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CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION[1]

To: Inter-Canyon League, Saddleback Canyons Conservancy, Rural Canyons Conservation Fund and Canyon Lands Conservation Fund

From: John G. McClendon

Re: Analysis of the Silverado-Modjeska Specific Plan

Date: June 21, 2016

INTRODUCTION AND SUMMARY CONCLUSION

In response to your request, I have reviewed the Silverado-Modjeska Specific Plan (hereinafter, the "Sil-Mod Specific Plan"), the County of Orange ("County") Zoning Code and other materials in light of the California Planning and Zoning Law (Gov. Code § 65000 *et seq.*) and relevant case law in order to try and answer the following two questions:

> *Is the Sil-Mod Specific Plan in force and binding in light of the County having adopted it by resolution?*
>
> *If its adoption by resolution is irrelevant, then to what degree is the Sil-Mod Specific Plan in force and binding?*

In the Analysis below, I conclude that the Sil-Mod Specific Plan is not rendered ineffectual on account of it having been adopted by resolution and that its provisions are sufficiently "fundamental, mandatory and clear" for the County and the courts to enforce them. Before getting to that Analysis, however, I believe the following overview of relevant law pertaining to general and specific plans will be helpful in setting the context for these documents and understanding why I reached those conclusions.

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[1] I am providing this to you as a privileged confidential attorney-client communication. However, you are the holders of that privilege and therefore have the right to waive it if you so desire. In my opinion, I believe the County would benefit from having this information.

THE EVOLUTION OF STATE LAW CONSTRAINTS ON LOCAL LAND USE REGULATION AND THE GENERAL PLAN

The "police power" to protect the public's health, safety and welfare provides the broad legal basis upon which California counties and cities regulate land use within their jurisdictions. The source of those police powers derives not from a delegation of authority by the State but from the common law as well as Article XI, section 7 of the California Constitution which provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.)

At one time, California laws limiting local land use police powers were minimal. For example, while state statutes providing for the adoption of general plans have been around since 1927, they were permissive in nature, and a general plan was viewed as merely " 'an idealistic statement of policy which might or might not be carried out' [citation omitted]; it was 'in reality an interesting study without much direct relevance to day-to-day activity.' " (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 532.)

However, in 1971, the Legislature significantly altered the status of the general plan by mandating that zoning and subdivision approvals had to be consistent with a city's or county's general plan. (*DeVita v. County of Napa, supra,* 9 Cal.4th at p. 772.) A year later, the Legislature enacted urgency legislation to clarify that "consistent with" could only be determined if a jurisdiction had "officially adopted" a general plan. (58 Ops.Cal.Atty.Gen. 21, 23-24 (1975).) With these enactments, the general plan became "a constitution for all future development" within a jurisdiction and the single most important planning document governing its land use. (*Id.*; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-571.)

By law, a general plan must be "a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries it determines bears a relation to its planning." (Gov. Code § 65300.) It must "consist of a statement of development policies" and include diagrams and text setting forth "objectives, principles, standards, and plan proposals." (Gov. Code § 65302.) And all general plans must also include:

- a land use element
- a circulation element
- a housing element

- a conservation element
- an open-space element
- a noise element
- a safety element

(*Id.*) As will be seen, these seven elements are relevant to the *Sil-Mod Specific Plan*. A general plan is required to be adopted by resolution. (Gov. Code § 65356.)

THE SPECIFIC PLAN

One step below the general plan in the land use approval hierarchy, and used for systematically implementing the general plan in a specific geographical area, is the specific plan. Once a county or city has adopted a general plan, it "may ... prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan." (Gov. Code § 65450.) Similar to the way a general plan must include certain elements, a specific plan must include, by text and diagram, the following:

> (1) The distribution, location, and extent of the uses of land, including open space, within the area covered by the plan.
>
> (2) The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy, and other essential facilities proposed to be located within the area covered by the plan and needed to support the land uses described in the plan.
>
> (3) Standards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable.
>
> (4) A program of implementation measures including regulations, programs, public works projects, and financing measures necessary to carry out paragraphs (1), (2), and (3).

(Gov. Code § 65451.) A specific plan must also include a statement of the relationship of the specific plan to the general plan. (*Id.*) Other subjects may be included if, in the judgment of the county or city, they "are necessary or desirable for implementation of the general plan." (Gov. Code § 65452.)

Unlike a general plan, which must be adopted by resolution [Gov. Code § 65356], a specific plan may be adopted either by resolution or by ordinance. (Gov. Code § 65453.) Based on the information and documents I have been provided, this is apparently a key point with the County and will be addressed below. However, whether it was adopted by resolution or ordinance, since a specific plan is a legislative act, it is subject to adoption or repeal by voter initiative. (*Yost v. Thomas* (1984) 36 Cal.3d 561, *Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, *De Vita v. County of Napa, supra*.)

A specific plan cannot be adopted unless it is consistent with the general plan. (Gov. Code § 65454.) Once adopted, all zoning ordinances within the area covered by the specific plan must then be consistent with it.[2] (Gov. Code § 65455.) Notably, similar to the way principles of statutory construction operate (*i.e.*, the more specific trumps the more general), the specific plan for an area controls over the jurisdiction's general plan such that the general plan and its less specific policies may not be applicable to the specific plan area. (*Markley v. City Council* (1982) 131 Cal.App.3d 656, 668.)

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[2] I reviewed the PowerPoint that County Public Works Development Services presented at an Inter-Canyon League meeting on April 5, 2016, in which the County apparently claimed the Sil-Mod Specific Plan was hierarchically inferior to County Zoning Code regulations on account of it having been adopted by resolution and "Specific Plans adopted by resolution do not supersede regulations contained in Zoning Code or Zoning Map." What with specific plans systematically implementing generals plan and Government Code section 65455 mandating that "no zoning ordinance may be adopted or amended with an area covered by a specific plan unless it is consistent with the adopted specific plan," the claim is perplexing and appears have it backwards:

> A zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan. (§ 65860.) *The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances.* ***The tail does not wag the dog***.

(*Lesher Communications, Inc. v. City of Walnut Creek, supra,* 52 Cal.3d at p. 541; emphasis added.)

ANALYSIS

In the first section of this Analysis, I address whether the Sil-Mod Specific Plan is in force and binding in light of the County having adopted it by resolution. Concluding that the Sil-Mod Specific Plan's adoption by resolution is irrelevant, in the second section of this Analysis I explore the extent to which the County and the courts may enforce it.

DOES THE SIL-MOD SPECIFIC PLAN LACK ANY "TEETH" AS A LAND USE CONTROL DOCUMENT ON ACCOUNT OF THE COUNTY HAVING ADOPTING IT BY RESOLUTION INSTEAD OF ORDINANCE?

Based on information you provided, it appears the County views the Sil-Mod Specific Plan as essentially having no value as to the "systematic implementation of the general plan" for those areas covered by it [Gov Code § 65450] and believes its "standards and criteria by which development will proceed" [Gov. Code § 65451] are unenforceable on account of the County having adopted it by resolution and not by ordinance. After researching this issue, I believe the County's incorrect view is probably predicated on one (or more) of three factors.

The first factor may be a large body of case law noting that ordinances and resolutions are different. Typical of this is *Central Manufacturing District, Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 860, where the court noted the difference by quoting 35 California Jurisprudence 2d, § 392, p. 200:

> An ordinance in its primary and usual sense means a local law. It prescribes a rule of conduct prospective in operation, applicable generally to persons and things subject to the jurisprudence of the city. "Resolution denotes something less formal. It is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides.

In the specific context of a *county* ordinance versus resolution, another court explained:

> We cannot in good conscience say that "ordinance" means the same thing as "resolution" in light of the well-established differences between the two modes of enacting legislation.

> 'The resolution of a board of supervisors is ordinarily not equivalent to an ordinance. A resolution is usually a mere declaration with respect to future purpose or proceedings of the board. An ordinance is a local law which is adopted with all the legal formality of a statute.' [citations] A resolution adopted without the 'formality' required of an ordinance cannot be deemed an ordinance. [citation] A duly enacted county ordinance is a 'law of this State' within the meaning of a penal statute proscribing the violation of such law [citation]; a board resolution is not.
>
> "The Legislature has been explicit concerning this distinction. It has exacted certain 'formalities' in the enactment of an ordinance by the supervisors of a county ([Gov. Code,] §§ 25120-25121), but not of their adoption of a resolution. It has specified certain requirements relative to the publication of a county ordinance after its passage ([Gov. Code,] §§ 50021, 25124), its deferred effective date in the typical case ([Gov. Code,] § 25123), its mandatory recording in an 'ordinance book' ([Gov. Code,] §§ 25102, subd. (b), 25122); compare [Gov. Code,] § 25102.1, as to the recording of resolutions, and the codification of ordinances generally ([Gov. Code,] §§ 25126-25130, 50022.2- 50022.5); none of these requirements apply to board resolutions. By statute, the Legislature has made the terms 'ordinance' and 'resolution' synonymous in a very few instances, each of which is highly specialized and applies to a city only (Gov. Code, § 60004; Sts. & Hy. Code, §§ 8007, 8305); in innumerable other statutes authorizing or directing actions by county boards of supervisors, it has been careful to state whether the specific action shall be taken by 'ordinance' or by 'resolution' in each case. It has emphasized the distinction between the two terms by further providing that, when a statute requires local legislative action by resolution but a local charter requires that it be taken by ordinance, 'action by ordinance is compliance with the statute for all purposes (§ 50020); it has made no converse statutory provision to the effect that a 'resolution' will suffice, where a statute requires action by 'ordinance,' under any circumstances.

> "Because the difference between a 'resolution' and an 'ordinance' is thus substantive, under case law and by deliberate legislative definition, the one . . . cannot be construed as having amounted to the other . . . ." (*City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 565-566 [90 Cal.Rptr. 843], fn. omitted.)

(*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 774-775 [269 Cal.Rptr. 796].)

The second factor may arise from *The Planner's Guide to Specific Plans*,[3] published by the Governor's Office of Planning and Research in 2001, taking the foregoing case law differentiating ordinances and resolutions, combining it with the Legislature's enactment of Government Code section 65453 allowing specific plans to be adopted either by ordinance or resolution, and concluding from it that counties and cities can henceforth adopt either a "full strength" specific plan or a "specific plan lite" depending on whether they do so by ordinance or resolution:

> **Adoption Options:**
> Unlike the general plan, which must be adopted by resolution (§65356), two options are available for the adoption of a specific plan: Adoption by resolution or adoption by ordinance. An ordinance is a local statute, enforceable by law. According to Black's Law Dictionary, the term "resolution" "…is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a statute… . Such is not law but merely a form in which a legislative body expresses an opinion."
>
> The choice between the two is dependent upon the role which the plan is intended to fill. When adoption is by resolution, the specific plan becomes a policy document similar to the general plan. It takes the form of a more specific set of policies which may give direction to the mix of land uses or goals of a particular development. When adoption is by ordinance, the specific plan effectively becomes a set of zoning regulations that

[3] The guide can be found at: https://www.opr.ca.gov/docs/specific_plans.pdf

> provide specific direction to the type and intensity of uses permitted or defines other types of design criteria including architectural standards. However, it is important to note that as in *City of Sausalito v. County of Marin*, (1970) 12 Cal.App.3d 550, 565, the adoption of plans which effectively rezone property must be completed by ordinance consistent with §65850. The enactment of a specific plan is a legislative act subject to adoption or repeal by voter initiative even when enacted by resolution (*Yost v. Thomas* (1984) 36 Cal. 3d 561, *Midway Orchards v. County of Butte* (1990) 220 Cal. App. 3d 765, *De Vita v. County of Napa*, (1995) 9 Cal. 4th 763).

(*Id.* at p. 26.)

> Specific plans may differ in their implementation of the general plan depending upon whether they are adopted by resolution or by ordinance. A specific plan adopted by resolution will propose implementation measures, whereas a specific plan adopted by ordinance imposes regulations. If the specific plan is regulatory by design, the plan's regulations must promote the general plan's statement of development policies. In particular, the regulations must be enactments resulting from and complying with the directives of the general plan's policies, plan proposals, or action programs.

(*Id.* at p. 29.)

The third factor derives directly from the first factor and is the County's enactment, on October 1, 1980, of Ordinance No. 3218 adding the following provisions to Title 7 ["Land Use and Building Regulations"], Division 9 ["Planning"], Article 2 ["Comprehensive Zoning Code"] of the County's Code of Ordinances:

> Sec. 7-9-156. - Specific plans.
>
> The provisions of sections 7-9-156 through 7-9-156.3 shall be known as the Specific Plan Procedures. All references to this section shall include sections 7-9-156.1 through 7-9-156.3.

When deemed to be necessary for the orderly implementation of the General Plan and when deemed to be in the public interest the Board of Supervisors may adopt a specific plan by ordinance or by resolution.

* * *

Sec. 7-9-156.1. - Specific plan resolution.

When a specific plan is intended to provide clarification and specific information with regard to the policies and concepts expressed within the General Plan, but not to provide the regulations necessary for implementation, such specific plan may be adopted by resolution of the Board of Supervisors.

(a) Contents of plan: A specific plan resolution may include all of the details, concepts and programs deemed necessary to ensure common understanding and implementation of the General Plan as applicable to the area and the issues covered by the specific plan. It shall include such direction and provisions deemed necessary to provide for the implementation of the General Plan.

(b) Regulations excluded: A specific plan resolution shall not include regulations and requirements for implementation of the General Plan, and any specific plan which contains such implementation regulations shall not be adopted by resolution.

Sec. 7-9-156.2. - Specific plan ordinance.

Regulations within a specific plan shall be adopted by the Board of Supervisors by ordinance. Such plan may either supplement or supersede all land use regulations applicable to the subject property, including all previously adopted ordinances, standards and guidelines deemed to be necessary for the orderly and systematic implementation of the General Plan.

> (a) Scope of plan: Each specific plan ordinance shall include such regulatory texts and maps necessary to provide the regulations for the development, maintenance and use of the subject real property in compliance with the policies and programs of the General Plan. Each plan shall specify clearly how and to what extent such plan is to supplement or supersede any adopted ordinances, regulations and standards. Where not otherwise addressed by a specific plan, all currently adopted ordinances, regulations and standards of the County of Orange are applicable.
>
> (b) Coordination with others: When a specific plan ordinance is intended to include items and issues that are not within the normal purview of the Planning Agency, the preparer of the plan shall consult with such persons and organizations deemed appropriate to ensure orderly implementation of the specific plan.
>
> (c) Designation on zoning map: Adoption of a specific plan ordinance shall also include adoption of an appropriate zoning district map. The zoning district map shall not indicate zoning for the area within the specific plan but shall show the letter S within a circle. Thereafter, all land use, development and improvements shall conform to the provisions of the adopted specific plan.

Assuming for the sake of argument that all of the foregoing three factors are valid, *none of them* justify the County treating the Sil-Mod Specific Plan as an unenforceable land use document on account of it having been adopted by resolution instead of ordinance. Taking the three factors in reverse order, Sections 7-9-156, 7-9-156.1 and 7-9-156.2 are entirely inapplicable to the original Sil-Mod Specific Plan. The County adopted the Sil-Mod Specific Plan in 1977, and adopted Sections 7-9-156, 7-9-156.1 and 7-9-156.2 in 1980, and I have not come across anything indicating that, at the time the County adopted those three Sections, it intended for them to apply retroactively to specific plans previously approved by

the County. Thus, under established principles of statutory construction, those three Sections do not apply to the original Sil-Mod Specific Plan.[4]

> Generally, statutes operate prospectively only. In the words of section 3 of California's Civil Code : "No part of [this code] is retroactive, unless *expressly* so declared." (Italics added.) ... In the words of the United States Supreme Court, "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " [citation]
>
> As the United States Supreme Court has consistently stressed, the presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles ... Just as federal courts apply the time-honored legal presumption that statutes operate prospectively "unless Congress has clearly manifested its intent to the contrary" [citation], so too California courts comply with the legal principle that unless there is an "express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application"

(*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841; *see also USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 216 ["The general rule is that absent a clear, contrary indication of legislative intent, we interpret statutes to apply prospectively. ... we presume they do not apply retroactively unless the Legislature has said otherwise expressly or unmistakably."].)

The second factor is inapplicable for a similar reason. The Legislature enacted Government Code section 65853 in 1984—seven years after the County adopted the Sil-Mod Specific Plan. Prior to that, the assumption was since the law said a specific plan was "for the systematic implementation of the general plan" with "standards and criteria by which development will proceed" within their boundaries," specific plans were to be adopted in the same manner as general plans: by resolution. Thus, while the Governor's Office of Planning and Research concluded the "by resolution or by ordinance" language in Government Code

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[4] The five subsequent amendments to the Sil-Mod Specific Plan, all of which the County adopted by resolutions between 1981 and 1985, would fall under Section 7-9-156.1.

section 65453 ushered in the ability to adopt two different *types* of specific plans, section 65453 has no bearing on the original Sil-Mod Specific Plan *even if* that conclusion is correct.

The first factor—case law drawing a distinction between ordinances and resolutions—is also irrelevant to the Sil-Mod Specific Plan. Whereas in 1970 the court in *City of Sausalito v. County of Marin*, (1970) 12 Cal.App.3d 550, 565-567, made much of the fact that "[a] resolution of a board of supervisors is ordinarily not equivalent to an ordinance," the following year the California Supreme Court took the opposite tack:

> Associated complains that although subdivision (b) of section 11546 requires that a city's *ordinance* set forth the standard for determining the amount of land to be declared or fee to be paid by a subdivider, ordinance 10-1.516 contains no such standard. It provides instead that the standards shall be set forth by resolution; it is resolution 2225 rather than the ordinance which specifies these matters. There is no showing in the record as to the circumstances under which the resolution was adopted.
>
> ***It has been held that even where a statute requires the municipality to act by ordinance if a resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance.*** (*Central Manufacturing District, Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 860 [1 Cal.Rptr. 733].) Since there is no showing in the record as to the circumstances under which the resolution was adopted, we presume its validity.

(*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 647-648; emphasis added, italics in original.) Notably, the appellate opinion the Supreme Court approvingly cited here makes salient what the law was at the time the County adopted the Sil-Mod Specific Plan, citing another Supreme Court (*Crowe v. Boyle*) case from 1920:

> The difference between an ordinance and a resolution is well stated in 35 California Jurisprudence 2d, section 392, page 200: "The enactments of a city's legislative branch are known as ordinances and resolutions. Strictly speaking, there is a difference between the two. An ordinance in its primary and

> usual sense means a local law. It prescribes a rule of conduct prospective in operation, applicable generally to persons and things subject to the jurisdiction of the city. 'Resolution' denotes something less formal. It is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides. Ordinarily it is of a temporary character, while an ordinance prescribes a permanent rule of conduct or of government. ***However, for many purposes the two words are equivalent terms.***" See also 37 American Jurisprudence, section 142, page 755.
>
> *Crowe v. Boyle*, 184 Cal. 117, 149 [193 P. 111]: "***But in the absence of statutory or charter provision to the contrary, a legislative act may be either in the form of a resolution or of an ordinance.*** [Citations.]
>
> For many purposes resolutions and ordinances are equivalent terms. [Citations.]
>
> 'And it has been held that even where the statute or municipal charter requires the municipality to act by ordinance, if a resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance. . . . ."

(*Central Mfg. Dist., Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 859-860; emphasis added.) As noted above, the adoption of a specific plan is a legislative act. (*Yost v. Thomas* (1984) 36 Cal.3d 561.) And at the time the County adopted the original Sil-Mod Specific Plan in 1977, the Legislature had not yet specified the manner in which specific plans were to be enacted. Thus, the enactment of the Sil-Mod Specific Plan by resolution does not make its provisions any less enforceable than the enactment of the County's General Plan by resolution. The adoption and amendment of both are legislative acts.

ASSUMING THE SIL-MOD SPECIFIC PLAN HAS "TEETH," EXACTLY HOW SHARP ARE THEY?

Even if the County's adoption of the original Sil-Mod Specific Plan by resolution does not undermine its utility as a land use document regulating the areas it covers, that still leaves

open the question of whether those standards and regulations must be honored and enforced by the County and the courts, and conversely, whether a disgruntled developer could successfully sue the County if the County used those standards and regulations as the basis to limit or deny that developer's proposed project. Answering this question requires the threshold recognition that all provisions of a general or specific plan are not created equal.

Government Code section 65040.2 requires the Governor's Office of Planning and Research to develop and adopt guidelines for the preparation of general plans and directs that those guidelines "shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans." Although not mandatory, as "the state's only official document explaining California's legal requirements for general plans" and that "closely adheres to statute and case law," for more than 40 years the *State of California General Plan Guidelines*[5] have been the general plan bible for cities and counties, with courts periodically referencing them for assistance in determining compliance with planning law. (*Corona-Norco Unified School Dist., supra,* at p. 994, fn. 6.)

The *General Plan Guidelines* explain that the various terms used in general and specific plans are not interchangeable but have discreet, formal and specific meanings:

> **Goal**
> A goal is a general direction-setter. It is an ideal future end related to the public health, safety, or general welfare. A goal is a general expression of community values and, therefore, may be abstract in nature. Consequently, a goal is generally not quantifiable or time-dependent."
>
> * * *
>
> **Objective**
> An objective is a specified end, condition, or state that is an intermediate step toward attaining a goal. It should be achievable and, when possible, measurable and time-specific. An objective may pertain to one particular aspect of a goal or it may be one of several successive steps toward goal achievement. Consequently, there may be more than one objective for each goal.
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> * * *

[5] They can be found at: http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf

> **Policy**
> A policy is a specific statement that guides decision-making. It indicates a commitment of the local legislative body to a particular course of action. A policy is based on and helps implement a general plan's objectives."
>
> * * *
>
> **Standards**
> A standard is a rule or measure establishing a level of quality or quantity that must be complied with or satisfied. Standards define the abstract terms of objectives and policies with concrete specifications. (*Id.*)

Thus, a "goal" is subjective and not quantifiable, "standards" are objective, qualifiable and quantifiable, and a "policy" falls in the middle and just below "standards."

Recognizing the differences in general and specific plan terms gives insight into the question of whether the Sil-Mod Specific Plan's standards and regulations are of the *type* that the County can legally enforce against developers and a court can compel the County to comply with if it fails to do so. Case law holds that the closer the "specific statement" of general or specific plan "policy" comes to resembling an objective "standard," the more inclined courts will be to require compliance with it.

In fact, a line of cases extending back more than thirty years holds a proposed project can be found to be inconsistent with a general or specific plan if it conflicts with just *a single* policy requirement. For example, in *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 ["*Native Plant*"], the city's general plan directed the city to design mitigation for certain wildlife species "in coordination with" the United States Fish and Wildlife Service and the California Department of Fish and Game. (*Id.*, at p. 635.) Opponents of the project argued that the city did not coordinate with the Fish and Wildlife Service because the city approved the project over the Fish and Wildlife Service's repeated objections that the proposed biological resource mitigation measures were inadequate. (*Id.*, at p. 641.) The city interpreted "coordination" to mean trying to work with someone else and as being synonymous with "consultation." (*Id.*) The court rejected this interpretation as unreasonable under the particular circumstances and concluded that "coordination" required a measure of cooperation. (*Id.*) Based on that definition, the court determined that the city's approval of the project was inconsistent with the general plan's coordination *requirement* and thus violated the Planning and Zoning Law. (*Id.*, at p. 642.)

Native Plant approvingly cited *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782 ["*EHL*"], where our local appellate court reiterated that "[a] project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." (*Native Plant* at p. 637.) Like the court in *Native Plant*, in *EHL* the court confronted a situation where a project was inconsistent not with a plan's permissive goals or guidelines but with the plan's specific and mandatory regulations applicable to traffic on Santiago Canyon Road. Noting that "[c]onsistency requires more than incantation, and a county cannot articulate a policy in its general plan and then approve a conflicting project," the court rejected the County's consistency finding because the project was inconsistent with unambiguous and mandatory general plan policies. (*EHL*, at pp. 787-789.) The *EHL* court then distinguished *Corona-Norco Unified School Dist., supra*, where "the general plan did not contain any specific, mandatory requirement." (*Id.* at pp. 789-790.)

EHL followed from *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341 ["*FUTURE"*], where the court rejected the argument that "simply one general plan policy should not be enough to scuttle a project." Again distinguishing *Corona-Norco Unified School Dist.,* and noting that "the nature of the policy and the nature of the inconsistency are the critical factors to consider," the *FUTURE* court rejected a county's determination that a proposed project was consistent with the general plan because the project violated a *single* policy in the general plan's land use element that was fundamental, mandatory and "anything but amorphous." (*Id.*)

In turn, *FUTURE* followed from *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 753, where the court affirmed the lower court's rejection of the county's general plan consistency finding for a project because the project was inconsistent with a single general plan policy. "Policy C4-a5 of the conservation element of the [c]ounty's general plan" – was a mitigation measure hardwired into the general plan that "require[d] the protection of 'beneficial, rare or endangered animals and plants with limited or specialized habitats.'" (*Id.*)

Applying the foregoing case law to the Sil-Mod Specific Plan leads to the conclusion that if any of the Sil-Mod Specific Plan's policies are "fundamental, mandatory, and clear" then the County can legally enforce them and a court could compel the County to comply with them if it fails to do so. With Government Code section 65451 saying specific plans "must" include "***[s]tandards*** and ***criteria*** by which development will proceed, and ***standards*** *for the conservation, development, and utilization of natural resources*, where applicable" and "[a] program of implementation measures including ***regulations***," one would reasonably expect to find such clear-cut policies in the Sil-Mod Specific Plan. (Emphasis added.)

A review of the Sil-Mod Specific Plan shows it "establishing a level of quality or quantity that must be complied with or satisfied" and defining "the abstract terms of [County General Plan] objectives and policies with concrete specifications." As noted above, such objective, qualifiable and quantifiable rules are "Standards" according to the *General Plan Guidelines* that must be complied with. The following are just a few examples of the Sil-Mod Specific Plan's standards for development:

LAND USE

General Development Guidelines (p. 1)

It is the intent of the county to promote subdivision and construction that will least disturb the natural contours and vegetation. All cut and fill banks shall be finished to harmonize with the existing topography. Abrupt changes of graded areas are to be avoided, rounding all edges into the natural topography and planting with appropriate vegetation. In no event will any development be allowed to proceed if the tentative plans submitted indicate high cut and fill banks that will destroy the beauty and integrity of the natural terrain and vegetation.

The following guidelines shall apply to all residential and recreational development in the Silverado-Modjeska area. Only in cases where the public safety and welfare are issues, and/or where site conditions dictate a design which better fits the goals and policies of the Specific Plan will one or more of these development guidelines be exempted.

1. Building pads and their access to a public street shall be located and designed in a manner which preserves the natural landscape.

    a. For any grading activity, the vertical height of any cut shall not exceed 10 feet, and the vertical height of any fill shall not exceed 10 feet. For graded roads the vertical height of any cut and/or fill shall not exceed 10 feet wherever feasible.

b. Landscape screening will obscure grading scars from view of any public road.

c. No grading will occur on slopes exceeding 45 percent except for fuel breaks and community-wide emergency access routes.

2. All lots shall, be so designed that surface drainage from the lot will be drained directly to its own street frontage, approved natural water course, or improved easement with a minimum of control devices.

CONSERVATION

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Tree Preservation (p. 6)

Trees exceeding five inches in diameter will be preserved or replaced in conjunction with any grading or construction activity. In situations where development necessitates tree removal, the county may require tree planting (appropriate species of any size) and maintenance (watering as necessary) on the subject property or public right of way on a one-for-one basis.

CIRCULATION

Rural Road Character (p. 8)

Curbs, gutters, sidewalks and street lights shall not be allowed unless necessary for safety purposes.

SCENIC HIGHWAY

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Site Plan Review (p. 9)

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3. There are to be no paved sidewalks along public roads.

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> 5. Parking lot roadway, walkway and security lighting fixtures are not to project above the roof line of any building and are to be shielded in a manner which minimizes their reflection onto adjacent property and public roads.

Moreover, it should be noted that the Sil-Mod Specific Plan includes all seven mandatory general plan elements, validating its stated purpose of amplifying the County's General Plan policies. Comparing these clarifications, interpretations and details to the *General Plan Guidelines*' definition of a "standard," they are more than just policies—they are objective standards—and as such they appear to be sufficiently "fundamental, mandatory and clear" to compel their enforcement.

In summary, it should come as no surprise that the Sil-Mod Specific Plan describes itself as a policy document with real land use regulatory "teeth" to it:

> ***It is a policy document*** for the defined areas of Modjeska Canyon, Williams Canyon, Silverado Canyon, Baker Canyon, and Black Star Canyon. Although not a part of the Orange County General Plan, ***the specific plan clarifies, interprets and details many general plan policies with specific reference to the conditions of the Silverado-Modjeska area***.[6]

(*Id.*; emphasis added.) To the extent the County or anyone else is either seeing tooth decay or no teeth at all in the Sil-Mod Specific Plan,[7] I would suggest they take a closer look.

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[6] In the 2013 unpublished opinion styled *Save Our Specific Plan v. County of Orange [Chad Kearns]* (4th Civ. Case No. G046416) our local appellate court incorrectly stated that the Sil-Mod's purpose was "to ensure the preservation of the rural environmental and lifestyle of the area while providing for reasonable development." According to the Sil-Mod Specific Plan [p. ii] this was the purpose of the "Foothill Corridor Policy Plan" that preceded the Sil-Mod Specific Plan.

[7] Notably, in *Save Our Specific Plan* the court found the County's own *actions* refuted its position:

> "Although appellants argue the county did not find the [Sil-Mod] Specific Plan requires compliance with its terms in the present matter and has repeatedly taken that position *in this case*, the county has amended the specific plan on at least three prior occasions when it apparently found a project would conflict with the specific plan."