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AUG 14 2003
SHERRI L. PEDERSEN
CLERK OF THE SUPERIOR COURT
DEPUTY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11
12 FOR THE COUNTY OF MONTEREY

13 BENJAMIN KAATZ, in his capacity as a) CASE NO. M65043
14 taxpayer resident of the City of Seaside,)
15 Plaintiff,) PLAINTIFF'S OPPOSITION TO
16 v.) DEFENDANT K&B/BAKEWELL'S
17 CITY OF SEASIDE, DANIEL E. KEEN, in his) MOTION TO VACATE PRELIMINARY
18 official capacity as City Manager for the City of) INJUNCTION
Seaside, and DOES 1-20, inclusive,)
19 Defendants.) [Code Civ. Proc. §527]
20) DATE: August 15, 2003
21) TIME: 9:00 a.m.
22) DEPT: 14

23 K&B/Bakewell's Motion to Vacate the Preliminary Injunction must be denied because (1) the
24 injunction was properly granted by Judge Kingsley on August 7, 2003, based upon plaintiff's clear
25 likelihood of prevailing on the merits and a balancing of harms in favor of plaintiff; and (2) any harm
that K&B/Bakewell or third parties may incur would be caused not by the injunction, but by
K&B/Bakewell's admitted 136 felony violations of the Subdivision Map Act.

1 **I. THE PRELIMINARY INJUNCTION WAS PROPERLY ISSUED**

2

3 "The law is well settled that the decision to grant a preliminary injunction rests in the sound
4 discretion of the trial court." (IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69.) On August 7,
5 2003, after reviewing approximately 80 pages of written points and authorities and several inch high
6 stacks of exhibits, after independently reviewing and researching cited case law, and after hearing oral
7 argument for approximately three solid hours (excluding recesses), Judge Kingsley exercised abundantly
8 sound discretion in granting the preliminary injunction prohibiting the City of Seaside from approving
9 any final subdivision maps for the Hayes Park Property.

10

11 **A. Preservation of Status Quo**

12 In its current state, Hayes Park is legally one piece of land. The 105 acres that the Army conveyed
13 to defendant City of Seaside is the same 105 acres that the City of Seaside gave away to defendant
14 K&B/Bakewell on July 25, 2002, for 1/20th of its actual value. In the absence of a preliminary
15 injunction, however, this parcel will be legally sliced and diced into 380 separate parcels of land and
16 sold off to 380 innocent homebuyers by the developer.

17 A quintessential "purpose of a preliminary injunction is to preserve the status quo pending a
18 determination on the merits of the claim." (Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003)
19 105 Cal. App. 4th 1414, 1415.) Here, the Court properly preserved the status quo of Hayes Park by
20 precluding its legal status from being forever altered and divided into 380 different parcels.

21

22 **B. Plaintiff Will Prevail on the Merits.**

23 "[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a
24 preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The
25 second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared
26 to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (IT Corp. v.
27 County of Imperial, *supra*, at pp. 69-70.)

1 After considering hours of oral argument and voluminous briefing on the matter, the Court made a
2 thorough analysis of the interrelated factors of likelihood of success and interim harm. However, with
3 respect to the first factor of likelihood of success, K&B/Bakewell distorts the reality of the Court's
4 ruling. The defendant improperly attempts to suggest to this Court that Judge Kingsley determined
5 plaintiff's sole likelihood of success in this action rested in his claim that defendant City of Seaside
6 violated California's Surplus Land Act. (Gov. Code sec. 54220, et seq.)

7 Indeed, while the transcript of the hearing is not yet available, all present heard and understood
8 Judge Kingsley's initial comments concerning her tentative ruling, which later became her ruling. After
9 stating that she had reviewed all the evidence presented, Judge Kinglsey informed the parties that she did
10 see a violation of the Surplus Land Act in this case, and found a significant likelihood that plaintiff
11 would prevail on that claim at trial. The Court further informed the parties that plaintiff had established
12 a likelihood of success at trial on the alleged violation of Government Code § 37364 prohibiting the sale
13 of residential real property at below fair market value unless specific statutory requirements for
14 affordable housing are satisfied, although the Surplus Land Act violation in the Court's view was a more
15 compelling argument. Defendant K&B/Bakewell is clearly confused and wholly inaccurate in its
16 representations to this Court that the Surplus Land Act violation is the only claim alleged whereby
17 plaintiff has demonstrated a likelihood of success at trial.

18 By footnote, defendant challenges the undisputed evidence before the Court that the fair market
19 value of Hayes Park on the date the land was conveyed to the developer was no less than \$94 million,
20 and upwards of \$115 million.¹ In support, defendant erroneously relies on an appellate decision and
21 specific statute pertaining to eminent domain, a unique area of law distinguishable and unrelated to any
22 of the facts now before this Court. Contra Costa Water Dist. v. Bar-C Properties (1992) 5 Cal.App.4th
23 652 is cited by defendant for the proposition that the evidence of the land's fair market value should not
24 be considered by this Court. The issue before the court in Contra Costa was limited to whether, in

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26 ¹Because defendant has moved to vacate a preliminary injunction issued only eight days prior, plaintiff
27 respectfully requests the Court to consider the comprehensive briefing and arguments previously made supporting
28 the issuance of the preliminary injunction. Plaintiff incorporates herein plaintiff's briefs, exhibits, declarations and
 oral arguments previously made on the issue of a preliminary injunction.

1 condemnation proceedings, the residual land value analysis of market value is too speculative to serve as
2 the basis for a condemnation award. Similarly, section 822 of the Evidence Code, relied on by defendant
3 to suggest that evidence presented through the declaration of Nader Agha and attachments thereto were
4 somehow improper, unambiguously governs and is limited to eminent domain and inverse condemnation
5 proceedings.

6 The principles of eminent domain and the governing cases and statutes are simply inapplicable to
7 and cannot be compared with the matter now before the Court. Whereas in matters involving eminent
8 domain, federal constitutional considerations exist which require special protections for private
9 individuals when the government takes away their land, no comparable protections are afforded to
10 private parties where, as here, the private party is taking land away from the government. The very
11 specific laws pertaining to eminent domain or inverse condemnation proceedings are simply not
12 applicable to the facts of this case.

13 Regardless of the attempt by defendant K&B/Bakewell's to short shrift Judge Kingsley's analysis,
14 and regardless of the legal theory upon which plaintiff will ultimately prevail, the fact still remains that
15 the Court has determined as a matter of law that plaintiff has demonstrated a strong likelihood of success
16 in this taxpayer action. The first of the two interrelated factors (i.e., whether plaintiff will prevail) is
17 established and nothing in K&B/Bakewell's present motion changes that inescapable conclusion.

18

19 **C. Plaintiff is Entitled to an Order Voiding the Attempted Conveyance of Hayes Park
and Restoring Possession of the Real Property to the City of Seaside**

20 At the August 7th hearing on the Preliminary Injunction, the Court expressly acknowledged that the
21 July 25, 2002 deed purporting to convey Hayes Park from the City of Seaside to K&B/Bakewell will be
22 void if plaintiff prevails on his Government Code section 37364 cause of action. Further, the Court
23 acknowledged that plaintiff had a reasonable possibility of prevailing on that theory. Not only were the
24 Court's statements made after extensive briefing in plaintiff's Memorandum of Points and Authorities in
25 Support of Preliminary Injunction, the Court's statements were entirely consistent with over 140 years of
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1 California case law. A deed or contract entered into by a public entity in violation of statute is void—not
2 voidable—and possession of the property reverts to the public entity.

3 Defendant's assertion that only dollars are at stake is plainly contradicted by plaintiff's complaint,
4 plaintiff's motion for preliminary injunction, 140 years of California black letter law, and Judge
5 Kingsley's express statements to the contrary. Defendant's cited cases such as Tahoe Keys Property
6 Owners Assn. v. State Water Resources Control Board (1994) 23 Cal.App.4th 1459, 1471, are premised
7 upon money damages being the exclusive remedy, and therefore are irrelevant to the issues of this case.

8

9 **D. K&B/Bakewell Has Chosen to Stand on the Sidelines Since May 16, 2003**

10 K&B/Bakewell seeks to argue that the facts have somehow now changed with respect to the
11 second factor (interrelated to plaintiff's showing of success at trial) of interim harm. Nevertheless, the
12 law is clear that a strong showing of likelihood of success by a plaintiff creates a significantly greater
13 burden for the defendant to overcome when arguing the interim harm. "The trial court's determination
14 must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's
15 showing on one, the less must be shown on the other to support an injunction." (Butt v. State of
16 California (1992) 4 Cal. 4th 668, 677-678 (citing King v. Meese (1987) 43 Cal.3d 1217, 1227-1228).)

17 Now crying foul, K&B/Bakewell argues that it should be granted relief because it somehow
18 previously was denied the opportunity to argue the merits of this case. Indeed, defendant claims it is
19 now entitled to relief because "K&B Bakewell has not previously had an opportunity to present to the
20 Court evidence demonstrating that the effect of the injunction on K&B Bakewell's buyer and
21 subcontractors, and on K&B Bakewell itself, weigh heavily against granting the preliminary injunction."
22 (Motion to Vacate, p.2, lines 4-6.) Nothing could be farther from the truth. The defendant had every
23 opportunity to raise the issues it now seeks to bring before this court but it made a tactical and deliberate
24 decision not to.

25 Indeed, it bears emphasizing that K&B/Bakewell chose to stand by the sidelines and to let the City
26 of Seaside represent its interests herein. Counsel for K&B/Bakewell were intimately involved in the
27 arguments raised by the City of Seaside in opposing the motion for preliminary injunction. As attested
28

1 to in the attorney declarations submitted by K&B/Bakewell with respect to the present motion,
2 K&B/Bakewell's attorneys have been present in court and have coordinated the defense efforts herein.
3 In this regard, section 9.13(b) of the Land Disposition Agreement ("LDA") between K&B/Bakewell and
4 the City of Seaside (Ex. 2 to Plaintiff's Memorandum of Points and Authorities in Support of Motion for
5 Preliminary Injunction), requires the City of Seaside to defend K&B/Bakewell's interests in this case and
6 to cooperate and act jointly in defense of this action. Any suggestion that defendant was somehow
7 caught off guard and precluded from protecting its interests is disingenuous.

8 Moreover, even in the absence of a contractual requirement that any resulting litigation be
9 coordinated between K&B/Bakewell and the City of Seaside, K&B/Bakewell was well aware of this
10 case from the start and elected not to intervene. As early as May 16, 2003, counsel for K&B/Bakewell
11 was informed that the hearing on the motion for preliminary injunction would go forward on August 7,
12 2003 before Judge Kingsley. Moreover, if this Court reviews the proof of service for the moving papers
13 in support of the motion for preliminary injunction, it will find that plaintiff served those papers not just
14 on the City of Seaside, but also on K&B/Bakewell's designated agent for service of process in
15 California. Clearly, the defendant had every opportunity to be heard in this matter, prior to the
16 amendment of the complaint. Moreover, defendant could easily have intervened in this action pursuant
17 to Code of Civil Procedure section 387 at any time, but it chose not to. As section 387 provides, "[u]pon
18 timely application, any person, who has an interest in the matter in litigation, or in the success of either
19 of the parties, or an interest against both, may intervene in the action or proceeding."

20

21 **E. Vacating the Preliminary Injunction Will Actually Harm The Prospective
Homeowners**

22

23 K&B/Bakewell, in fact, may benefit from having the preliminary injunction in place. As discussed
24 herein, defendant jumped the gun and began building and selling homes without first getting the required
25 final subdivision map approval. While it is unfortunate that K&B/Bakewell's clients were apparently
26 not notified by K&B/Bakewell that this action, seeking to set aside the deed, is pending, this does not
mean that these prospective homeowners will be better off if the preliminary injunction is vacated.

27

28

1 In addition to the uncertainty these homeowners will face at the prospect of their deed from
2 K&B/Bakewell ultimately being deemed void (because K&B/Bakewell's deed from the City of Seaside
3 is void), all 86 of these homeowners will likely face an order from this court adding them as
4 indispensable party defendants herein. Plaintiff requests that this Court take judicial notice of the briefs
5 filed with respect to the motion to add K&B/Bakewell as a defendant herein. As discussed in detail in
6 prior briefing, any party claiming to hold title to any part of the Hayes Park Property is, by definition, an
7 indispensable party that the court, on its own motion, must add as a party defendant. The statute
8 pertaining to necessary and indispensable parties provides as follows:

9 (a) A person who is subject to service of process and whose joinder will not deprive the court of
10 jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his
11 absence complete relief cannot be accorded among those already parties or (2) he claims an
12 interest relating to the subject of the action and is so situated that the disposition of the action in
13 his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii)
14 leave any of the persons already parties subject to a substantial risk of incurring double, multiple,
15 or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so
16 joined, the court shall order that he be made a party.

17 (Code Civ. Proc., sec. 389 (emphasis added)).

18 While K&B/Bakewell may have placed its clients in a bad position, the balancing of the hardships
19 requires that the bad situation not be made worse for these innocent third parties.

20 The express goal of avoiding the multiplicity of legal proceedings which would necessarily result
21 if the preliminary injunction were vacated is set forth in section 529 (a)(1) of the Code of Civil
22 Procedure. That section provides: "An injunction may be granted . . . where the restraint is necessary to
23 prevent a multiplicity of judicial proceedings." By granting the preliminary injunction, the Court
24 addressed this very practical concern by halting further construction and damage to Hayes Park and
25 avoiding a situation whereby each new deed holder would, by necessity, be brought into this case.

26 **II. ANY HARM WHICH K&B/BAKEWELL MIGHT INCUR WOULD ARISES FROM ITS
27 ADMITTED 50 FELONY VIOLATIONS OF THE SUBDIVISION MAP ACT BY
28 ILLEGALLY AND PREMATURELY COMMENCING CONSTRUCTION OF HOUSES
FOR SALE**

1 **A. California Law Neither Protects Nor Rewards Subdividers That Illegally Begin**
2 **Construction Prior to Receiving All Required Approvals**

3 Where a subdivider proceeded with a development in violation of law, it was reversible error for
4 the superior court not to grant a preliminary injunction to preserve the status quo pending final judgment
5 in the action. (Keith v. Superior Court (1972) 26 Cal.App.3d 521.) The Appellate Court in Keith was
6 confronted with a fact pattern similar to the facts of the instant case. In Keith, the defendant developer
7 was engaged in site preparation of his property for construction of a 337 home subdivision. Approval of
8 the development included a condition, among others, that the developer obtain certain rights to a
9 neighbor's easement for purposes of constructing a retention basin. The developer chose, however, to
10 proceed with building the retention pond in violation of this approval condition and in violation of
11 trespass laws, as the easement had not been acquired or extinguished. (Id. at 523.) Despite the willful
12 violation of law by the developer, the superior court weighed the equities and denied the preliminary
13 injunction on account of the "substantial expense" to the developer from ceasing work and changing
14 their plans. (Id. at 524.)

15 The Keith court reversed the lower court holding that the plaintiff was entitled to the preliminary
16 injunction as a matter of law on several grounds. First, because defendant decided to simply go ahead
17 with its subdivision in violation of law, any "inconvenience and expense which defendant might suffer
18 by the frustration of that purpose are not 'equities' which the trial court should have weighed." (Id. at
19 525.) Any alleged hardship suffered by a party arising from its own illegal conduct simply cannot be
20 judicially recognized as a consideration when weighing the relative harms of granting or denying a
21 preliminary injunction motion. Second, if construction had been allowed to proceed, "at the end of the
22 trial, the court would be required to choose between a mandatory injunction, requiring defendant to
23 restore the premises at great expense, or limit plaintiff's recovery to monetary damages." (Id. at 524.)
24 Such a result is fundamentally unfair to plaintiff because, as a practical matter, it severely limits
25 plaintiff's remedies. The Keith court recognized that this unfairness, in particular where the defendant's
26 violations were willful, "is an excellent additional reason for granting a preliminary injunction." (Id. at
27 524.)

1 A similar result was obtained in Bosio v. Superior Court (1974) 36 Cal.App.3d 586. In Bosio,
2 petitioners filed a public interest lawsuit to prevent the construction of a multilane freeway across
3 Lompoc Valley. After trial, the court issued a memorandum of intended decision, indicating its initial
4 intent to find in favor of the real party in interest, the Department of Public Works. Without waiting for
5 a final ruling in that action, the real party in interest jumped the gun and immediately awarded a contract
6 for construction of the freeway. The appellate court then issued its writ directing the trial court to issue a
7 cease and desist order, prohibiting the real party in interest from causing any construction work on the
8 proposed freeway pending resolution of the underlying litigation and further order of the appellate court.

9 The Bosio court considered arguments of the real party in interest that the action was frivolous,
10 that pressing social needs existed requiring the construction to continue, that petitioners were guilty of
11 laches, and that further delay would cause substantial increased expenses. The court found that these
12 considerations were not “so strong as to make it inequitable to require the real party in interest to await
13 the conclusion of the underlying litigation.” Bosio, infra, at 589. The court found obvious the fact that
14 if construction continued pending outcome of the litigation, such damage might render moot the
15 significant and difficult questions before the court. The court reasoned that where, as here, there is an
16 affirmative showing that a party has knowingly and intentionally acted at its own risk, the equities do not
17 lie in its favor. “Real party in interest stands before us in a posture similar to that of the subdivider in
18 Keith v. Superior Court (citations omitted). A party who flouts appropriate judicial action in that fashion
19 presents no equitable claim for relief from the costs he thus incurred.” Bosio, infra, at 590.

20

21 **B. KB Admits to Having Committed 50 Felony Violations of The Subdivision Map Act**
22 **by Commencing Construction of Houses For Sale Prior to Approval of the Final**
23 **Subdivision Map**

24 Beginning in May 2003, K&B/Bakewell intentionally chose to commence construction of houses
25 in violation of the Subdivision Map Act. In what appears to be a truly brazen attempt by K&B/Bakewell
26 to speed the project along, the developers submitted a signed three-page document requesting that the
27 City of Seaside waive enforcement of an ordinance to allow the developers to begin construction of
28

1 houses for sale, separate and apart from the already-completed model homes, prior to the recordation of
2 the final subdivision map. (Ex. 7 to Plaintiff's Memorandum of Points and Authorities in Support of
3 Motion for Preliminary Injunction.) The ordinance (Section 16.44.010A of the City's Subdivision
4 Ordinance), however, is merely a verbatim restatement of a statute within the Government Code's
5 Subdivision Map Act (Govt. Code, §66499.30) applicable to every subdivision in the State regardless of
6 local ordinances.

7 Commencement of the construction of houses for sale prior to recordation of a final subdivision
8 map is plainly prohibited by statute:

9 (a) No person shall sell, lease, or finance any parcel or parcels of real property or commence
10 construction of any building for sale, lease or financing thereon, except for model homes, or allow
11 occupancy thereof, for which a final map is required by this division or local ordinance, until the
final map thereof in full compliance with this division and any local ordinance has been filed for
record by the recorder of the county in which any portion of the subdivision is located.

12 (Govt. Code §66499.30)

13 Each violation of this law by the owner of the property is a felony punishable by up to one year's
14 incarceration in the State Penitentiary:

15 Each violation of this division by a person who is the subdivider or an owner of record, at the time
16 of the violation, of property involved in the violation shall be punishable by imprisonment in the
17 county jail not exceeding one year or in the state prison, by a fine not exceeding ten thousand
dollars (\$10,000), or by both that fine and imprisonment. Every other violation of this division is a
misdemeanor.

18 (Govt. Code § 66499.31.)

19 Finally, there exists just one exception to this rule, allowing owners of property to enter into
20 contracts for construction with builders, so long as the construction itself is not commenced until
21 approval of the final subdivision map:

22 (e) **Nothing contained in subdivisions (a) and (b) shall be deemed to prohibit an offer or**
contract to sell, lease, or finance real property or to construct improvements thereon where the
23 sale, lease, or financing, or the commencement of construction, is expressly conditioned upon the
approval and filing of a final subdivision map or parcel map, as required under this division.

24 (Govt. Code §66499.30, emphasis added.)

25 In this case, however, K&B/Bakewell did not just contract for construction, but actually commenced
26 construction of 50 homes on their property despite the absence of an approved final subdivision map.

1 Defendant has admitted in its moving papers and the Declaration of Dan Freed that it has illegally
2 commenced construction of 50 homes for sale on the Hayes Park property. Defendant cannot with a
3 straight face credibly claim mistake. In the entire State of California, it would be difficult to name more
4 than a handful of corporations which have subdivided more open land than K B Homes, defendant's
5 parent corporation. Few if any persons or entities have reason to be more familiar with the Subdivision
6 Map Act than K & B Homes and defendant, herein. Further, the framing of its request to the City's
7 Community Development Director as a simple, discretionary waiver of a municipal ordinance, employed
8 to obtain the City's consent, is clearly demonstrative of wrongful intent.

9 Finally, K&B/Bakewell incorrectly suggests that at the August 7, 2003 hearing on the preliminary
10 injunction motion the court was not interested in K&B/Bakewell's conduct. In fact, the court was
11 specifically interested in the question of K&B/Bakewell's attempt to have the City of Seaside's
12 Community Development Director "waive" enforcement of City ordinances relating to the development.
13 Judge Kingsley stated at the August 7, 2003, hearing on the preliminary injunction motion that, while it
14 is obvious that a city employee cannot waive enforcement of a state statute, particularly one with felony
15 criminal penalties, it also did not appear that a city employee had any authority to agree to "waive" a city
16 ordinance. The Judge stated that her independent research on the issue indicated that a city ordinance
17 could only be "waived" by the adoption of a specific ordinance so specifying. And, of course, it was not
18 disputed that the City lacked any authority whatsoever to waive the provisions of the state's Subdivision
19 Map Act.

20

21 **III. ANY HARM TO PURCHASERS IS ATTRIBUTABLE TO K&B/BAKEWELL'S**
22 **FAILURE TO DISCLOSE ITS KNOWLEDGE OF THE LAWSUIT FROM AT LEAST**
23 **MAY 16, 2003, AND FROM ITS APPARENT 86 FELONY VIOLATIONS OF THE**
24 **SUBDIVISION MAP ACT BY ILLEGALLY ENTERING INTO UNLAWFUL**
25 **CONTRACTS FOR THE SALE OF NON-EXISTENT PARCELS.**

26 K&B/Bakewell has had notice of plaintiff's lawsuit challenging title to the Hayes Park property
27 since at least May 16, 2003, the date that the application for a temporary restraining order was heard and
28 argued before Judge Kingsley. In addition to the contractual requirement between the City of Seaside

1 and K&B/Bakewell that they cooperate in defense of any challenge to the development of Hayes Park,
2 K&B/Bakewell's lawyers were present in the public seating area of the courtroom, and were huddling
3 with counsel for City of Seaside before and after argument. Based upon the 6 declarations submitted
4 herein by defendant, the first purchase agreements were not entered into until June 2003, the earliest one
5 being entered into on June 2, 2003, two and a half weeks **after** the lawsuit was filed, the Application for
6 a Temporary Restraining Order was heard, and K&B/Bakewell had knowledge of the lawsuit.

7 There is no evidence, however, that the six purchasers who submitted declarations herein, or any
8 of the other purported 86 buyers currently in escrow, were ever notified that a lawsuit had been filed
9 alleging that deed purporting to convey it to them from the City on July 25, 2003, for one-twentieth its
10 value, was void as a matter of law, and alleging that, therefore, K&B/Bakewell did not legally own
11 Hayes Park. While purchasers may now be surprised to learn that there is a serious lawsuit in existence
12 challenging K&B/Bakewell's claimed ownership of all 105 acres of Hayes Park, the fault lies squarely
13 on the shoulders of K&B/Bakewell to the extent they failed to disclose this important fact to purchasers.
14 The court should not, by vacating the preliminary injunction, prejudice plaintiff to right this wrong.
15 Buyers who were misled by K&B/Bakewell have very clear and well-defined legal remedies against
16 K&B/Bakewell to make them whole for any damages they suffer due to K&B/Bakewell's wrongdoing.

17 In addition, it appears that the original purchase agreements entered into with the buyers failed to
18 state that the purchase agreements were contingent upon approval of the Final Parcel Map. According to
19 Mr. Freed's invalid declaration, an addendum was later added specifying this contingency. (Decl of
20 Freed, par. 19.) Entering into a contract for the sale of a home prior to approval of the final parcel map,
21 like commencing construction of homes for sale, is a *prima facie* violation of Government Code section
22 66499.30(a) of the Subdivision Map Act (the text of the relevant statutes are set forth above).

23 Again, as stated above there exists one exception to this rule, allowing a contract for sale to be
24 entered into **only if it is expressly conditioned** upon the approval and filing of a final subdivision map.
25 (Govt. Code §66499.30, text set forth above.)

1 Again, as with the unlawful commencement of construction, such violations are considered
2 felonies, punishable by incarceration up to one year in the state prison. (Govt. Code § 66499.31, text set
3 forth above.)

4 It is unfortunate that up to 86 individuals are facing the possibility of an extended escrow and/or
5 may suffer personal damages. The fact, however, that K&B/Bakewell sold them subdivided parcels
6 which did not legally exist as parcels then, and do not legally so exist today, without the original
7 purchase contracts being conditioned upon approval of the final subdivision map, is the fault of
8 K&B/Bakewell. The 86 buyers have clear legal remedies against K&B/Bakewell for what amounts to
9 K&B/Bakewell's admitted 86 felony violations of the Subdivision Map Act. The buyers have the right
10 to be made whole for the damages inflicted upon them by K&B/Bakewell, but, again, this should not be
11 done to the detriment of plaintiff and in a manner benefitting defendant.

12

13 **IV. PLAINTIFF IS WILLING TO ENTER INTO REASONABLE STIPULATIONS FOR THE
14 BENEFIT OF THE 86 HOME BUYERS VICTIMIZED BY K&B/BAKEWELL'S
15 ILLEGAL CONDUCT AND LIKELY FAILURE TO DISCLOSE PLAINTIFF'S
16 CHALLENGE TO TITLE**

17 **A. Plaintiff Willing To Stipulate To An Early Trial Date**

18 It is entirely appropriate for the court to condition the preliminary injunction upon the
19 parties going to trial within a reasonable time fixed by the court. (Keith v. Superior Court, supra, 26
20 Cal.App.3d at 526.) Not only does this action have trial precedence due to the preliminary injunction, it
21 also has precedence under Code of Civil Procedure section 526a as a taxpayer action. Defendant stole
22 an illegal head start on building and selling homes three months ago in May 2003. Defendant now
23 appears herein identifying six purchasers with escrows scheduled to close from September through
24 December 2003. It would not be unreasonable to try this case no later than early December. Those
25 escrows scheduled to close in September could be extended three months to close in December 2003, the
26 amount of time being the same as defendant's unlawful head start in developing the property. As for the
27 buyers in escrow, defendant will just have to attempt to make them whole by compensating them,
whether monetarily or with temporary housing, for the three-month delay.

1 Of course, in order to meet such a short trial date, the court should approve a discovery plan,
2 ideally stipulated to by the parties, that includes reasonable time, method and amount limitations.
3 Furthermore, given the high probability that the final judgment after trial will be reviewed on appeal (by
4 at least one appellate court), it would not make sense to spend the time and resources arguing the issues
5 through dispositive motions such as motions for summary judgment. In this case, the most efficient
6 method would likely be to simply have all of the issues presented and resolved by the court at the court
7 trial. Plaintiff is willing to cooperate with defendants in reaching stipulations regarding these matters.
8

9 **B. Plaintiff and Defendant May be Able Reach A Stipulation to Lift the Preliminary
10 Injunction If The Parties Can Agree to Certain Measures Designed to Prevent
11 Prejudice to the Plaintiff**

12 It is also possible that plaintiff and defendant could reach a stipulation which provides enough
13 security for plaintiff to justify lifting the preliminary injunction. Counsel for plaintiff are willing to meet
14 with counsel for defendants to explore this possibility. The requirements under which plaintiff would
15 stipulate to lifting the preliminary injunction might include:

- 16 ▶ 50% of the sale proceeds are deposited with the Court by the escrow agent. Although KB Home,
17 Inc. has agreed to make good on any judgments against its LLC, there is still no guarantee KB
18 Homes will still be in business given the ever-changing economy, the start of a downturn in the
19 homebuilding industry, and the damage to KB Home balance sheets by having to absorb up to a
20 \$150 million loss charged against its earnings, which is a realistic estimate if the deed is voided
21 and Hayes Park ultimately returned to the citizens of Seaside.
- 22 ▶ KB Homes Inc. provides additional guarantees of complete satisfaction of any judgment in excess
23 of court-held funds.
- 24 ▶ K&B/Bakewell ceases development, construction, and/or sale of any other portions of Hayes Park
25 pending final resolution through exhaustion of any and all appeals or expiration of time within
26 which to file appeals.

1 ▶ Purchasers waive any and all rights to join this lawsuit or initiate further litigation regarding the
2 issues of this lawsuit, including title to the property. Purchasers may retain, however, any
3 potential rights against K&B/Bakewell regarding disclosure issues.

4 ▶ The parties stipulate to a speedy trial, limited discovery, and no dispositive motions.

5 ▶ To the extent any remedy is limited to voiding the conveyance of Hayes Park to K&B/Bakewell,
6 defendant stipulates to money damages at the fair market value of the property at the time of entry
7 of final judgment for property already conveyed by K&B/Bakewell to the 86 home buyers.

8

9 **V. THE BOND SET BY JUDGE KINGSLEY SHOULD REMAIN UNCHANGED BY THE**
10 **COURT**

11 The decision setting an amount of an injunction bond rests in the sound determination of the trial
12 court. Indeed, an order fixing the amount of a preliminary injunction bond is not separately appealable.
13 (County of Los Angeles v City of Los Angeles (1999) 76 Cal. App. 4th 1025, 1026, [an “order fixing

14 amount of preliminary injunction bond is not separately appealable” and the appellate court has no
15 jurisdiction to hear such dispute].) Here, as set forth in detail above, it is clear that the harm caused
16 herein has arisen from K&B/Bakewell’s violation of the Subdivision Map Act and not from the
17 preliminary injunction. Further, taxpayer actions, including the case at bench, serve significant and
18 legitimate public purposes. The underlying action challenging a city and private developer’s violations
19 of law furthers the significant Legislative goal of developing affordable housing within the State of
20 California, and in particular, within the County of Monterey (Gov. Code sections 54220 *et seq.* (the
21 “Surplus Land Act”) and 37362-37364). After exhaustive argument at the August 7th hearing on the
22 motion for preliminary injunction, the Court concluded that plaintiff had a *prima facie* meritorious
23 action, was entitled to a preliminary injunction, and had demonstrated as a matter of law the likelihood
24 of success at trial as to those causes of action furthering a Legislative goal deemed to be of “vital
25 statewide importance”. (Gov. Code sec. 54220).

26 While a bond is generally required for a preliminary injunction (Code Civ. Proc., sec. 529), the
27 mandatory language of this section allows for discretion in setting the amount of the bond, and in certain
28

1 circumstances, permits waiving the bond altogether. (Conover v. Hall (1974) 11 Cal.3d 842; City of Los
2 Angeles v. Superior Court (1940) 15 Cal.2d 16.) Nominal bonding serves a legitimate public purpose in
3 ensuring access to the Courts for those private persons (and nonprofit organizations) who would
4 otherwise be precluded from obtaining injunctive relief because of their financial inability to post a
5 substantial bond.

6 Defendant K&B/Bakewell maintains that a substantial bond should be required in this case
7 because defendant has begun incurring certain costs of construction resulting from its own conduct in
8 beginning construction on Hayes Park prior to the approval of the final subdivision map and in violation
9 of the law (see, *infra*). While defendant may temporarily suffer an economic loss by the Court's order
10 preserving the status quo, such losses surely were anticipated by defendant in beginning construction and
11 entering into contracts without the property first being subdivided, and should be considered as little
12 more than the cost of doing business. In fact, K&B/Bakewell's potential losses, as alleged in the instant
13 motion, may be significantly less than the cost of voiding the conveyance and undoing the project if
14 plaintiff ultimately prevails at trial.

15 K&B/Bakewell cites Abba Rubber Co. v. Seaquist (1991) 235 Cal.App.3d 1 for the proposition
16 that its anticipated expenditure of \$200,000 in attorneys' fees through defense of this action should be
17 added to the amount of undertaking required of plaintiff. However, in that action, unlike the case at
18 bench, the parties had not briefed and the Court had not considered the matter of whether a bond should
19 be required or the amount of any undertaking prior to the Court order granting the preliminary
20 injunction. Thereafter, an undertaking was set at \$1,000. The reviewing court found that under the
21 specific facts of the case before it, the bond was inadequate, however, the court did "not purport to
22 determine what an adequate amount would be." (Id. at p. 22.) Because, unlike here, the necessity and
23 amount of the bond had not briefed and argued prior to the court's granting of the injunction, the case
24 was sent back to the trial court for further consideration. As noted by the Abba court, the fact and
25 amount of a bond "is an exercise of the trial court's sound discretion, and will not be disturbed on appeal
26 unless it clearly appears that the trial court abused its discretion by arriving at an estimate that is
27 arbitrary, capricious or is beyond the bounds of reason." (Id. at p. 14.)

1 Considering the public purpose served by this lawsuit, it would be appropriate and well within this
2 Court's sound discretion to allow the preliminary injunction and bond fixed in the sum of \$1000 to
3 stand.

4

5 Dated: August 14, 2003

6 LAW OFFICES OF HEIDI K. WHILDEN

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9 Attorneys for Plaintiff

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PROOF OF SERVICE

The undersigned declares:

1. My name is Heidi K. Whilden.
2. My business address is Law Offices of Heidi K. Whilden, 1130 Fremont Blvd. #105, 262, Seaside, CA 93955.
3. I am over the age of 18 years and not a party to the cause herein.
4. On August 14, 2003, for each person whose name and address appears on the attached list, I served a true and correct copy of **PLAINTIFF'S OPPOSITION TO DEFENDANT BAKEWELL'S MOTION TO VACATE PRELIMINARY INJUNCTION** via facsimile and by first class mail in a sealed envelope with proper postage affixed thereto.

(See attached list.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 14, 2003, at Monterey County, California.

Heidi K. Whilden

Heidi K. Whilden

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