that subsequent discretionary actions shall not prevent, delay, or impose additional burdens upon, or obligations in connection with, the development of the Property for the uses and to the density and intensity of development as provided by the Entitlements and this Agreement, in effect as of the Effective Date of this Agreement.

2.7 Subsequent Annexations. County and Developer acknowledge that under current provisions of state law (i.e. Government Code Section 65865.3), the Initial Term of this Agreement and any extensions thereof may be affected by a subsequent annexation of all or any portion of the Property into the jurisdictional boundaries of an existing city.

SECTION 3
PLAN AREA FEES

3.1 Application, Processing, and other Fees and Charges