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 CLERK OF SUPERIOR COURT
 COUNTY OF SANTA CLARA
 M. Rosales

10 Attorneys for Petitioner and Plaintiff
 11 BERG & BERG ENTERPRISES, LLC,
 a California Limited Liability Company

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 13 FOR THE COUNTY OF SANTA CLARA

15 BERG & BERG ENTERPRISES, LLC, a
 California limited liability company,
 16
 Petitioner and Plaintiff,
 17
 v.
 18
 19 CITY OF SAN JOSE; SAN JOSE CITY
 COUNCIL; and DOES 1 through 50,
 20
 Respondents and Defendants.

Case No.
**PETITION FOR WRIT OF MANDATE
 AND COMPLAINT**

22 Petitioner and Plaintiff hereby alleges as follows:

23 **PARTIES**

24 1. Petitioner and Plaintiff BERG & BERG ENTERPRISES, LLC ("Berg") is,
 25 and at all times mentioned herein was, a limited liability company, organized under the
 26 laws of the State of California, with its principal place of business in Santa Clara County,
 27 California. Through related entities Mission West Properties, LLC, and Ione Enterprises 2,
 28 LLC, Berg is the operating entity that owns and controls that real property located within

1 the City of San Jose that is more particularly described in *Exhibit A* attached hereto ("Berg
2 Parcel"). Berg also filed with the City of San Jose the Berg Parcel development
3 applications referenced below.

4 2. Respondent and Defendant CITY OF SAN JOSE ("City") is a municipal
5 corporation located within the County of Santa Clara. Respondent and Defendant SAN
6 JOSE CITY COUNCIL ("Council") is the legislative body of the City, and took the actions
7 that are the subject of this action.

8 3. Berg is ignorant of the true names and capacities of Defendants sued herein
9 as DOES 1 through 50, inclusive, and therefore sues these Defendants by such fictitious
10 names. Berg will amend this Complaint to allege their true names and capacities when
11 ascertained. Berg is informed and believes and thereon alleges that each of the fictitiously
12 named Defendants is responsible in some manner for the occurrences herein alleged, and
13 that Berg's damages as herein alleged were proximately caused by such Defendants.

14 4. Berg is informed and believes, and on that basis alleges, that the Defendants
15 named herein are the partners, joint venturers, alter egos, agents, principals,
16 representatives, employees, servants, successors or predecessors of the other Defendants,
17 each and all of them, with respect to the matters alleged herein. The Defendants named
18 herein acted within the course and scope of their authority as such partners, joint venturers,
19 alter egos, agents, principals, representatives, employees, servants, successors or
20 predecessors, and with the consent, ratification and approval of their co-Defendants in
21 doing the things alleged herein.

22 **JURISDICTION**

23 5. The acts giving rise to this action occurred in the City, and the real property
24 that is the subject of this action is located in the City.

25 6. Berg has timely exhausted its administrative remedies, timely petitioned this
26 Court within 90 days of Council's May 15, 2007 decision, and timely commenced this
27 action.

28

1 **FACTUAL BACKGROUND**

2 7. In August 1976, the City adopted the original Evergreen Development Policy
3 ("EDP"), which established policies for correcting transportation and flood control service
4 deficiencies in the area, and which established an allocation program to phase residential
5 development based upon available traffic capacity and planned traffic improvements.

6 8. The EDP area is land within the City's Urban Service Area Boundary, south
7 of Story Road, east of U.S. Highway 101, and north of the intersection of U.S. Highway
8 101 and Hellyer Avenue. The Berg Parcel is within the EDP area.

9 9. In 1980, in conjunction with the EDP, the City approved General Plan
10 amendments to exchange land uses between the Evergreen and Berryessa areas.
11 Approximately 300 acres in the Berryessa area were converted from Industrial Park uses to
12 residential uses, while approximately 375 acres of land in Evergreen were converted from
13 low density residential to Campus Industrial uses. The Berg Parcel was designated
14 Campus Industrial under the General Plan as a result of the City's action.

15 10. The EDP allows new development capacity within four "Major Opportunity
16 Sites" within the EDP area. As recognized by the City, these four sites "represent the
17 largest, most readily identifiable sites available for new development or redevelopment
18 within the Evergreen Development Policy area and as such warrant unique treatment."

19 11. One of the four "Major Opportunity Sites" is a 320-acre site on the easterly
20 side of Yerba Buena Road, and is identified by the City as the "Campus Industrial"
21 Opportunity Site. The 175-acre Berg Parcel is within the Campus Industrial site. The two
22 other landowners within the Campus Industrial Opportunity Site are IDS Real Estate
23 Group (24 acres) and Legacy (120 acres).

24 12. In the Fall of 2002, the City approached the property owners within the EDP
25 area, including Berg, and asked the owners to help fund updates to the EDP and
26 comprehensive General Plan amendments that would facilitate development of the EDP
27 area.

28

1 13. In February 2003, Berg and the other EDP area developers began providing
2 the City with funding for the EDP update. Berg's funding was made in reliance upon the
3 City's representations that the funding would facilitate processing and approval of
4 development applications within the EDP, including Berg's intended General Plan
5 amendment that would convert the Berg Parcel from Campus Industrial to Residential
6 uses.

7 14. On November 4, 2003, the Council adopted Resolution No. 71814, wherein
8 the City authorized the City Manager to negotiate a funding agreement with Yerba Buena
9 Opco, Inc. to pay approximately \$8.8 million for work associated with the preparation of
10 the Evergreen Smart Growth Strategy, the EDP update and related environmental
11 documents by City staff and consultants. As recognized by the City, Yerba Buena Opco,
12 Inc. includes property owners and developers with real estate interests in the Evergreen
13 area, including Berg.

14 15. On November 14, 2003 and June 27, 2006, the Council approved a Funding
15 and Reimbursement Agreement between the City and Yerba Buena Opco, Inc.
16 ("Reimbursement Agreement").

17 16. The stated purpose of the Reimbursement Agreement is to provide a means
18 for the "participating property owners," including Berg, to fund the costs of preparation of
19 a community-based Smart Growth Strategy, related General Plan amendments, an updated
20 Evergreen Area Development Policy, and related studies, infrastructure funding
21 mechanism, and environmental documents, all as they pertain to the Evergreen Area
22 (collectively identified in the Reimbursement Agreement as "Strategy Documents").

23 17. Under the express terms of the Reimbursement Agreement, as consideration
24 for the participating property owners' agreement to fund the preparation of the Strategy
25 Documents, "City agrees to process the Strategy Documents in an expeditious manner and,
26 upon their completion, to bring the Strategy Documents before City's Planning
27 Commission and/or City Council for their consideration, as appropriate, all to the extent
28

1 that adequate funding has been provided to City to cover the actual costs incurred by City
2 (including consultant costs) to perform and complete such work and tasks."

3 18. Under the express terms of the Reimbursement Agreement, the City also
4 agreed to "take all reasonable steps ... to meet timelines for performance" set forth in the
5 Reimbursement Agreement, including processing the Strategy Documents for final hearing
6 before the City no later than December 2006.

7 19. On April 6, 2004, the Council approved a policy document entitled the
8 "Framework, as a Guideline, to Evaluate Proposed Conversions of Employment Lands to
9 Other Uses" ("Framework"). The Framework supported conversion of "employment" (*i.e.*,
10 industrial) lands to other uses in various areas of the City, while discouraging such
11 conversions in other areas of the City such as Edenvale. The Framework supported
12 conversion of the Evergreen Industrial Area to housing, retail, or mixed uses if
13 recommended through what was then referred to as the "Evergreen Smart Growth Strategy
14 Process." A March 24, 2004 Staff Report for this item identified Evergreen as one of the
15 subareas for the City "to promote or facilitate conversion" to housing, retail, or mixed uses.
16 This official City policy to support conversion of industrial uses to residential uses on the
17 Campus Industrial Opportunity Site was consistent with the City's representations to Berg
18 that the Berg Parcel was appropriate for conversion.

19 20. On May 6, 2005, in reliance upon the City's representations in the
20 Reimbursement Agreement and through other communications that development
21 applications would be expeditiously processed and timely submitted to the Planning
22 Commission or Council for approval, Berg filed two development applications with the
23 City. The first application (GP05-08-01C) sought to amend the General Plan Land Use
24 Designation of the Property from Campus Industrial to Medium Density Residential and
25 Parks/Open Space. The second application (PDC05-048) sought to rezone the Property
26 from the A Zoning District to the A(PD) Zoning District, to allow for approximately 1,100
27 residential units.

28

1 21. In June 2005, the Council initiated an update to the EDP and associated
2 General Plan amendments, including the General Plan amendment application filed by
3 Berg in May 2005. These Council items were part of a larger "Evergreen Visioning
4 Project," which the City defined as a comprehensive land use and transportation planning
5 effort for the Evergreen area. The Evergreen Visioning Project was subsequently renamed
6 the "Evergreen-East Hills Visioning Strategy" ("EEHVS").

7 22. Regarding the development of the Campus Industrial site, the developers
8 proposed up to 2,000 residential units with no nonresidential uses, while Staff
9 recommended up to 1,275 residential units and maintaining 120 acres as Campus
10 Industrial. On November 10, 2006, the Planning Commission unanimously recommended
11 that the Council adopt either the developers' proposed land uses or Staff's recommendation.

12 23. On December 12, 2006, the Council considered the EEHVS and
13 unanimously upheld the Planning Commission's certification of the Final EIR for that
14 project. The Council also voted to defer consideration of the remainder of the EEHVS and
15 the owners' development applications to Spring 2007, even though the Planning
16 Commission had recommended that the Council approve the applications under either the
17 developers' or Staff's proposal. Berg and other developers in the EDP submitted written
18 and oral communication to the Council at or before the December 12 meeting, urging the
19 Council to act promptly.

20 24. In Spring of 2007, the developers of the Evergreen Opportunity Sites
21 volunteered to contribute \$221.45 million to the City in order to construct various
22 transportation projects and community amenities beyond what the City could legally
23 require through standard exactions and fees. According to Planning Staff's analysis,
24 approximately \$135 million of the cash contribution would be provided from the owners of
25 the Campus Industrial Opportunity Site, including Berg.

26 25. Prior to an April 30, 2007 Council Study Session regarding the EEHVS,
27 Planning Staff submitted a Staff Report that identified five "policy options" for Council
28 consideration regarding proposed development of the EDP area. Planning Staff

1 recommended Option #5, which was to not update the EDP and to defer consideration of
2 housing development opportunities in the EDP area to the General Plan update, which
3 would not occur until the following year. In its Staff Report, Planning Staff admitted that
4 if "the proposed EDP update is deferred to the General Plan update, the developers and
5 some members of the community would perceive the EEHVS process as a waste of time
6 and money." Berg is informed and believes that the City's deferral of the EDP update was
7 designed in part to force the EDP area developers to contribute more funding to the City
8 than what the developers had previously offered.

9 26. At the April 30, 2007 Study Session, Council directed Staff to return with a
10 further analysis of issues related to traffic, affordable housing, schools, amenities and
11 public facilities, retail and commercial development, and retention of industrial lands.

12 27. In a May 14, 2007 memorandum to the Council, Vice Mayor Cortese warned
13 against any proposals by Staff or the Council to defer the EDP developers' applications or
14 to discourage the proposed industrial conversions:

15 Some members of the City Council feel that the merits of industrial retention
16 in Evergreen have not been fully vetted by the EEHVS Task Force (despite
17 nearly four years of study) and that the General Plan update is the
18 appropriate venue for a decision on this issue. This is inconsistent with
19 previous (and unanimous) City Council action to defer to the EEHVS to
20 recommend future uses for these lands. The removal of these lands from
21 consideration at the present time completely disembowels the EEHVS
22 because all four Opportunity Sites are relying on each other in a complex
23 financial arrangement designed to bring balance across the entire study
24 area....

25 The City Council therefore should be careful about gambling the surety of a
26 nearly \$200 million dollar investment in San Jose now versus the possibility
27 of corporate location to a site that has remained largely vacant since 1981, at
28 a time when most of the City Council's efforts are spent bolstering the
employment capacity of North San Jose, the downtown and Edenvale.

As stated above, a refusal to consider even a partial conversion of industrial
land is the death-knell for the EEHVS.... [T]he City Council will have
betrayed their commitment to thoughtful and managed growth in this
community.

29 28. On May 15, 2007, Berg submitted a letter to the Council setting forth the
30 factual and legal reasons why the Council was obligated to act at the May 15 meeting and

1 that postponing any action until completion of the General Plan update was illegal and
2 unfair to Berg and the other landowners.

3 29. At its May 15, 2007 meeting, the Council ignored the Planning
4 Commission's November 10, 2006 unanimous recommendation that the Council adopt
5 either the developers' proposed land uses or Staff's recommendation. Instead, the Council
6 deferred consideration of all proposed EEHVS Campus Industrial land conversions to the
7 General Plan update, which the Council estimated to be completed in August 2008 at the
8 earliest. The Council also directed Staff to provide a work plan for Council consideration
9 that includes amendments to the EDP that would impose new development "triggers" to
10 prohibit residential development unless and until industrial development occurs in the
11 EDP.

12 30. In a June 1, 2007 Staff Report, Staff recommended to the Council that "no
13 new housing development could be allowed until some minimum amount of jobs (*e.g.*,
14 5,000 or 10,000 jobs) occurs within Evergreen." Staff asked the Council for direction on
15 how to impose proposed employment-based triggers as a prerequisite to any residential
16 development within Evergreen.

17 31. A June 4, 2007 Staff Report regarding the General Plan update provided: "In
18 order to accomplish the proposed work program and schedule, processing of individual
19 privately-initiated General Plan Amendments will not be referred to the General Plan
20 Update and should proceed during the General Plan Amendment process." The Council's
21 decision on May 15, 2007 to defer consideration of all proposed EEHVS Campus
22 Industrial land conversions to the General Plan update directly contradicts this stated
23 policy.

24 32. Prior to the Council's June 26, 2007 meeting to approve actions related to the
25 EDP, Berg transmitted a letter to the Council setting forth the factual and legal bases for its
26 objections to the Council's anticipated actions. In particular, Berg objected to the
27 imposition of triggers recommended by Staff that would prohibit residential housing
28 development until speculative jobs were first created within the EDP area. Berg explained

1 that there was no market for nonresidential uses in the area, and that despite aggressive
2 marketing efforts throughout the years, it was impossible to locate nonresidential uses
3 there. Earlier, several experienced commercial and industrial real estate brokers and
4 professionals submitted letters to the Council, and they unanimously agreed that
5 nonresidential uses are not feasible on the Campus Industrial site of the EDP area.

6 33. At its June 26, 2007 meeting, the Council directed Staff to bring forward
7 certain amendments to the EDP, while directing Staff to do no additional work on the EDP
8 until certain employment capacity in the EDP area was fulfilled (*i.e.*, triggers met). In
9 particular, the counsel directed the staff to discourage any proposed general plan
10 amendments for residential uses. In addition, the Council approved a June 22
11 memorandum from Vice Mayor Cortese and Councilmember Liccardo, which expressly
12 stated, "Council's approval of this memorandum will signify its support for the Campus
13 Industrial site to be preserved and encouraged for employment growth." Thus, Berg's
14 proposed conversion of the Berg Parcel to residential uses was effectively denied by the
15 Council.

16 34. Recent City documents demonstrate that the General Plan update, to which
17 the City now seeks to defer purported consideration of Berg's development applications,
18 will be a lengthy process. Phase I of the General Plan update is not expected to conclude
19 until September 2008 at the earliest, and Phase II is not expected to conclude until
20 February 2010 at the earliest.

21
22 **FIRST CAUSE OF ACTION**
(Petition for Writ of Mandate)

23 35. Berg incorporates by this reference the allegations set forth in paragraphs 1
24 through 34 as if specifically set forth herein.

25 36. The Council's action on May 15, 2007 was arbitrary, capricious, entirely
26 lacking in evidentiary support, and/or unlawfully or procedurally unfair.

27 37. The Council's decision to defer consideration of all proposed EEHVS
28 Campus Industrial land conversions to the General Plan update for at least another year

1 was arbitrary and capricious and bore no reasonable relationship to the public welfare.
2 This deferral contradicted the terms of the Framework, which provided that industrial
3 conversions should be addressed through the EEHVS process, not the General Plan update
4 process. As recognized by Vice Mayor Cortese, this deferral was also "inconsistent with
5 previous (and unanimous) City Council action to defer to the EEHVS to recommend future
6 uses for these lands."

7 38. The Council's decision to direct Planning Staff to provide a work plan that
8 includes amendments to the EDP that would impose new development "triggers" to
9 prohibit residential development unless and until industrial development occurs in the EDP
10 was arbitrary and capricious and bore no reasonable relationship to the public welfare.
11 This decision is expressly at odds with the Council's historical regulation of the EDP and
12 with the express terms of the Framework.

13 39. Defendants' actions were also arbitrary and capricious in that they were
14 designed to induce Berg to fund the processing of the Strategy Documents over the last
15 several years based upon promises of expeditious and fair processing of Berg's
16 development applications, only to reverse itself by delaying processing of the applications
17 for an indefinite period, and only after Defendants impose development triggers that would
18 make the proposed conversion of the Berg Parcel to residential uses virtually impossible.
19 Defendants' actions have been designed to have Berg and the other developers in the EDP
20 subsidize the City's Planning Department based on the false promise of expeditious
21 processing and a fair hearing. Any claims by Defendants that its actions were justified are
22 refuted by these facts and by the fact that Defendants have supported and approved similar
23 industrial/residential conversions, even on properties that are clearly not suited for
24 residential development under the City's guidelines.

25 WHEREFORE, Berg prays judgment against the Council as hereinafter set forth.
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1 developers' development applications and present them for consideration by the Planning
2 Commission and/or Council within a reasonable time, the latest date being December
3 2006.

4 46. The representations made by the City were in fact false. The City did not
5 timely process Berg's development applications. To the contrary, despite receiving
6 approximately \$1,892,917 in net payments from Berg, the City has not completed
7 processing of Berg's development applications. Moreover, instead of presenting Berg's
8 development applications for consideration by the Planning Commission and/or Council,
9 the City and Council have refused to process any such applications unless and until certain
10 unattainable employment triggers are met, thereby effectively denying Berg's proposed
11 project before it is considered by the Council.

12 47. At the time that Berg was induced into providing funding to the City, and at
13 the time Berg rendered its performance under the Reimbursement Agreement, Berg did not
14 know the City's representations were false, but believed them to be true and reasonably
15 relied upon them. In particular, Berg provided the City with approximately \$1,892,917 in
16 net payments pursuant to the Reimbursement Agreement, with the expectation that its
17 development applications would be expeditiously processed and presented for
18 consideration by the Planning Commission and/or Council no later than December 2006.
19 Had Berg known the true facts, it would not have entered into the Reimbursement
20 Agreement and would not have rendered performance thereunder.

21 48. Berg intends service of the summons and complaint in this action to serve as
22 notice of rescission of the Reimbursement Agreement, and hereby demands that
23 Defendants restore to it the consideration furnished by Berg, specifically the sum of
24 \$1,892,917 as Berg's net monies paid under the Agreement.

25 WHEREFORE, Berg prays judgment against Defendants as hereinafter set forth.
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1 **FOURTH CAUSE OF ACTION**
2 (Promissory Estoppel)

3 49. Berg incorporates by this reference the allegations set forth in paragraphs 1
4 through 48 as if specifically set forth herein.

5 50. Pursuant to the terms of the Reimbursement Agreement, the City promised to
6 process Berg's development applications in "an expeditious manner," and to bring them
7 before the Planning Commission and/or Council for their consideration.

8 51. The City reasonably should have expected that its promise to expeditiously
9 process Berg's development applications would result in Berg agreeing to fund the City's
10 purported planning efforts through the Reimbursement Agreement.

11 52. Berg spent considerable sums of money to fund the City's planning efforts as
12 a result of the promise.

13 53. Berg was harmed by the City's decision to not timely process the
14 development applications.

15 54. The City's breach of its promise was a substantial factor in causing injury to
16 Berg.

17 WHEREFORE, Berg prays judgment against Defendants as hereinafter set forth.

18 **FIFTH CAUSE OF ACTION**
19 (Common Count: Money Had and Received)

20 55. Berg incorporates by this reference the allegations set forth in paragraphs 1
21 through 54 as if specifically set forth herein.

22 56. The City received money from Berg that was intended to be used for the
23 benefit of Berg.

24 57. The money received by the City was not used for the benefit of Berg, as the
25 City failed to process the Strategy Documents.

26 58. The City has not returned the net funding provided to the City by Berg.

27 WHEREFORE, Berg prays judgment against Defendants as hereinafter set forth.
28

1 **SIXTH CAUSE OF ACTION**
2 (Specific Performance)

3 59. Berg incorporates by this reference the allegations set forth in paragraphs 1
4 through 58 as if specifically set forth herein.

5 60. Berg has performed all of the terms and conditions required of it pursuant to
6 the Reimbursement Agreement, except those which have been excused by Defendants'
7 conduct.

8 61. Berg was at all times, and still is, ready, willing, and able to perform these
9 conditions required on its part in accordance with the terms and conditions of the
10 Reimbursement Agreement and has offered, and continues to offer, to perform them.

11 62. The City has refused to continue processing Berg's development
12 applications, despite its express representation in the Reimbursement Agreement that it
13 would do so.

14 63. The Berg Parcel is unique real property, thus the legal remedy of damages is
15 inadequate to compensate Berg.

16 WHEREFORE, Berg prays judgment against Defendants as hereinafter set forth.

17 **SEVENTH CAUSE OF ACTION**
18 (Declaratory Relief)

19 64. Berg incorporates by this reference the allegations set forth in paragraphs 1
20 through 63 as if specifically set forth herein.

21 65. Section 12.A. of the Reimbursement Agreement provides in full:

22 In addition to any other remedies that a party may have arising out of this
23 AGREEMENT, a party may institute proceedings for mandamus, specific
24 performance or other injunctive or declaratory relief to enforce this
25 AGREEMENT; provided, however, that in no event shall CITY be liable in
26 damages for any breach or violation of this AGREEMENT. Nothing in this
27 SECTION shall preclude PARTICIPATING PROPERTY OWNERS from
28 enforcing their rights to any sums CITY is obligated to return to
PARTICIPATING PROPERTY OWNERS under this AGREEMENT.

66. A real and actual controversy has arisen and now exists between Berg and
Defendants regarding the legality of Section 12.A.

1 d. On June 21, 2005, the Council approved rezoning on the corner of a
2 332-acre site near 5600 Cottle Road from Industrial Park (IP) District to IP(PD) District to
3 allow up to 2,930 residential units and other uses (Ord. 27491).

4 e. On May 15, 2007, at the same meeting that it derailed Berg's
5 development applications, the Council approved rezoning on property bordered by
6 Auizerais Avenue, Lincoln Avenue and Northrup Street from IP District to A(PD) District
7 to allow up to 975 multi-family residential units and other uses (Ords. 28048, 28049). As
8 a result of this approval, existing industrial uses and tenants were displaced from the
9 property, and existing industrial buildings were demolished.

10 f. On June 12, 2007, the Council directed Staff to explore the conversion
11 of the 75-acre iStar property located at Highway 85 and Cottle Road, from an IP land use
12 designation and zoning to a residential land use designation and zoning, in response to the
13 developer's proposal to develop up to 1,500 residential units on the parcel.

14 g. On August 14, 2007, the Council is scheduled to consider the
15 rezoning of two industrial parcels to residential uses. The first is located at 3300 Zanker
16 Road, and the proposed rezoning from IP to A(PD) would allow up to 1,900 single-family
17 attached residences and other uses. The second is located at 1590 Berryessa Road, and the
18 proposed rezoning from A(PD) and IP to A(PD) would allow up to 2,818 residential units
19 and other uses on the 120-acre site. As of August 9, 2007, Planning Staff recommended
20 both proposed industrial conversions.

21 71. In addition to approving these and other conversions from industrial to
22 residential uses, the Council has approved numerous conversions of existing industrial uses
23 to nonindustrial uses such as commercial, thereby reducing the amount of land available
24 for industrial uses within the City. According to the City's documents dated March 15,
25 2007, the City has approved 41 General Plan amendments converting industrial uses to
26 nonindustrial uses from 2004-2006. Berg is informed and believes that none of the
27 industrial conversions approved by the City involved agreements by the applicant to
28

1 provide hundreds of millions of dollars of additional infrastructure funding to the City,
2 unlike Berg and the other EDP area developers.

3 72. The actions and inaction of Defendants in delaying the processing of the
4 Berg's development applications, while approving similar applications of similarly-situated
5 property owners within the City, were clearly arbitrary, capricious and unreasonable,
6 having no real or substantial relation to the public health, safety, morals or general welfare,
7 and deprived Berg of its civil rights guaranteed by the Equal Protection Clause of the
8 Fourteenth Amendment of the United States Constitution, California Constitution and
9 Federal and California Statutes.

10 73. Defendants intentionally treated Berg differently from other similarly
11 situated persons and entities. The City has recently approved proposed conversions of
12 industrial land to residential uses, even for properties that are surrounded by industrial
13 uses. Instead of approving Berg's proposed conversion, Defendants have imposed
14 arbitrary employment triggers, indefinitely postponed consideration of Berg's development
15 applications, and have demanded that Berg and other EDP developers spend millions of
16 dollars to fund the City's planning efforts in the EDP area. To date, the City has not
17 imposed these conditions on other similarly situated persons or entities that seek to convert
18 industrial uses to nonindustrial uses such as residential.

19 74. The Defendants' conduct in this regard was plainly arbitrary, irrational and
20 intended to discriminate and deprive Berg of its rights without any rational basis to a
21 legitimate state interest.

22 75. The Defendants' conduct set forth above was acted upon under color of state
23 law.

24 76. The Defendants have a clear and present duty to comply with the Fourteenth
25 Amendment of the United States Constitution and Article I, Section 7, of the California
26 Constitution, and Berg has a clear, present and beneficial interest in performance of such
27 duty.

28

1 77. As an actual and proximate result of the Defendants' actions, Berg has
2 suffered compensatory and consequential damages in an amount to be proven at trial, but
3 exceeding the jurisdictional minimum of this Court.

4 WHEREFORE, Berg prays judgment against Defendants as hereinafter set forth.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, petitioner and plaintiff prays as follows:

- 7 1. For a peremptory writ of mandate to issue under Code of Civil Procedure
8 §1085 directed to respondent Council, and compelling respondent to set
9 aside its decision of May 15, 2007;
- 10 2. For a peremptory writ of mandate to issue under Code of Civil Procedure
11 §1094.5 directed to respondent Council, and compelling respondent to set
12 aside its decision of June 26, 2007;
- 13 3. For compensatory damages in an amount to be proven at trial;
- 14 4. For consequential damages in an amount to be proven at trial;
- 15 5. For recoverable attorneys' fees;
- 16 6. For such other relief as the Court deems as just and appropriate.

17
18 Dated: August 13, 2007

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

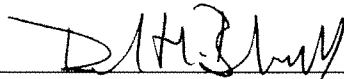
19
20 By: 
21 ROBERT R. MOORE
22 Attorneys for Petitioner and Plaintiff
23 BERG & BERG ENTERPRISES, LLC
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EXHIBIT A

LEGAL DESCRIPTION

Real property in the City of San Jose, County of Santa Clara, State of California, described as follows:

ALL THAT PROPERTY DESCRIBED AS "PARCEL A" IN THAT CERTAIN LOT LINE ADJUSTMENT PERMIT NO. AT03-102, RECORDED NOVEMBER 18, 2003, AS DOCUMENT NO. 17479820, SANTA CLARA COUNTY RECORDS. AND FURTHER DESCRIBED AS FOLLOWS;

REAL PROPERTY IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, BEING ALL OF THAT PARCEL OF LAND DESCRIBED IN THE DEED TO MISSION WEST PROPERTIES, L.P., RECORDED JULY 21, 2000, IN DOCUMENT NUMBER 15324907 OF OFFICIAL RECORDS, SANTA CLARA COUNTY RECORDS.

AND EXCEPTING, THEREFROM, THE FOLLOWING AREA:

REAL PROPERTY IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, BEING A PORTION OF THAT PARCEL OF LAND DESCRIBED IN THE DEED TO MISSION WEST PROPERTIES, L.P., RECORDED JULY 21, 2000, IN DOCUMENT NUMBER 15324907 OF OFFICIAL RECORDS, SANTA CLARA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST NORTHERLY CORNER OF LOT O AS SHOWN ON THAT CERTAIN MAP OF TRACT 9179, FILED FOR RECORD ON DECEMBER 20, 2001, IN BOOK 746 OF MAPS, AT PAGES 14 THROUGH 19, SANTA CLARA COUNTY RECORDS, BEING ON THE SOUTHERLY LINE OF ABORN ROAD, AS SHOWN ON SAID MAP;

THENCE ALONG THE EASTERLY LINE OF SAID MAP, SOUTH 10°29'15" EAST, 0.50 FEET, TO THE MOST WESTERLY CORNER OF SAID PARCEL OF LAND DESCRIBED IN THE DEED TO MISSION WEST PROPERTIES, L.P., TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING ALONG SAID EASTERLY LINE, SOUTH 10°29'15" EAST, 681.23 FEET;

THENCE ALONG A LINE PARALLEL WITH THE CENTERLINE OF VOLTAIRE STREET, AS SHOWN ON SAID MAP, NORTH 19°00'31" EAST, 820.57 FEET, TO THE NORTHERLY LINE OF SAID PARCEL OF LAND, BEING ON THE SOUTHERLY LINE OF ABORN ROAD;

THENCE ALONG THE GENERAL NORTHERLY LINE OF SAID PARCEL OF LAND, THE FOLLOWING FOUR COURSES:

1. THENCE SOUTH 79°30'53" WEST, 339.02 FEET;
2. THENCE ALONG A TANGENT CURVE TO THE LEFT, HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 90°00'00" FOR AN ARC LENGTH OF 31.42 FEET;
3. THENCE SOUTH 10°29'07" EAST, 13.00 FEET;
4. THENCE SOUTH 79°30'53" WEST, 45.00 FEET, TO THE TRUE POINT OF BEGINNING.

APN: 659-02-010

LEGAL DESCRIPTION

Real property in the City of San Jose (partially), County of Santa Clara, State of California, described as follows:

ALL THAT CERTAIN REAL PROPERTY SITUATED PARTLY WITHIN AND PARTLY WITHOUT THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL ONE:

BEGINNING AT A POINT IN THE CENTER LINE OF THE FOWLER ROAD, SAID POINT BEING THE NORTHEASTERLY CORNER OF THE 15 ACRE TRACT DEEDED TO ERNEST BUECK, BY DEED DATED OCTOBER 23, 1905 AND RECORDED IN BOOK 298 OF DEEDS, PAGE 512, IN THE OFFICE OF THE COUNTY RECORDER OF SANTA CLARA COUNTY, CALIFORNIA; RUNNING THENCE ALONG THE EASTERLY LINE OF SAID 15 ACRE TRACT, S. 10 DEG. 25' E., 20.073 CHAINS TO AN IRON PIPE STANDING AT THE SOUTHEASTERLY CORNER OF SAID 15 ACRE TRACT; THENCE N. 79 1/2 DEG. E., 8.87 CHAINS TO AN IRON BOLT; THENCE N. 14 DEG. 49' W., 8.44 CHAINS TO A WHITE OAK TREE, 4 FEET IN DIAMETER MARKED WITH 3 NOTCHES; THENCE N. 57 DEG. 22' E., 7.247 CHAINS TO A STAKE MARKED 6-7-1 STANDING ON THE WESTERLY SIDE OF THE TRAVELED PART OF A ROAD; THENCE N. 28 DEG. 31' W., 2.25 CHAINS TO A STAKE MARKED 6-7-2; THENCE N. 69 DEG. 38' W., 2.34 CHAINS TO A STAKE MARKED 6-7-3; THENCE N. 34 DEG. 52' W, 0.988 CHAINS TO A STAKE MARKED 6-7-4; THENCE N. 2 DEG. 52' W., 1.72 1/3 CHAINS, TO A STAKE MARKED 6-7-5; THENCE N. 17 DEG. 14' E., 2.02 1/3 CHAINS TO A STAKE MARKED 6-7-8 STANDING ON THE SOUTHERLY LINE OF THAT 99.19 ACRE TRACT TO JEREMIAH KALLEHAR BY DEED DATED OCTOBER 18, 1899 AND RECORDED IN BOOK 224 OF DEEDS, PAGE 178, SANTA CLARA COUNTY RECORDS; THENCE ALONG THE SOUTHERLY LINE OF SAID 99.19 ACRE TRACT S. 79 DEG. 30' W., 12.718 CHAINS; THENCE N. 54 3/4 DEG. W., 0.54 CHAINS TO A POINT IN THE CENTER LINE OF THE FOWLER ROAD; THENCE ALONG THE CENTER LINE OF THE FOWLER ROAD, S. 79 DEG. 30' W. 0.08 CHAINS TO THE PLACE OF BEGINNING, AND BEING PART OF THE RANCHO YERBA BUENA.

EXCEPTING THEREFROM THAT PORTION THEREOF LYING NORTHEASTERLY OF THE EXTENSION OF FOWLER ROAD, AS GRANTED TO JOHN H. MACHADO BY DEED DATED JUNE 28, 1949 AND RECORDED FEBRUARY 27, 1950, BOOK 1934 OFFICIAL RECORDS, PAGE 309.

APN: 660-33-012 & 006
Arb: 662-10-015.01 & 018

PARCEL TWO:

BEGINNING AT A STAKE MARKED 4-5 STANDING ON THE SOUTHERLY LINE OF THAT CERTAIN 152.21 ACRE TRACT DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874 AND RECORDED IN BOOK 33 OF DEEDS, PAGE 571, FROM WHICH STAKE THE SOUTHWESTERLY CORNER OF THAT 152.21 ACRE TRACT BEARS S. 79 DEG. 30' W. 23.045 CHAINS; THENCE ALONG THE SOUTHERLY LINE OF SAID 152.21 ACRE TRACT N. 79 1/2 DEG. E. 16.77 CHAINS TO A STAKE MARKED 4-6; THENCE N. 65 DEG. 43' W. 11.94 CHAINS TO A STAKE MARKED 1-6; THENCE N. 14 DEG. 49' W. 10.83 CHAINS TO AN IRON BOLT; THENCE S. 79 1/2 DEG. W. 5.539 CHAINS TO A STAKE MARKED 4-5 FROM WHICH STAKE THE SOUTHEASTERLY CORNER OF THAT CERTAIN 15 ACRE TRACT DEEDED TO ERNEST BEUCK BY DEED DATED OCTOBER 23,

1905 AND RECORDED IN BOOK 298 OF DEEDS, PAGE 512, BEARS S. 79 1/2 DEG. W. 3.131 CHAINS; THENCE S. 10 1/2 DEG. E. 17.60 CHAINS TO THE POINT OF BEGINNING, BEING A PART OF THAT CERTAIN 152.21 ACRE TRACT DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874 AND RECORDED IN BOOK 33 OF DEEDS, PAGE 571, AND BEING PARCEL 5 DESIGNATED BY THE PARTIES IN THE PARTITION DEED BETWEEN JOHN KELLIHER TO JOHN KELLIHER, ET AL, DATED DECEMBER 17, 1914 AND RECORDED JANUARY 9, 1915 IN BOOK 426 OF DEEDS, PAGE 91, SANTA CLARA COUNTY RECORDS.

APN: 660-33-013 & 020

Arb: 662-10-015.02 & 016.01

PARCEL THREE:

BEGINNING AT AN IRON PIPE IN THE CENTER LINE OF THE FOWLER ROAD, DISTANT THEREON N. 79 1/2 DEG. E. 12.45 CHAINS FROM THE NORTHWESTERLY CORNER OF THAT CERTAIN 50 ACRE TRACT DESCRIBED IN THE DEED FROM JEREMIAH AND PATRICK KALLIHAR TO MARGARET BOLESTER, DATED JULY 25, 1874 AND RECORDED JULY 25, 1874 IN BOOK 32 OF DEEDS, PAGE 464, RECORDS OF SANTA CLARA COUNTY, FROM WHICH SAID POINT OF BEGINNING IS SET A 2 1/2 INCH PIPE; S. 10 1/2 DEG. E. 20 FEET ON SOUTH SIDE OF FOWLER ROAD; THENCE S. 10 DEG. 30' E. 20.08 CHAINS ALONG THE EASTERLY LINE OF LANDS NOW OR FORMERLY OF MRS. M. VENNUM TO AN IRON PIPE ON THE SOUTHERLY LINE OF SAID 50 ACRE TRACT; THENCE N. 79 1/2 DEG. E. ALONG THE SOUTHERLY LINE OF SAID 50 ACRE TRACT, 7.47 CHAINS TO AN IRON PIPE; THENCE N. 10 1/2 DEG. W. 20.08 CHAINS TO AN IRON PIPE IN THE CENTER LINE OF FOWLER ROAD, FROM WHICH IS SET A PIPE 2 1/2 INCHES IN DIAMETER, S. 10 1/2 DEG. E. 20 FEET; THENCE S. 79 1/2 DEG. W. 7.47 CHAINS ALONG THE CENTER LINE OF FOWLER ROAD TO THE PLACE OF BEGINNING.

EXCEPTING THEREFROM THAT PARCEL OF LAND CONVEYED TO HAROLD WOOD, ET UX, BY DEED DATED OCTOBER 24, 1949 AND RECORDED OCTOBER 26, 1949 IN BOOK 1866 OF OFFICIAL RECORDS, PAGE 455, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT AN IRON PIPE IN THE CENTER LINE OF FOWLER ROAD, DISTANT THEREON N. 79 DEG. 30' E. 821.70 FEET FROM THE NORTHWESTERLY CORNER OF THAT CERTAIN 50 ACRE TRACT OF LAND DESCRIBED IN THE DEED FROM JERIMIAH AND PATRICK KALLIHAR TO MARGARET BOLSTER, DATED JULY 25, 1874 IN BOOK 32 OF DEEDS, PAGE 464, SANTA CLARA COUNTY RECORDS, FROM WHICH POINT OF BEGINNING, A 2 1/2 INCH IRON PIPE SET ON THE SOUTHERLY LINE OF FOWLER ROAD BEARS S. 10 DEG. 30' E. 20.00 FEET, SAID POINT OF BEGINNING ALSO BEING THE NORTHWESTERLY CORNER OF THAT CERTAIN 15.00 ACRE PARCEL LAND DESCRIBED IN THE DEED FROM HENRY BEUCK, AS EXECUTOR OF THE WILL OF ERNEST F. BEUCK, ALSO KNOWN AS ERNEST BEUCK, DECEASED, TO JOSEPH MARCHANT, DATED MAY 4, 1949 AND RECORDED MAY 5, 1949 IN BOOK 1782 OF OFFICIAL RECORDS, PAGE 349, SANTA CLARA COUNTY RECORDS; THENCE LEAVING SAID POINT OF BEGINNING, AND RUNNING S. 10 DEG. 30' E. ALONG THE WESTERLY LINE OF SAID 15.00 ACRE TRACT 1045.44 FEET; THENCE N. 79 DEG. 30' E. AND PARALLEL WITH THE SAID CENTER LINE OF FOWLER ROAD 250.00 FEET; THENCE N. 10 DEG. 30' W. AND PARALLEL WITH THE WESTERLY LINE OF SAID 15.00 ACRE TRACT 1045.44 FEET TO A POINT IN THE SAID CENTER LINE OF FOWLER ROAD; THENCE S. 79 DEG. 30' W,. ALONG THE SAID CENTER LINE OF FOWLER ROAD 250.00 FEET TO THE POINT OF BEGINNING.

APN: 660-33-014

Arb: 662-10-015.03

PARCEL FOUR:

ALL THAT PROPERTY DESCRIBED AS "PARCEL FOUR, AFTER LOT LINE ADJUSTMENT" IN THAT CERTAIN LOT LINE ADJUSTMENT, FILE NO. AT 00-11-146, RECORDED SEPTEMBER 24, 2001, AS DOCUMENT NO. 15879819, SANTA CLARA COUNTY RECORDS. AND FURTHER DESCRIBED AS FOLLOWS;

BEGINNING AT A STAKE MARKED 2-4 (HEREINAFTER REFERRED TO AS POINT "A") STANDING ON THE SOUTHERLY LINE OF THAT CERTAIN 15 ACRE TRACT DEEDED TO ERNEST BEUCK, BY DEED DATED OCTOBER 23, 1905 AND RECORDED IN BOOK 298 OF DEEDS, PAGE 512, IN THE OFFICE OF THE COUNTY RECORDER OF SANTA CLARA COUNTY, CALIFORNIA, FROM WHICH STAKE THE SOUTHEASTERLY CORNER OF SAID 15 ACRE TRACT BEARS N. 79 1/2° E. 2.31 CHAINS; THENCE ALONG THE SOUTHERLY LINE OF SAID 15 ACRE TRACT AND THE PROLONGATION OF SAID SOUTHERLY LINE N. 79 1/2° E. 5.441 CHAINS TO A STAKE MARKED 4-5; THENCE S. 10 1/2° E. 17.60 CHAINS TO A STAKE MARKED 4-5 STANDING ON THE SOUTHERLY LINE OF THAT 152.21 ACRE TRACT DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874 AND RECORDED IN BOOK 35 OF DEEDS, PAGE 571, IN THE OFFICE OF THE COUNTY RECORDER OF SANTA CLARA COUNTY, CALIFORNIA; THENCE ALONG THE SOUTHERLY LINE OF SAID 152.21 ACRE TRACT, S. 79° 30' W. 6.955 CHAINS TO A STAKE MARKED 3-4 (HEREINAFTER REFERRED TO AS POINT "B") FROM WHICH STAKE THE SOUTHWESTERLY CORNER OF THE SAID 152.21 ACRE TRACT BEARS S. 79° 30' E. 16.00 CHAINS; THENCE ALONG A FENCE OF THE EASTERLY SIDE OF VINEYARD, N. 10° 21' W. 6.22 CHAINS TO A FENCE POST MARKED 2-3-4 (HEREINAFTER REFERRED TO AS POINT "C"); THENCE N. 79° 39' E. 1.494 CHAINS TO A STAKE MARKED 2-4 (HEREINAFTER REFERRED TO AS POINT "D"); THENCE N. 10 1/2° W. 11.38 CHAINS TO THE PLACE OF BEGINNING, AND BEING PART OF THE 152.21 ACRE TRACT DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874 AND RECORDED IN BOOK 33 OF DEEDS, PAGE 571, IN THE OFFICE OF THE COUNTY RECORDER OF SANTA CLARA COUNTY, CALIFORNIA.

AND, EXCEPTING THEREFROM, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "A"; THENCE ALONG THE SOUTHERLY LINE OF SAID 15 ACRE TRACT N. 79° 30' E. 99.36 FEET; THENCE S. 10° 30' 00" E. 342.60 FEET TO A TANGENT CURVE TO THE RIGHT, THENCE ALONG SAID CURVE HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 90° 00' 00", A LENGTH OF 31.42 FEET, THENCE S. 79° 30' 00" W 79.36 FEET, THENCE N. 10° 30' W 362.60 FEET, MORE OR LESS, TO THE POINT OF BEGINNING.

AND, EXCEPTING THEREFROM, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "B"; THENCE N. 10° 21' W. 410.52 FEET TO THE AFOREMENTIONED POINT "C", THENCE N. 79° 39' E. 98.60 FEET TO THE AFOREMENTIONED POINT "D", THENCE N. 10° 30' 00" W. 388.48 FEET; THENCE N. 79° 30' 00" E. 79.36 FEET TO A TANGENT CURVE TO THE LEFT, THENCE ALONG SAID CURVE HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 90° 00' 00", A LENGTH OF 31.42 FEET; THENCE N. 79° 30' 00" E. 60.00 FEET, THENCE S. 10° 30' 00" E. 819.00 FEET, MORE OR LESS, TO THE SOUTHERLY LINE OF SAID 152.21 ACRE TRACT, THENCE ALONG SAID SOUTHERLY LINE S. 79° 30' 00" W. 259.28 FEET TO POINT "B" AND THE POINT OF BEGINNING.

APN: 660-33-025

Arb: 662-10-015.04

PARCEL FIVE:

ALL THAT PROPERTY DESCRIBED AS "PARCEL FIVE, AFTER LOT LINE ADJUSTMENT" IN THAT CERTAIN LOT LINE ADJUSTMENT, FILE NO. AT 00-11-146, RECORDED SEPTEMBER 24, 2001, AS DOCUMENT NO. 15879819, SANTA CLARA COUNTY RECORDS. AND FURTHER DESCRIBED AS FOLLOWS;

BEGINNING AT A STAKE MARKED 1-2 (HEREINAFTER REFERRED TO AS POINT "E") STANDING ON THE SOUTHERLY LINE OF THAT TRACT OF LAND CONTAINING 25 ACRES DEEDED TO MARY VENNUM BY DEED DATED DECEMBER 19, 1905 AND RECORDED IN BOOK 302 OF DEEDS, PAGE 236, FROM WHICH STAKE THE SOUTHWESTERLY CORNER OF SAID 25 ACRE TRACT BEARS S 79° 30'W. 8.81 CHAINS; THENCE LONG THE SOUTHERLY LINE OF SAID 25 ACRE TRACT, AND THE SOUTHERLY LINE OF THAT 15 ACRE TRACT DEEDED TO ERNEST BEUCK BY DEED DATED OCTOBER 23, 1905 AND RECORDED IN BOOK 298 OF DEEDS, PAGE 512, N. 79° 30' E. 8.794 CHAINS TO A STAKE MARKED 2-4 (HEREINAFTER REFERRED TO AS POINT "A") FROM WHICH STAKE THE SOUTHEASTERLY CORNER OF SAID 15 ACRE TRACT BEARS N. 79° 30' E. 2.31 CHAINS; THENCE S. 10° 30'E 11.38 CHAINS TO A STAKE MARKED 2-4 (HEREINAFTER REFERRED TO AS POINT "D"); THENCE S. 79° 39'W. 8.794 CHAINS TO A STAKE 1-2 (HEREINAFTER REFERRED TO AS POINT "F"); THENCE N. 10° 30'W. 11.36 CHAINS TO THE PLACE OF BEGINNING, AND BEING A PART OF THAT 152.21 ACRE TRACT DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874 AND RECORDED IN BOOK 33 OF DEEDS, PAGE 571, AND BEING A PORTION OF THE YERBA BUENA RANCHO.

AND, EXCEPTING THEREFROM, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "D"; THENCE S. 79° 39'W. 500.05 FEET; THENCE N. 10° 30'W. 387.57 FEET, THENCE N. 79° 30' 00" E. 500.05 FEET, THENCE S. 10° 30'E 388.48 FEET, MORE OR LESS, TO THE POINT OF BEGINNING;

AND, EXCEPTING THEREFROM, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "F"; THENCE N. 10° 30' W 387.16 FEET; THENCE N. 79° 30' 00" E. 80.35 FEET; THENCE; S. 10° 30'E 387.57 FEET, MORE OR LESS; THENCE S. 79° 39' W. 80.35 FEET TO THE POINT OF BEGINNING.

AND, IN ADDITION THERETO, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "A", THENCE ALONG THE SOUTHERLY LINE OF SAID 15 ACRE TRACT N. 79° 30' E. 99.36 FEET; THENCE S. 10° 30' 00" E. 342.60 FEET TO A TANGENT CURVE TO THE RIGHT, THENCE ALONG SAID CURVE HAVING A RADIUS OF 20.00 FEET, THROUGH A CENTRAL ANGLE OF 90° 00' 00", A LENGTH OF 31.42 FEET, THENCE S. 79° 30' 00" W 79.36 FEET, THENCE N. 10° 30' W 362.60 FEET, MORE OR LESS, TO THE POINT OF BEGINNING.

AND, IN ADDITION THERETO, THE FOLLOWING AREA:

BEGINNING AT THE AFOREMENTIONED POINT "E"; THENCE LEAVING SAID SOUTHERLY LINE S. 10° 30'E. 362.60 FEET, THENCE S. 79° 30' 00" W. 220.45 FEET, THENCE S. 83° 18' 51" W. 150.33 FEET, THENCE S. 79° 30' 00" W. 211.01 FEET TO THE EAST LINE OF LANDS NOW OR FORMERLY OF FOWLER; THENCE ALONG SAID EASTERLY LINE N. 10° 30'W. 352.60 FEET TO A

4" X 4" STAKE MARKED K-K-E-F (HEREINAFTER REFERRED TO AS POINT "G") STANDING ON THE EASTERLY LINE OF THE LANDS NOW OR FORMERLY OF FOWLER AT THE SOUTHWESTERLY CORNER OF THAT 25 ACRE TRACT DEEDED TO MARY VENNUM BY DEED DATED DECEMBER 19, 1905 AND RECORDED IN BOOK 302 OF DEEDS, PAGE 236; RUNNING THENCE ALONG THE SOUTHERLY LINE OF SAID 25 ACRE TRACT N. 79° 30'E. 581.46 FEET TO THE AFOREMENTIONED POINT "E" AND THE POINT OF BEGINNING.

EXCEPTING THEREFROM SO MUCH THEREOF DESCRIBED AS FOLLOWS:

BEGINNING AT THE AFOREMENTIONED POINT "G"; THENCE ALONG THE SOUTHERLY LINE OF SAID 25 ACRE TRACT, N. 79° 30' E. 148 FEET TO AN IRON PIPE; THENCE S. 10° 30' E. 148 FEET TO AN IRON PIPE; THENCE S. 79° 30' W. 148 FEET TO AN IRON PIPE ON THE EASTERLY LINE OF THE LANDS NOW OR FORMERLY OF FOWLER; THENCE ALONG SAID EASTERLY LINE N. 10° 30' W. 148 FEET TO THE POINT OF BEGINNING.

APN: 660-33-026

Arb: 662-10-015.06; 015.05.02; & 015.04.02

PARCEL SEVEN:

BEGINNING AT A 4" X 4" STAKE MARKED K.K.E.F. STANDING ON THE EASTERLY LINE OF LANDS NOW OR FORMERLY OF FOWLER AT THE SOUTHWESTERLY CORNER OF THAT 25 ACRE TRACT DEEDED TO MARY VENNUM BY DEED DATED DECEMBER 19, 1905, RECORDED IN BOOK 302 OF DEEDS, PAGE 236; THENCE ALONG THE SOUTHERLY LINE OF SAID 25 ACRE TRACT N 79 DEG. 30' E. 148 FEET TO AN IRON PIPE; THENCE S. 10 DEG. 30' E. 148 FEET TO AN IRON PIPE; THENCE S. 79 DEG. 30' W. 148 FEET TO AN IRON PIPE ON THE EASTERLY LINE OF THE LANDS NOW OR FORMERLY OF FOWLER; THENCE ALONG SAID EASTERLY LINE N. 10 DEG. 30' W. 148 FEET TO THE POINT OF BEGINNING.

BEING A PORTION OF THE YERBA BUENA RANCHO AND PART OF THE CERTAIN 152.21 ACRE TRACT OF LAND DEEDED TO PATRICK KALLEHAR BY DEED DATED JULY 25, 1874, RECORDED IN BOOK 33 OF DEEDS, PAGE 571.

APN: 660-33-001

Arb: 662-10-002

PARCEL EIGHT:

BEGINNING AT AN IRON PIPE IN THE CENTER LINE OF FOWLER ROAD, DISTANT THEREON NORTH 79 DEG. 30' EAST 821.70 FEET FROM THE NORTHWESTERLY CORNER OF THAT CERTAIN 50 ACRE TRACT OF LAND DESCRIBED IN THE DEED FROM JEREMIAH KALLIHAR AND PATRICK KALLIHAR TO MARGARET BOLSTER, DATED JULY 25, 1874, RECORDED JULY 25, 1874 IN DEEDS, AT PAGE 464, SANTA CLARA COUNTY RECORDS, FROM WHICH POINT OF BEGINNING A 2 1/2 INCH IRON PIPE SET ON THE SOUTHERLY LINE OF FOWLER ROAD, BEARS SOUTH 10 DEG. 30' EAST 20.00 FEET TO SAID POINT OF BEGINNING, ALSO BEING THE NORTHWESTERLY CORNER OF THAT CERTAIN 15.00 ACRE TRACT OF LAND DESCRIBED IN THE DEED FROM HENRY BEUCK, AS EXECUTOR OF THE WILL OF ERNEST F. BEUCK, ALSO KNOWN AS ERNST BEUCK, DECEASED, TO JOSEPH MARCHANT, DATED MAY 4, 1949, RECORDED MAY 5, 1949 IN BOOK 1782 OF OFFICIAL RECORDS, AT PAGE 349, SANTA CLARA COUNTY RECORDS; THENCE LEAVING SAID POINT OF BEGINNING AND RUNNING SOUTH 10 DEG. 30' EAST, ALONG THE WESTERLY LINE OF SAID 15.00 ACRE TRACT, 1045.44 FEET; RUNNING THENCE NORTH 79 DEG. 30' EAST AND PARALLEL WITH THE SAID CENTER LINE OF FOWLER ROAD, 250.00 FEET;

RUNNING THENCE NORTH 10 DEG. 30' WEST AND PARALLEL WITH THE WESTERLY LINE OF SAID 15.00 ACRE TRACT, 1045.44 FEET TO A POINT IN SAID CENTER LINE OF FOWLER ROAD; RUNNING THENCE SOUTH 79 DEG. 30' WEST, ALONG THE SAID CENTER LINE OF FOWLER ROAD, 250.00 FEET TO THE POINT OF BEGINNING.

APN: 660-33-011

Arb: 662-10-004.01

PARCEL NINE:

BEGINNING AT AN IRON PIPE IN THE CENTER OF THE FOWLER ROAD AT THE NORTHEAST CORNER OF THE LANDS FORMERLY OF A. J. FOWLER; AND RUNNING THENCE ALONG THE CENTER OF SAID ROAD NORTH 79 1/2 DEG. EAST 12.45 CHAINS TO AN IRON PIPE; THENCE SOUTH 10 1/2 DEG. EAST 20.08 CHAINS TO AN IRON PIPE ON THE LINE BETWEEN LANDS FORMERLY OF MRS. MARY VENNUM AND THOSE FORMERLY OF P. KELLEHAR; THENCE SOUTH 79 1/2 DEG. WEST 12.45 CHAINS TO A STAKE IN THE CORNER OF LANDS FORMERLY OF P. KELEHAR, A. J. FOWLER AND MRS. MARY VENNUM; THENCE ALONG THE LINE BETWEEN LANDS FORMERLY OF VENNUM AND FOWLER, NORTH 10 1/2 DEG. WEST 20.08 CHAINS TO THE PLACE OF BEGINNING.

APN: 660-33-002

Arb: 662-10-001

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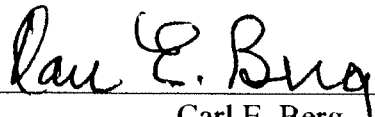
VERIFICATION

I have read the foregoing PETITION FOR WRIT OF MANDATE AND COMPLAINT and know its contents.

I am managing member of plaintiff and petitioner Berg & Berg Enterprises, LLC. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.

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

Executed on August 15th, 2007, at Cupertino, California.



Carl E. Berg