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**F7a**

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STAFF REPORT: DE NOVO HEARING

Application Number: A-3-MCO-16-0017

Applicant: Community Housing Improvement Systems and Planning Association, Inc. (CHISPA)

Project Location: Moro Cojo Inclusionary Housing Subdivision, located off of Castroville Boulevard near the community of Castroville in unincorporated North Monterey County.

Project Description: Amend the deed restrictions for 161 existing single-family residences in the subdivision to reduce the duration of required affordability from permanent to 20 years from the date of the first deed conveyance.

Staff Recommendation: Approval with Conditions

SUMMARY OF STAFF RECOMMENDATION

Monterey County approved a coastal development permit (CDP) for the Moro Cojo Inclusionary Housing subdivision in 1995. The subdivision was developed as an affordable housing project and it includes a public park, 90 multi-family units, and 175 single-family homes that were constructed in the early 2000s. The subdivision was constructed using "sweat equity" whereby the homeowners themselves provided the majority of the construction labor. The subdivision is located approximately two miles northeast of Castroville in North Monterey County and is predominantly surrounded by agricultural land and wetlands. The current proposed project would modify the deed restrictions there were placed on the existing residential properties in order to implement Condition 99 of the 1995 County CDP, which required all of the homes to be

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affordable and available only to very-low-, low-, and moderate-income families. At the time of the original County CDP approval, the duration of that affordability term was not defined, although the developer (CHISPA, a local non-profit affordable housing development firm) indicates that it was not intended to apply in perpetuity. The County was sued on its CDP action, and settlement of that litigation resulted in CHISPA recording deed restrictions that identify the affordability requirement as in perpetuity, but that also provide that the perpetuity duration could be modified if supported by substantial evidence. . In 2015, CHISPA applied to the County to modify the deed restrictions on 161 of the 175 single-family residences by reducing the term of the affordability requirement from permanent to 20 years from the date of the first deed conveyance.¹ Removal of the affordability requirement would allow those homeowners to sell their homes at market rate to any buyer starting in 2020, rather than at a capped price only to families who qualify as very-low-, low-, and moderate-income as is currently the case under the affordability restriction. The County approved the change in 2016, and that approval was appealed to the Commission. On August 10, the Commission found that the County's action raised substantial Local Coastal Program (LCP) issues, and took jurisdiction over the proposed change.

Commission staff have since further evaluated the issues surrounding the proposed change to the affordability term, and it is clear that there are a variety of ways to understand LCP requirements as they apply to this subdivision and the proposed change. Although at face value it would seem that eliminating a requirement for the homes to be sold only to qualified lower income purchasers would be at odds with LCP affordable housing objectives, this is not so straightforward a case. In fact, the original project was not some sort of inclusionary housing built to mitigate for some other project, rather this was an affordable housing project built by a non-profit affordable housing-only developer who remains in the business of facilitating affordable housing. And the original non-profit affordable housing-only developer is the Applicant in this case, and they are the entity requesting the change, including as doing so makes it consistent with the manner in which their other 'sweat equity' projects function. Commission staff believes that the change proposed can be found consistent with Monterey County's certified LCP for the following reasons.

First, the Applicant has provided evidence that the permanent affordability requirement has caused a financial hardship on the current homeowners due to an inability to refinance their loans, which have significantly higher interest rates than current generally available rates. Although removing the affordability restriction would not limit the housing involved to only future low income families, modifying the restriction would allow the *current* families to remain in the homes they built. The Applicant also states that the affordability restriction creates a disincentive to make repairs or improvements because such improvements would not add value to their home due to the resale restriction. This can lead to deterioration of these existing houses, which would be inconsistent with LCP policies that require protection of existing affordable housing. Therefore, a decision to alleviate the financial hardship that the existing affordability condition puts on *current* homeowners (i.e., to protect *their* existing affordable housing opportunities) rather than protect possible affordable housing opportunities for *future* low-income families, can be found consistent with the LCP's intent in protecting existing affordable

¹ Because most of the deeds were conveyed in 2000, the effect of the amendment would be to eliminate the affordability condition by 2020.

housing.

Additionally, while the LCP requires replacement of existing affordable housing lost due to conversion, under the Mello Act (Government Code Section 65590), the definition of “conversion” of affordable housing is defined to include only change from a residential use to a non-residential use or a change in the form of ownership, such as a residential dwelling to a condominium or cooperative (not “conversion” of affordable housing to market rate, as is the case here). The Mello Act does help frame the issue, particularly because it provides for the “minimum requirements for housing within the coastal zone for persons and families of low or moderate income.”² Because modifying the affordability restriction associated with the County’s CDP does not change the units from a residential use to nonresidential use or change the form of ownership, the proposed modification does not constitute a “conversion” of affordable housing units under the Mello Act definition and thus does not require commensurate replacement of such units. The County found this to be the case in approving the change. Under the County’s line of reasoning, the proposed change to the affordability restriction can be found consistent with the LCP’s intent in protecting affordable housing.

At the same time, however, it is clear that there are other ways to understand the LCP’s affordable housing policies, and a reasonable argument exists that the LCP does not allow a CDP amendment that would “convert” existing affordable units currently restricted in perpetuity to allow for the units to be sold at market rate in approximately three years (i.e., starting in about 2020). The primary LCP policy relevant here states:

*The County shall protect existing affordable housing opportunities in the North County coastal area from loss due to deterioration, conversion, or any other reason. The County will: a) Discourage demolitions, but, require replacement on a one by one basis of all demolished or converted units which were affordable to or occupied by low and moderate income persons. ...*³

The LCP includes a variety of statements that indicate conversion could be interpreted differently than the Mello Act definition, or that the protection of existing affordable housing requires that future residents are given the same affordable housing opportunities as the current homeowners.

That being said, the particular facts of this situation illustrate why the affordability term of this CDP (which applies *only* to the deed restrictions required pursuant to Condition 99 of the County’s 1995 approval of the housing project that were the result of the litigation settlement at that time) can be understood in the context of an unusual affordable housing dilemma, and thus removal of the affordability term can be deemed consistent with the LCP, despite different interpretations of the LCP that might warrant a contrary result. First, the settlement agreement language that interpreted the term to be in perpetuity also expressly states that the term can be modified if supported by substantial evidence. The Applicant and County agree that substantial evidence has been shown in this case, including for the reasons above, and thus have changed the duration. This is a reasonable action to take given the facts of this particular case. In addition, as described above the affordable housing in question was built with “sweat equity” whereby

² Government Code Section 65590(k).

³ LUP Policy 4.3.6.D.1.

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families contributed 10 months of full-time labor to the construction of each home (in this case, covering about *two-thirds* of the actual construction involved), which is not typically how affordable housing projects are financed or constructed. Also, this was not an inclusionary housing project that was built as some type of mitigation for a higher cost project. Rather, this was an affordable housing development that was conceived, developed, and built by CHISPA, a nonprofit affordable housing developer. According to the Applicant, other such sweat equity projects generally have some time-delimited period during which the affordable restriction adheres (e.g., currently a minimum of 15 years). Thus in this case, removing the affordability requirement for this particular affordable housing subdivision, which was built by a nonprofit developer with the sweat equity of the homeowners, would be consistent with the manner in which similar sweat equity projects are conditioned, and would not somehow allow other dissimilar inclusionary housing projects to remove their affordability restrictions without appropriate mitigation.

Importantly, if the Commission ultimately finds the project can only be approved provided replacement affordable housing is provided, such an interpretation would likely effectively lead to a de facto denial of the requested modification. Specifically, a requirement to replace 161 affordable housing units within the North Monterey County coastal zone is likely infeasible to achieve due to the scarcity of water, and requiring same would thus likely have the same effect as a denial. In any case, notably, Monterey County has taken great steps to address affordable housing needs, and has identified the potential for 567 affordable units in the County in areas nearby but outside the coastal zone where resource constraints would allow such development that are likely to be constructed within the next five years. Thus, additional affordable housing opportunities are likely nearby in the short term, which will help address the lack of same in the County regardless.

Although the proposed modification to the County's affordability restriction raises some LCP consistency questions, as discussed above, it can also be found appropriate under the LCP for this particular fact set. In light of the discussion above, staff believes that the proposed affordability changes can be found consistent with the LCP and thus staff recommends that the Commission approve the project. The single motion necessary to implement this recommendation is found on page 6 below.

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APPENDICES

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EXHIBITS

Exhibit 1 – Project Location Maps

Exhibit 2 – Proposed Modification and List of Homeowners

Exhibit 3 – Project Site Images

Exhibit 4 – Letter from CHISPA to Board of Supervisors

Exhibit 5 – Statement of Overriding Considerations

Exhibit 6 – Settlement Agreement dated November 28, 1995

Exhibit 7 – Deed Restriction dated September 22, 1997

Exhibit 8 – Homeowner Declarations

Exhibit 9 – Correspondence

I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as submitted and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission **approve** Coastal Development Permit Number A-3-MCO-16-0017 pursuant to the staff recommendation, and I recommend a **yes** vote.*

***Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-3-MCO-16-0017 and adopts the findings set forth below on grounds that the development is in conformity with Monterey County Local Coastal Program policies. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Approved Project.** The approved project allows the 161 homeowners listed in **Exhibit 2** to modify the deed restrictions that were required by Condition 99 of Monterey County CDP SH93001 in order to reduce the term of the affordability requirement from permanent to 20 years from the date of the first deed conveyance of each property from the developers to the original owners of the units, in conformance with the proposed project as listed in **Exhibit 2**. The Permittee shall work with Monterey County and the homeowners to process the deed restriction modifications. This project is not applicable to the remaining 14 single-family homes not listed in **Exhibit 2** or any of the multi-family units in the Moro Cojo Subdivision. The approved project does not affect any other condition of approval in CDP SH93001 and all other conditions remain in effect.
2. **Future CDP Amendments.** Any future amendments to Monterey County CDP SH93001 or modifications to the deed restrictions of the remaining 14 single family homes or multi-family units shall remain under the jurisdiction of Monterey County.
3. **Indemnification by Permittee/Liability for Costs and Attorneys' Fees.** By acceptance of this CDP, the Permittee agrees to reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys' fees (including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys' fees that the Coastal Commission may be required by a court to pay) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this CDP. The Coastal Commission retains complete authority to conduct and direct the Commission's defense of any such action against the Coastal Commission.

IV. FINDINGS AND DECLARATIONS

In this de novo review of the proposed CDP application, the standard of review is the Monterey County certified LCP. (Pub. Res. Code § 30604(b).) Because the project is not located between the first public road and the sea, the public access and recreation policies of the Coastal Act are not applicable. (See Pub. Res. Code § 30604(c).)

A. PROJECT LOCATION

The Moro Cojo Inclusionary Housing subdivision is located approximately two miles northeast of the unincorporated community of Castroville in North Monterey County (see **Exhibit 1** for location maps). The subdivision is predominantly surrounded by agricultural land and wetlands, including nearby Moro Cojo Slough. The subdivision includes 175 single-family residences, 90 multi-family units, and a public park (see **Exhibit 3** for site photos).

B. PROJECT DESCRIPTION AND BACKGROUND

The project site and associated subdivision and development have an extensive permitting and legal background. Prior to development of the subdivision, the project site was historically used for agriculture and as a water collection pond. The site was subsequently re-zoned high-density residential and was the subject of numerous development proposals beginning in the 1970's. None of these earlier proposals were approved due to a lack of water, inadequate public services, and the site's proximity to wetlands and agricultural uses. In the early 1990's the site was owned by a now-defunct federal agency, the Resolution Trust Corporation.⁴ In 1992, the Commission certified, with modifications, a County request for an LCP amendment⁵ to rezone a portion of the property as open space, while allowing a maximum of 88 total units on the remaining portion of the site. Around this time, CHISPA (the current Applicant) purchased the property below market value from the Resolution Trust Corporation and began the process of gaining approval for an affordable housing subdivision on the site. Although the Commission had certified, with suggested modifications, the County's prior LCP amendment to limit the number of allowed units and designate a portion of the property as open space, at CHISPA's request the County never took the necessary action to adopt the Commission's suggested modifications for final approval of the LCP amendment (*see* Pub. Res. Code §§ 30512(b), 30513) in order to give CHISPA the opportunity to pursue an affordable housing project on the entire site under the high-density zoning established in the 1970's. The Commission's LCP amendment approval for Monterey County LCP Amendment No. 3-91 thus expired, leaving the site zoned for high-density residential uses.

In October 1994, the Moro Cojo Inclusionary Housing Final Environmental Impact Report (EIR) for an affordable housing project on the site was completed. The EIR identified several significant environmental impacts from the proposed project, including impacts to groundwater, traffic, and wetland habitat. Prior to certification of the EIR, CHISPA submitted a letter to the County urging certification because the project "presents a unique opportunity to create a significant number of new homes for low-income families" (see **Exhibit 4**). The letter also stated that there were "**no other sites available**" for an affordable housing project and the project presents the "**only opportunity to meet the needs for affordable housing in this area**" (emphasis in original). CHISPA argued that the significant environmental impacts of the project "must be considered in the larger context of the **great need for affordable housing and the lack of available sites in North Monterey County**" (emphasis in original).

Despite the project's identified environmental impacts, the County determined that the public benefit of an affordable housing project outweighed any environmental impacts and adopted a Statement of Overriding Considerations in approving the project (see **Exhibit 5**). Specifically, the County determined that "North Monterey County and Castroville, specifically, suffers from an acute need for affordable housing" and that "there is also a severe over-crowding condition existing in the available housing stock." Accordingly, on December 20, 1994 the County

⁴ The Resolution Trust Corporation was a temporary U.S. government-owned asset management company charged with liquidating assets, primarily real estate-related assets that had been assets of savings and loan associations declared insolvent by the Office of Thrift Supervision as a consequence of the savings and loan crisis of the 1980s.

⁵ See Monterey County LCP Amendment No. 3-91. The amendment was to rezone several different properties, including the subject property. The Commission approved the amendment to rezone the subject property as submitted, but modified other portions of the amendment.

certified the EIR and approved CDP SH93001 for the Moro Cojo Inclusionary Housing project, which included a subdivision and development of 175 single-family residences, 90 multi-family units, and a public park. Condition 99 of that approval, which is the subject of this application, states that “all the units in the Moro Cojo Inclusionary Housing Development Projects (SH 93001 and SH 93002) [must] be affordable to very-low-, low- and moderate-income households.” Condition 99, however, did not specifically state the length of time the units must be made affordable to low-income households.

Following the County’s approval of CDP SH93001, the Sierra Club and David Green appealed that approval to the Commission on a variety of LCP conformance issues.⁶ Staff recommended that the Commission find that a substantial issue existed with regard to the project’s conformance with LCP policies related to the protection of groundwater and environmentally sensitive habitat areas (ESHA). During the substantial issue hearing on February 9, 1995, the Commission’s discussion was focused almost entirely on the public benefit of affordable housing, despite the recognized environmental concerns. Chair Williams noted the “tension between environmental community and those of us who support low-income housing.” Commissioner Stevens recognized that the environmental concerns were “not insignificant,” but ultimately supported the project “with some reluctance.” Commissioner Giacomini stated that the environmental impacts were “undeniably a substantial issue,” but supported the project due to “social public policy.” Commissioner Karas (who was also a Monterey County supervisor at the time) urged a finding of No Substantial Issue because “[t]here’s never been one affordable housing unit in North Monterey County in the 11 years I have sat on the board and by God we now have the opportunity to do it, so let’s do it.” Consequently, the Commission determined that the appeal did not raise a substantial issue of conformance with the LCP by an 8-2 vote and the local CDP approval became effective.

Following the Commission’s decision, an alliance of local environmental activists filed suit against the County and CHISPA over the project’s approval. The parties ultimately entered a Settlement Agreement and Stipulation for Judgment (Judgment) (see **Exhibit 6**) in November 1995. The purpose of the Judgment was to interpret the length of the affordability condition. According to the Judgment, the parties agreed that Condition 99 “shall be a permanent deed restriction on the project parcels, and shall not be subordinated to any financial encumbrance, loan, development agreement, contract, lease or other document.” In other words, the parties agreed to interpret Condition 99 as requiring all project residences to be remain affordable in perpetuity. The Judgment further stated that none of the conditions of approval could be modified, including lifting or amending the affordability terms, unless CHISPA itself requests the modification and provides “substantial evidence to support its request for modification.”

In September 1997, the County approved the final Moro Cojo Inclusionary Housing subdivision map and found that Condition 99 would be satisfied by recordation of a permanent deed restriction on all of the units.⁷ In October 1997, CHISPA recorded the deed restrictions (see **Exhibit 7**) with the County Recorder along with the final subdivision map. The deed restrictions

⁶ Appeal A-3-MCO-95-02.

⁷ All 175 single-family homes and 90 multi-family units are subject to the deed restriction. The proposed modification that is the subject of this CDP would lift the deed restriction on 161 of the 175 single-family homes, but would retain the affordability restriction on the multi-family units and the remaining 14 single-family homes. Fourteen single-family homeowners declined to participate in the modification request for undisclosed reasons.

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state that all units in the Moro Cojo Inclusionary Housing Development Project shall be affordable to very-low-, low-, and moderate-income households, and that it “is intended that this Deed Restriction is irrevocable.” The restriction further explains that “but for the imposition of the above condition, the proposed development could not be found consistent with the provisions of the California Coastal Act of 1976 and that a permit could therefore not have been granted.”

After the final map was recorded, CHISPA began to recruit low-income families to participate in a “Self Help” homeownership program developed by the Rural Housing Service branch of the United State Department of Agriculture (USDA). None of the recruitment brochures distributed by CHISPA informed potential participants of the deed restriction that was recorded two years prior to the start of construction.

Under the federal “Self Help” program, groups of families would pool their efforts and spend 40 hours a week per family building single-family homes for approximately 10 months under the supervision of CHISPA. Approximately 65% of home construction was performed by the families, with more technical construction components completed by CHISPA and its contractors. USDA provided CHISPA with grant funds to cover the costs of running the program. In return for their labor, program participants purchased the new single-family homes that they helped build without a down payment and at cost, which was often significantly below market rate due to grant funding and the use of participant labor. The monetary difference between typical construction costs and the actual purchase price for Self-Help homes is also generally known as “sweat equity.” Additionally, there were no closing costs and Private Mortgage Insurance was not required, further lowering the purchase price.

In terms of financing, USDA provided mortgage loans ranging from \$100,000 to \$120,000 to each program participant to purchase a home from CHISPA once it was constructed. Of that money, \$55,000 was to purchase the unimproved lot. The excess of each loan (approximately \$45,000 to \$65,000) was pooled together to cover the costs of constructing the 175 single-family homes in the subdivision. The USDA loans were typically 33-year fixed-rate loans. Interest rates were based on the average rates at the time, between 8% and 9%, although actual payments are modified by federal subsidies based on income levels. Interest rates can be as low as 1% for qualifying individuals and homeowners never pay more than 24% of their monthly income on mortgage payments.⁸ Program participants facing acute hardship can apply to USDA for a two-year payment moratorium. Partial forgiveness of the loan is also possible in the event that a home is sold for less than what is owed on the loan.

On top of the USDA mortgage, and although the actual value of the homes (accounting for the deed restriction) was not equal to the appraised market value (without the deed restriction) due to the deed restriction, CHISPA placed a second mortgage on the homes based on the difference between the appraised market value of each house and the USDA loan. These mortgage loans, which CHISPA calls “excess equity” loans, were between \$30,000 and \$35,000 and are unique in self-help housing programs. Under the terms of the loan, monthly payments to CHISPA were equal to the 3% interest rate of the loan. No principal payments were due for the first ten years, providing that the homeowner was not in default. After the first ten years, 10% of the principal would be forgiven each year, absent default, such that the entire note would be forgiven after

⁸ CHISPA has not provided detailed information on how many homeowners pay the full interest rate or receive federal subsidies.

twenty years. If the owner sold the house prior to twenty years, the entire note would be due. Many homeowners, however, have claimed that they were unaware of the deed restriction at the time they purchased the home. Because the deed restriction limits the resale value of the homes to an affordable price and not the appraised market value, a sale prior to forgiveness of the second “excess equity” loan made it possible for the homeowners to owe more on their mortgage than what they would receive for the potential purchase price, since the potential purchase price was limited by the deed restriction.

In addition, in subsequent years, some homeowners participated in cash-out refinancing and encumbered their properties with debt that is greater than the value of the home given that the deed restriction limits the sale price of the properties to an affordable amount. Again, many homeowners claimed they were unaware of the deed restriction, which explains why some homeowners would encumber their homes with debt greater than the value of the deed restricted home. The resale prices of the homes are capped under the deed restriction and are individually calculated using a number of factors explained in the Monterey County Inclusionary Housing Program Administrative Manual. The current maximum resale value of a three-bedroom house in the subdivision is \$291,750.⁹ Thus, to summarize, because of either the second “excess equity” loan required by CHISPA, or through standard refinancing, home equity lines of credit, or other financial actions that encumbered additional debt, homeowners were burdened with debt that exceeded potential resale value of the home due to the deed-restriction’s maximum resale value requirements. Again, the homeowners claim that the deed restriction requirements were not clear to them at time of purchase.

A group of homeowners sued CHISPA in 2009, claiming that CHISPA failed to inform homeowners of the deed restriction and persuaded the owners into manual labor under false pretense. The homeowners sought to collect damages for fraudulent and negligent nondisclosure and breach of implied contract. The Sixth Circuit Court of Appeal determined that the claims against CHISPA were barred by the Statute of Limitations because, even though CHISPA failed to disclose the deed restriction, the homeowners should have discovered the restriction when the grant deed was provided to them at the close of escrow in 2000. The court held that the three-year statute of limitation ended in 2003 and thus the homeowners were time-barred from bringing their claims against CHISPA in 2009.¹⁰

As an alternative to collecting damages, the homeowners also attempted to invalidate the deed restriction as an unreasonable restraint on alienation of property. The court explained that the homeowners were “essentially arguing that this housing program should have been designed differently, namely just to benefit them, the first wave of low-income buyers.” The court determined that it is “reasonable to impose a continuing affordability requirement for the benefit of future low- to moderate-income homeowners.” The court concluded that because the homeowners “enjoyed the benefits of owning a home through the affordable housing program, [the homeowners] cannot now reject its obligations” and thus denied the homeowners’ claim that

⁹ According to real estate websites Trulia.com and Zillow.com, the average sale price of a three-bedroom home in Castroville over the last year was approximately \$345,000 with a year over year trend of +8.3%, a difference of \$53,250 from the current maximum resale value for an affordable restricted home.

¹⁰ *Alfaro v. CHISPA* (2009) 171 Cal.App.4th 1356.

the deed restriction constitutes an unreasonable restraint on alienation of property.¹¹

In November 2015, CHISPA submitted a CDP amendment application to the County to modify Condition 99, which, as required to be interpreted by the 1995 Judgement, required the houses to be affordable only to very-low-, low-, and moderate-income families in perpetuity. The modification request was to reduce the term of the affordability condition on 161 of the 175 single-family residences from permanent to 20 years from the date of the first deed conveyance.¹² Because most of the deeds were conveyed in 2000, the effect of the amendment would be to eliminate the affordability condition by 2020. Removal of the affordability condition would allow the homeowners to sell homes within the Moro Cojo Inclusionary Housing subdivision at market price to any buyer, rather than at a capped price only to families who qualify as very-low-, low- and moderate-income. Although the County's Housing Advisory Committee recommended that the amendment include a requirement to replace the loss of the 161 affordable housing units on a one-for-one basis due to the extremely high demand for affordable housing in the area (see **Appendix A**), the Board of Supervisors did not require replacement of the lost affordable housing units and approved the amendment as requested.

The Board's approval was appealed to the Coastal Commission, and on August 10, 2016 the Commission found that the appeal raised a substantial issue of conformance with the County's certified LCP by a vote of 9-2 and took *de novo* jurisdiction over the project. The proposed project is the same project that was the subject of the Commission's Substantial Issue hearing, whereby CHISPA is proposing to modify the deed restrictions attached to 161 existing single-family residences that implement Condition 99's affordability requirements from perpetuity to 20 years from the date of the first deed conveyance. Specifically, the owners of the 161 residences listed in **Exhibit 2** would record a deed restriction, subject to Monterey County review and approval, for their property stating:

The term of the affordability restriction is a 20-year term commencing on the date of the first deed of conveyance from the developers to the original owners of the units and shall terminate thereafter.

Lifting or amending the affordability terms on the remaining 14 homes would require separate CDP approval in the future. See **Exhibit 2** for the Applicant's proposed project.

¹¹ It is worth noting that, although the Sixth Circuit Court of Appeal rejected the homeowners' claim that the deed restriction constitutes an unreasonable restraint on alienation of property, the Court did not consider whether a deed restriction for affordable housing can be subsequently removed by the permitting authority because of policy considerations – in which case the Commission's ability to act on the present CDP amendment would be limited. Rather, the Court simply upheld the deed restrictions as reasonable restraints on alienation for the purpose of addressing the homeowners' causes of action in their lawsuit. A decision does not stand for a proposition not considered by the court. (*See Norvatis v. SHAC* (2006) 143 Cal.App.4th 1284.)

¹² CHISPA originally requested a reduction to 15 years based on Health and Safety Code Section 33413, which requires redeveloped affordable housing units "to remain at an affordable housing cost to, and occupied by, persons and families of low-income, moderate-income, and very low income households, respectively, for the longest feasible time, but for not less than . . . 15 years for mutual self-help housing units." The definition of "longest feasible time" as used in Health and Safety Code Section 33413 "includes, but is not limited to, unlimited duration." Through subsequent discussions with the County, CHISPA agreed to request a 20-year term from the date of deed conveyance.

C. STANDARD OF REVIEW

On *de novo*, the standard of review for the proposed CDP amendment is the certified LCP.¹³

D. AFFORDABLE HOUSING LCP POLICIES

The LCP contains various policies designed to “increase the availability of low and moderate income housing.” These policies are “based on the goals of the adopted County Housing Element.” In addition to policies that encourage new affordable housing opportunities, the LCP provides strong protections for existing affordable units, including the following policy:

LUP Policy 4.3.6.D.1. The County shall protect existing affordable housing opportunities in the North County coastal area from loss due to deterioration, conversion, or any other reason. The County will:

a) Discourage demolitions, but, require replacement on a one by one basis of all demolished or converted units which were affordable to or occupied by low and moderate income persons.

The LCP states that the County shall protect existing affordable housing opportunities from loss due to deterioration, conversion, or any other reason. The Moro Cojo Inclusionary Housing project is an existing subdivision that provides affordable housing opportunities in the form of 90 multi-family units and 175 single-family residences, which are all deed restricted to be affordable to very-low-, low-, and moderate-income households. The approved amendment would eliminate the affordability restriction for 161 of 175 single-family homes within the next three years and allow the units to be sold at market rate to any interested buyer regardless of income.

With respect to the first part of the LCP policy, the policy is clear that existing affordable housing opportunities must be protected. However, the policy is not clear on *how* to protect existing affordable housing opportunities. As such, the Applicants claim that the affordability restriction needs to be lifted because it will help existing homeowners maintain and live in their existing affordable homes, thereby protecting existing affordable housing opportunities. The Applicants claim that the deed restriction has made it difficult for current homeowners to refinance their loans in order to make mortgage payments more affordable and could prevent the homeowners from obtaining home improvement loans, which may lead to deterioration of the existing homes. In other words, without lifting the restriction, the existing homes could fall into disrepair, inconsistent with the LCP requirement to protect existing affordable housing from loss

¹³ The Commission considers this proposed project based on an unusual procedural history. As discussed previously, the Commission in 1995 found no substantial issue (NSI) for the appeal of the underlying local CDP SH93001. However, the proposed CDP amendment was appealed to the Commission, for which the Commission found substantial issue (SI) at the August 2016 meeting. Even though the Commission found NSI on the original CDP appeal, since the Commission had jurisdiction to hear the appeal of the original CDP (per Pub. Res. Code § 30603(a)), the Commission inherently has the jurisdiction to hear an appeal of an amendment to that local CDP. Under the Commission’s regulations, the Commission’s SI finding for the appeal of the CDP amendment is analogous to a determination that the proposed amendment is “material” (per 14 CCR § 13166(b)), and thus the standard of review is the certified LCP (per 14 CCR § 13166(c).)

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due to deterioration. Lifting the restriction would allow existing homeowners to upkeep their homes, and thus maintain these homes as affordable to them. To support its application to modify the deed restrictions and demonstrate the property owners' financial hardship, CHISPA submitted two declarations from homeowners stating that they were unable to refinance their loans to take advantage of lower interest rates (see **Exhibit 8**).¹⁴ One of the homeowners subsequently successfully refinanced her mortgage in July 2016. As described above, the original loans provided by the USDA were between 8% and 9%, well above the current 30-year fixed rate of 4%. Although actual payments can be reduced to as low as 1% interest for qualifying individuals due to federal subsidies, some individuals may be making full interest payments.¹⁵ CHISPA also submitted one declaration stating that the homeowner was reluctant to make repairs or improvements because the resale restriction precludes a return on her investment (see **Exhibit 8**).

A possible unintended consequence of the deed restriction is that it can deter improvements from being made, including ones that are expensive and add debt to the home, given that the resale price is capped at \$291,750 for a three-bedroom home regardless of market value. The capped resale price could potentially dissuade homeowners from investing capital to make improvements if their investment does not add any value to their home that can be recouped. Moreover, the current situation is very unique in that the subdivision was pursued by a non-profit affordable housing developer and the majority of the construction of the homes was compelled by the owners themselves with sweat equity. This was not a typical inclusionary housing project that was built to mitigate for the impacts of a high cost project, but rather one where the owners are the ones who actually built and live in their own affordable home. Therefore, a decision to alleviate the financial hardship that the existing affordability condition puts on current homeowners (i.e., to protect *their* existing affordable housing opportunities) in this unique situation rather than protect possible affordable housing opportunities for *other* future low-income families can be found consistent with the LCP's intent in protecting existing affordable housing.

The next part of the policy discusses losing affordable housing through conversion. Based on one interpretation of the LCP's use of the term "converted units," the CDP amendment does not necessarily result in the conversion of existing affordable housing opportunities and therefore no replacement units would be required. LCP Policy 4.3.6.D.1.a requires replacement of demolished or converted units that were affordable to or occupied by low- and moderate-income persons. The 161 houses subject to the proposed modification are affordable to and have been occupied by low- and moderate-income persons since construction of the homes in 2000. The applicability of the replacement requirement to this proposed modification is thus dependent upon the definition of the term "converted units" and whether modifying the deed restrictions on these 161 affordable homes constitutes a "conversion."

As a preliminary matter, the LCP does not provide express definitions of the terms "conversion" or "converted units." Absent clear guidance in the LCP, the terms "conversion" and "converted

¹⁴ The Monterey County Housing Advisory Committee found that 41 homeowners have successfully refinanced their home loans.

¹⁵ CHISPA has not provided detailed information on how many homeowners pay the full interest rate or receive federal subsidies.

units” are open to interpretation. The plain meaning of “conversion” would include any type of change, including a change from an affordable unit to a market rate unit. In the affordable housing context, the term “conversion” includes a change from an affordable unit to a market rate unit.¹⁶ Additionally, Monterey County’s 2015-2023 Housing Element makes multiple references to the term “converted units” that suggests the term includes units that are changed from affordable to market rate.¹⁷ Moreover, the overarching LCP policy to protect affordable housing opportunities from loss due to deterioration, conversion, or “any other reason” would suggest that a broad definition of “converted units” that includes a change from an affordable unit to market rate unit would be appropriate. However in the Mello Act,¹⁸ which is a law that is specific to affordable housing in the coastal zone, conversion is defined as a change from a residential use to a nonresidential use or a change in the form of ownership, such as a residential dwelling to a condominium or cooperative (Gov. Code § 65590(g)(1)). Although the Mello Act definition of “converted units” does not appear to be as protective of existing affordable housing opportunities as other possible definitions, this definition reflects statewide standards for affordable housing replacement requirements within the coastal zone and can be considered reasonable to use for interpretive purposes. Therefore, based on the Mello Act definition of “conversion,” the proposed project does not include any form of “conversion,” and thus replacement of affordable housing is not required.

As a practical matter, it is important to note that a requirement to replace 161 affordable housing units within the North Monterey County coastal zone would likely not be achievable at this time anyway due to the scarcity of water and developable land. Construction of new affordable units would likely be infeasible because of the lack of an identifiable, available, long-term supply of water in North County, as well as the conversion of extensive existing agricultural lands and sensitive habitats that would likely be required for such housing. Another option for replacement units would be for the Applicant to purchase existing market rate units and deed restrict those units as affordable, which would likely be a cost-prohibitive solution. In practical terms, a requirement to replace the 161 affordable housing units would therefore likely have the effect of a denial of the CDP amendment.

Moreover, the County acknowledges that affordable housing is a major concern and thus has implemented an aggressive program to provide more housing opportunities for low-income individuals. The County has identified a total of 1,089 affordable housing units that are expected to be constructed within the next five years. Of that, 567 units will be located in Salinas, Marina,

¹⁶ For example, in *Highlights of the State of Housing in California: Affordability Worsens, Supply Problems Remain* (California Department of Housing and Development, 2014) a section is devoted to the problem of affordable housing at risk of “conversion” to market rate. Additionally, in *What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?* (United States Department of Housing and Urban Development, 2012) the problem of affordable housing “converting” to market rate is also discussed.

¹⁷ “This section . . . evaluates the potential of such housing to convert to market rate” (*Id.* at 36); “11 units are potentially at risk of converting to market rate” (*Id.* at 36); “The construction of new low income housing units is a means of replacing the at-risk units should they be converted to market-rate units” (*Id.* at 39); “Work with property owners and nonprofit housing providers to preserve lower income housing at risk of converting to market rate” (*Id.* at 120); “11 very low income units are at-risk of converting to market rate housing” (*Id.* at 121); “Within 60 days of notice of intent to convert at-risk units to market rate rents . . .” (*Id.* at 122); “No housing unit was at risk of converting to market rate” (*Id.* at C-3).

¹⁸ The Mello Act provides the “minimum requirements for housing within the coastal zone for persons and families of low or moderate income.” (Gov. Code § 65590(k).)

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and East Garrison, which are all in the vicinity of the Moro Cojo subdivision. The County's affordable housing program and the identified 567 units will help offset the impact of removing the deed restrictions on the Moro Cojo units for those needing additional affordable housing.

And finally, it should be noted that even though the homes would be market rate, the average sale price of a three-bedroom home in Castroville over the last year was approximately \$345,000, so homes in this area will still be 'affordable' when compared with adjacent areas such as Marina (average home price \$515,000) or Monterey (average home price \$736,900). And even though the owners could sell their homes, there is little evidence to suggest that a flood of current owners will do so, including because these are homes that they built themselves. The Applicant has claimed that approximately 90% of the homeowners of their self-help housing projects remain in their home, regardless of whether there is an affordability condition. Both of these facts lend additional credence to the notion that the proposed project addresses a unique affordable housing situation.

In sum, although there are conflicting interpretations of the LCP that could warrant denial of the amendment in order to protect existing affordable housing opportunities or require replacement of the units, interpreting the LCP to allow for the protection of the current homeowners' affordable housing opportunities by reducing their financial burdens and aligning the LCP's replacement requirements with applicable state law is reasonable. This interpretation would allow for the Commission to alleviate the financial hardship on the homeowners in this unique situation, where the homeowners built their homes themselves with sweat equity, in order to protect their affordable housing opportunities. Thus, in order to alleviate that financial burden, **Special Condition 1** allows the 161 homeowners listed in **Exhibit 2** to modify the deed restrictions that were required by Condition 99 of Monterey County CDP SH93001 in order to reduce the term of the affordability requirement from permanent to 20 years from the date of the first deed conveyance of each property from the developers to the original owners of the units. This condition allows CHISPA to work with Monterey County and the homeowners to process the deed restriction modifications. However, this approval does not apply to the remaining 14 single-family homes or any of the multi-family units in the Moro Cojo Subdivision, which will remain restricted as affordable. Monterey County remains the permitting authority over CDP SH93001. If the owners of the remaining affordable units wish to modify the deed restrictions on their homes, or if there is a request to amend any other condition of CDP SH93001, Monterey County would have jurisdiction over that request.

E. SUBDIVISION ORDINANCE

Title 19 of the LCP, also known as the subdivision ordinance, regulates the division of land within the coastal zone of Monterey County and implements the provisions of the Subdivision Map Act. The subdivision ordinance controls modifications to recorded Final Maps or Parcel Maps. The subdivision ordinance lists seven reasons a recorded map may be modified. Six of those reasons are to correct various errors in the recorded map. The seventh reason allows amendments to accomplish the following:

Implementation Plan (IP) Section 19.08.015.A.7. ...To make modifications to a final map or parcel map where there are changes which make any or all of the conditions of

the map no longer appropriate or necessary and that the modifications do not impose any additional burden on the present fee owner of the property, and if the modifications do not alter any right, title or interest in the real property reflected on the recorded map.

The subdivision ordinance allows modifications to a condition of a final map if there are “changes which make any or all of the conditions of the map no longer appropriate *or* necessary” (emphasis added). The approved amendment would modify the affordability condition of the Moro Cojo final map and allow the 161 single-family homes to be sold at market rate to any buyer regardless of income. According to the County’s Housing Element, the demand for affordable housing in the County remains high. There is no evidence to suggest that there have been changes in the County’s affordable housing stock that makes the existing affordable housing units no longer necessary.

However, the subdivision ordinance also allows conditions to be modified if the condition is no longer appropriate. Despite the continued need for affordable housing in the County and even though affordability conditions (such as the one removed by the CDP amendment) may still be one way to address that need, IP Section 19.08.015.A.7 also allows conditions on final maps to be modified if the conditions are found to be no longer appropriate. The Applicant claims that the condition is no longer appropriate because the recession of 2008 has prevented some of these current homeowners from being able to refinance their mortgages in order to take advantage of lower interest rates, which has caused them financial hardship. The Applicant submitted two declarations from current homeowners who have been denied in their attempts to refinance their loans, which are at a fixed rate between 8% and 9% compared to the current average rate of 4%.¹⁹ Due to the hardship on current homeowners this creates, the changed financial landscape therefore arguably makes the permanent affordability condition no longer appropriate. Thus amending the condition as allowed by **Special Condition 1** can reasonably be found consistent with IP Section 19.08.015.A.7.

F. COASTAL ACT SECTION 30614

The Coastal Act includes the following a provision to protect existing CDP conditions related to affordable housing:

***30614.** The commission shall take appropriate steps to ensure that coastal development permit conditions existing as of January 1, 2002, relating to affordable housing are enforced and do not expire during the term of the permit.*

The standard of review for the current project is the County’s certified LCP and, for projects between the sea and the first public road, the Chapter 3 public access policies of the Coastal Act. This project is not located between the sea and the first public road, nor is Coastal Act Section

¹⁹ The Monterey County Housing Advisory Committee found that 41 homeowners have successfully refinanced their home loans. Additionally, due to the terms of the USDA loans, the interest rate of the mortgage does not reflect the actual interest rate paid in many cases because the homeowners are provided federal subsidies that can lower the rate paid to as little as 1%. Some homeowners, however, do pay more than the current interest rate of and have had difficulty refinancing.

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30614 found within the Chapter 3 public access policies of the Coastal Act. This section is not incorporated into the County's certified LCP. Although Coastal Act Section 30614 does generally show that existing affordable housing opportunities are important to the Commission, this section cannot be utilized as a standard of review for the proposed CDP amendment.²⁰

G. INDEMNITY CONDITION

Coastal Act Section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application in the event that the Commission's action is challenged by a party other than the Applicant. Therefore, consistent with Section 30620(c), the Commission imposes a condition requiring reimbursement for any costs and attorneys' fees that the Commission incurs in connection with the defense of any action brought by a party other than the Applicant challenging the approval or issuance of this permit (**Special Condition 2**).

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096(a) of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

Monterey County adopted a Negative Declaration on January 26, 2016, which found that the proposed project will not have any significant impact on the environment. The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. (14 CCR § 15251(c).) Because the project only impacts the affordability of an existing subdivision and does not include any physical development, the Commission finds that the project will not have significant adverse impacts to coastal resources. All above findings are incorporated herein in their entirety by reference.

The Commission finds that the proposed project avoids significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project would have on the environment within the meaning of CEQA. The proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

²⁰ Coastal Act Section 30614 can be utilized as the standard of review for projects within the Commission's original jurisdiction or where the Commission has retained permitting authority in a jurisdiction due to the lack of a certified LCP.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

Moro Cojo Inclusionary Housing Development Project Final Environmental Impact Report, Jones and Stokes Associates, October 27, 1994.

Staff Report: Appeal Substantial Issue A-3-MCO-95-02, A-3-MCO-95-04, Rick Hyman, January 30, 1995.

Staff Report: Appeal No Substantial Issue A-3-MCO-95-02, A-3-MCO-95-04, Rick Hyman, March 15, 1995.

Moro Cojo Subdivision Amendment Revised Negative Declaration, County of Monterey, July 2, 2015.

Housing Authority Recommendation Agenda No. 4a, Monterey County Housing Authority Committee, January 14, 2015.

County of Monterey 2015-2023 Housing Element, County of Monterey, June 2015.

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APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

County of Monterey, Planning Department

United State Department of Agriculture, Salinas Rural Development Office

Community Housing Improvement Systems and Planning Association, Inc.

Center for Community Advocacy

Habitat for Humanity Monterey Bay