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**VIA E-MAIL AND OVERNIGHT MAIL**  
**jlindsay@saratoga.ca.us**

James Lindsay  
City Manager  
City of Saratoga  
13777 Fruitvale Avenue  
Saratoga, CA 95070

Re: Quito Village; Application of Skilled and Trained Workforce Requirements

Dear Mr. Lindsay:

We represent Pulte Home Company and are following up with additional information of why skilled and trained workforce obligations of SB 35 are not applicable to the Quito Village project ("Project"). As discussed below, the skilled and trained workforce requirements of SB 35 are not imposed on projects such as the Project which are located within a jurisdiction in a coastal or bay county unless the jurisdiction's population is 225,000 or more, which is not the case here.

As an initial summary, Section 65913.4(a)(9) of the Government Code provides that a development resulting in a subdivision qualifies under SB 35 so long as the development is consistent with all objective subdivision standards and either the development has received or will receive low-income housing tax credits, or "the development is subject to the requirement that prevailing wages be paid, and a skilled and trained workforce used, *pursuant to paragraph (8).*"

The reference to "paragraph (8)" is to Section 65913.4(a)(8), which governs the applicability of both prevailing wages as specified in paragraph (8)(A), and a skilled and trained workforce as specified in paragraph (8)(B)). Relevant here, paragraph (8)(B) specifies that a skilled and trained workforce is required only in certain circumstances based on the date of the application's approval, the development's residential unit count, and the population of the jurisdiction to which the application was submitted.

As discussed below, when these provisions are read together in the context of a development resulting in a subdivision (such as the Project), the language "pursuant to paragraph (8)" must mean the *entirety* of paragraph (8) applies, including those provisions

creating exceptions from the skilled and trained workforce requirements for developments that meet certain criteria.

### **Statutory Interpretation**

Section 65913.4(a)(9)(B) of the Government Code specifies that a development involving the subdivision of a parcel may qualify under SB 35 if the development is consistent with all objective subdivision standards in the local subdivision ordinance and either the development is subject to financing or funding by means of low-income housing tax credits or: **“The development is subject to the requirement that prevailing wages be paid, and a skilled and trained workforce used, pursuant to paragraph (8).”**

The clause **“pursuant to paragraph (8)”** is a reference to Section 65913.4(a)(8) of the Government Code. This section includes the provisions requiring a skilled and trained workforce under certain circumstances, such as those circumstances identified in Section 65913.4(a)(8)(B)(i)(I), *i.e.*, when a development application is approved between January 1, 2018 and December 31, 2021, the development consists of 75 or more units with a residential component that is not 100 percent subsidized affordable housing, ***and will be located within a jurisdiction located in a coastal or bay county with a population of 225,000 or more.*** The SB 35 Guidelines make clear that the population number is the population of the “Locality to which Development Submitted pursuant to the last Centennial Census,” *i.e.*, here, the City of Saratoga.

The skilled and trained workforce requirement in **paragraph (9)** relative to the use of a subdivision map must be read in the context of **paragraph (8)**, which specifies those instances when the use of a skilled and trained workforce is required. Read together, paragraphs (8) and (9) make clear that the Project is not required to use a skilled and trained workforce even though the Project includes a subdivision map because the City of Saratoga’s population does not exceed 225,000.

Put simply, the language “pursuant to paragraph (8)” means the ***entirety*** of paragraph (8), including the exceptions found within paragraph (8), and not simply those portions of paragraph (8) that specify a skilled and trained workforce is required under certain circumstances. To read this language any other way would lead to absurd results because it suggests local governments are allowed to “cherry pick” provisions in paragraph (8) to impose upon a project. It also makes the exception provisions surplusage, and according to well established black letter law, “A construction making some words surplusage is to be avoided.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1387 (1987).)

Other provisions in SB 35 support the view that “pursuant to paragraph (8)” means the entirety of paragraph (8), including the exceptions found within paragraph (8). For example, Section 65913.4(a)(9)(A), which governs developments involving a subdivision that receives tax credits, specifies that the development must be subject to the requirement that prevailing wages be paid “pursuant to subparagraph (A) of paragraph (8).” This further specification of a

subparagraph within paragraph (8) indicates that the California Legislature was cognizant of its ability to specify portions of paragraph (8) that may or may not apply in a given circumstance. Here, the “pursuant to paragraph (8) language” does not specify any particular portion of paragraph (8) that applies and so the reasonable interpretation is that the *entirety* of paragraph (8) applies.

Moreover, if the “pursuant to paragraph (8)” clause was applied to ignore the limitations on application of the skilled in workforce requirement, it would be equally logical to ignore the subdivisions relating to the prevailing wage requirement in Section 65913.4(a)(8)(A), *i.e.*, the provisions requiring the maintenance of certified payroll records, allowing for State enforcement of the prevailing wage requirement, etc. However, no one is suggesting that the “pursuant to paragraph (8)” language could be applied so that the only prevailing wage requirement is simply the payment of the prevailing wage rate. The only logical outcome is that all of Section 65913.4(a)(8)(A) and its subdivisions apply. And so too, the only logical conclusion is that all of Section 65913.4(a)(8)(B) and its subdivisions apply, including the limitation that removes the skilled and trained workforce requirement for the project.

Notably, the reference to analogous provisions in the SB 35 Guidelines do not include the clause “pursuant to paragraph (8).” This is of limited relevance, however, because the SB 35 statute (which is Section 65913.4 of the Government Code) trumps HCD’s SB 35 Guidelines, and the SB 35 statute (not the SB 35 Guidelines) serves as the controlling authority on this issue.

### **Case Law Interpreting “Pursuant To”**

A significant body of case law interpreting the phrase “pursuant to” exists and is consistent with the view that “pursuant to” means “in accordance with” or “in conformity to,” in other words, exactly as prescribed elsewhere. The following examples reflect the views of courts throughout the United States, including the United States Supreme Court:

- The phrase “pursuant to” is defined as “acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.” *Old Colony Co. v. Commissioner of Internal Revenue*, 301 U.S. 379, 383 (1937).
- “The term ‘pursuant to’ is a prepositional phrase defined as: in the course of carrying out; in conformance to or in agreement with; or according to a standard.” *World Pub. Co. v. White*, 32 P.3d 835, 842 n.21 (Okla. 2001).
- “‘Pursuant to’ is a preposition, defined as: ‘in the course of carrying out: in conformance to or in agreement with: according to (*pursuant to* the proposals of this note) (acted *pursuant to* their agreement).” *State ex rel. Polar Ware Co. v. Muuss*, 18 Wis.2d 521, 526 (Wis. 1963) (emphasis in original).
- “‘Pursuant to’ means ‘in the course of carrying out: in conformance to or agreement with: according to.’” *Knowles v. Holly*, 82 Wash.2d 694, 702 (Wash. 1973).

- “We hold that ‘pursuant to’ [is] ‘equivalent to “in conformity with” and imply[ing] that what is done is in accordance with an instruction or direction.” *Cheyenne Newspapers, Inc. v. City of Cheyenne*, 386 P.3d 329, 335 (Wyo. 2016).
- “The expressions ‘pursuant to’ or ‘in pursuance of’ have a restrictive interpretation. They have been regarded as equivalent to ‘in conformity with’ and imply that what is done is in accordance with an instruction or direction.” *Fabianich v. Hart*, 31 A.2d 881, 883 (D.C. Mun. App. Ct. 1943).

In light of this case law, a court interpreting the phrase “pursuant to paragraph (8)” in Section 65913.4(a)(9)(B) of SB 35 should read that phrase to mean “in accordance with” or “in conformity with” *all* of the provisions in paragraph (8), not merely certain *portions* of paragraph (8).

### **Policy Considerations**

Although no legislative history of SB 35 appears to address these issues, we can reasonably speculate as to the Legislature’s rationale for identifying population limits in connection with the skilled and trained workforce requirements in SB 35, and this rationale demonstrates why the population exceptions established in paragraph (8) should apply regardless of whether a development seeks to subdivide land as contemplated in paragraph (9).

Clearly, the limited application of the skilled and trained workforce requirement is tied to the size of the jurisdiction. Two explanations seem likely. First, smaller jurisdictions may not have been considered to have a sufficient workforce population to support the skilled and trained workforce requirement.

An additional explanation is that the skilled and trained workforce requirements (see, *e.g.*, Section 65913.4(a)(9)(B)(iii), Public Contract Code sections 2600, et seq.) impose oversight obligations on the public entity and awarding body. These obligations would demand local jurisdictions to commit resources and bear the costs of oversight and enforcement. Thus, exempting smaller jurisdictions from the skilled and trained workforce requirements is logical, so as not to impose these added costs and burdens on the jurisdictions least able to bear them. This would also explain why the population threshold for coastal or bay area communities is smaller than inland jurisdictions, *i.e.*, because smaller coastal and bay area jurisdictions are likely to have larger budgets (due to property values) and be more on par economically with larger non-coastal and bay area jurisdictions.

Importantly, either of the above reasons for imposing jurisdictional limits to the skilled and trained workforce requirement would exist regardless of whether the development involves the subdivision of a parcel. It would not make sense to impose on smaller jurisdictions the skilled and trained workforce requirement simply because the project involves the subdivision of a parcel. The only logical reading is that the “pursuant to paragraph (8)” clause was intended to

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carry through the exemption for smaller jurisdictions from the skilled and trained workforce obligation.

### **Additional Considerations**

Although we believe the foregoing demonstrates clearly that SB 35 never imposed a skilled and trained workforce requirement on the Project, several additional considerations support allowing the Project to proceed as intended under SB 35 without a skilled and trained workforce requirement. First, this same conclusion was reached by the City of Burbank in 2022 with respect to Burbank's only SB 35 project. That conclusion was based on the same analysis as above, resulting in the conclusion that Section 65913.4(a)(9)(B) allows for an exception pursuant to Section 65913.4(a)(8), and that specifically, the exception provides that the requirement that a skilled and trained workforce be used did not apply to the project at issue because the City of Burbank's population as determined under the last Centennial Census is not 225,000 or more.

Moreover, the City is likely aware that currently pending before the Legislature is Senate Bill 423, which in its current form would remove entirely the skilled and trained workforce requirements in Section 65913.4. Whether or not enacted, SB 423 reflects the reality that skilled and trained workforce requirements were only of limited applicability under SB 35 as originally enacted.

For all of the foregoing reasons, we believe it clear that the Project is not subject to statutory skilled and trained workforce requirements under SB 35.

Sincerely,

Cox, Castle & Nicholson LLP



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cc: Debbie Pedro, AICP, Community Development Director  
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