



City of Lafayette
Staff Report
City Council

Date: May 14, 2018

Staff: Mala Subramanian, City Attorney

Subject: Supplemental Informational Update Regarding whether Terraces of Lafayette Apartment Project could be subject to a General Plan Amendment and Referendum

Background

I have received follow up questions on the informational update previously provided to you on April 9, 2018 on whether an approval of the Terraces of Lafayette Apartment Project could be subject to a referendum.

This report is for information purposes only and consistent with the limitations set forth in Salinas v. Vargas (2009) 46 Cal.4th 1. In Salinas v. Vargas, the court found that informational reports to assist the City Council with the operation and services of the City, which contain past and present facts and are not intended to sway voters or contain inflammatory language, are allowed.

Analysis

A referendum applies only to legislative acts. DeVita v. County of Napa (1995) 9 Cal.4th 763. Legislative acts generally involve the formulation of rules to be applied in all future cases, whereas adjudicatory and administrative acts generally involve the application of a fixed rule to a specific set of existing facts.

Legislative acts are actions which prescribe a new policy or plan, declare a public purpose and make provisions for the ways and means of the accomplishment of such policy, plan or public purpose. Administrative or adjudicatory acts, on the other hand, are those which are “necessary to carry out the legislative policies and purposes already declared by the legislative body.” (Fishman v. City of Palo Alto (1978) 86 Cal.App.3d 506, 509.) Permits qualify as administrative acts and are not subject to referendum. (Wiltshire v. Superior Court (1985) 172 Cal.App.3d 296 [conditional use permits]; Fishman v. City of Palo Alto, supra 86 Cal.App.3d 506 [planned unit development permits].)

Here, the Terraces of Lafayette Apartment Project sought the following permits: Land Use permit; Hillside Development permit; Design Review; Grading permit; and a Tree permit. In accordance with established case law, these permits are administrative, not legislative acts and, therefore, are not subject to referendum.

As you may recall, the Terraces of Lafayette Apartment Project has not yet been considered by the Council. The Application was deemed complete in 2011. The Council certified the EIR in 2013. Then, in 2014, in effort to resolve concerns and establish a path for consideration of a lower density project, the City and Applicant entered into the Process Agreement. By its terms, the Process Agreement tolled or suspended the processing of the Apartment Project, while the Council considered the “Homes at Deer

Hill Project” also known as the Project Alternative. A copy of the Process Agreement is attached for your reference¹.

Pursuant to Section 3.5.5 of the Process Agreement, the Applicant has the option to terminate the Process Agreement if the Council did not approve the Homes at Deer Hill Project, or in the event that an appeal, challenge or referendum has not been resolved in a manner acceptable to Applicant in Applicant’s sole and absolute discretion. If the Applicant exercises this option, the City’s “processing of the Apartment Project Application shall immediately resume with Applicant and City situated as they were (with all respective rights, causes of action, and defenses related to the Apartment Project Application intact, in accordance with Section 2 above) prior to the suspension of processing of the Apartment Project Application pursuant to Section 3.5 above.”

Therefore, if the Applicant exercises its option to terminate the Process Agreement, the City shall immediately resume processing the Terraces of Lafayette Apartment Project. No new application will be submitted by the Applicant.

General Plan Amendment

As part of the application process of the Homes at Deer Hill Project, the Council approved a General Plan Amendment from Administrative/Professional Office (APO), which permits multiple-family residential up to 35 units per acre to Low Density Single Family Residential (SFR- LD), which permits single-family residential up to 2 units per acre.

The Terraces of Lafayette Apartment Project is an affordable housing project under the Housing Accountability Act (Gov. Code 65589.5) (the “Act”). For such projects, the Act specifies that a local agency (such as the City) “shall not disapprove a housing development project “ or “condition approval [of the project] in a manner that renders the housing development project infeasible for the development” of affordable housing. (Gov. Code 65589.5(d)). Specifically, the City would need to find the project would have “a specific adverse impact upon public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.” (Gov. Code 65589.5(d)(2).) The Act further specifies that “inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact.” (Gov. Code section 65589.5(d)(2).) In addition, Government Code section 65589.5(d)(5) provides that a change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project.

Although a general plan amendment or rezoning is a legislative act subject to referendum, the Terraces of Lafayette Apartment project does not require a general plan amendment or rezoning. The project application was deemed complete in 2011, when the property had a general plan and zoning designation of Administrative/Professional Office (APO). Therefore, any subsequent change to the General Plan (including the change from APO to the current SFR-LD designation) would not be a basis for denial of the project. As a result, no legislative act that is subject to referendum is required for the applicant to develop the project.

¹ The Process Agreement has been amended several times to include the dog park and to extend the term to allow for processing of the Homes at Deer Hill Project and subsequent challenges thereto.