S129125

Second Appellate District, Division Six
Case No. B175054

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE CITY OF GOLETA,

Petitioner,

v.

SANTA BARBARA SUPERIOR COURT,

Respondent,

OLY CHADMAR SANDPIPER GENERAL PARTNERSHIP,
a Delaware Corporation,

Real Party in Interest.

SANTA BARBARA COUNTY SUPERIOR COURT
HON. J. WILLIAM McLAFFERTY, JUDGE

REPLY BRIEF ON THE MERITS OF REAL PARTY IN INTEREST OLY CHADMAR SANDPIPER GENERAL PARTNERSHIP

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REPLY BRIEF ON THE MERITS

The City accuses Oly Chadmar of making "complicate[d]," "misleading," and "radical" arguments [Resp.Br. 1], but Oly Chadmar's position is simple, straightforward, and conservative: A public entity must obey the laws it enacts.

Oly Chadmar's opening brief showed that Government Code section 66413.5 does not give new cities unlimited power to ignore all other laws. Under the Subdivision Map Act, as implemented by the subdivision map ordinances the City adopted from the County, and deliberately readopted without meaningful change ("SMA Ordinances"), the City was required to approve Oly Chadmar's final map. Further, the actions of the City's agents

estopped it to deny map approval.

Each of these points is properly before the Court notwithstanding the City's protest [Resp.Br. 13. See also, p. 3].[1]

I.

A STATUTE INTENDED TO LIMIT A PUBLIC ENTITY'S DISCRETION IN ONE CIRCUMSTANCE DOES NOT GRANT THE ENTITY UNLIMITED DISCRETION IN OTHER CIRCUMSTANCES NOT MENTIONED IN THE STATUTE.

The City argues incessantly that the "plain language" of section 66413.5 gave it discretion to deny approval of Oly Chadmar's final map. Yet, not once does the City point to any language of the statute that grants this discretion. There is none. Oly Chadmar has never claimed to be sheltered by the safe harbor provision of section 66413.5.

In effect, the City argues that a statute specifying what a newly incorporated city ***must*** do in certain circumstances should be interpreted to give the city unlimited discretion to **do the opposite in all other circumstances**. That is an illogical, incorrect, and overbroad reading of section 66413.5. Although Oly Chadmar did not copy the statute into its brief (the Court of Appeal opinion [p. 5] and the petition for review [pp. 4-

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[1]In criticizing Oly Chadmar's statement of the issues presented, the City apparently assumes that the summary of issues in the Court's news release defines the issues presented. However, the news release states explicitly that its description of the case "do[es] not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court." Since the Court did not limit the issues to be decided in its December 22, 2004 order granting review, it may address "any issues that are raised or fairly included in the petition or answer" (Rule 29, subds. (a), (b), California Rules of Court).

5] had already quoted it), Oly Chadmar's interpretation has never varied.

A. THE LANGUAGE OF SECTION 66413.5

It is true, as the City notes [Resp.Br. 16] that there are situations in which newly incorporated cities might have discretion over county-approved tentative maps. That can occur when the new city's subdivision map ordinances allow such denial, as Oly Chadmar noted in the trial court,[2] or perhaps if the subdivision map ordinances are silent, but not when the ordinances spell out a procedure for ministerial approval, as the City's SMA Ordinances did.

Though the City argues that courts must apply unambiguous statutes according to their terms, without judicial construction [Resp.Br. 2, 19], the City invites the Court to add words to section 66413.5, subd. (f). It argues that the statute "requir[es] newly incorporated cities to approve final maps conforming to county-approved tentative maps, ***but only*** if two conditions are met: (1) the tentative map application must have been submitted before the date of the first signature on the incorporation petition; ***and*** (2) the

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[2]Specifically, Oly Chadmar wrote:

> Thus, a city could arguably deny a final map if (1) the 'safe harbor' time frame was not met; and (2) it adopted implementing SMA ordinances that allowed for such denial. In the present case, the City could possibly have changed the SMA Ordinances to provide for automatic denial of any tentative vesting maps that fell outside the 'safe harbor' provision. It did not do so.

Vol. I, p. 70:23-28.

county must have approved the tentative map before the incorporation election" [Resp.Br. 1-2, emphasis by the City]. Section 66413.5 does not have a "but only" clause – or any other language nullifying the rest of the Subdivision Map Act. There is no language in section 66413.5 giving the City unlimited discretion over Oly Chadmar's final map.

By urging an interpretation that adds words to section 66413.5, the City "violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.] This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not insert what has been omitted from a statute" (*People v. Guzman* (2005) 35 Cal.4th 577, 587, quoting *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998, internal quotation marks omitted. *See also*, Resp.Br. 21, citing *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 648).

Oly Chadmar's opening brief pointed out that interpreting section 66413.5 to confer implied powers upon cities to deny map approval is contradicted by subdivisions (c) and (e) of the statute, which confer express power to do so in certain circumstances [Merits OB, pp. 15-16]. The City's response is that there is no conflict between these subdivisions[3] and the City's interpretation because subdivisions (c) and (e) merely put new cities on the same footing as existing ones in being allowed to deny or condition

[3]The City's brief refers to subdivisions (c) and (d) at one point [Resp.Br. 15], but this appears to be a typographical error.

permits for health and safety reasons [Resp.Br. 15]. This misses the point of Oly Chadmar's argument: There is no reason to interpret section 66413.5, subd. (f) as giving new cities implied power to deny approval to final maps arising from county-approved tentative maps that fall outside the safe harbor because, when the Legislature intended to empower new cities to deny map approval, it knew how to say so explicitly – as it did in subdivisions (c) and (e) (*see, Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1106).

B. THE CITY'S ORDINANCES

The only amendment the City made to relevant provisions of the County's SMA Ordinances was to substitute the names "City of Goleta" for "County of Santa Barbara," and "Goleta City Council" for "Board of Supervisors." As thus changed, section 21-10 of the City's SMA Ordinances provides:

> When the [City] Surveyor is satisfied that the map is technically correct, conforms to the approved tentative map or any approved alterations thereof and complies with all applicable laws and regulations, the [City] Surveyor will notify in writing the licensed land surveyor . . . who prepared the map and request delivery of the original tracing of the final or parcel map. . . . In the case of a final map . . . the [City] Surveyor will transmit the same to the Clerk of the [City Council] for filing and approval. The [City Council] shall approve the map at its next regular meeting if it conforms with all the requirements of applicable laws and regulations made thereunder.

The City asserts that this cosmetic change in the ordinance had a substantive effect, i.e. to limit the City's obligation to grant ministerial

approval to "final maps that conform to ***City Council-approved*** tentative maps" [Resp.Br. 3, 7, 17-18, emphasis by the City].

This is nonsensical. The theory would require a finding that after February 1, 2002, when the City adopted all County's Ordinances and inserted the name change, there no longer was a vesting tentative map as defined in the City's SMA Ordinances.

The City's own actions belie its reasoning. The City's Resolution concerning the Project, No. 03-01, states "The City Surveyor notified the City Engineer of the City of Goleta by letter dated November 26, 2002, that the proposed Final Map for the Sandpiper Project was technically correct, consistent with the requirements of the Subdivision Map Act, and ready for filing with the City Council" [Vo. 19, p. 6007, Recital 22]. If the vesting tentative map had never been approved by an authorized entity, then the final map arising from it was not consistent with the Subdivision Map Act and not ready for filing with the City.

The premise of the City's theory is that sections 21-6 and 21-7 of the City's SMA Ordinances identify the City Council as the "decision-maker for all tentative maps" [Resp.Br. 17, citing Vol. 22. pp. 6304-6435]. Yet the City does not mention section 21-4, part of the same article of the City's Codes. Section 21-4 says the article applies to "(1) ***Any*** subdivision as the same now is or hereafter may be defined in Section 66424 of the California Government Code" (emphasis added). That statute defines subdivision without reference to whether a county or a city approved the tentative

subdivision map.[4]

Adopting the City's name-change theory would also make City Ordinance No. 02-15, adopted March 25, 2002, meaningless. Ordinance No. 02-15 imposed a moratorium on certain projects but exempted those "which have received all final development project approvals prior to February 1, 2002" [Vol. 19, p. 6040]. If the City's adoption of the County Code were intended to operate only as to projects that had actually been approved by the City, this ordinance would be a nullity, because the City could not have approved any projects before the specified date (i.e., the date of the City's incorporation). The City cannot be heard to argue that one of its ordinances was a nullity, in the hope of establishing that another ordinance means something other than what it says.

The City believes the Subdivision Map Act "assum[es] that one legislative body is generally not bound by another's land use approval" [Resp.Br. 19]. In support, it first cites section 66413.5, stating that the statute

> [I]mposes a requirement on new cities to approve final maps conforming to county-approved tentative maps when subdivision (f)'s temporal conditions are satisfied. The need to enact a statute imposing this requirement demonstrates that

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[4]"'Subdivision' means the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way . . ." (Gov. Code, §66424).

> it is ***not*** generally assumed that one legislative body will be bound by another's tentative map approval.

Emphasis by the City.

This is tautological; the language of section 66413.5 cannot be used to establish a general principle that is in turn used to explain what section 66413.5 means.

Secondly, the City cites section 66474.1 because that statute provides that a "legislative body shall not deny approval of a final . . . map if ***it*** has previously approved a tentative map" (emphasis by the City). The Attorney General addressed a similar argument in 1980, and rejected it:

> Literally construed, section 66474.1 refers to action upon a final map by the same legislative body which had previously approved a tentative map. However, neither section 66458 nor section 66473 is subject to any such literal constraint. Considering both the text and texture of the statutory design and the rationale of *Youngblood [v. Board of Supervisors* (1978) 22 Cal.3d 644] and *Great Western [Sav. & Loan Ass'n v. City of Los Angeles* (1973) 31 Cal.App.3d 403], which are equally applicable in the case of a successor agency, we find no basis for any such distinction.

63 Ops. Cal. Atty. Gen. 844, 848; Vol. 21, Tab X, pp. 6254-6259,

The text and texture of the Subdivision Map Act have not changed in any way that would allow the City to ignore *Youngblood*, *Great Western*, or the opinion of the Attorney General.

C. OLY CHADMAR DOES NOT ASSERT THAT NEW CITIES MUST "REACH OUT AND DISAVOW" THEIR PREDECESSORS' MAP APPROVALS.

The City quotes the Court of Appeal's statement that section 66413.5 "is not subject to modification by a local agency and requires no implementing legislation to be effective" [Resp.Br. 11, quoting Opin., p. 7]. While the opinion contains that language, the passage is not responsive to Oly Chadmar's position. Oly Chadmar has never urged, and the trial court did not hold, that section 66413.5 requires a newly incorporated city to "*sua sponte* reach out and disavow" [Resp.Br. 20] any county-approved map pending at the time of incorporation, or that section 66413.5 requires new cities to enact enabling ordinances or take other steps to implement section 66413.5.

To the contrary, the trial court concluded the City had five options available. It could: (1) honor the vesting tentative map; (2) invalidate the vesting tentative map, by ordinance or otherwise, because it was outside the safe harbor of the statute; (3) adopt an ordinance setting guidelines for vesting tentative map approvals; (4) require resubmission of the Project; or (5) amend the City's SMA Ordinances to comport with section 66413.5 [Vol. 2, Tab G, pp. 410-411].

Thus, Oly Chadmar's argument does not reflect any "misunderstanding of how government operates" [Resp.Br. 22]. Rather than suggesting that cities must "reach out and disavow" county-approved tentative maps, Oly Chadmar argues only that when cities make quasi-

judicial decisions [see Resp.Br. 22], they do so in accord with their local ordinances. The City's Ordinance 21-10 was written in such a way as to require approval of Oly Chadmar's final map. That is why the trial court concluded that the City exercised its discretion by the ordinances it did adopt, and exercised that discretion in a way that required consideration of Oly Chadmar's map to be ministerial [Vol. 2, Tab G, pp. 410-413].

D. LEGISLATIVE HISTORY

The City comments that in enacting section 66413.5, the Legislature expressly noted that then-current law did not require a newly incorporated city to approve final maps conforming to tentative maps approved by the county before incorporation [Resp.Br. 25, footnote omitted]. The pertinent change in the law was to require newly incorporated cities to approve those maps if the tentative map was filed within the safe harbor period. Conversely, there is nothing in the legislative history to suggest the Legislature intended to change any other aspect of the Subdivision Map Act.

Oly Chadmar does not dispute that the Legislature was concerned about runs on development approvals, and that is why it created a time-limited safe harbor period rather than requiring automatic approval of all county-approved maps. But that is a far cry from the contention that the Legislature intended to let cities violate their own ordinances under the mantle of section 66413.5, and the City has no support – in the language of the statute, in the legislative history, or otherwise – for this startling proposition.

According to the City, section 66413.5 put Oly Chadmar "on notice" that its project was subject to discretionary review [Resp.Br. 27]. The only notice the statute gave is that Oly Chadmar's project did not come within the safe harbor. Because Oly Chadmar has never claimed reliance on the safe harbor provision, the point is irrelevant.

II.

OLY CHADMAR WAS ENTITLED TO APPROVAL OF ITS FINAL SUBDIVISION MAP.

Since section 66413.5 did not empower the City to deny final map approval arbitrarily, the City was required to process and approve Oly Chadmar's map as provided in state law and the City's ordinances. Under Government Code section 66458 and the City's SMA Ordinance 21-10, the City had a ministerial duty to approve the map. The City's respondent's brief still does not identify any valid justification for its denial of final map approval.

A. THE "MAD DASH" ARGUMENT IS UNTENABLE.

The City calls attention to Oly Chadmar's efforts to gain County approval for its vesting tentative map as support for a contention that Oly Chadmar "rushed to receive County approvals before the City's official incorporation date" [Resp.Br. 28-29]. Significantly, five of the six "examples" the City lists took place ***before the vote*** on incorporation. Moreover, Oly Chadmar had acquired the land and begun working to gain approval of the Project long before the first signature was placed on the petition for incorporation in July of 1999 [Vol. 3, Tab M, pp. 1072-1082;

Vol. 5, pp. 1669:19-1672:24].

Oly Chadmar submitted its application for the Project on November 18, 1999; the application was deemed complete on January 7, 2000 [Vol 5, p. 1646]. By then, the Project site had received site-specific environmental review in the context of three previous environmental impact reports [Vol 5, p. 1648].

Although Oly Chadmar's original application sought approval for 159 homes [Vol. 20, pp. 6164-6165], as the application progressed through the County, Oly Chadmar reduced the number of housing units from the 159 in its original application [Vol. 20, pp. 6164-6165] – not 111 as the City states [Resp.Br. 5] – to 119, then 111, and finally to 109, the number of units shown on the vesting tentative map the County ultimately approved [Vol. 20, pp. 6166-6187;Vol. 6, pp. 1853, 1981-1982, 1989-2000; Vol. 7, pp. 2153-2159; Vol. 15, p. 4627-4708].

Since Oly Chadmar concedes it was anxious to move the project along, in light of the vast amounts of time and money it had already spent on the Project and the continuing economic risks it was taking, the "mad dash" contention is not germane.

B. THE COUNTY ACTED APPROPRIATELY.

The City's assertion that the County "relied exclusively on the Developer's consultants" [Resp.Br. 29, fn. 12] is both irrelevant and inaccurate. The County relied on an environmental impact report prepared by an independent consultant the County itself retained, Scientific Applications International Corporation [Vol. 3, p. 1102].

Equally irrelevant and inaccurate is the City's claim that the County approved the Project despite "numerous unmitigatable impacts" [Resp.Br. 29, fn. 12]. In approving the Project, the County Board of Supervisors made all the findings required by state and local law, including the the Subdivision Map Act [Vol. 8, pp. 2445-2448], the County's Coastal Zoning Ordinance [Vol. 8, pp. 2447-2449], and the California Environmental Quality Act (CEQA) [Vol. 18, pp. 2437-2449]. The CEQA findings included:

- Certain unavoidable impacts were mitigated to the maximum extent feasible [Vol. 8, pp. 2437-2440];
- Certain impacts were mitigated to insignificance by conditions of approval [Vol. 8, 2440-2443];
- Mitigation of certain impacts was within the responsibility and jurisdiction of other public agencies [Vol. 8;, p. 2443]; and
- Project alternatives identified in the EIR were not feasible [Vol. 8, pp. 2443-2444].

Beyond these findings, the Board of Supervisors adopted a statement of overriding considerations detailing numerous social, technological and other benefits of the Project which warranted its approval notwithstanding impacts that were not fully mitigated [Vol. 8, pp. 2444-2445]. Oly Chadmar was even able to allay the concerns of the Environmental Defense Center, the Urban Creeks Council, and the Citizens for Goleta Valley [Vol. 8, pp. 2609-2610].

The City did not pursue any CEQA or other land use-related court

challenge to the County's approval of the Project, its findings, or the EIR, even though there was ample time after incorporation for the City to do so [Vol. 8, pp. 2511-2512; Vol. 19, p. 6004]. The City is thus collaterally estopped from raising these issues now (*Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645-646).

C. THE CITY'S FINDINGS WERE UNSUPPORTED.

The City found that the Project was "likely to cause serious public safety and/or health problems" [Vol. 19, Ex. M, pp. 6009-6012], but the statute calls for a finding that a project "would place" residents or the community "in a condition dangerous to their health or safety, or both" (Gov. Code, §66498.1, subd. (c); §66413.5, subd. (c)). The trial court rejected this finding. Oly Chadmar's opening brief showed why this determination was correct: The City did not, and could not, make the finding necessary to overcome Oly Chadmar's vested rights [Merits OB 23-25].

None of the City's responses is tenable. The City claims the trial court erred in finding that there was no support for its findings, says these statutes only apply when a City has a ministerial duty to go forward, but then denies having a ministerial duty to approve the map, and argues that the semantic difference between "likely to cause . . . problems" and "would place" residents and the community in a dangerous condition "improperly elevates form over substance" [Resp.Br. 43-47].

1. "LIKELY TO" IS AN INADEQUATE FINDING.

There is a fundamental difference between finding that something is

"likely to" create a danger and that it "would place" people in danger. A finding that a project would place residents or the community in danger conveys the idea of certain danger. Conversely, "'likely' may be used flexibly to cover a range of expectability from possible to probable'" (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 916).

Given the range of meanings encompassed within the word "likely," a finding that the Project was likely to create a danger does not rise to the level of certainty required before sections 66498.1 and section 66413.5, subd. (c) would allow the City to deny approval.

2. THE EVIDENCE WAS NOT SUFFICIENT.

When the trial court concluded that there was no meaningful evidence that Oly Chadmar's Project would place anyone in danger, it relied on a 20-page analysis of the evidence that Oly Chadmar had submitted [Vol. I, Tab B, pp. 100-119]. The City scolds that this document was not evidence [Resp.Br. 43-45], but fails to note that the 20-page analysis cited extensively to evidence in the administrative record, some of which is cited in Oly Chadmar's opening brief [Merits OB 26-28, citing Vol. 6, pp. 1987-1988; Vol. 7, pp. 2134-2135, 2252-2257, 2332; Vol. 8, pp. 2424, 2470, 2492; Vol. 12, p. 3792; Vol. 14, p. 4488; Vol. 16, pp. 4989-4990, 5003-5004; Vol. 17, pp. 5448-5449; Vol. 19, pp. 5845-5874, 5897, 5993-5994, 5996, 5997-5999; Vol. 20, p. 6194].

Much of the City's evidentiary discussion concerns the size of property setbacks and the number of parking spaces [Resp.Br. 44-45]. These are not health and safety issues; having smaller setbacks or fewer

parking spaces than the City thinks necessary will not place residents of the subdivision or the community in danger to their health or safety. Further, there is no evidence that the size of the setbacks might result in collisions, only a Council member's speculation [Vol. 19, p. 6002]. In reality, the Project provides far more parking spaces than the County's Coastal Zoning Ordinance (which was adopted by the City) requires [Vol. 7, pp. 2252-2257; Vol. 16, pp. 5002-5004; Vol. 17, p. 5448-5449]. Yet Oly Chadmar offered to make even more parking available [Vol. 8, p. 2442; Vol. 16, pp. 4490, 5005-5006; Vol. 17, p. 5445; Vol. 18, p. 5822].

The City also asserts that it properly questioned the Project's affordability because "only 20% of the units would be 'affordable,' and would be targeted at the high range of 'affordability'" [Resp.Br. 45]. In fact, Oly Chadmar voluntarily agreed, and the County conditioned the Project to require, that 20% of the Project be affordable to a mix of low, lower moderate, and upper moderate income households, even though not mandated by statute, ordinance, or otherwise [Vol. 6, pp. 1987-1988; Vol. 7, pp. 2134-2135]. The prices ranged from $94,920 to $203,400 [Vol. 7, p. 2332; Vol. 8, p. 2424]. The affordable units include amenities such as walk-in closets and washer/dryer connections not usually found in affordable housing [Vol 7, pp. 2195-2196]. The amicus curiae letter filed by California Rural Legal Assistance describes Oly Chadmar's affordable housing component as "an impressive 20 percent of the total development, surpassing inclusionary housing standards" yet Oly Chadmar offered to increase the number of affordable units beyond what it had already agreed

to [Vol. 19, p. 5000].

III.

THE SUBDIVISION MAP ACT AND CITY ORDINANCE 21-10 REQUIRED THE CITY TO APPROVE OLY CHADMAR'S FINAL MAP.

Independent of the section 66413.5 issue, Oly Chadmar has already shown that, under Government Code section 66458 and the City's Ordinance No. 21-10, Oly Chadmar's final map was deemed approved when the map was finally submitted after all conditions were met, and the City failed to act at its next regular Council meeting [Merits OB, pp. 29-30].

The City argues that Oly Chadmar's map could not have been final when it was submitted on November 27, 2002, because Oly Chadmar submitted "materials necessary to Final Map consideration" on December 5 [Resp.Br. 47]. This is inaccurate. The vesting tentative map required Oly Chadmar to provide one-half of the street improvements along Las Armas Road. The December 5 submissions related to Oly Chadmar's offer to fund full street improvements to accommodate even more parking spaces [Vol. 17, p. 5445] to go beyond County-imposed conditions [Vol. 19, p. 5955; Vol. 22, p. 6303].

This did not in any way affect the finality of the map. Moreover, the City Surveyor determined on November 26, 2002, that the final map was "technically correct, consistent with the requirements of the Subdivision Map Act, and ready for filing with the City Council" [Vol. 19, p. 6007 (Resolution 03-01, ¶22)]. This determination necessarily required that the

conditions, including funding of the street improvements called for in the vesting tentative map, had been assured.

Further, one of the options provided to the City Council in the City's Agenda Bill dated December 6, 2002, was to approve the final map [Vol. 19, p. 6097]. If the map was not in final form, then approval would not have been a viable alternative.

The City also claims that some of the Council meetings after the final map was delivered to the City on November 27, 2002, were "study sessions" rather than regular meetings [Resp.Br. 49]. When the afternoon session was indeed a "study session," the City so specified. Thus, for the December 2, 1:30 p.m. meeting, the City Agenda noted that it was a "special meeting workshop" [Vol. 19, pp. 6086-6087]. However, the City's own minutes, which are *prima facie* evidence of the business transacted (*McFayden v. Town of Calistoga* (1925) 74 Cal.App. 378, 386; *see also Le Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313, 327), explain that the 1:30 p.m. meetings on December 16, 2002 and on January 6, 2003 were "Regular" meetings [Vol. 19, pp. 6117, 6127]. The Supplemental Agenda for the December 16, 2002 1:30 p.m. meeting describes it as a "Regular Meeting" [Vol. 19, p. 6116]. Further, the minutes for the December 16, 2002, 6:00 p.m. meeting and the January 6, 2003 1:30 p.m. and 6:00 p.m. meetings also denote each of them as "Regular Meetings" [Vol. 19, pp. 6119, 6127, 6132].

To evade this *prima facie* evidence, the City asserts that "To the extent that the agendas identify them as anything other than a special work

study session, it is a typographical error" [Resp.Br. 49, citing Vol. 22, p. 6276, footnote omitted]. That assertion rests on a declaration of the City Manager that is pure hearsay [Vol. 22, pp. 6273-6275] to which Oly Chadmar objected below. Further, it is belied by the fact the City conducted regular business at these afternoon sessions. For example, at the December 16 afternoon meeting, the City Council met in executive session to confer with legal counsel regarding exposure to litigation [Vol. 19, pp. 6117-6118]. At the January 6 meeting, the City considered and took formal action upon a development agreement concerning a different project [Vol. 19, p. 6128] and again met with counsel in closed session to consider possible litigation [Vol. 19, p. 6131].

The City further asserts that it did not "have to take 'final action' to avoid having a final map be deemed approved by operation of law" [Resp.Br. 48]. The claim that the City's nonaction was essentially a denial makes no sense because the City had specific legal obligations to fulfill once the final map was presented to it. The motion approved by the City on December 16, 2002 confirms that the City did not deny the Project that day. The motion was "to direct staff to prepare a resolution rejecting the final map with appropriate findings and to continue this matter to the next regular city council meeting to consider final adoption of the resolution" [Vol. 19, p. 5984].

In short, there is no persuasive answer to Oly Chadmar's position. The project was deemed approved.

IV.

A REVIEWING COURT MUST BALANCE THE EQUITIES BEFORE IT MAY REJECT A TRIAL COURT'S FINDING OF ESTOPPEL.

The trial court's finding of estoppel is premised on the entirely reasonable notion that the City should be required to follow its own ordinances, not on a claim that Oly Chadmar is entitled to rely on anyone's violation of law. Oly Chadmar does not rely on an invalidly issued permit or any other act in excess of a City officer's authority, but on conduct undertaken by City officials in accord with City ordinances, and on the acts of the City Council itself. For that reason, the cases the City cites, *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1480 and *Shea Homes Ltd. Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1270, support Oly Chadmar's position that ***the City must obey its ordinances***, rather than supporting the City.

Oly Chadmar's opening brief noted that appellate courts ordinarily honor trial court factual findings in estoppel cases, but that appellate courts balance deference to trial courts against public policy considerations when estoppel is asserted against a public entity [Merits OB 31-32]. The problem with the Court of Appeal's approach in this case is that it did neither. Moreover, even if, as the City asserts [Resp.Br. 32], the facts concerning estoppel are undisputed and the *de novo* standard of review applies, the facts and the relevant public policy considerations compel a finding that the City is estopped to deny map approval.

A. THE CITY RELIES ON IRRELEVANT FACTS.

In response to the finding of estoppel, the City cites a "high level of interest" and "serious concerns" on the part of some City Council members and the City Attorney [Resp.Br. 8, 33-34]. These expressions, many of which predated incorporation, are meaningless. Certainly Oly Chadmar knew of "interest" in the Project. What Oly Chadmar did not know was that the City intended to claim section 66413.5 empowered it to act contrary to SMA Ordinance section 21-10, particularly after the City twice readopted that ordinance without change, and after Oly Chadmar spent almost $2 million acting in reliance on the City's ordinances.

Citing *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 Cal.App.4th 1410, 1413, the City contends that processing Oly Chadmar's map does not support estoppel because "[t]he City and its staff were required by law to continue processing the map" [Resp.Br. 34-36]. Some of the acts carried out by the City were required by state law, but the trial court identified several acts which were optional yet were undertaken by the City: ***re***adopting county subdivision map ordinances providing for only ministerial review; authorizing Oly Chadmar's Project to proceed with design review; and requesting numerous changes to the agreements required for the Project [Vol. 2, Tab G, pp. 415-416].

In a similar vein, the City argues [Resp.Br. 36] that Oly Chadmar "misplaced" reliance on the City's Ordinance No. 02-15, which exempted multi-family residential projects such as Oly Chadmar's from a building moratorium extension, and stated that these projects would be allowed to

"go forward in the near future without substantial detriment to, or interference with, the City's ability to adopt a general plan and implementing land use regulations . . ." [Vol. 19, p. 6037].

Though the moratorium exemption does not identify Oly Chadmar's Project by name (nor was it required to), there is no question that the Project was covered by the ordinance. As evidenced by the City's admission concerning the "high level of interest" even before the incorporation election, the City was well aware that Oly Chadmar's was a multi-family residential project; the City Council's minutes of February 4, 2002, identify Oly Chadmar's Project as a "multi-family residential vesting tentative map" in Item 63 of a "Cumulative Project List" [Vol. 2, pp. 306-315. *See also*, Vol. 19, pp. 6030, 6034].

The City challenges Oly Chadmar's mention of the $1.8 million it spent in fees and costs, claiming Oly Chadmar failed to provide record support for its claim [Resp.Br. 35, fn. 15]. The record citation the City is looking for appears on page 5 of Oly Chadmar's opening brief on the merits, stating "Oly Chadmar spent $1,890,000 in reliance on the City's conduct [Vol. 14, pp. 4437-4458]."

Neither *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309 nor *Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, cited at page 37 of the respondent's brief, are helpful to the City. *Toigo* held that a town's assurances when it denied a prior subdivision application that it would approve a certain subdivision design did not estop the town to deny approval of that design when it was submitted in a later map. *Penn-Co* held

it was unreasonable for a developer to rely on the county's finding that a development plan was consistent with a general plan. But the representation in *Toigo* was a "general endorsement" and a "conceptual, informal recommendation" (70 Cal.App.4th at 323). The representation in *Penn-Co* was "merely one step along the road to obtaining a permit" (158 Cal.App.3d at 1081). The government actions Oly Chadmar relied upon were direct actions undertaken to clear conditions on Oly Chadmar's final map and reenactment of an ordinance that required the final map to receive ministerial approval.

B. PUBLIC POLICY SUPPORTS A FINDING OF ESTOPPEL.

The City thinks that finding estoppel in this case would invalidate section 66413.5, because "to the extent that every newly incorporated city follows its statutory duty to adopt the relevant county code, that city would be agreeing to approve final maps that conform to county-approved tentative maps, thereby eliminating any discretion that might have been available under section 66413.5" [Resp.Br. 40]. This assumes that every newly incorporated city would behave in the same self-contradictory manner as the City of Goleta did, and defy its ordinances. Public policy compels the conclusion that the City is estopped to deny approval of Oly Chadmar's final map, because any other finding would countenance lawlessness on the part of local public entities.

The Legislature has left no doubt where it thinks the balance of public policy should swing when a local entity is considering an affordable housing project. In Government Code section 65580, the Legislature made

five findings, each of which supports approval of Oly Chadmar's final map:

> (a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order.
>
> (b) The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.
>
> (c) The provision of housing affordable to low-and moderate-income households requires the cooperation of all levels of government.
>
> (d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.
>
> (e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.

CONCLUSION

Under the City's interpretation of section 66413.5, when a developer obtains county approval of a tentative or vesting tentative subdivision map, the map approval process would have to start all over again whenever a new city incorporates unless the application for the map had been filed before the first signature on the incorporation petition and approved by the county before the vote on incorporation, no matter what the city's ordinances said.

Nothing in the language of the statute automatically forces

developers back to square one when a new city incorporates after a county has approved a tentative or vesting tentative map. Section 66413.5 does not create an invariable rule. When a developer has (1) complied with all county-approved vesting tentative map conditions; and (2) has taken every procedural step required under state law and city ordinances, a new city must approve the final map.

Oly Chadmar has satisfied every map condition. It submitted its final map to the City as required, and the City had a ministerial duty to approve the final map. The trial court found that the City's supposed health and safety concerns were not supported by substantial evidence.

Also, the City failed to act at the next regular board meeting as required by the Government Code and by Ordinance No. 21-10. Further, the trial court correctly concluded that the City is estopped to deny approval of Oly Chadmar's map.

This Court should therefore reverse the decision of the Court of Appeal and deny the City's petition for writ of mandate. The trial court's judgment should be affirmed and Oly Chadmar should be awarded its costs arising from the writ proceedings.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

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Dated: _____ _____

Appellate Counsel