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December 5, 2018

VIA E-MAIL AND U.S. MAIL

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**Re: Conflict of Interest Issues Regarding City Council Member-Elect
Susan Candell with Respect to the Terraces of Lafayette Apartment Project**

Dear Rob:

This letter is in response to your call late Friday afternoon, on November 30, 2018, after having received and reviewed our letter earlier that day documenting Councilmember-elect Susan Candell's long history actively opposing our clients' proposed 315-unit affordable apartment project in Lafayette and even expressing personal hostility to our clients. You called to ask for my thoughts on *City of Fairfield v. Superior Court*, 14 Cal.3d 768 (1975), which I briefly explained is both off point and distinguishable. This letter elaborates further on that topic.

As you know, *Fairfield* is an older California Supreme Court decision that addressed a planned unit development permit for a new shopping center. There, the city council scheduled a hearing to consider the adequacy of the project EIR and to determine whether to grant the permit. At the outset of the hearing, the developer's attorney requested that the mayor and one councilmember disqualify themselves from participation and filed two declarations in support of the request. One declaration stated that before the hearing the mayor had told the developer he was opposed to the project. The other stated that the other councilmember spoke against the project at two meetings of the planning commission, and in response to an audience question at a candidate's night meeting, reiterating his opposition. Both councilmembers refused to disqualify themselves and voted with a three-member majority to deny the project.

Without waiting for an answer to its complaint alleging that the bias of the councilmembers denied the developer a fair hearing, the developer sought to depose the councilmembers. One category of questions sought to inquire into the evidence the council examined and relied upon and the reasoning process underlying the denial of the project, including the factors the mayor considered in making up his mind to vote against the project. A second category sought to discover when the councilmembers

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had decided to vote against the project and whether they had stated their opposition to the project at a date earlier than the council meeting. The trial court ordered the councilmembers to respond to the questions. The city sought to restrain enforcement of that order in the court of appeal. The court of appeal disagreed with the trial court and held that because the developer made no showing that its questions were reasonably calculated to lead to the discovery of admissible evidence, as required by Code of Civil Procedure section 1094.5(e) (evidence additional to the administrative record can be introduced only if that evidence could not with reasonable diligence have been presented at the administrative hearing, or was improperly excluded at that hearing), the trial court erred in granting the developer's motion to compel answers.

The *Fairfield* decision focused on whether, under section 1094.5, the mayor and the councilmember could be deposed about the mental deliberations that led to their decision to vote against the project. Importantly, the city's zoning ordinance did not prescribe any specific standards for the grant of a planned unit development permit and thus the proceedings before the city council did not turn upon the adjudication of disputed facts or the application of specific standards to the facts found. As a result, "the few factual controversies were submerged in the overriding issue of whether construction of the shopping center would serve the public interest" because in a city of Fairfield's size at the time, the council's decision on the location and construction of a shopping center could significantly influence the nature and direction of future economic growth as an issue of local policy:

"The construction of that center will increase both the city's revenue and its expenditures; will affect the value not only of neighboring property but of alternative shopping center sites and of existing businesses; will give employment but may also aggravate traffic and pollution problems. These topics are matters of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the desirability of the shopping center with each other and with their elected representatives."

Accordingly, the court acknowledged in dicta that a councilmember may discuss issues of vital concern with his constituents and state his views on matters of public importance. The court qualified this point, however, by noting that most of the comments at issue occurred in the context of a political campaign, where candidates should have some freedom to express their policy views about matters of importance in the community.

The *Fairfield* decision did not discuss, much less consider and analyze, the concept of common law bias. And while *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470 (2004) did not discuss or distinguish *Fairfield*, the court in *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152 (1996) did. It construed *Fairfield* narrowly, as tolerating general comments about local policy only, as distinguished from comments about a specific project:

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“Of course, a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. [citation omitted]. Here, Benz’s conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, Benz’s personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker.”

In short, *Nasha* and *Clark* are on point and deal squarely with the constitutional legal requirement for unbiased decision-makers in adjudicative matters such as land use permitting. In contrast, however, *Fairfield* was focused largely on the council’s mental deliberations and whether discovery on that subject could appropriately be conducted. It also dealt with elected officials already sworn into office, not prospective elected officials who opposed a project before their candidacy or election. In addition, *Fairfield* did not address common law rules against constitutionally impermissible bias and was focused heavily on city policy issues rather than adjudicative fair hearing rights.

Of course, we are not interested in conducting discovery into Susan Candell’s mental deliberations, particularly when she has freely volunteered her thoughts about the project publicly for years, and she was not a candidate for office much less an elected official when she made the vast majority of her extensive statements in opposition. In addition, the Terraces project is about the issuance of an adjudicative land use permit under the findings established in Lafayette Municipal Code section 6-215, subject to the strict rules established by the state’s Housing Accountability Act (Gov’t Code section 65589.5), and has nothing to do with general city land use or housing policy. In fact, if the project has anything at all to do with policy it has to do with *state* policy and the legislature’s command that the HAA “be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing,” (section 65589.5(a)(1)(L)). As shown in our November 30 letter, however, Ms. Candell has already expressed her hope that the City attempt to figure out “what it would take to make [the HAA’s] findings” to deny the project, an objective contrary to the plain terms of the HAA.

Again, Ms. Candell’s deeply held opposition to the project is extensively documented and widely known. Indeed, it helped catapult her into office. Thus, we note that Ms. Candell could not have washed away her passionate project opposition with any self-serving statement about her ability to be neutral and fair once elected, and to her credit she has not made any attempt even to try to do so. Instead, the only facts in the record are Ms. Candell’s repeated expressions of opposition to the project, freely made, without compulsion or coercion. This clearly indicates that she cannot fairly consider it. No reasonable person could conclude otherwise.

While we acknowledge again that Ms. Candell had a right to express herself as a private citizen and to advocate against the project, a right she regularly exercised for more than half a dozen years, there is a consequence to having done so now that she

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has been elected to the City Council. Once sworn in Ms. Candell will be required to uphold the law, including compliance with the HAA and our clients' legal rights to impartial adjudicators. But she cannot fulfill that role here, however, when it comes to the project, because she is embroiled in her long and spirited battle against it.

Thus, we again respectfully make clear that Ms. Candell must recuse herself from participating in any part of the City's ongoing processing of the project (including open meetings and closed sessions, meetings or conversations with other City officials and staff, and otherwise) and indicate publicly, on the record, that she has so recused herself. As the chief legal officer for the City itself, embodied in the City Council as a whole, the City Attorney previously provided such sound advice under far more benign facts several years ago when Councilmember Traci Reilly signed but a single petition against the project while still a private citizen. Similarly here, to ensure the City's upcoming permitting process for the project is fair and legally valid, we are confident that similar advice will and must be provided under the abundant facts here that establish a level of unusually committed project opposition and resultant bias that has never been and cannot be credibly denied.

Thank you in advance for your prompt assistance with this important matter.

Sincerely,

MILLER STARR REGALIA

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cc: Honorable Mayor Don Tatzin and City Councilmembers
Steve Falk, City Manager
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