

September 20, 2013

MEMORANDUM

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL
(EXCLUDING COUNCILMEMBER REILLY)

FROM: CITY ATTORNEY

RE: TERRACES OF LAFAYETTE – TOLLING AGREEMENT

This will explain the decision by the City to sign the Tolling Agreement with the O'Brien Land Company and Anna Maria Dettmer (collectively, Applicants) regarding the Terraces of Lafayette Apartment Project (Terraces Project).

We recommended that the City enter into the Tolling Agreement to avoid unnecessary litigation and to minimize the City's attorney's fees and costs. The Applicants dispute the City Council's August 12, 2013, decision to certify the EIR for the Terraces Project. They believe those claims will be time barred unless the statute of limitations is tolled. We disagree and believe that such a lawsuit would be premature since the City has not made a decision on the Terraces Project and related applications. State CEQA Guidelines § 15352 (CEQA only applies at the time a public agency proposes to "approve" a project); § 15112 (CEQA statutes of limitations concern "challenges to the approval of projects"). Nevertheless, without the Tolling Agreement, the City would have faced two lawsuits, one challenging the EIR and another lawsuit after the Terraces Project is decided. This would increase the City's attorney's fees and costs, and likely displease the Court since it expects cooperation to avoid unnecessary litigation.

We approved a Tolling Agreement that only preserved the Applicants' claims and the City's defenses because the City does not have any claims to preserve at this time. The Council's August 12 decision regarding the EIR was a decision by the City, not the Applicants. Therefore, the Applicants have not committed any acts or taken any actions that would be subject to challenge. Tolling agreements can be prepared to preserve the claims of both sides or the claims of one side. We have approved both types, and our recommendation is based, as here, on the nature of the disagreement.

I hope this explanation helps answer questions by the public.

MALA SUBRAMANIAN
GENE TANAKA