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January 24, 2017

*VIA E-MAIL*

Donald Larkin  
City Attorney  
City of Morgan Hill  
17575 Peak Avenue  
Morgan Hill, California 95037-4128

Re: Residential Development Control System (RDSCS) Draft Competition Manual –  
Progress Report Comments

Dear Mr. Larkin:

Over the past year, DivcoWest SVI (“DivcoWest”) has been actively participating in the Planning Commission’s weekly workshops regarding Measure S and the Residential Development Control System (“RDSCS”). First, DivcoWest commends Chair Wayne Tanda and the Commission’s efforts to solicit input from stakeholders and greatly appreciates the opportunity to provide comments on the process. In the last few months, the Commission has been creating a new competition manual which appears to be based on an underlying presumption that all residential projects must “go above and beyond” what is required under City policies and ordinances to qualify for and successfully secure building allocations under the RDSCS. DivcoWest and other property owners and developers have raised concerns during the workshops that the approach being contemplated under Measure S could result in a City *mandate* that project proponents make such contributions to qualify for the competition. We understand that the Commission is still in progress and intends to test the draft competition manual by scoring sample projects. As part of that process, we request that you review the analysis provided below and ensure that the competition manual complies with these legal requirements.

## **Overview of the RDSCS**

As you know, the primary purpose and intent of the voter-approved RDSCS is to regulate the pace of residential growth in the City of Morgan Hill. The key feature of the RDSCS is the competition whereby applicants compete with each other to earn points for various design features and community benefits. To even be eligible to enter the competition, applicants must earn a minimum qualifying score of 160 points. Then, through the competition, projects with the highest scores in each competition category receive a share of the building allocations, which are metered out on an annual basis. Depending on the market and the number of competitors, applicants may need to offer significant additional *voluntary* commitments and community benefits to ultimately prevail, such as paying higher school and parks impact fees, dedicating more parkland and open space, committing to a higher percentage of affordable housing, or

cash contributions to the City for off-site circulation and infrastructure improvements that are unrelated to the project, for some examples.

Under Measure C, adopted by the City in 2004, generally, a well-designed project which is consistent with the General Plan and Zoning, and which meets the City's design standards and criteria, can earn sufficient points to at least achieve the minimum qualifying score to enter the competition. This framework ensures that applicants who design quality projects in compliance with City policies and ordinances will at least have the right to qualify to compete for building allocations and any commitments to go above and beyond what the City can otherwise legally require are voluntary and driven by the competition in the market at the time.

With the adoption and voter approval of Measure S, the Commission is overhauling the competition manual used to implement Measure C. Based on our understanding of the direction so far, the Commission has indicated that it intends to eliminate criteria from the prior competition manual that gives point credit for quality design features consistent with City General Plan, Zoning and design standards. The Commission's rationale appears to be that creating a high-quality development through consistency with City policies and standards, and paying established impact fees, should no longer be enough to *even qualify* for the competition. It appears that the direction is that the points will be defined such that all applicants will - regardless of the competitive pool - be mandated by the City to go "above and beyond" what is otherwise legally required by the City.

### **Measure S Must Comply with Federal Nexus and Rough Proportionality Requirements**

Although the City may legally restrict the number of annual building allotments, the program is nonetheless subject to state and federal takings law. Under two well-known U.S. Supreme Court cases, Nollan v. California Coastal Commission (1987) 483 U.S. 825 and Dolan v. City of Tigard (1994) 512 U.S. 374, exactions must have (1) "essential nexus" (Nollan requires that the dedication or impact fee advances the same objective for which it would be imposed) and (2) "rough proportionality" (Dolan requires the public agency to make an individualized determination and find that the required dedication is "roughly proportional" both in nature and extent to the impact of the proposed development).

If residential projects that comply with the City's General Plan and Zoning Code requirements cannot even *qualify* to enter the competition without exceeding the City's baseline requirements - in the absence of any competitive applicants that make these commitments truly voluntary - the RDCS program would exceed the limits of essential nexus and rough proportionality, and the City could be at risk of takings claims.

### **Under State Law, Cities Must Not Unduly Constrain Housing Development**

Moreover, the competition manual, as presently drafted, runs the risk of also potentially violating State housing policies intended to ensure an adequate and economically diverse supply of housing. California, and the Bay Area in particular, is suffering from a nationally recognized housing crisis. Under Article 10.6 of the Government Code (section 65580-65590), State law recognizes the critical role that local governments play in the supply and affordability of housing. Housing policy in the State relies on the effective implementation of local general plans and, in particular, local housing elements. Housing element law also requires that the Department of Housing and Community Development (HCD) review

local housing elements for compliance with State law and to report its written findings to the local government and monitor compliance with state housing law.

Morgan Hill, like all other local governments, is required to adopt and regularly update its housing element to implement the State mandate that local governments adequately plan to meet the existing and projected housing needs of all economic segments of the community. In order for the private market to adequately address housing needs and demand, State Housing element law requires that local governments adopt land use plans and regulatory systems which provide opportunities for, and do not unduly constrain, housing development. The RDCS is, at its essential core, a constraint on housing development. Therefore, it is extremely important to ensure that the RDCS pointing system in the compliance manual does not inadvertently become an *undue* constraint in violation of State housing law by making the bar to entry in the competition for allocations too high.

### Conclusion

DivcoWest understands and supports the City's desire to encourage high quality projects that benefit the larger Morgan Hill community. However, the City should adopt a program that does not risk legal claims and results in a disincentive for quality housing investment in Morgan Hill. We recommend you ensure that non-nexus based contributions remain a truly voluntary result of *competition*, not a mandate by the City. We appreciate your consideration.

Sincerely,



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