Attachment 9

GARFINKLE LAW OFFICE
Attorneys at Law
1205 Via Gabarda
Lafayette, California 94549

Gary S. Garfinkle, Certified
Appellate Law Specialist
Maria J. Garfinkle

(925) 932-3737
Fax: 932-2048
ggarfinkle@comcast.net

April 9, 2018

By Email and Hand Delivery
Don Tatzin, Mayor
Cameron Burks, Vice Mayor
Mike Anderson, Councilman
Mark Mitchell, Councilman
Ivor Samson, Councilman
City of Lafayette

Re: Lafayette City Council Meeting, April 9, 2018, Item 7F

Dear Mayor Tatzin and City Council Members,

The Save Lafayette organization hereby responds to the city attorney's misleading "Informational Update Regarding whether Terraces of Lafayette Apartment Project could be subject to a Referendum." She states that the Terraces proposal sought permits which are administrative and, she claims, not subject to referendum. But she ignores essential provisions which would indeed be "legislative" acts subject to the constitutionally protected power of the People to override the Council by both referendum and litigation.

Supporters of the "Homes at Deer Hill" proposal attempt to scare voters into believing that a "No" vote on Proposition L will result in the Terraces project with 315 apartments on the sensitive parcel between Deer Hill Road, Pleasant Hill Road and Highway 24. The truth, however, is that the apartment project has never been approved; and it would face the same extreme obstacles as before if the developer elects to resurrect it — including but not limited to the People's referendum power.

The certified Environmental Impact Report (EIR) for the Terraces proposal describes 53 "significant adverse impacts," 13 of which would be "unavoidable" even with permissible mitigation. The EIR is so devastating to the developer that it appealed the Planning Commissions's certification of the EIR and then threatened a lawsuit when the Council affirmed the certification in 2013.

As Mayor Tatzin explained, "the Council has taken no position with regard to the project. All the Council has done is certify the EIR ...." (City Council Minutes, Sept. 23, 2013, p. 55.) And when the Council decided to shelve the Terraces application, then-Vice Mayor Andersson declared, "there are places where the original 315-unit project would be a great project, but this was not the place and people came out and made that point clearly

and overwhelmingly ....” (City Council Minutes, Jan. 22, 2014, p. 16.)

Thus, the possibility of the Council approving the Terraces apartments is highly problematic at best. And if it were to do so, the citizens of Lafayette could override that approval by referendum and/or litigation.

First, a project of this magnitude commonly includes a development agreement to establish the rights and duties of the developer and the City. (See Gov. Code, § 65864 et seq.) While not mandatory, the agreement has important benefits to the City and “allows a developer to make long-term plans for development without risking future changes in the municipality’s land use rules, regulations, and policies.” (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239, 1255, fn. 2.) Thus, the current Deer Hill Homes project has a lengthy detailed development agreement.

Government Code section 65867.5(a) provides, “A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum.” Specifically, a “development agreement .... is subject to referendum, which allows the electorate to overturn approval of the agreement.” (*San Francisco Tomorrow*, *supra*, 228 Cal.App.4th at p. 1255, fn. 2.)

Second, the Terraces apartments cannot lawfully be approved without a general plan amendment — which also is subject to referendum. It is elementary that “ ‘the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.’ ” (*San Francisco Tomorrow*, 228 Cal.App.4th at p. 1248.) The City vehemently asserted that very point in its failed attempt to justify its improper interference with the Referendum process. (*Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 663-665.)

In 2015, the Council amended the general plan to specify “Low Density” single-family residences “up to 2 dwelling units per acre” for the sensitive parcel between Deer Hill Road, Pleasant Hill Road and Highway 24. That is utterly inconsistent with the Terraces proposal’s high density apartment use.

“It is settled that the adoption or amendment of a general plan is a legislative act subject to referendum.” (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 773, citing, e.g., *Yost v. Thomas* (1984) 36 Cal.3d 561, 570; accord, *San Francisco Tomorrow*, 228 Cal.App.4th at p. 1248, in turn citing Gov. Code, § 65301.5 [“The adoption of the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or element thereof is a legislative act”]; *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 367.)

As the Court of Appeal explained when repudiating the Council's improper interference with the referendum process, Government Code section 65860(c) provides, "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, ... the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended." (*Save Lafayette v. City of Lafayette*, *supra*, 20 Cal.App.5th at pp. 665-666.) To that end, the court specifically cited the Low Density Residential LR-5 designation, which the Council previously approved but deferred while considering the developer's application. (*Save Lafayette*, at p. 667.)

Accordingly, if and when the People defeat the Deer Hill project in the court-mandated Proposition L referendum, the City will be required to restore consistency between the general plan and zoning — which will require a legislative act subject to referendum.

Nor does it matter that the former APO general plan designation was in effect at the time of the Terraces application. Absent unique circumstances not present here, "a property developer is vulnerable to shifts in zoning or other land use regulations occurring during the preparatory stages of his project. [Citations.] By issuing approvals preparatory to a building permit, the government makes no representation that the developer will be exempt from changing land-use regulations; he must comply with the ordinances in effect at the time he secures a building permit." (*Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 975.)

As noted, nothing in the Terraces proposal has been approved except the EIR which cites numerous significant and unavoidable adverse impacts. Thus, there is no vested right under the former APO designation; and the current general plan "may operate retroactively to require a denial of the application." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1179.)

Nor does the 2013 "tolling agreement" preserve the former APO general plan designation. The agreement exists to preserve the developer's right to legally challenge the EIR certification. It does not purport to preserve zoning and general plan provisions, for which the developer has not acquired any vested right.

Third, any other contract or policy determination would be subject to referendum. "'"Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power...."'" (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1113.) More specifically, "'"the award of a contract, and all the acts leading up to the

award, are legislative in character."'" (*Id*. at p. 1114.)

Fourth, remarkably, the ballot argument rebuttal by councilmen Anderson and Burks and others mistakenly asserts, without explanation, that the apartments project "is prevented by the Housing Accountability Act from being put to a vote." That is simply incorrect.

The HAA neither requires the Council to approve the apartments, nor restricts the People's right to overrule an approval. The HAA authorizes rejection where the proposed project "would have a specific, adverse impact upon the 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 or rendering the development ... financially infeasible." (Gov. Code, § 65589.5, subd. (d)(2).) As previously noted, the EIR cites numerous significant and unavoidable adverse impacts.

Thus, both the Council and the citizens have ample authority to deny the apartments proposal.

Even assuming the HAA may limit the Council's discretion, such restrictions on local government would not restrict the People's constitutionally reserved power of referendum. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 935 [restriction on local government taxation does not restrict the People's power], citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785 [statutory CEQA review is not required for voter initiative]; *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1036 [CEQA review not required where local body directly adopts voter initiative].)

Fifth, the People also would have ample authority to overturn an approval of the Terraces apartment project in the courts. "[L]ocal government entities cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans." (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 957-958; accord, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782-787, 789.)

In *Endangered Habitats*, the court set aside approval of a project that would cause an unacceptable increase in traffic, conflict with the policy that new developments must comply with all specific plans, and exempt the project from otherwise mandatory, more stringent, requirements regarding tree preservation, grading, and open space. (131 Cal.App.4th at pp. 783-787, 789.) The Terraces apartments proposal deviates in all of the

above, and several other extreme respects, from numerous objectives, policies and land use provisions.

For all of these reasons, it is unconscionable for supporters of the Homes project to attempt to scare the voters into believing that a "No" on Proposition L would result in the even more intensely opposed apartments on the sensitive parcel. The city attorney's simplistic and misleading support for the scare tactic should be rejected.

Respectfully submitted,

Gary Garfinkle
Attorney for Save Lafayette

cc: Steven Falk, City Manager
Joanne Robbins, City Clerk
Malathy Subramanian, City Attorney