MANATT, PHELPS & PHILLIPS, LLP
JACK S. YEH (SBN 174286)
jyeh@manatt.com
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000 / Facsimile: (310) 312-4224

MANATT, PHELPS & PHILLIPS, LLP
KELI N. OSAKI (SBN 179920)
kosaki@manatt.com
695 Town Center Drive, 14th Floor
Costa Mesa, CA 92626-1924
Telephone: (714) 371-2500 / Facsimile: (714) 371-2550

Attorneys for Real Parties in Interest
ROMAN CATHOLIC DIOCESE OF ORANGE and
KISCO SENIOR LIVING, LLC

NICHOLAS S. CHRISOS, COUNTY COUNSEL
and NICOLE M. WALSH, DEPUTY (SBN 248222)
nicole.walsh@coco.ocgov.com
333 W. Santa Ana Blvd., Suite 407
Santa Ana, California 92701
Telephone: (714) 834-6257 / Facsimile: (714) 834-2359

Attorneys for Respondents
COUNTY OF ORANGE and ORANGE COUNTY BOARD OF SUPERVISORS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

FOOTHILL COMMUNITIES COALITION, an unincorporated association,

Plaintiff,

v.

COUNTY OF ORANGE, ORANGE COUNTY BOARD OF SUPERVISORS, and DOES 1 through 10, inclusive,

Respondents.

Case No. 30-2011-00467132-CU-WM-CXC

Assigned for all purposes to the Honorable Gail A. Andler, Department CX101

JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS AND REAL PARTIES IN INTEREST RE *AVENIDA SAN JUAN PARTNERSHIP v. CITY OF SAN CLEMENTE*

[Under Submission]

Petition Filed: April 14, 2011
Hearing on Writ Petition: January 23, 2012

[CEQA Action]

ROMAN CATHOLIC DIOCESE OF ORANGE, KISCO SENIOR LIVING, LLC, and DOES 11 through 25, inclusive,

Real Parties in Interest.

Pursuant to this Court's January 23, 2012 Order, Respondents County of Orange and Orange County Board of Supervisors (collectively, the "County") and Real Parties in Interest Roman Catholic Diocese of Orange and Kisco Senior Living, LLC (collectively, "Real Parties") submit this Supplemental Brief regarding a recent California Court of Appeal decision, *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256 ("*Avenida*").[1]

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

---

[1] The Court also referred the parties to two other recent decisions, *Center for Sierra Nevada Conservation v. County of El Dorado*, 2012 Cal.App. LEXIS 32, and *Sierra Club v. United States Environmental Protection Agency*, 2012 U.S. App. LEXIS 1178, and advised the parties that, if applicable, they may discuss them in their respective Supplemental Briefs. The County and Real Parties do not believe either of these cases apply in substance or principle and thus do not discuss them herein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. CALIFORNIA SPOT ZONING LAW REMAINS UNCHANGED BY THE *AVENIDA* CASE 2

A. Petitioner Does Not Have Standing to Bring a Spot-Zoning Claim Because Petitioner Is Not the Island-Owner 2

B. Zoning Decisions That Create a Spot Are Not Illegal *Per Se* 3

C. Even if the County's Zone Change Approval Were Spot Zoning, Its Legislative Findings Must Nevertheless Be Afforded Substantial Deference to Determine if They Were Arbitrary and Capricious 5

D. The County's Exercise of Its Police Powers Was Consistent with the General Plan and Bears a Reasonable Relationship to the Public Welfare 6

III. CONCLUSION 7

I. INTRODUCTION

Spot zoning does not exist simply because there is a spot. It is a creature of common law, not of statute, and is rooted in principles of equal protection. An examination of *Avenida*, and all of the other cases cited by Petitioner and the County alike, reveals the essential elements of a spot-zoning claim. A spot-zoning claim can only be brought (1) by a ***property owner whose property has been re-zoned (or its application to re-zone has been denied)*** (2) in a manner that affords the ***surrounding sea*** of property owners ***greater rights***, and (3) the ***restriction placed on*** the owner's ***island*** is (a) ***discriminatory*** and (b) ***without a rational basis (i.e., the restriction is arbitrary and capricious)***. This is the essence of spot zoning – the unfair adverse treatment of land comparative to its surrounding uses without justification.

However, Petitioner confuses spot zoning with traditional zoning jurisprudence. Every zone change – outside of a comprehensive general plan update or specific plan adoption – can be considered spot zoning. Governmental approval of a commercial use adjacent to a residential use is not in and of itself unlawful, nor is it spot zoning. Legislatively, the government can and often does decide that a commercial use should be placed next to a residential use. Surrounding residents can, of course, object to the environmental impacts of such a decision – under CEQA and the California Planning and Zoning Law – but the alleged incompatibility must then be examined under the legislatively deferential standard of review applicable to such determinations.

Petitioner has turned this analysis on its head – arguing that the *Avenida* case has created some massive change in the law that vests the judicial branch of government with massive veto power over zoning decisions that are undisputedly legislative. Petitioner urges this Court to independently determine that the placement of a Senior Residential Housing ("SRH") development next to single family residences (and a major arterial thoroughfare) is illegal per se. However, Petitioner's reliance on the newly published *Avenida* case is gravely misplaced. *Avenida* changes nothing. The present action is not a spot zoning case.

While Petitioner's counsel contends the *Avenida* Court instructed the analysis to "begin[] and end[] with the Judge's eyeballs," that is not the holding of the case nor is it the law in California. The analysis may begin with the Court's eyeballs, but it certainly does not end there.

The *Avenida* case is a traditional spot-zoning case and in no way changes decades of California spot-zoning law or the deferential standard of review applicable to such claims. Petitioner's spot-zoning claim must be denied for the following alternative reasons.

II. CALIFORNIA SPOT ZONING LAW REMAINS UNCHANGED BY THE *AVENIDA* CASE

A. Petitioner Does Not Have Standing to Bring a Spot-Zoning Claim Because Petitioner Is Not the Island-Owner

As a preliminary matter, the *Avenida* case (and all other spot-zoning cases) are inapplicable to this case. In order to bring a spot-zoning claim, a petitioner must be the owner of the island created amongst the sea of surrounding uses and the island must have suffered some kind of adverse action. *See, e.g., Avenida,* 201 Cal.App.4th at 1260-1262, 1269-1272 [property owner of island brought spot-zoning claim and prevailed in demonstrating City was discriminatory and had no rational basis for down-zoning property which unfairly de-valued the property for fair market takings purposes]; *see also, e.g., Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1529-1533, 1536-1540 ("*Arcadia*") [property owner of zoned-island subject to a Density Restriction brought spot-zoning claim but City had a rational basis for the restriction].

Petitioner contends the County engaged in spot zoning by providing Real Parties some kind of "special" or "privileged" treatment. However, approval of a zone change application (particularly after extensive levels of administrative review) is not, in and of itself, special or privileged treatment. Even if an approval could be considered to be privileged (which it is not), Petitioner has identified no case in California history (nor does there appear to be one) that has ever found spot-zoning to occur when a zoned-island receives "special" or "privileged" treatment that *benefits* the island. In fact, every zone change approval by an agency results in a benefit to that parcel.

Rather, spot-zoning concerns itself with the discriminatory adverse treatment of an island. Where such discrimination occurs (to the disadvantage of the island owner), it can nevertheless be lawful if the action is rational (*i.e.*, the discrimination was not arbitrary and capricious). This is specifically what the *Avenida* Court was faced with – an island-owner challenging an unrequested

down-zone change that devalued its property. The Court of Appeal in *Avenida* reiterated this principle of *prejudice to the island* when articulating the long-standing narrow and specific definition of spot zoning:

> The essence of spot zoning is irrational discrimination. . . . Spot zoning occurs where a ***small parcel is restricted*** and ***given lesser rights*** than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of a larger area devoted to other uses.

Avenida, 201 Cal.App.4th at 1268-1269 (emphasis added) [quoting *Arcadia,* 197 Cal.App.4th at 1536].

Consistent with this definition, the *Avenida* Court referenced other California Supreme Court and Court of Appeal spot-zoning cases where a small parcel was restricted and given lesser rights than the surrounding properties: *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 790-791 [striking down a "minimum one-acre lot size requirement on a 2.2-acre parcel as arbitrary and discriminatory, given the existence of denser construction to the east, north, and west of the property"]; *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 961 [finding a city guilty of spot zoning when it imposed a one-acre restriction on a 1.117-acre plot, preventing the construction of a second dwelling on the property, which was permitted on the surrounding properties].

In all of these spot-zoning cases, the party bringing the spot-zoning claim owned the "island" and the island suffered the claimed injury. That is not the case here. There is not a single case cited by Petitioner, nor is there any California case of which Real Parties and Respondent are aware, in which the surrounding sea of owners have been permitted to bring a spot-zoning claim. Standing is properly limited to the island-owner because it is the island-owner's equal protection rights that are at the center of a spot-zoning analysis.

B. Zoning Decisions That Create a Spot Are Not Illegal *Per Se*

Every zone change theoretically creates a spot. But the creation of a spot is not illegal *per se*, nor is it spot zoning. The ability to update zoning is within the general grant of authority to local governments to regulate land use. "California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts." *Arnel Dev. Co. v. City of*

Costa Mesa (1980) 28 Cal.3d 511, 514-521. The Legislature declared that in enacting zoning laws, "it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." Gov. Code § 65800. Quite simply, the government always retains the exclusive right and legislative discretion to rezone property as long as it is consistent with general and specific plans and CEQA.

Petitioner's argument that spot zoning occurs where a single parcel is benefited and provided greater rights than the surrounding properties turns this well-settled principle of administrative jurisprudence on its head. There is no support for this proposition in *Avenida* or in any other case. Rather, Petitioner's scenario simply illustrates a traditional zone change process.[2] The Legislature has created a specific statutory mechanism through which such scenarios must proceed – CEQA and the Planning and Zoning Law.

For example, if a hospital were proposed to be placed in the middle of a residential area, surrounding property owners would have the right to object to the attendant traffic, noise and other impacts. The evidence provided to the legislative body during that process would be judicially reviewed under a deferential abuse of discretion standard. If the legislative decision complies with CEQA and the Planning and Zoning Law (*i.e.*, findings are supported by substantial evidence and consistent with applicable general and specific plans), it must be determined to be a lawful exercise of legislative discretion. Simply because the zoning between the two adjacent parcels is different does not make it spot zoning or otherwise illegal. There was no spot zoning in this instance.[3]

---

[2] Indeed, every zone change falls under Petitioner's proposed fact pattern (and, thus, every zone change would be spot zoning). If that were the case, the exception would swallow the rule.

[3] The SRH District Zoning Amendment and the application of that zoning amendment to the Project site did not result in spot zoning. To the contrary, this case does not fit within the definition of spot zoning. Rezoning the property to the SRH District does not result in discrimination against the Project site as it will not be restricted or given lesser rights than surrounding properties and it is not surrounded by less restrictive zoning designations. *See Arcadia, supra,* 197 Cal.App.4th at 1536-37 (analyzing a density restriction imposed on plaintiff's property under a spot zoning analysis and determining that it was not spot zoning because the property was not "surrounded by property with less restrictive zoning designations").

C. Even if the County's Zone Change Approval Were Spot Zoning, Its Legislative Findings Must Nevertheless Be Afforded Substantial Deference to Determine if They Were Arbitrary and Capricious

Assuming *arguendo* that the right parties were asserting a cognizant spot-zoning claim, which is not the case here, the Court's evaluation would not end there. Even if the County's zone change could even remotely be considered a spot zone (which it cannot), the Court must nevertheless determine if the agency's decision was arbitrary and capricious. *Avenida*, 201 Cal.App.4th at 1268; *Arcadia,* 197 Cal.App.4th at 1536.

The rezoning of property, including a single parcel, is a legislative act subject to review under ordinary mandamus. The standard for review of a legislative act is whether the action was arbitrary or capricious or totally lacking in evidentiary support. *Arnel Dev. Co., supra,* 28 Cal.3d at 514. This limited review is grounded in the doctrine of separation of powers, which sanctions the legislative delegation of authority to the agency and acknowledges the agency's presumed expertise. *See Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819, 836. Courts have consistently refused to substitute judicial judgment for the legislative judgment of the governing body of a local agency. So long as the enactment bears a reasonable relationship to the public welfare, it is upheld. *See California Hotel & Motel Assn. v. Industrial Welfare Comm'n.* (1979) 25 Cal.3d 200, 211-212.

Petitioner's argument to the contrary notwithstanding, the *Avenida* case did not and cannot eliminate this deferential standard of review. In fact, the *Avenida* Court reaffirmed the need for deference, acknowledging that "[e]ven where a small island is created in the midst of less restrictive zoning, the zoning may be upheld ***where rational reason in the public benefit exists for such a classification***." *Avenida*, 201 Cal.App.4th at 1268 (emphasis added). The *Avenida* Court also noted Justice Mosk's observation "in a case otherwise devoted to development exactions that because spot zoning implicates discriminatory treatment, it entails a 'more rigorous form of judicial review.'" *Id.* at 1269 (quoting *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.)). Hence, it appears that a more searching inquiry into the reasons and motives of the legislative body is necessary to determine if the zoning is arbitrary and

discriminatory. Nevertheless, this more rigorous form of judicial review does not alter the deference accorded to the legislative decision-makers.

D. **The County's Exercise of Its Police Powers Was Consistent with the General Plan and Bears a Reasonable Relationship to the Public Welfare**

Even if a more rigorous form of review were appropriate or applied in this case, there is substantial evidence that the County's exercise of its police powers was consistent with the General Plan and bears a reasonable relationship to the public welfare. The evidence is substantial that ***the new SRH District – which is residential in nature – is compatible with surrounding uses***. The SRH District and the Project provide for senior residential uses sited and designed to maintain the residential character of the area and meet the residential development standards of the North Tustin Specific Plan ("NTSP"). (AR 376-377; 1626-27; 3449.) The Project includes design features that are compatible with the surrounding residential uses including only allowing one-story structures along certain portions of the Project site, limiting the building height of the central/common area to the limits of the NTSP (*i.e.*, two story and 35 feet), incorporating setbacks that exceed County standards, and providing for bungalow style residences that resemble single-family homes and dense, mature landscaping. (AR 368; 1626; 2685-87.)

Further, the SRH District and the Project are consistent with General Plan land use designation (Suburban Residential) which is a designation that provides for the greatest flexibility in residential development and is characterized by a wide range of housing types from detached units such as estates on large lots to attached units including townhomes and condominiums. (AR 368; 2685-87.) The Project's provision for a mix of senior housing units fits squarely within these allowed uses.

The County also concluded that the adoption of the SRH zoning designation and its application to the Project site was consistent with the County's General Plan and NTSP, and that all applicable CEQA requirements had been satisfied. (AR 3486-3487) The nearly 10,000 page record in this action establishes that the County carefully considered Petitioner's request for a zoning amendment to the NTSP and rezoning of the Project site.

Indeed, the County made a specific finding related to the public welfare: the SRH Amendment and rezoning are "consistent with the objectives, policies and general land uses and programs specified in the General Plan .... Development of senior residential housing is in furtherance of the County's General Plan Housing Element, which includes specific goals for meeting the needs of housing Orange County's growing senior population, expected to grow to approximately 27% of the County's population by 2020." (AR 3486.)

Further, in the Statement of Overriding Considerations (AR 212) and in the Staff Report (AR 2686), the County cited particular facts relating to the senior population which support the County's finding relating to the public welfare benefits. Lastly, the County's General Plan acknowledges that seniors have special housing needs, identifies senior living as an area of special concern (AR 212; 9238), and recognizes that many elderly homeowners may at some time be unable to maintain their own homes or live alone. (AR 9238.) Accordingly, substantial evidence in the record establishes that the Project is consistent with the General Plan and the NTSP, and in compliance with CEQA and the Planning and Zoning Law. Based on these facts, the County made a reasoned decision to allow for the SRH zoning amendment and the rezoning of the Project site as a component of residential development and as a way to implement general plan policies and goals.

III. CONCLUSION

For each of the foregoing reasons, Respondents and Real Parties respectfully submit that the *Avenida* decision does not alter existing spot-zoning law. The County's approval of the Project did not result in spot zoning and the claim should be rejected.

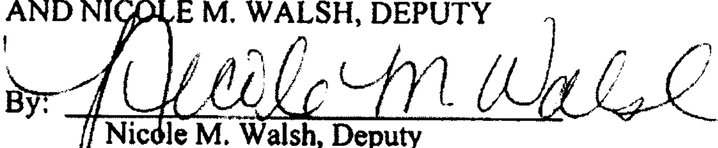
Dated: January 30, 2012

MANATT, PHELPS & PHILLIPS, LLP

By: Jack S. Yeh
Attorneys for Real Parties in Interest
ROMAN CATHOLIC DIOCESE OF ORANGE
and KISCO SENIOR LIVING, LLC

Dated: January 30, 2012

NICHOLAS S. CHRISOS, COUNTY COUNSEL
AND NICOLE M. WALSH, DEPUTY



By: Nicole M. Walsh, Deputy
Attorneys For Respondents
COUNTY OF ORANGE AND ORANGE
COUNTY BOARD OF SUPERVISORS

301349062 4

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

PROOF OF SERVICE

I, Regina Simpson, declare:

I am employed in Orange County, Costa Mesa, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 695 Town Center Drive, 14th Floor, Costa Mesa, California 92626-1924. On the date set forth below, I served the within:

JOINT SUPPLEMENTAL BRIEF OF RESPONDENTS AND REAL PARTIES IN INTEREST RE *AVENIDA SAN JUAN PARTNERSHIP v. CITY OF SAN CLEMENTE*

on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

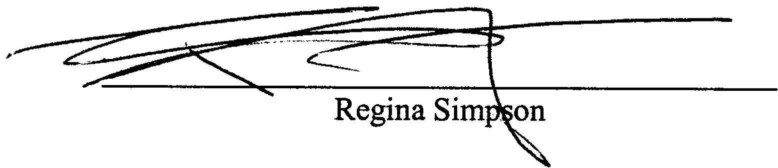
☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Costa Mesa, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

☐ **(BY OVERNIGHT MAIL)** By placing such document(s) in a sealed envelope, for collection and overnight mailing at Manatt, Phelps & Phillips, LLP, Costa Mesa, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of overnight service mailing, said practice being that in the ordinary course of business, correspondence is deposited with the overnight messenger service, ***Federal Express***, for delivery as addressed.

☐ **(BY PERSONAL SERVICE)** By causing such document(s) to be delivered by hand, as addressed by delivering same to ***Nationwide Legal, Inc.*** with instructions that it be personally served.

☐ **(BY ELECTRONIC MAIL)** By transmitting such document(s) electronically from my e-mail address, rsimpson@manatt.com at Manatt, Phelps & Phillips, LLP, Costa Mesa, California, to the person(s) at the electronic mail addresses listed above. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 30, 2012, at Costa Mesa, California.



Regina Simpson

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

John G. McClendon, Esq. Leibold McClendon & Mann 23422 Mill Creek Drive, Suite 105 Laguna Hills, CA 92653-7920 Telephone: (949) 457-6300 Facsimile: (949) 457-6305 john@CEQA.com	*Attorneys for Petitioner* Foothill Communities Coalition
Nicholas S. Chrisos, County Counsel Nicole M. Walsh, Deputy 333 W. Santa Ana Boulevard, Suite 407 Santa Ana, CA 92701 Telephone: (714) 834-6257 Facsimile: (714) 834-2359 nicole.walsh@coco.ocgov.com	*Attorneys for Respondents* County of Orange and Orange County Board of Supervisors