SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT ("Agreement") is entered into by and between petitioner Building Industry Association of San Diego County, a California corporation (the "BIA"), and respondent the City of Encinitas, a municipal corporation ("City") on the following terms and conditions. BIA and City are, from time-to-time, individually referred to in this Agreement as a "Party" and collectively referred to as the "Parties."

RECITALS

A. On October 10, 2014, Petitioner BIA filed a Petition for Writ of Mandate and Complaint against the City. The complaint is pending in San Diego County Superior Court, North County Division, entitled *Building Industry Association of San Diego County v. City of Encinitas,* San Diego County Superior Court Case No. 37-2014-00034550-WM-NC, filed by BIA on October 10, 2014 (the "Lawsuit"). The complaint contains four causes of action alleging the following:

1) The City's Housing Element of the General Plan was updated in 1992 and amended between 1993 and 2007. The BIA asserts that the City's Housing Element does not conform to State law.

2) On July 16, 2014, the City Council adopted certain motions shown in Exhibit A attached hereto and incorporated by this reference (the "July 2014 Policies"). The BIA contends that certain aspects of these policies are inconsistent with State law.

B. Through this Agreement, the Parties now desire to resolve the issues raised in the Lawsuit as between the City and BIA, except for the issue reserved in Section 2(e), under the terms and conditions set forth herein.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual terms, covenants, conditions, promises and benefits contained in this Agreement, the Parties agree and warrant as follows:

1. DEFINITIONS AND EXHIBITS

(a) **Defined Terms**. In addition to the terms defined in the body of this Agreement, the following terms are specially defined for this Agreement as indicated below:

(i) "Date of Approval" means the date on which the last of the Parties has executed this Agreement.

(ii) "General Plan" is the General Plan adopted by the City pursuant to Government Code Section 65250 – 65303.4.

(iii) "Maximum Allowable Residential Density" is as defined in Government Code Section 65915(o)(2).

(iv) "Planning Period" is as defined in Government Code Section 65588(f)(1).

(v) "RHNA" means the Regional Housing Needs Assessment for the City of Encinitas as established by the San Diego Association of Governments for the 2013 – 2021 Planning Period.

(vi) "Updated Housing Element" is a Housing Element (as described in Government Code Sections 65583 to 65583.2) for the City of Encinitas for the 2013 – 2021 Planning Period.

(b) **Exhibits**. The following exhibits are attached to and incorporated in this Agreement:

(i) Exhibit A – July 2014 Policies

(ii) Exhibit B – Pipeline Projects and Credits

(iii) Exhibit C – Form of Judgment Pursuant to Stipulation.

2. CLAIMS RELATED TO GOVERNMENT CODE SECTION 65915 AND CITY COUNCIL ACTIONS OF JULY 16, 2014

(a) **Rescission of July 2014 Policies.** On the earliest reasonably possible date after the Date of Approval, but no later than sixty (60) days after the Date of Approval, the City agrees to place on its City Council meeting agenda for Council consideration the rescission of the July 2014 Policies. Upon rescinding these actions, the Council will instead utilize the provisions of the City's existing Municipal Code in calculating Maximum Allowable Residential Density.

(b) **Development Projects Applied for Prior to July 16, 2014.** Applications for the six development projects described in Exhibit A, attached hereto and incorporated by this reference (the "Pipeline Projects"), were submitted to the City for approval prior to adoption of the July 2014 Policies. The Pipeline Projects shall be reviewed, either as originally submitted or as modified since the July 2014 Policies were adopted, at the option of the applicant, under the policies and practices related to Government Code 65915 in effect at the time the applications for those Pipeline Projects were submitted. In addition, the Pipeline Projects will receive: (i) priority for completion of environmental review, staff review, and review by decision-making bodies; and (ii) a credit against future City planning application and building permit fees as shown in Exhibit A. Except for the City's agreement to review the Pipeline Projects as described above, BIA acknowledges that execution of this Agreement, in and of itself, in no way limits the discretion of the City in reviewing the Pipeline Projects.

(c) **Adoption of Density Bonus Ordinance.** On the earliest reasonably possible date after the Date of Approval, the City agrees to place on its Planning Commission

and City Council meeting agendas for Planning Commission and City Council consideration a Density Bonus Ordinance specifying how compliance with Government Code Section 65915 will be implemented, and, if adopted, to submit the draft Density Bonus Ordinance to the Coastal Commission for review and approval.

(d) **Conditions Subsequent.** This Agreement is subject to the conditions subsequent that the City must rescind the July 2014 Policies and take the actions listed in Sections 2(b) and 2(c).

(e) **Reserved Claim.** With regard to the claim pertaining to the proper calculation of Maximum Allowable Residential Density as described in paragraphs 27-29 in the Complaint on file in this Lawsuit (the "Base Density Claim"), the Parties disagree regarding whether Government Code Section 65915(f)(5) in its current form requires the City, in calculating Maximum Allowable Residential Density, to round up density calculations resulting in fractional units to the next whole number. The Parties acknowledge that upon rescission of the July 2014 Policies as set forth in section 2(a) above, the Council intends to utilize the provisions of the City's existing Municipal Code in calculating Maximum Allowable Residential Density, and further acknowledge that this action will not violate this Agreement. Nevertheless, the Parties, respectively, reserve all of their rights, claims and causes of action with respect to the Base Density Claim.

3. CLAIMS RELATED TO HOUSING ELEMENT

(a) **Submission of Draft Housing Element to HCD.** The City has submitted a draft Updated Housing Element to the California Department of Housing and Community Development ("HCD") for its statutory compliance review under Government Code § 65585, with the goal being to obtain findings and a determination of substantial compliance by HCD. The City shall use best efforts to obtain such a determination from HCD for the Updated Housing Element. The Updated Housing Element shall substantially comply with Housing Element Law and shall include the provisions specified in subsection (b) of this Section 3.

(b) **Housing Element Contents.**

(i) **Regional Housing Needs for 2013 – 2021 Planning Period and Accommodation of Unmet Need from 2005 – 2013 Planning Period.** The Updated Housing Element shall accommodate, at a minimum, the City's RHNA for the 2013 – 2021 Planning Period and the unaccommodated portion of the regional housing need allocated to the City for the 2005 – 2013 Planning Period (together the "City's Housing Need"). The Parties agree that the unaccommodated need for the 2005 – 2013 Planning Period is equal to 236 lower income housing units and that those additional units must be accommodated in the Updated Housing Element as required by Government Code Section 65584.09.

(ii) **Rezoning Program.** The Updated Housing Element shall include a rezoning program (the "Rezoning Program"), to be adopted concurrently with adoption of the Updated Housing Element, that will: a) rezone sites as required to accommodate the City's Housing Need and b) include all other zoning changes required to implement the programs in the Updated Housing Element.

(c) **Preparation of General Plan and Zoning Amendments to Implement Housing Element.** No later than January 1, 2016, subject to reasonable extension for unforeseen delays, the City shall prepare and issue publicly proposed General Plan and zoning amendments to implement the Rezoning Program contained in the draft Updated Housing Element and such changes to other elements of the General Plan as required to make those elements internally consistent with the draft Updated Housing Element (the "General Plan and Zoning Amendments").

(d) **Environmental Review.** The judgment in this Lawsuit shall incorporate Government Code Section 65759, which provides in part that the California Environmental Quality Act ("CEQA") "does not apply to any action necessary to bring [the City's] general plan or relevant mandatory elements of the plan into compliance with any court order or judgment under this article." The City will conduct the environmental assessment required by Section 65759(a)(2) and will complete full environmental review, as permitted by Section 65759(a)(4), if such review can be completed within the time limits established under subsections (a) and (c) above.

(e) **Vote Required by Proposition A.** The City Council shall complete its review of the Updated Housing Element and the General Plan and Zoning Amendments by August 1, 2016 and, if adopted, shall place the Updated Housing Element and the General Plan and Zoning Amendments on the November 8, 2016 ballot for voter approval as required by Encinitas Municipal Code section 30.00.010 *et seq.* (Proposition A.)

(f) **Conditions Subsequent.** This Agreement is subject to the condition subsequent that the City must take the actions listed above in this Section 3 and adopt the Updated Housing Element and General Plan and Zoning Amendments no later than the date that the City Council adopts the resolution required by Elections Code Section 10263 declaring the results of the November 8, 2016 election.

4. JUDGMENT AND ENFORCEMENT

(a) Contemporaneous with the execution of this Agreement, the Parties shall execute a Judgment pursuant to Stipulation, in the form attached as Exhibit B attached hereto and incorporated by this reference. This Agreement shall be incorporated into that Judgment pursuant to Stipulation and shall be enforceable pursuant to Code of Civil Procedure Section 664.6.

(b) The Court shall retain continuing jurisdiction to effectuate the provisions of this Agreement until the later of: (i) rescission of the July 2014 Policies as described in Section 2(a); (ii) completion of discretionary review of Pipeline Projects as described in Section 2(b); (iii) adoption of a Density Bonus Ordinance as described in Section 2(c); and (iv) adoption of an Updated Housing Element and the General Plan and Zoning Amendments as required by Section 3.

(c) In the event that either Party believes that the other Party is in breach of any of the terms set forth in this Agreement, the Party asserting a breach shall give written notice to the other Party of the breach, which notice shall set forth with reasonable particularity the alleged breach and the action required to remedy the alleged breach. The Parties shall meet,

confer, and attempt to resolve the alleged breach within fifteen (15) working days of such notice. If the Parties cannot resolve the alleged breach within such time, either Party may seek judicial enforcement.

5. BIA'S WAIVER AND RELEASE

(a) Except as expressly provided in Section 2(e), the City shall not pursue an appeal or further litigation from the Judgment pursuant to Stipulation entered as required by Section 4(a).

(b) Except as expressly provided in Sections 2(e) and 4(b), for and in consideration of the covenants made in this Agreement, the BIA hereby completely waives, releases, and forever discharges the City, and the City's predecessors and successors in interest, heirs, assigns (past, present, and future), Council members, staff, principals, agents, officers or directors, managers, employees, attorneys, insurers, and all other persons or entities in any manner related thereto or acting on their behalf, from any and all claims, demands, actions, proceedings, and causes of action of any and every sort, whether known or unknown, arising out of or relating to the claims made in the Lawsuit.

(c) The BIA and the City intend this Agreement to be and to constitute a full general release and to constitute a full and final accord and satisfaction extending to all claims arising out of or relating to the Lawsuit, except as expressly provided in Sections 2(e) and 4(b), whether the same are known, unknown, suspected, anticipated, unsuspected, or unanticipated. Accordingly, except as expressly provided in Sections 2(e) and 4(b), the BIA, by signing this Agreement, agrees and warrants that it has read, understood, and expressly releases and waives the provisions of California Civil Code Section 1542, which reads as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

(d) In consideration of the City's satisfaction of its obligations under this Agreement, except as expressly provided in in Sections 2(e) and 4(b), the BIA will not pursue additional litigation against the City in any state or federal court or before any local, state, or federal agency, including but not limited to HCD, with respect to any claims existing as of the Date of Approval, known or unknown, with respect to the matters alleged in the Lawsuit, nor shall the BIA encourage or assist any other person or entity to do so.

(e) This Agreement, and the release contained herein, shall not extend to any right, claim or cause of action that the BIA may assert in a separate action, and not as a breach of this Agreement, in connection with provisions of the Updated Housing Element and General Plan and Zoning Amendments that are adopted at the conclusion of the actions outlined in Section 3.

6. ATTORNEYS' FEES

(a) The City shall pay the BIA the sum of two hundred thousand dollars ($200,000) in full settlement of the BIA's attorneys' fees and costs through the entry of Judgment pursuant to Stipulation in the Lawsuit. Payment of this amount (the "Settlement Payment") shall be made no later than ten (10) business days after the Date of Approval. The attorneys' fees shall be deemed earned in full as of the effective date of this Agreement and the City shall have no right to claim them back if conditions subsequent are not satisfied. The Settlement Payment is not intended to include any fees or costs incurred from or after the Date of Approval pursuant to Sections 2(e) or 4(b).

(b) Except as expressly set forth in this subsection (b), upon receipt of the Settlement Payment, the BIA and its attorneys shall have no other claim or right to, and hereby waive and release the City from, any and all other or additional consideration or payment of any kind in connection with or arising from the Lawsuit or this Agreement and obtaining entry of a Judgment pursuant to Stipulation in this matter. This waiver and release shall not apply to claims for attorneys' fees and costs incurred after the entry of judgment in relation to any litigation undertaken as provided in Section 2(e) or 4(b), or to claims for attorneys' fees and costs incurred to enforce this Agreement or the Judgment, and the Court may order the City to pay such fees expended by BIA's counsel to obtain the City's compliance with the terms of the Judgment.

7. OTHER PROVISIONS

(a) **No Admission of Liability.** Nothing in this Agreement, nor any fact, legal issue, claim, or defense on the part of either Party may be used or constructed by the Parties or by any other person or entity as an admission of liability or fault; any such interpretation of this Agreement is hereby expressly disclaimed.

(b) **Effective Date; Counterparts.** This Agreement shall be effective as of the Date of Approval. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Agreement. Signatures provided by facsimile or portable document format (PDF) shall have the same force and effect as original signatures.

(c) **Integration.** This Agreement embodies the entire agreement and understanding that exists between the Parties with respect to the Lawsuit and supersedes all prior and contemporaneous agreements, representations, and undertakings. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by both Parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.

(d) **Headings**. The heading titles for each section of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.

(e) **Severability**. If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this section shall not be applied to the extent that it would result in a frustration of the Parties' intent under this Agreement. The Parties shall use their best efforts to cure any inadequacies or deficiencies identified by the court in a manner consistent with the express and implied intent of this Agreement and then to adopt or re-enact such part of this Agreement as necessary or desirable to permit implementation of this Agreement.

(f) **Each Party's Role in Drafting the Agreement**. Each Party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither Party shall rely upon Civil Code Section 1654 in order to interpret any uncertainty in the meaning of the Agreement.

(g) **Governing Law; Venue**. This Agreement shall be governed by the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of San Diego.

(h) **Notice**. All notices, demands, or other communications which this Agreement contemplates or authorizes shall be in writing and shall be personally delivered, faxed, or mailed by express mail, return receipt requested, to the respective Party as follows:

If to City:	Attn: City Manager City of Encinitas 505 South Vulcan Avenue Encinitas, CA 92024 Tel: (760) 633-2610 Fax: (760) 633-2627
With a Copy To:	Attn: City Attorney City of Encinitas 505 South Vulcan Avenue Encinitas, CA 92024 Tel: (760) 633-2672 Fax: (760) 633-2627
If to BIA:	Attn: Borre Winckel, President and CEO Building Industry Association of San Diego County 9201 Spectrum Center Blvd., Suite 110 San Diego, CA 92123 Tel: (858) 450-1221 Fax: (858) 552-1445

With a Copy To: Timothy M. Hutter, Esq.
Allen Matkins Leck Gamble Mallory & Natsis LLP
501 West Broadway, 15th Floor
San Diego, CA 92101-3541
Tel: (619) 233-1155
Fax: (619) 233-1158

Any Party may change the address stated herein by giving notice in writing to the other Parties as specified in this subsection (i), and thereafter notices shall be addressed and transmitted to the new address.

(i) **Additional Documents and Good Faith Cooperation.** The Parties agree to cooperate fully in good faith and execute any and all supplementary documents and to take all additional actions which may be reasonably necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

(j) **Cooperation in Challenge to Settlement Agreement.** The Parties shall mutually cooperate with each other in any litigation, administrative action, or other proceeding brought by a third party or parties challenging this Agreement.

(k) **Authority of Signatories.** Each signatory to this Agreement represents and covenants that he or she possesses the necessary capacity and authority to sign and enter into this Agreement and to bind the party on whose behalf he or she is a signatory.

(l) **Binding on Successors.** This Agreement shall be binding upon and shall inure to the benefit of the Parties and the Parties' successors, administrators, managers, assigns, and employees, and shall be binding upon and shall inure to the benefit of the Parties' officers and agents acting in their official capacity.

IN WITNESS WHEREOF, the Parties do hereby agree to the full performance of the terms set forth herein.

CITY OF ENCINITAS,
a municipal corporation

By: _____

Dated: 07/14/15

APPROVED AS TO FORM:

_____
Barbara E. Kautz, counsel for the City of Encinitas

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, a California corporation

By: _____

Dated: _____

APPROVED AS TO FORM:

_____
Valentine S. Hoy, counsel for Building Industry Association of San Diego County

IN WITNESS WHEREOF, the Parties do hereby agree to the full performance of the terms set forth herein.

CITY OF ENCINITAS,
a municipal corporation

By: _____

Dated: _____

APPROVED AS TO FORM:

_____
Barbara E. Kautz, counsel for the City of Encinitas

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, a California corporation

By: _____
GEORGE P. WINCKEL, PRES., CEO

Dated: 7.13.15

APPROVED AS TO FORM:

_____
Valentine S. H[illegible], counsel for Building Industry Association of San Diego County

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EXHIBIT A

July 2014 Policies

EXHIBIT A

July 2014 Policies

A. Directed staff to follow Municipal Code Section 30.16.010(B)(1), which provides for rounding down when the base density results in a fractional unit.

B. Required that any affordable dwelling units included in a density bonus project must be at least 75% of the size of the market rate units, and at a minimum must meet the standard set forth in the Inclusionary Housing ordinance.

C. Waiver requests based on physical infeasibility must be accompanied by sufficient documentation to demonstrate the claim of infeasibility. If the City determines that a smaller unit size could be accommodated without the waivers, such waivers should be denied. If the developer requests an incentive based on financial infeasibility, the City must require financial documentation to justify the request.

D. Directed staff to implement these policies effective immediately and shall be applied to any projects not yet permitted or holding vested rights.

EXHIBIT B

Pipeline Projects and Credits

EXHIBIT B

Pipeline Projects and Credits

Case No.	Street Address(es)	Credits
13-187	378 Fulvia Street	**$0**
13-230	560 Requeza Street	**$6,000**
13-267	720 Balour Drive	**$0**
13-272	556 Union Street	**$0**
14-069	764 & 782 Leucadia Blvd.	**$0**
14-111	1412 Mackinnon Avenue	**$6,000**

EXHIBIT C

Form of Judgment Pursuant to Stipulation

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CITY OF ENCINITAS

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Attorneys for Plaintiff and Petitioner
BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, a California corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

SAN DIEGO COUNTY, NORTH DIVISION

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, a California corporation, Plaintiff and Petitioner, v. CITY OF ENCINITAS, a municipal corporation; and DOES 1 through 20. inclusive, Defendants and Respondents.	Case No.: 37-2014-00034550-CU-WM-NC Assigned for all Purposes to: THE HON. ROBERT P. DAHLQUIST, DEPARTMENT N-29 **JUDGMENT PURSUANT TO STIPULATION** Action Filed: October 10, 2014

On or about October 10, 2014 Petitioner Building Industry Association of San Diego County ("Petitioner") filed this action against the City of Encinitas (the "City") containing four

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causes of action relating to certain motions adopted by the Encinitas City Council on July 16, 2014 (the "July 2014 Policies") and the City's Housing Element of the General Plan.

The parties desire to fully settle and resolve the merits of the above-captioned action without further litigation, except as to certain reserved claims. The City has reached an agreement with Petitioners to resolve this litigation without admission of liability or fault. A true and correct copy of the Settlement Agreement, executed by all parties, is attached to this Judgment Pursuant to Stipulation as Exhibit A. The Settlement Agreement provides that "[t]his Settlement Agreement shall be incorporated into [this] Judgment Pursuant to Stipulation and shall be enforceable pursuant to Code of Civil Procedure Section 664.6." It further provides that "[t]he Court shall retain continuing jurisdiction to effectuate the provisions of this Agreement until the later of: (i) rescission of the July 2014 Policies as described in Section 2(a); (ii) completion of discretionary review of Pipeline Projects as described in Section 2(b); (iii) adoption of a Density Bonus Ordinance as described in Section 2(c); and (iv) adoption of an Updated Housing Element and the General Plan and Zoning Amendments as required by Section 3 of the Settlement Agreement."

IT IS THEREFORE STIPULATED by the parties, through their attorneys of record, that this case, except for reserved claims contained in Section 2(e) of the Settlement Agreement, has been settled pursuant to Section 664.6 of the Code of Civil Procedure on the terms set forth in the Settlement Agreement attached as Exhibit A. The parties request that the Court enter judgment accordingly, and retain jurisdiction over them to enforce the Settlement Agreement until the later of: (i) rescission of the July 2014 Policies as described in Section 2(a) of the Settlement Agreement; (ii) completion of discretionary review of Pipeline Projects as described in Section 2(b) of the Settlement Agreement; (iii) adoption of a Density Bonus Ordinance as described in Section 2(c) of the Settlement Agreement; and (iv) adoption of an Updated Housing

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Element and the General Plan and Zoning Amendments as required by Section 3 of the Settlement Agreement.

IT IS SO STIPULATED:

Dated: May ____, 2015

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

By: _____

VALENTINE S. HOY
Attorneys for Plaintiff and Petitioner
BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, a California corporation

Dated: May ____, 2015

GOLDFARB & LIPMAN, LLP

By: _____

BARBARA E. KAUTZ
Attorneys for Defendant and Respondent
CITY OF ENCINITAS

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JUDGMENT

Pursuant to the foregoing stipulation of the parties and the Court's power under Section 664.6 of the Code of Civil Procedure,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be, and hereby is, entered in accordance with the terms of the Settlement Agreement between the parties, attached as Exhibit A hereto. This judgment expressly incorporates the terms of the attached Settlement Agreement, including but not limited to, the provisions of Government Code Section 65759, which provides in part that the California Environmental Quality Act ("CEQA") "does not apply to any action necessary to brings its general plan or relevant mandatory elements of the plan into compliance with any court order or judgment under this article," provided the City will conduct the environmental assessment required by that provision. Pursuant to Section 65759, CEQA does not apply to any discretionary actions necessary to bring the Housing Element and relevant mandatory elements of the General Plan into compliance with State Law.

The Court retains jurisdiction over the parties at their request to enforce the Settlement Agreement until the later of: (i) rescission of the July 2014 Policies as described in Section 2(a) of the Settlement Agreement; (ii) completion of discretionary review of Pipeline Projects as described in Section 2(b) of the Settlement Agreement; (iii) adoption of a Density Bonus Ordinance as described in Section 2(c) of the Settlement Agreement; and (iv) adoption of an Updated Housing Element and the General Plan and Zoning Amendments as required by Section 3 of the Settlement Agreement.

Dated: _____ _____
Judge of the Superior Court

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