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INITIATIVE MEASURE TITLE AND SUMMARY

CITY OF SIERRA MADRE  
CITY CLERK'S OFFICE

PREPARED BY CITY ATTORNEY  
UNDER ELECTIONS CODE § 9203

BALLOT TITLE

Petition for Initiative Measure to Change the General Plan Land Use Designation from "Institutional" to "Hillside" and the Zoning Designation from "Institutional" to "Hillside Management" for the Mater Dolorosa Property

INITIATIVE SUMMARY

This initiative amends the allowable land use for the parcels owned by The Congregation of Passion, Mater Dolorosa Community. Specifically, the initiative changes the parcels' General Plan land use designation from "Institutional" to "Hillside" and zoning designation from "Institutional" to "Hillside Management."


The Congregation of the Passion, Mater Dolorosa Community, is a California charitable corporation that owns the parcels located at 700 North Sunnyside Avenue in Sierra Madre, California (APN: 5761-002-008) ("Mater Dolorosa Property"). The initiative does not amend the land use designation for any other property owner in the City.

Currently, the Mater Dolorosa Property is zoned as Institutional. Residential uses are limited in the Institutional zone. Single-family homes are prohibited, whereas communal residential facilities are allowed with a conditional use permit and master plan amendment approved by the City's Planning Commission after a public hearing.

Under the initiative, the Mater Dolorosa Property would be zoned Hillside Management. Any subdivisions of the Mater Dolorosa Property created after January 25, 2022, would also be zoned Hillside Management. Residential uses are permitted in the Hillside Management Zone. Under state law, duplexes, single-family homes, and accessory dwelling units are allowed with a permit approved ministerially and without a public hearing by the Director of Planning and Community Preservation. The existing Mater Dolorosa Passionist Retreat Center would be allowed to continue operating as a nonconforming use.

If you sign this petition, you will help place this initiative measure on the ballot for election by the qualified voters of the City of Sierra Madre.

If you do not sign this petition, you will not help place this initiative measure on the ballot.

  
\_\_\_\_\_  
Aleks R. Giragosian, City Attorney

2/9/2022  
\_\_\_\_\_  
Date

**COLANTUONO**  
**HIGHSMITH** **ATTACHMENT**  
**WHATLEY, PC**

ALEKS R. GIRAGOSIAN | (213) 542-5734 | AGIRAGOSIAN@CHWLAW.US

**MEMORANDUM**

TO: Mayor and Councilmembers, FILE NO: 49011.0009  
City of Sierra Madre

FROM: Aleks R. Giragosian, City Attorney DATE: July 8, 2022

CC: Jose Reynoso, City Manager  
Laura Aguilar, City Clerk  
Vincent Gonzalez, Director of Planning and Community Preservation

RE: An Analysis of the Initiative's Impacts, a Comparison with the Meadows Project, and an Evaluation of Its Legality Under Elections Code Section 9212

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**EXECUTIVE SUMMARY**

At the City's Council's request, the City Attorney's Office prepared this memorandum under Elections Code sections 9212 and 9215 to analyze the impacts of the Mater Dolorosa Hillside Zoning Initiative ("Initiative"). This memorandum is composed of three parts:

1. Part one analyzes the Initiative's impacts on land use and concludes:
  - a. The Initiative amends the General Plan Land Use Map and Zoning Map designations for the Mater Dolorosa Property from Institutional to Hillside/Hillside Management; and
  - b. The Initiative likely increases the residential development potential of the Mater Dolorosa Property; and
  - c. The Initiative converts the Retreat Center and the Stations of the Cross at the Mater Dolorosa Property to non-conforming uses; and
  - d. The Initiative is consistent with the General Plan; and

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- e. The Initiative's impacts on the City's Regional Housing Needs Allocation are unknown.
2. Part two compares the Initiative to the Meadows at Bailey Canyon Project and focuses on the following:
    - a. Residential development potential;
    - b. Public facilities fees;
    - c. Other types of financial and in-kind benefits; and
    - d. Degree of discretionary review.
  3. Part three evaluates the Initiative's opponents' legal arguments and concludes:
    - a. The Initiative may be vulnerable to a claim under the Religious Land Use and Institutionalized Persons Act alleging unlawful discrimination and a substantial burden on the Passionists' exercise of religion;
    - b. The Initiative may not be vulnerable to a claim under the California Constitution alleging an unlawful form of initiative;
    - c. The Initiative may not be vulnerable to a claim under the California Constitution alleging an unlawful exercise of police power; and
    - d. The Initiative may not be vulnerable to a claim under Senate Bill No. 330 alleging an unlawful reduction in intensity of use.

This memorandum will be presented at the City Council's July 12th regular meeting. Following the presentation, the City Council will need to determine whether to:

1. Adopt the ordinance within 10 days; or
2. Submit the ordinance to the voters.<sup>1</sup>

#### **BACKGROUND**

On January 25, 2022, three proponents submitted their intent to circulate an initiative petition titled "Mater Dolorosa Hillside Zoning Initiative" ("Initiative"). The Initiative applies to property owned by the Congregation of the Passion, Mater Dolorosa Community, a religious, non-profit organization ("Passionists"). The property is located

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<sup>1</sup> Elec. Code, § 9215, subd. (c).

at 700 North Sunnyside Avenue in Sierra Madre, California, Assessor Parcel's Number 5761-002-008 ("Mater Dolorosa Property").

The Mater Dolorosa Property is the subject of a pending development application submitted by the Passionists titled "The Meadows at Bailey Canyon" ("Meadows Project"). The Passionists have contracted with New Urban West, Inc. ("Developer") to develop the Meadows Project. The Passionists and the Developer are opposed to the Initiative and have threatened to sue to prevent its enforcement.

On June 14, 2022, the City Clerk certified that the petition received the requisite number of valid signatures. The City Council directed the City Attorney to prepare a report on the impacts of the Initiative within 30 days. This memorandum is prepared in response to the City Council's request and will be presented at the July 12, 2022 City Council Regular Meeting.

#### **THE INITIATIVE'S IMPACT ON LAND USE**

- a. The Initiative Amends the General Plan Land Use Map and Zoning Map

Development in the City of Sierra Madre is governed by the General Plan and Zoning Code. The General Plan is a comprehensive, long-term plan for development in the City.<sup>2</sup> The Zoning Code is a detailed set of land use regulations that must be consistent with the General Plan.<sup>3</sup>

Chapter One of the General Plan establishes land use designations for each parcel in the City. One such land use designation is "Institutional", denoted by the letter "I", which is intended to provide "for the development of private institutional uses in areas where such uses currently exist and ensure that they are compatible with and complement adjacent land uses."<sup>4</sup> Another land use designation is "Residential Low Density – Hillside", denoted by the letter "H", which was created for the purpose of:

- "Preserving the hillside through the application of standards and guidelines that direct and encourage development that is sensitive to the unique characteristics of the hillsides, which include, but are not limited to, slopes, land forms,

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<sup>2</sup> Gov. Code, § 65300.

<sup>3</sup> Gov. Code, § 65860.

<sup>4</sup> Sierra Madre General Plan, p. 71.

vegetation, wildlife habitat and scenic quality; accordingly, innovation in the design of buildings and structures is encouraged in order to preserve hillside areas;”<sup>5</sup>

- “Minimizing hazards in the hillside;”<sup>6</sup>
- “Protecting views to and from hillside areas in order to maintain the image and identity of the City as a village of the foothills;”<sup>7</sup> and
- “Incorporating measures to promote sustainability in Hillside neighborhoods.”<sup>8</sup>

The General Plan land use designations are reflected in a General Plan Land Use Map.

The Zoning Code is located in Title 17 of the Sierra Madre Municipal Code. The Zoning Code establishes land use regulations specific to each zone. Like the General Plan, the Zoning Code has zoning designations for each parcel in the City, which is reflected in the Zoning Map. Chapter 17.38 governs the Institutional Zone. Chapter 17.52 governs the Hillside Management Zone.

The Mater Dolorosa Property has a General Plan land use designation of “Institutional” and a zoning designation of “Institutional.” Section 3 of the Initiative proposes to amend the Mater Dolorosa Property’s General Plan land use designation to Hillside. Section 4 of the Initiative proposes to amend the Mater Dolorosa Property’s Zoning designation to Hillside Management.

b. The Initiative Likely Increases the Residential Development Potential of the Mater Dolorosa Property

i. Residential Development on Properties Designated Institutional is Limited

The General Plan and Zoning Code contemplate a very limited set of residential uses for properties designated Institutional. The General Plan encourages, “the re-use of existing institutional properties as appropriate for the following uses: ... c. Housing for institutional uses such as dormitories.”<sup>9</sup> Similarly, the Zoning Code conditionally

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<sup>5</sup> Sierra Madre General Plan, Objective L15, p. 37.

<sup>6</sup> Sierra Madre General Plan, Objective L16, p. 38.

<sup>7</sup> Sierra Madre General Plan, Objective L17, p. 39.

<sup>8</sup> Sierra Madre General Plan, Objective L18, p. 39.

<sup>9</sup> General Plan, Policy L41.3, p. 73.

permits the development of "Housing for institutional uses such as dormitories."<sup>10</sup> Thus, residential uses may be permitted at Institutional sites as an auxiliary use in furtherance of the primary institutional use. Single-family homes are generally inappropriate on sites designated Institutional.

In contrast, the General Plan and Zoning Code conditionally permit the development of single-family residential homes on a property designated Hillside/Hillside Management. The General Plan defines the Hillside Management Zone as a "Single-family residential zone that includes properties characterized by hillside topography and subject to the requirements of the Hillside Management Zone Ordinance."<sup>11</sup> The Zoning Code conditionally permits "Any primary or accessory use permitted in the R-1 one-family residential zone."<sup>12</sup>

ii. Base Density Calculations Are Reflected in the Master Plan and Zoning Code

Density is generally calculated by dividing the number of residential units per lot or per acre. The maximum density at an Institutional site is governed by its master plan.<sup>13</sup> Thus, the maximum density is determined on a case-by-case basis and may exceed the maximum density allowable in adjacent commercial and residential areas.<sup>14</sup>

Many Institutional sites in Sierra Madre do not have a master plan because they were established before the adoption of the requirement. The Mater Dolorosa Property predates the General Plan and does not have a master plan. If housing for an institutional use is proposed in the future, the Mater Dolorosa Property would need to adopt a master plan that will include density standards. Until then, there are no density standards governing the Mater Dolorosa Property.

Under the General Plan, the maximum density in the Hillside is limited to 1 dwelling unit per lot.<sup>15</sup> The General Plan also states, "In subdividing larger parcels, determine development density based on a calculation that uses slope as one of the primary factors, which means that the steeper the slope, the larger the minimum lot

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<sup>10</sup> Sierra Madre Municipal Code Section 17.38.030(A)(9).

<sup>11</sup> General Plan, Appendix, 1. Glossary.

<sup>12</sup> Sierra Madre Municipal Code Section 17.52.070(C)(1).

<sup>13</sup> General Plan, Figure 1-2, p. 26.

<sup>14</sup> General Plan Policy L41.2, p. 72.

<sup>15</sup> General Plan, Figure 1-2, p. 26.

size.”<sup>16</sup> The Zoning Code seeks to implement the General Plan by establishing slope categories.

Slope Categories	Grade of Natural Slope
1	0 to 14.9%
2	15% to 19.9%
3	20% to 24.9%
4	25% or greater

The Mater Dolorosa Property measures 44.89 acres, of which approximately 35 acres are located within Slope Category 1. The remainder of the parcel is too steep to be developable. Of the 35 acres, approximately 17 are undeveloped. These 17 acres are also the site of the proposed Meadows Project.

The density calculation is derived by determining the number of lots based on slope categories.

Slope Category	Development Limit Factor (unit/acre) *	Lot Area (acres) =	Maximum # of Lots Allowed (Subject to 2-acre Minimum)
1	2.90		
2	2.00		
3	0.50		
4	0.01		

Based on 35 acres of developable land with a Slope Category of 1, the Mater Dolorosa Property could be subdivided into 17 lots.<sup>17</sup> Since the General Plan only allows one unit per lot, the maximum base density at the Mater Dolorosa Property would be 17 units.

<sup>16</sup> General Plan Policy L15.1, p. 37.

<sup>17</sup> Using the calculation in Table 2 yields 101.5 lots (2.90 development limit factor \* 35 acres = 101.5). But the calculation is subject to a 2-acre minimum. Therefore, the true base density would be 17.5, rounded down to 17 (35 acres/2-acre minimum)

If the base density calculation is limited to the undeveloped 17 acres, then with a Slope Category of 1, the Mater Dolorosa Property could be subdivided into 8 lots.<sup>18</sup> Since the General Plan only allows one unit per parcel, the maximum base density at the Mater Dolorosa Property would be 8 units.

Acres	Slope	Lots	Units
35	1	17	17
17	1	8	8

iii. State Law Permits Densities Beyond the Limits in the General Plan and Zoning Code

The State Legislature adopted three laws that preempt local density limits:

- Accessory Dwelling Unit (“ADU”) law;<sup>19</sup>
- Junior Accessory Dwelling Unit (“JADU”) law;<sup>20</sup> and
- Senate Bill No. 9 (“SB 9”).<sup>21</sup>

The ADU and JADU law are codified in Chapter 17.22, titled “Second Units,” of the Sierra Madre Municipal Code. SB 9 is codified in Chapter 16.18, titled “Urban Lot Splits”, and Chapter 17.59, titled “Ministerial Design Review Permits,” of the Sierra Madre Municipal Code.

The ADU and JADU laws apply to “areas zoned to allow single-family or multifamily dwelling residential use.”<sup>22</sup> SB 9 applies “within a single-family residential zone ... .”<sup>23</sup> As noted above, single-family or multifamily residential uses are not permitted on a site designated Institutional and may only be conditionally permitted as

<sup>18</sup> Using the calculation in Table 2 yields 49.3 lots (2.90 development limit factor \* 17 acres = 49.3). But the calculation is subject to a 2-acre minimum. Therefore, the true base density would be 8.5, rounded down to 8 (17 acres/2-acre minimum)

<sup>19</sup> Gov. Code, § 65852.2.

<sup>20</sup> Gov. Code, § 65852.22.

<sup>21</sup> Gov. Code, §§ 65852.21, 66411.7.

<sup>22</sup> Gov. Code, § 65852.2, subd. (a)(1).

<sup>23</sup> Gov. Code, § 65852.21, subd. (a).



a use auxiliary to the primary institutional use. In contrast, a site designated Hillside and Hillside Management does contemplate single-family residential use as its primary use. Therefore, through a combination of ADUs, JADUs, and SB 9 units, an applicant may exceed base density on a parcel designated Hillside/Hillside Management.

Assuming the existing Retreat Center were demolished and the entire 35 acres were developed, the 8 lots used to calculate base density may be further subdivided under SB 9 into 34 separate lots. An applicant may then construct up to two residential units on each of the 34 lots through duplexes or some combination of single-family homes and ADUs/JADUs. Thus, the maximum state-permitted density under SB 9 for the Mater Dolorosa Property is 68 units.

In the alternative, if the existing Retreat Center remains intact and only the 17 acres are developed, the 16 lots used to calculate base density may be subdivided into 16 separate lots. An applicant may then construct up to two residential units on each of the 16 lots through duplexes or some combination of single-family homes and ADUs/JADUs. Thus, the maximum state-permitted density under SB 9 for the Mater Dolorosa Property would be 32 units.

Acres	Lots Pre-SB 9 Subdivision	Lots Post-SB 9 Subdivision	Units
35	17	34	68
17	8	16	32

iv. Gross Floor Area Calculations Are Reflected in the Master Plan and Zoning Code

Generally, the gross floor area is the total property square footage, as measured between the exterior walls of a building. The floor area standards are governed by the Zoning Code. For a property designated Institutional, the gross floor area would be set in the master plan. As noted above, the Mater Dolorosa Property does not have a master plan. As a result, the Mater Dolorosa Property does not have a gross floor area standard.

Under the Hillside Management Zone:

The maximum permissible gross floor area of all structures on a R-H zoned lot shall be computed as follows, up to a maximum of six thousand five hundred square feet:

For lots of less than six thousand square feet: one thousand eight hundred square feet;

For lots between six thousand and eleven thousand square feet: thirty percent of the lot area;

For lots of more than eleven thousand square feet, three thousand three hundred square feet plus ten percent of the lot area in excess of eleven thousand square feet.<sup>24</sup>

Under the base density calculation, since the average lot size in the Mater Dolorosa Property will be 2 acres or approximately 87,000 square feet, the maximum gross floor area will be set at the 6,500 square foot cap.<sup>25</sup>

Under the City's ordinance implementing SB 9, the total floor area standards are governed by total floor area standards in the underlying zone.<sup>26</sup> Therefore, the Hillside Management Zone's standards quoted above apply. Since under the urban lot split provision of SB 9 the average lot size will be around 1 acre or approximately 44,000 square feet, the maximum gross floor area will also be set at the 6,500 square foot cap.<sup>27</sup>

Therefore, under both the maximum base density and state-permitted density, a developer can build homes of up to 6,500 square feet on the Mater Dolorosa Property if it is designated Hillside/Hillside Management.

- c. The Initiative Converts the Retreat Center and the Stations of the Cross to a Non-Conforming Use

A non-conforming use exists when the specific land use was lawfully established in its time, but was made unlawful through the passage of a General Plan or Zoning Code amendment. For example, if a hotel was constructed in the R-1 One-Family Residential Zone before the adoption of the Zoning Code, that hotel would be a non-

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<sup>24</sup> SMMC § 17.52.120(A)(5).

<sup>25</sup>  $87,000 - 11,000 = 76,000$ ;  $3,300 + (0.1)(76,000) = 10,900$ , but capped at 6,500 square feet.

<sup>26</sup> SMMC § 17.59.050(F).

<sup>27</sup>  $44,000 - 11,000 = 33,000$ ;  $3,300 + (0.1)(33,000) = 6,600$ , but capped at 6,500 square feet.

conforming use today because the R-1 One-Family Residential Zone does not permit hotels. A non-conforming structure exists when a structure was lawfully constructed in its time, but was made unlawful through the passage of a General Plan or Zoning Code amendment. For example, if a 10,000 square foot single family home was constructed in the R-1 One-Family Residential Zone before the adoption of the Zoning Code, that home would be a non-conforming structure because although single-family homes are a permitted use, the size of the home exceeds current development standards under the Zoning Code. The development of non-conforming uses and structures are governed by Sierra Madre Municipal Code Chapter 17.56, titled "Non-conforming Uses and Structures."

Under the Initiative, the Retreat Center and the Stations of the Cross would be non-conforming uses within the Hillside Management Zone.<sup>28</sup> As a conforming use, the Retreat Center may be maintained and continued, "provided there is no increase or enlargement of the area, space, or volume occupied or devoted to the non-conforming use, except as allowed by this chapter."<sup>29</sup> Therefore, the Passionists may maintain and repair the Retreat Center as needed under the Initiative.

The Sierra Madre Municipal Code places the following restrictions on non-conforming uses:

1. A non-conforming use may not be altered or enlarged unless a minor conditional use permit is first obtained, in accordance with Chapter 17.60.
2. The use shall comply with the performance standards and applicable development standards for the subject zoning district.
3. There shall be no expansion of a non-conforming use onto an additional lot, adjacent or otherwise.<sup>30</sup>

All three elements above must be satisfied for a non-conforming use to be altered or enlarged. The ambiguity in the code is whether a minor conditional use permit can be obtained to alter a prohibited use in addition to a conditionally permitted. The standards

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<sup>28</sup> They are not non-conforming structures because neither a retreat center nor religious depictions are permitted uses in the Hillside Management Zone.

<sup>29</sup> MMC § 17.56.030(A)(1).

<sup>30</sup> SMMC § 17.56.080(F).

in the Hillside Management Ordinance and Variance and Discretionary Permits Ordinance are instructive.

Each zoning district states which uses are permitted, conditionally permitted, and prohibited. If a zoning district is silent as to prohibited uses, it is considered prohibited if it is not expressly permitted. For example, Sierra Madre Municipal Code Section 17.52.070 lists which uses are permitted (Subsection A), conditionally permitted (Subsection B & C), and prohibited (Subsection D) in the Hillside Management Zone. Since a retreat center and religious depictions are not listed as permitted or conditionally permitted uses, they are prohibited in the Hillside Management Zone.

Chapter 17.60, titled “Variances and Discretionary Permits,” includes the requirements for granting a minor conditional use permit. Section 17.60.055, titled “Minor Conditional Use Permit,” states:

Uses, activities and development standards listed in sections of this title as permitted subject to the granting of a minor conditional use permit may be approved by the director of development services, without a public hearing, pursuant to the following provisions:

...

D. Determination. Upon consideration of any comments received, the director of development services may approve, conditionally approve, or deny the proposed minor conditional use permit pursuant to the following findings:

1. That the proposed request will not be detrimental, or otherwise be inconsistent with the character of its neighborhood;

...

5. That the proposed request will be arranged, designed, constructed, operated and/or maintained so as to be compatible with the intended character of the surrounding area and shall not change the essential character of the surrounding area from that intended in the general plan.

The quoted language clarifies that a minor conditional use permit can only be granted where the director of development services<sup>31</sup> makes each of the five findings required to grant the permit. Finding 1 requires that the use not “be inconsistent with the character of the neighborhood.” Finding 5 requires the use “to be compatible with the

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<sup>31</sup> Currently referred to as the Director of Planning and Community Preservation

intended character of the surrounding area and shall not change the essential character of the surrounding area from that intended in the general plan.” Findings 1 and 5 can be made with respect to a conditionally permitted use, but cannot be made with respect to a prohibited use. Therefore, a minor conditional use permit cannot be granted to alter or enlarge a non-conforming use that is prohibited in the underlying zoning district.

With respect to the Retreat Center and the Stations of the Cross, the Passionists would not be able to apply for a minor conditional use permit under Sierra Madre Municipal Code Section 17.56.030(A)(1) because both uses are prohibited under the Hillside Management Zone.<sup>32</sup> Further, any alteration or enlargement of the Retreat Center or Stations of the Cross would not be consistent with the “performance standards and applicable development standards” under the Hillside Management Zone as required under Sierra Madre Municipal Code Section Sierra Madre Municipal Code Section 17.56.030(A)(2).

Lastly, the provisions above apply to the alteration or enlargement of existing non-conforming uses. Sierra Madre Municipal Code Section 17.56.050 makes clear that “no new use or structure may be constructed, ....” Therefore, not only does the non-conforming use ordinance prohibit the Passionists from altering or expanding the Retreat Center and the Stations of the Cross, it also prohibits them from introducing new unpermitted uses like a chapel, shrine, or monastery.

d. The Initiative is Consistent with the General Plan

The Initiative is consistent with General Plan Objective L15, which seeks to preserve “the hillside through the application of standards and guidelines that direct and encourage development that is sensitive to the unique characteristics of the hillsides, which include, but are not limited to, slopes, land forms, vegetation, wildlife habitat and scenic quality; ... .”<sup>33</sup> The Mater Dolorosa Property is located along the base of the San Gabriel Mountains. Designating the Mater Dolorosa Property as Hillside will create strict standards for development to minimize environmental impacts and will be consistent with the General Plan Land Use Map designation of similarly situated parcels along the base of the San Gabriel Mountains.

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<sup>32</sup> SMMC § 17.52.070(D); § 17.56.100(B);

<sup>33</sup> Sierra Madre General Plan, Objective L15, p. 37.

- e. The Initiative's Impacts on the City's Regional Housing Needs Allocation Are Unknown

The Initiative's impacts on the City's Regional Housing Needs Allocation ("RHNA") are unknown. The impact will depend on the type of development that takes place. The most likely development will be above moderate-income residential development, as more affordable housing tends to be located within multi-family unit development, which is prohibited on property designated Hillside.

For the 2021-2029 Planning Period, the City was allocated a target of 51 units at above moderate-income. At base density and assuming full-build out, the Initiative will serve to satisfy approximately one-third of the City's above moderate-income unit target. At the state-permitted maximum density and assuming full-build out, the Initiative will serve to satisfy all of the City's above moderate-income unit target.

#### **A COMPARISON OF THE INITIATIVE AND THE MEADOWS PROJECT**

- a. A Comparison of Residential Development Potential

This section analyzes six potential development scenarios<sup>34</sup>:

1. The Meadows Project as proposed;
2. The Meadows Project with the addition of one ADU and one JADU to each parcel;<sup>35</sup>
3. Maintenance of the Retreat Center and development of the 17 acres under base density assumptions of the Hillside Management Zone;
4. Maintenance of the Retreat Center and development of the 17 acres under the state-permitted maximum density;
5. Demolition of the Retreat Center and development of the 35 acres under the base density assumptions of the Hillside Management Zone; and

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<sup>34</sup> Note that the development scenarios are contemplated at the theoretical maximums. The actual development of the Mater Dolorosa Property under any of these scenarios (except the first) may be smaller.

<sup>35</sup> This section does not analyze the possibility that the Meadows Project will be developed under the State permitted maximum density because that scenario is not currently economically feasible. Under SB 9, each of the proposed 42 parcels may be further subdivided and developed with a maximum of 2 units per subdivided parcel. However, to do so would require the demolition of the new homes constructed by the Developer and the subdivision and development of parcels on a lot-by-lot basis. Such a scenario is very unlikely given current construction costs.

6. Demolition of the Retreat Center and development of the 35 acres under the state-permitted maximum density.

	Meadows Project	Meadows Project + ADUs/JADUs	17-Acre: Base Density	17-Acre: State-Permitted Density	35-Acre: Base Density	35-Acre: State-Permitted Density
Maximum Density	42 Units	126 Units	8 Units	32 Units	17 Units	68 Units
Maximum Gross Floor Area	3,3775 sq. ft./unit <sup>36</sup>	3,775 sq. ft./ unit + ADUs/JADUs <sup>37</sup>	6,500 sq. ft./ unit	6,500 sq. ft./ unit	6,500 sq. ft./ unit	6,500 sq. ft./ unit

b. A Comparison of Public Facilities Fees

Public facilities fees, which include development impact fees and Quimby Act fees, are monetary exactions imposed by the City in connection with the approval of a development project for the purpose of defraying all or a portion of the cost imposed on public facilities resulting from the development. Sierra Madre imposes seven types of public facilities fees:<sup>38</sup>

1. General Government Fee
2. Library Fee
3. Public Safety Fee
4. Parks (Quimby) Fee
5. Traffic Fee
6. Water Fee
7. Sewer Fee

The table below summarizes the anticipated public facilities fees given the potential development scenarios:

<sup>36</sup> The draft Specific Plan proposes a maximum of 3,775 square feet with no more than 40% of units at the maximum.

<sup>37</sup> Per Chapter 17.22 of the Sierra Madre Municipal Code, ADUs are limited to 1,200 square feet and JADUs are limited to 500 square feet.

<sup>38</sup> The applicable rates for each fee are summarized in Attachment A.

	Meadows Project	Meadows Project + ADUs/ JADUs	17-Acre: Base Density	17-Acre: State-Permitted Density	35-Acre: Base Density	35-Acre: State-Permitted Density
Public Facilities Fees	\$2,605,493	\$2,605,493 <sup>39</sup>	\$496,284	\$1,985,138	\$1,054,604	\$3,138,957

c. A Comparison of Other Types of Financial and In-Kind Benefits

Under the four development scenarios where the Initiative is adopted, the City will be deprived of the financial and in-kind benefits it stands to gain under the Meadows Project. The City’s ability to condition approval of a tentative tract map or hillside development permit on other financial and in-kind benefits is limited.

Per Section 4(d) of the Development Agreement, the Developer agreed to pay \$910,000<sup>40</sup> to “implement ‘Net Zero’ water use strategies, which are intended to create a water-neutral development where the amount of supplemental water purchased and stored and the amount of water use offset by water-efficient improvements are equal to the development’s total impact to the City’s water system.” The City may make reasonable adjustments to the sum to account for increases in the price of water or increases in the applicable Engineering News Record Construction Cost Index, not to exceed \$983,500.<sup>41</sup> The payment for “Net Zero” water use strategies is only available through the Meadows Project.

Per Section 4(b) of the Development Agreement, the Developer agreed to dedicate a turn-key public park to the City. Per Section 4(c), the park will be maintained by funds collected from the proposed 42 units through a Community Facilities District. A public park, whose construction and maintenance is financed through the development of the Mater Dolorosa Property, is only available through the Meadows Project.

<sup>39</sup> The City Council waived all public facilities fees for ADUs and JADUs.

<sup>40</sup> \$380,000 (water replenishment) + \$530,000 (lawn replacement) = \$910,000.

<sup>41</sup> \$408,500 (water replenishment) + \$575,000 (lawn replacement) = \$983,500.



Per Section 3 of the Development Agreement, the Passionists will deed restrict a portion of its property above the Retreat Center so that it is preserved as open space. The contemplated restrictive covenants are only available through the Meadows Project.

- d. A Comparison of the Degree of Discretionary Review
  - i. The City Council and Planning Commission May Exercise Discretion in Their Review of the Meadows Project

The Mater Dolorosa Property is currently zoned Institutional. The development of single-family homes, as contemplated by the Meadows Project, is prohibited under the current zoning designation. As a result, the Passionists have applied for a General Plan Land Use Map and Zoning Map amendment, as well as a corresponding Specific Plan and Development Agreement.

Through the Specific Plan and Development Agreement, the City Council and Planning Commission may exercise a greater degree of discretion in their review of the Meadows Project. For example, the City Council may amend the design of the project based on their subjective opinions about the project's density, gross floor area, height, or other development standard. Further, the City Council may request additional monetary or in-kind exactions or may structure a project through a development agreement. The flexibility afforded through a development agreement is not ordinarily available as a condition of approval for a Hillside Development Permit.

- ii. Under the Initiative, the City Council's and Planning Commission's Review Would Be Limited by the Housing Accountability Act and Senate Bill 330.

The Hillside Management Zone permits "Construction of a detached single-family dwelling unit on an existing legal lot."<sup>42</sup> The Hillside Management Zone also permits "Land divisions, whether by parcel map, tract map, or otherwise."<sup>43</sup> If the Mater Dolorosa Property were rezoned to Hillside Management, the Passionists could apply to subdivide the lot and build a residential project by applying for a Tentative Tract Map<sup>44</sup> and a Hillside Management Permit.<sup>45</sup> Such a project would be subject to the Housing

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<sup>42</sup> SMMC 17.52.050(C)(2).

<sup>43</sup> SMMC 17.52.050(C)(3).

<sup>44</sup> SMMC 16.08.030.

<sup>45</sup> SMMC 17.52.050(C).

Accountability Act and the Senate Bill 330 because it contemplates the creation of more than two residential units.<sup>46</sup>

Under the Housing Accountability Act, “When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria,” the City’s ability to deny the project or reduce its density is constrained.<sup>47</sup> This limitation applies to both the Tentative Tract Map and the Hillside Management Permit.<sup>48</sup> Many of the existing development and design standards under the Hillside Management Ordinance are not objective, as defined by statute, and cannot be applied to a future project.<sup>49</sup> Without the ability to deny a project or amend its design based on all the development criteria in the Hillside Management Ordinance, the City’s discretionary review of the project is severely limited.

Under Senate Bill 330, “if a proposed housing development project complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, ... [the city] shall not conduct more than five hearings ... in connection with the approval of that housing development project.”<sup>50</sup> The five hearings include meetings of both the Planning Commission and the City Council.<sup>51</sup> As a result, the City’s ability to review a project and the public’s ability to provide input will be further constrained.

#### **AN EVALUATION OF THE INITIATIVE’S OPPONENTS’ LEGAL ARGUMENTS**

The Passionists and the Developer have expressed their intention to challenge the Initiative should it be adopted by the voters. The City will be named as a defendant in any legal challenge. The City Attorney’s Office is aware of four potential legal theories which may serve as a basis for suit. All four theories are analyzed below.

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<sup>46</sup> Gov Code, § 65589.5, subd. (h)(2); Gov Code, § 66300, subd. (a)(6);

<sup>47</sup> Gov Code, § 65589.5, subd. (j)(1).

<sup>48</sup> Gov Code, § 65589.5, subd. (h)(6).

<sup>49</sup> Gov Code, § 65589.5, subd. (h)(8).

<sup>50</sup> Gov Code, § 65905.5, subd. (a).

<sup>51</sup> Gov Code, § 65905.5, subd. (b)(2).

- a. Religious Land Use and Institutionalized Persons Act Claim Alleging Unlawful Discrimination and a Substantial Burden on the Passionists' Exercise of Religion

A claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") must analyze two inquiries:

- 1) Whether it imposes a substantial burden on religious exercise; or
- 2) Whether it discriminates or excludes a religious assembly or institution.

The merits of both inquiries are analyzed separately below.

- i. Substantial Burden Analysis

The substantial burden analysis applies to "the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."<sup>52</sup> Courts have interpreted this to mean "RLUIPA does not apply directly to land use regulations, such as the Zoning Code ..., which typically are written in general and neutral terms. However, when the Zoning Code is applied to grant or deny a certain use to a particular parcel of land, that application is an 'implementation' under 42 U.S.C. § 2000cc(2)(C)."<sup>53</sup> Therefore, while the Initiative itself cannot be challenged for imposing a substantial burden, the City's denial of an application to introduce a new non-conforming use or to alter or enlarge an existing non-conforming use would constitute the implementation of a system of land use regulations — the Initiative and the non-conforming uses ordinance.

RLUIPA provides:

[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:

- A. is in furtherance of a compelling governmental interest; and

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<sup>52</sup> 42 U.S.C.A. § 2000cc(a)(2)(C).

<sup>53</sup> *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter* (9th Cir. 2006) 456 F.3d 978, 987.

- B. is the least restrictive means of furthering that compelling governmental interest.<sup>54</sup>

Therefore, the Passionists would need to demonstrate that:

1. their planned development furthers some religious exercise; and
2. their religious exercise is substantially burdened by the Initiative.<sup>55</sup>

If the Passionists are able to satisfy the first two elements, then the City bears the burden of persuasion to demonstrate:

1. the Initiative furthers a compelling governmental interest; and
2. the Initiative employs the least restrictive means of furthering a compelling governmental interest.<sup>56</sup>

“[F]or a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise.”<sup>57</sup> The substantial burden inquiry is a fact intensive, totality of the circumstances analysis.<sup>58</sup> California courts will favor a religious institution where the government entity has practically banned the religious use.<sup>59</sup> The Ninth Circuit in *Pentecostal Church of God v. Douglas County* succinctly summarized the substantial burden analysis by inquiring whether the religious institution “has no ready alternatives, or that alternatives required substantial

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<sup>54</sup> 42 U.S.C.A. § 2000cc(a)(1).

<sup>55</sup> *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, *supra*, 456 F.3d at p. 988.

<sup>56</sup> *Id.* at p. 992.

<sup>57</sup> *San Jose Christian Coll. v. City of Morgan Hill* (9th Cir. 2004) 360 F.3d 1024, 1034 (internal quotation marks omitted).

<sup>58</sup> *Anselmo v. Cnty. of Shasta, Cal.* (E.D. Cal. 2012) 873 F. Supp. 2d 1247, 1258; *New Harvest Christian Fellowship v. City of Salinas* (9th Cir. 2022) 29 F.4th 596, 602.

<sup>59</sup> See *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, *supra*, 456 F.3d at p. 989 (“We need not and do not decide that failing to provide a religious institution with a land use entitlement for a new facility for worship necessarily constitutes a substantial burden pursuant to RLUIPA. At the same time, we do decide the County imposed a substantial burden here based on two considerations: (1) that the County’s broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient.”)

delay, uncertainty, and expense[;]" or whether there is an "adverse history behind the [institution's] application, the denial, or the proceedings leading up to it."<sup>60</sup>

The Initiative severely constrains the Passionists' alternatives to develop their property for religious purposes. The Initiative's impact on commercial development at the Mater Dolorosa Property, including the Meadows Project, does not constitute a substantial burden on religious exercise.<sup>61</sup> However, the Initiative's conversion of the religious uses at the Mater Dolorosa Property to non-conforming uses may substantially burden the religious exercise of the Passionists. As explained above, the Initiative converts the Retreat Center and the Stations of the Cross into non-conforming uses that cannot be altered or enlarged. Further, the Mater Dolorosa Property's non-conforming status would prevent the Passionists from establishing new religious uses, such as the reconstruction of the monastery or the construction of a chapel or shrine.

Of particular importance in RLUIPA cases is the background and history preceding a denial of a permit application.

- In *Harbor Missionary Church Corp.*, the court emphasized that before the city asked for a CUP, the church had already tried to mitigate complaints from the neighbors; and after the church applied for the CUP, city staff thoroughly reviewed the application and recommended approval.<sup>62</sup>
- In *Guru Nanak*, the court found it "[m]ost important to us the history behind Guru Nanak's two CUP application processes, and the reasons given for ultimately denying these applications, to a significantly great extent lessened the possibility that future CUP applications would be successful."<sup>63</sup>

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<sup>60</sup> *Pentecostal Church of God v. Douglas Cnty.* (9th Cir. 2020) 798 F. App'x 995, 997 (internal quotation marks omitted).

<sup>61</sup> *California-Nevada Annual Conference of the Methodist Church v. City and County of San Francisco* (N.D. Cal. 2014) 74 F.Supp.3d 1144, 1154 ("RLUIPA's statutory language, its legislative history, and relevant case law establish that commercial endeavors such as that here — the sale of property for the construction of market rate condominiums — even if undertaken by the Conference in order to fund its religious mission, do not constitute 'religious exercise' protected by RLUIPA.")

<sup>62</sup> *Harbor Missionary Church Corp. v. City of San Buenaventura*, *supra* 642 F. App'x 726, 728; see also *Congregation Etz Chaim v. City of Los Angeles* (C.D. Cal. July 11, 2011 No. CV10-1587 CAS EX) 2011 WL 12472550, at \*3—\*6 (history between the city and the religious institution was fraught).

<sup>63</sup> *Id.* at 989.

- In *Westchester Day School*, the court found a substantial burden where the zoning board denied the religious day school's land use application despite the day school having “worked for over one-and-a-half years to address the [zoning board's] concerns and offered to make changes to, inter alia, parking, the size of [the proposed construction,] landscaping, [the] enrollment cap[, and] a bus departure management plan to mitigate the traffic impact.”<sup>64</sup>

If the Passionists are successful in demonstrating a substantial burden on the exercise of religion, then the burden shifts to the City to show that “it employed the least restrictive means available to further a compelling governmental interest.”<sup>65</sup> The governmental entity “must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general.”<sup>66</sup> Further, compelling state interests are “interests of the highest order.”<sup>67</sup>

In *Grace Church of North County v. City of San Diego*, the city argued that “a local government has a compelling interest in enforcing its zoning and planning regulations, particularly when it is enforcing those regulations with the purpose of protecting industrial lands for industrial use, the reason stated by Defendants for the denial of Grace Church's request for a ten year CUP.”<sup>68</sup> The court held that this did not constitute a compelling state interest.<sup>69</sup>

The Initiative purports to preserve “the intent of the City in adopting the General Plan and the Hillside Management Ordinance”<sup>70</sup> and “to ensure that any future development is protective of the City's hillside environment, while permitting the continued operation of the Mater Dolorosa.”<sup>71</sup> But as stated in *Grace Church of North County*, defending the consistent application of a zoning designation is not a compelling purpose. The health and safety considerations, such as fire prevention and environmental protection, underlying those zoning designations may be a compelling interest. But it will

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<sup>64</sup> *Westchester Day Sch. v. Vill. of Mamaroneck*, *supra*, 417 F.Supp.2d 477, 549.

<sup>65</sup> *Harbor Missionary Church Corp. v. City of San Buenaventura*, *supra* 642 F. App'x 726, 730.

<sup>66</sup> *Westchester Day Sch. v. Vill. of Mamaroneck* (2d Cir. 2007) 504 F.3d 338, 353.

<sup>67</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 546.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Initiative Section 2(a)(6), p. 1.

<sup>71</sup> Initiative Section 2(b), p. 2.

be difficult to overcome the burden of persuasion where the Final Environmental Impact Report finds that the negative environmental impacts may be mitigated. Further, the will of the majority of the voters will not constitute a compelling interest.<sup>72</sup>

ii. Discrimination and Exclusion Provisions

RLUIPA also provides that “[n]o government shall impose or implement a land use regulation in a manner that:

1. “treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution;”<sup>73</sup> or
2. “discriminates against any assembly or institution on the basis of religion or religious denomination;”<sup>74</sup> or
3. “totally excludes religious assemblies from a jurisdiction; or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”<sup>75</sup>

(1) The Initiative May Be Vulnerable to a Challenge under RLUIPA’s Equal Terms Provision

Under the equal terms provision, the complainant must show:

- (1) that there is an imposition or implementation of a land use regulation,
- (2) by a government,
- (3) on a religious assembly or institution, and
- (4) the imposition must be on less than equal terms with a nonreligious assembly or institution.<sup>76</sup>

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<sup>72</sup> *Westchester Day Sch. v. Vill. of Mamaroneck*, *supra* 504 F.3d at p. 353 (holding “the application was denied not because of a compelling governmental interest that would adversely impact public health, safety, or welfare, but was denied because of undue deference to the opposition of a small group of neighbors”).

<sup>73</sup> 42 U.S.C.A. § 2000cc(b)(1).

<sup>74</sup> 42 U.S.C.A. § 2000cc(b)(2).

<sup>75</sup> 42 U.S.C.A. § 2000cc(b)(3).

<sup>76</sup> *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma* (9th Cir. 2011) 651 F.3d 1163, 1171.

With respect to element number four, the religious institution must offer a similarly situated secular comparator to show that the imposition of land use regulation is on less than equal terms with a nonreligious assembly or institution.<sup>77</sup>

In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the Centro Familiar bought a large building in the downtown area, knowing that it would need a Conditional Use Permit (“CUP”) to hold church services.<sup>78</sup> The CUP was denied because, among other reasons, the establishment of the church would prevent the issuance of liquor licenses within 300 feet from the church building and hinder the City’s attempt to revitalize the downtown district.<sup>79</sup> In holding that Yuma had violated the equal terms provision of RLUIPA, the court emphasized that “religious organizations” were specifically called out in the City Code as requiring a CUP to operate in the downtown area—“the express distinction drawn by the ordinance establishes a prima facie case for unequal treatment.”<sup>80</sup> It also pointed out that the Code excluded non-church religious organizations which did not trigger the 300-foot liquor license ban; that the Code excluded schools that did not trigger the 300-foot liquor license ban; and that many secular uses permitted as of right would have the practical effect of dampening the “entertainment” of downtown (such as a block of apartments or a prison).<sup>81</sup>

Like *Centro Familiar Cristiano Buenas Nuevas*, there is a prima facie case of unequal treatment because “The Initiative applies to the Mater Dolorosa Property and any parcels created from the Mater Dolorosa Property, including those parcels created after the Notice of Intent to Circulate the Initiative was submitted. The Initiative does not adopt, alter, or change any other land use classifications or zoning on any real property in the City of Sierra Madre.”<sup>82</sup> The Initiative targets the Mater Dolorosa Property specifically.

Here, the secular comparator would be the other residences in the City that abut the San Gabriel Mountains. The Zoning Map reveals that nearly all of them, with the exception of a few parcels, are zoned Hillside Management. However, that does not explain why the Mater Dolorosa property was designated Institutional in 1997 in the first

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<sup>77</sup> *Id.* at 1172–73.

<sup>78</sup> *Id.* at 1166.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1171.

<sup>81</sup> *Id.* at 1174–75.

<sup>82</sup> Initiative Section 6, p. 3.



instance, after the establishment of the Hillside Management Zone in 1994, which seems to be inconsistent with its stated purpose.

(2) The Initiative May Not Be Vulnerable to RLUIPA's Non-discrimination Provision

To make out a prima facie claim of religious discrimination, the complainant must show that the imposition of a land use regulation was motivated by religious discrimination.<sup>83</sup> The non-discrimination provision “addresses discrimination on the basis of religion or religious denomination.”<sup>84</sup> The complainant must show “intentional or purposeful discrimination by the City because of Plaintiff’s religious denomination” through direct or circumstantial evidence.<sup>85</sup> One case found that it was “especially significant that irregularities in Defendants’ decision-making process followed the neighbors’ expressions of animus.”<sup>86</sup>

While it may be true that the Initiative represents an irregularity in the City’s decision-making process, there is not enough information in the administrative record to demonstrate that this irregularity was due to intentional discrimination.

(3) The Initiative May Not Be Vulnerable to RLUIPA’s Exclusions and Limits Provision

This provision prohibits a government from imposing a land use regulation that “totally excludes religious assemblies from a jurisdiction; or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”<sup>87</sup> RLUIPA does not define “jurisdiction,” but “courts consider the ‘geographical area covered by the ordinance’ in applying the term in the context of a RLUIPA exclusion claim”<sup>88</sup> — “the geographical area

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<sup>83</sup> *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty., Maryland* (4th Cir. 2019) 915 F.3d 256, 263–64.

<sup>84</sup> *Rluipa’s Nondiscrimination Provision, supra*, 16 Rich. J.L. & Pub. Int. 295, 304.

<sup>85</sup> *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.* (N.D. Ga. 2012) 843 F. Supp. 2d 1328, 1370 (“it is well-established that a plaintiff challenging an action as discriminatory must go further than identifying disparate treatment and prove that the decision-making body acted with discriminatory intent.”)

<sup>86</sup> *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty., Maryland, supra*, 915 F.3d 256, 264.

<sup>87</sup> 42 U.S.C.A. § 2000cc(b)(3).

<sup>88</sup> *Calvary Chapel Bible Fellowship v. Cnty. of Riverside* (C.D. Cal. Aug. 18, 2017, No. CV16-259 PSG (DTBX)) [2017 WL 6883866] at \*17, *affd.* (9th Cir. 2020) 948 F.3d 1172.

over which the [ ] government [entity] exercises its authority.”<sup>89</sup> In this case, the inquiry would be confined to the jurisdictional boundary of Sierra Madre.

In *Bethel World Outreach Ministries v. Montgomery County Council*, the court interpreted the exclusions and limitations provision as a whole against the church, which could not show “any evidence suggesting that religious organizations are left without a reasonable opportunity to build elsewhere in the County.”<sup>90</sup> In *Calvary Chapel Bible Fellowship v. County of Riverside*, the court held that “because the undisputed evidence shows that such a large portion of the County is zoned to allow religious institutions, [the religious institution] cannot meet its burden of showing that the County ‘totally excludes’ or ‘unreasonably limits’ religious assemblies in violation of RLUIPA.”<sup>91</sup>

A court is unlikely to find that the Initiative excludes or unreasonably limits religious assemblies if the analysis focuses on the entire City, as opposed to the Mater Dolorosa Property specifically. Since the Initiative permits the Passionists to maintain their current uses and structures and expand into other parts of the City, this provision likely does not apply.

b. California Constitutional Claim Alleging An Unlawful Form of Initiative

Article II, section 12 of the California Constitution establishes that “No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.”<sup>92</sup>

The issues are whether the Initiative:

- 1) Is a statute proposed by the electors;
- 2) Names or identifies any private corporation; and

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<sup>89</sup> *Id.* at \*18.

<sup>90</sup> *Bethel World Outreach Ministries v. Montgomery Cnty. Council* (4th Cir. 2013) 706 F.3d 548, 560.

<sup>91</sup> *Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, *supra*, (C.D. Cal. Aug. 18, 2017, No. CV16-259 PSG (DTBX)) at \*18; see also *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch* (3d Cir. 2004) 100 F. App'x 70, 77; *Redwood Christian Sch. v. Cnty. of Alameda* (N.D. Cal. Mar. 8, 2007, No. C-01-4282 SC, 2007 WL 781794), at \*5.

<sup>92</sup> Cal. Const., art. II, § 12.

3) States the performance of some function or authorizes some power or duty.

i. The Initiative is a Statute

The Initiative is a legislative decision to amend the General Plan and Zoning Map. In *Pala Band of Mission Indians v. Board of Supervisors*, the appellate court held that article II, section 12 applies to local ballot measures.<sup>93</sup> Therefore, the Initiative is a statute for purposes of article II, section 12.

ii. The Initiative Names a Private Corporation

The Passionists are a private, non-profit California corporation registered with the California Secretary of State. Article II, section 12 applies to nonprofit corporations as well as for-profit corporations.<sup>94</sup>

While the Initiative does not name the “Congregation of the Passion, Mater Dolorosa Community” specifically, it does make several references to the “Mater Dolorosa Passionist Retreat Center” and “Mater Dolorosa.” Some of these references are to the Mater Dolorosa Property, while others appear to refer to the nonprofit corporation, such as the following:<sup>95</sup>

- “The Intent of the Initiative is to permit the continued operation of the Mater Dolorosa Passionist Retreat Center without expansion, significant physical alteration, or change in use, as a non-conforming use.”<sup>96</sup>
- “The purpose of this Initiative is to change the General Plan Land Use Designation and the zoning of the Mater Dolorosa property, APN 5761-002-008, located at 700 North Sunnyside A venue (hereinafter ‘Mater Dolorosa Property’), as shown on Exhibit A, from Institutional/Institutional to Hillside/Hillside Residential Zone to ensure that any future development is protective of the City’s hillside environment, while permitting the continued operation of the Mater Dolorosa.”<sup>97</sup>
- “It is the intent of the voters that the existing retreat center, the Mater Dolorosa Passionist Retreat Center, may continue as a pre-existing non-

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<sup>93</sup> *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal. App. 4th 565, 581;

<sup>94</sup> *Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal. 3d at p. 833-834.

<sup>95</sup> *Pala Band of Mission Indians*, *supra*, 54 Cal. App. 4th at p. 585.

<sup>96</sup> Initiative at p. 1.

<sup>97</sup> *Id.* at p. 2.

conforming use under the provisions of the Sierra Madre Municipal Code relating to non-conforming use.”<sup>98</sup>

Additionally, the Initiative is named the “Mater Dolorosa Hillside Zoning Initiative.” Therefore, the Initiative does name a private corporation.

iii. The Initiative Likely Does Not State the Performance of Some Function, Nor Does It Authorizes Some Power or Duty

In *Pala Band of Mission Indians*, a corporation was named in an initiative to perform certain tasks related to a landfill project. For example, the Initiative stated the corporation “‘shall secure’ or ‘shall obtain’ numerous identified environmental and other regulatory permits and ‘shall conduct’ consultations with specified government agencies.”<sup>99</sup> The court held “[t]he initiative specifies functions and duties that [the corporation] must perform in operating the facility and gives [the corporation] the exclusive authority to prepare a site plan, apply to operate, and operate the Project.”<sup>100</sup>

Unlike *Pala Band of Mission Indians*, the language in the Initiative is permissive rather than mandatory. The Initiative states its intent is:

- “to permit the continued operation of the Mater Dolorosa Passionist Retreat Center without expansion, significant physical alteration, or change in use, as a non-conforming use;”<sup>101</sup> and
- “that the existing retreat center, the Mater Dolorosa Passionist Retreat Center, may continue as a pre-existing non-conforming use under the provisions of the Sierra Madre Municipal Code relating to non-conforming use.”<sup>102</sup>

Such permissive language does not state the performance of a function or authorize some power or duty. While the courts have not defined the term “duty” in this context, the “duties” imposed on corporations have usually been characterized as “assigned

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Pala Band of Mission Indians, supra*, 54 Cal. App. 4th at p. 571.

<sup>100</sup> *Id.* at 585.

<sup>101</sup> Initiative, p. 1. (Emphasis added.)

<sup>102</sup> *Id.* at p. 2. (Emphasis added.)

services.”<sup>103</sup> Since the Passionists have not been assigned a service under the Initiative, it is unlikely that a court would hold the above provisions are “duties” or “functions” under article II, section 12.

Even if they were duties or functions, the provisions are transferrable and would likely not violate article II, section 12. In *Hernandez v. Town of Apple Valley*, the Town Council of Apple Valley decided to place an initiative on a special election ballot to approve a commercial development.<sup>104</sup> The initiative granted certain powers to “any individual or other entity proposing any development within the Specific Plan area.”<sup>105</sup> The initiative never named Walmart, but Walmart “was the sole corporation entitled to develop or own the property.”<sup>106</sup> The court held that the initiative did not violate article II, section 12 because “Walmart as an entity has no superior right under the Initiative. If it sold the property, or decided that it did not want to develop the property, it would have no rights under the Initiative superior to any other corporation or person.”<sup>107</sup>

Like Walmart, the Passionists would not be prohibited from selling the Mater Dolorosa Property after the passage of the Initiative. The non-conforming use restrictions run with the land and would then pass to the next owner of the lot. The transferability of any duties or functions ensures that no superior rights are granted to the Passionists.

c. California Constitutional Claim Alleging Unlawful Exercise of Police Power

“[T]he California Constitution empowers cities and counties to make and enforce such local, police, sanitary and other regulations as are not in conflict with general laws.”<sup>108</sup> Courts have stated, “A land use ordinance is a valid exercise of the police power if it bears a substantial and reasonable relationship to the public welfare. It is invalid only if it is arbitrary, discriminatory, and bears no reasonable relationship to a legitimate public interest.”<sup>109</sup> Therefore, the City may amend its General Plan and

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<sup>103</sup> *Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal. 3d 805, 831 (the corporation had to “advocate the interests of insurance consumers in any forum.”)

<sup>104</sup> *Hernandez v. Town of Apple Valley*, *supra*, 7 Cal.App.5th at p. 196.

<sup>105</sup> *Id.* at p. 198.

<sup>106</sup> *Id.* at p. 210.

<sup>107</sup> *Id.* at p. 211.

<sup>108</sup> *Stagg v. Municipal Court* (1969) 2 Cal.App.3d 318, 323; Cal. Const., art. XI, § 11.

<sup>109</sup> *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1536.

Zoning Code by voter Initiative if that amendment does not conflict with State law, and is not arbitrary, discriminatory, or lacking a relationship to a legitimate public interest.

An Initiative that results in spot zoning may be an unlawful exercise of the City's police powers. "Spot zoning occurs when 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."<sup>110</sup> The Developer claims that the Initiative would result in an unlawful spot zoning by only re-designating the Mater Dolorosa Property and leaving the adjacent properties untouched. However, the claim is likely to fail as re-designating the Mater Dolorosa Property as Hillside Management would make it consistent with the other single-family uses neighboring the property and would be consistent with the other properties that abut the San Gabriel Mountains.

The Developer also cites the case of *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330 ("*Arnel*") for the proposition that the Initiative is arbitrary, discriminatory, and bears no reasonable relationship to a legitimate public interest. In *Arnel*, the City of Costa Mesa rezoned a 46-acre parcel for the express purpose of allowing a large residential development and apartment complex.<sup>111</sup> Shortly after the city approved the project a citizens' group mounted a successful initiative rezoning the property to single-family residential.<sup>112</sup> The *Arnel* court struck down the initiative ordinance as not rationally related to the public welfare. The court observed that the initiative ordinance was adopted 16 months after the city had completed an extensive process that led to the determination of the appropriate zoning for the property. The initiative rezoned the property, "without evidence of any significant change in conditions or circumstances and for the sole and specific purpose of defeating the *Arnel* development."<sup>113</sup>

In evaluating an initiative, the court must identify competing interests and decide "whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests."<sup>114</sup> Here, the competing interests are the

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<sup>110</sup> *Ibid.*

<sup>111</sup> *Arnel Development Co. v. City of Costa Mesa, supra*, 126 Cal.App.3d at pp. 333-334.

<sup>112</sup> *Id.* at p. 334.

<sup>113</sup> *Id.* at p. 335.

<sup>114</sup> *Id.* at p. 339.

development of the Meadows Project, on the one hand, and to “ensure that those long-standing goals for the protection of sensitive and potentially hazardous areas in Sierra Madre are enforced to the greatest extent possible under the law,”<sup>115</sup> on the other. As noted in the Findings:

[T]he proposed development of the Mater Dolorosa Passionist Retreat Center property, located adjacent to Bailey Canyon Wilderness Park, and in a very high fire hazard zone, would undermine the intent of the City in adopting the General Plan and the Hillside Management Ordinance. The Mater Dolorosa property is one of the only properties abutting the mountains that is not protected by a zoning designation of Open Space or Hillside residential. Permitting the construction of 42 homes would irrevocably alter the natural setting and change the feel of this portion of Sierra Madre forever, taking away the environmental setting that makes Sierra Madre special.<sup>116</sup>

Unlike *Arnel*, a court may find that the Initiative is not adopted for the discriminatory purpose of defeating the Meadows Project, but rather for the legitimate public interest in preserving the hillside and reducing fire risk.

d. Senate Bill No. 330 Claim Alleging Unlawful Reduction in Intensity of Use

SB 330 applies to an “affected city,” which “means a city, including a charter city, that the Department of Housing and Community Development [HCD] determines, pursuant to subdivision (e), is in an urbanized area or urban cluster, as designated by the United States Census Bureau.”<sup>117</sup> HCD is tasked with creating a list of affected cities that “shall remain valid until January 1, 2030.”<sup>118</sup> The City of Sierra Madre is listed as an “affected city” on HCD’s list.

The provisions of SB 330 only apply, “with respect to land where housing is an allowable use, ....”<sup>119</sup> SB 330 does not define “housing,” nor is the term defined in the

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<sup>115</sup> Initiative, Section 2(A)(4).

<sup>116</sup> Initiative, Section 2(A)(6).

<sup>117</sup> Gov. Code, § 66300, subd. (a)(1)(A).

<sup>118</sup> Gov. Code, § 66300, subd. (e).

<sup>119</sup> Gov. Code, § 66300, subd. (b)(1).

Government Code. But SB 330 does cite to a definition for a “housing development project”.<sup>120</sup> While the definition of a “housing development project” is likely narrower than the definition of “housing,” it may be instructive in determining the type of housing relevant for purposes of applying SB 330.

“‘Housing development project’ means a use consisting of any of the following:

- (A) Residential units only.
- (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
- (C) Transitional housing or supportive housing.”<sup>121</sup>

This definition does not mention dormitories specifically, but dormitories are likely considered a residential use. If dormitories were to be constructed at the Mater Dolorosa Property, they would need to constitute at least two-thirds of the square footage of the site to qualify as a housing development project. Based on this definition, dormitories which constitute less than two-thirds of the square footage of the site and are an auxiliary use to the primary institutional use likely are not “housing” as contemplated by SB 330.

The term “allowable use” also is not defined in the Government Code or HCD’s regulatory publications. One question is whether an “allowable use” refers to both those uses that are allowable by right as well as those that are conditionally allowable. For example, in the R-1 One-Family Residential Zone of the Sierra Madre Municipal Code, a project proposing a single, residential unit below a certain height and size threshold is allowable by right, meaning the house may be developed without undergoing discretionary review. On the other hand, in the Hillside Management Zone, a project proposing a single, residential unit must undergo discretionary review regardless of its height or size. Subsequent legislation building on SB 330 clarified that “‘Housing development project’ includes, but is not limited to, projects that involve no discretionary approvals and projects that involve both discretionary and nondiscretionary approvals.”<sup>122</sup> In the past, the City Attorney’s Office has interpreted SB 330 to apply to both the One-Family Residential Zone and the Hillside Management Zone, regardless of whether the housing was permitted as of right or conditionally.

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<sup>120</sup> Gov. Code, § 66300, subd. (a)(6); Gov. Code, § 65905.5, subd. (b)(3).

<sup>121</sup> Gov. Code, § 65589.5, subd. (h)(2)(B).

<sup>122</sup> Senate Bill No. 8; Gov. Code, § 65905.5, subd. (b)(3)(B).



A second question is whether an “allowable use” refers to a primary use or includes auxiliary uses. For example, housing is clearly the primary use in the R-1 One-Family Residential Zone of the Sierra Madre Municipal Code. On the other hand, while emergency shelters, a type of housing, are permitted in the Manufacturing Zone, the primary use is intended to be industrial. In the past, the City Attorney’s Office has interpreted SB 330 to not apply to those zones where housing is not the primary use. A broader interpretation would result in the application of SB 330 to nearly every zone in the City, including the institutional, manufacturing, and commercial zones.

Nevertheless, assuming SB 330 applies to the Mater Dolorosa Property, the City is prohibited from adopting an Initiative that would have the effect of:

Changing the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018, except as otherwise provided in clause (ii) of subparagraph (B) or subdivision (i). For purposes of this subparagraph, ‘reducing the intensity of land use’ includes, but is not limited to, reductions in height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site’s residential development capacity.<sup>123</sup>

Here, it is difficult to determine whether changing the Mater Dolorosa Property’s designation from Institutional to Hillside/Hillside Management actually results in a reduction in the intensity of the land use, because there are limited points of comparison. While the Institutional Zone does articulate development standards for height and lot coverage, it lacks many other development standards such as density, setbacks, gross floor area, floor area ratio, and angle plane. Most development standards in the Institutional Zone would be included in the Master Plan. Therefore, the

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<sup>123</sup> Gov. Code, § 66300, subd. (b)(1)(A).

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development standards are unique to each property and do not apply throughout the Institutional Zone.

In the case of the Mater Dolorosa Property, there is no Master Plan because the General Plan and the corresponding requirement to adopt a Master Plan were established after the Retreat Center was approved. If the Passionists ever apply for a residential development in the institutional zone, they will need to prepare a Master Plan that will include development standards. Until then, there are no development standards applicable to the Mater Dolorosa Property.

In the absence of a point of comparison, a court is unlikely to conclude that the Hillside/Hillside Management designation reduces the intensity of the existing Institutional land use.

#### **CONCLUSION**

At the City's Council's request, the City Attorney's Office prepared this memorandum under Elections Code sections 9212 and 9215 to analyze the impacts of the Initiative. This memorandum will be presented at the City Council's July 12th regular meeting. Following the presentation, the City Council will need to determine whether to:

1. Adopt the ordinance within 10 days; or
2. Submit the ordinance to the voters.<sup>124</sup>

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<sup>124</sup> Elec. Code, § 9215, subd. (c).