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June 13, 2018



Hand-Delivered June 13, 2018

Mayor Tatzin and City Council
c/o Niroop Srivatsa, Planning and Building
Director
City of Lafayette
3675 Mount Diablo Boulevard, Suite 210
Lafayette, CA 94549

Re: City Council Hearing June 13, 2018/Urgency Zoning Ordinance

Mayor Tatzin and City Council:

Our offices continue to represent O'Brien Land Company, LLC ("O'Brien) and Anna Maria Dettmer, Trustee ("Dettmer"), the applicant and owner, respectively, of the subject property at APN 232-150-027 ("Property").

Two days ago, on June 11, 2018 the City Council held a public hearing on the Property. The published "purpose" of the June 11 hearing was to consider rezoning options for the Property, in order to bring the Property's zoning consistent with the General Plan pursuant to Government Code 65860. (See Agenda, Staff Report, dated June 11, 2018). The Staff Report of June 11 recommended that the Council consider options, and direct staff to proceed with a rezoning under the normal procedures.

However, at the June 11 hearing, citizens appeared and, orally and in writing, "demanded" that the City Council immediately downzone the property – *in order to stop the Apartment Project*. Please reference oral and written comments, stating as follows:

"[S]top the Terraces Apartment Project and adopt a low density single-family residential zoning without any delay." (See written comments dated June 10, 2018, in Council's packet.)

Citizens testified that they do not want the affordable Apartment Project in the City, and that action needs to be taken immediately to prevent the Apartment Project. They stated that, given these demands, merely downzoning the zoning ordinance in a "reasonable time" as required by Government Code 65860, is "not good enough." Instead, citizens stated that an "urgency ordinance" should be adopted in order to more quickly downzone the property

In response to the citizen's demands, the Council directed Staff to immediately draft an "urgency ordinance" and to bring such urgency ordinance back to the Council for approval within two days (48 hours).

An urgency ordinance under Gov't Code Section 65858 requires specific, legislative findings that there is a "current and immediate threat to the public health, safety, or welfare." *The Council did not identify any threat to the public health or safety* – instead the Council directed the City Attorney immediately draft an urgency ordinance, and such direction was based solely in response to the referenced citizen comments.

Of course, an affordable housing project is not a threat to the public health, safety, or welfare. Such affordable housing project is greatly needed within the City. The City of Lafayette remains far behind in its production of affordable housing under all State laws and the Housing Accountability Act.

Please see specific comments set forth below.

1. There is no evidence of a current and immediate threat to public safety, health or welfare in this case.

Government Code 65858(a) and (c) state as follows:

(a) Without following the procedure otherwise required prior to the adoption of a zoning ordinance, the legislative body of a . . . city, *to protect the public safety, health and welfare*, may adopt as an emergency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body planning commission or the planning department is considering or intends to study within a reasonable time.

(c) The legislative body shall not adopt or extend any interim ordinance pursuant to this section *unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variance, building permits, or any other applicable entitlements for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety or welfare.*

There is absolutely no evidence of a health, safety or welfare threat in this case. (At time of this writing, the specific urgency ordinance has not been made available to the property owner, developer, or to the public, and we are unable to address the findings that will be drafted. We will necessarily supplement this letter when such ordinance is made available.)

Generally, an urgency measure is adopted where a property owner submits a land use proposal for use of property that may be in conflict with the proposal the City is considering. (See *California Land Use and Planning Law*, 35th Edition, at p. 65.) Here, the subject property

has been vacant for decades. There are no proposals for development – except for the Apartment Project, as discussed below.

2. The City's actions deny the property owner and developer due process

The City's opposition to the Apartment Project has been well-documented in earlier administrative proceedings. Here, the City is proposing an extraordinary "urgency ordinance" on private property, without any evidence in the record. We have noted that the vote on Measure L has not yet been certified – and yet the City is adopting an "urgency ordinance" based on the potential results of the vote. Such action in and of itself denies the landowner and applicant its due process rights.

We further note that a moratorium that contains an improper land use regulation may result in temporary taking – for which money damages needs to be paid. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 321 (1987).

3. The City has executed a binding Process Agreement with the property owner/developer.

As stated in our office's June 11, 2018 letter, when the Apartment Project was proposed and deemed "complete," the City approached O'Brien regarding a compromise approach for a single family zoning and project (the Single-Family Project). The City, in making that approach, promised O'Brien orally and in writing that if the Single-Family Project was the subject of a referendum, O'Brien could resume processing the Apartment Project and the City would immediately process the Apartment Project application. The property owner and O'Brien relied on the City's express promises in this regard.

The City executed the Process Agreement with the property owner/developer. Pursuant to the Process Agreement, the City agreed to: (i) suspend the Apartment Project; (ii) provide a procedure for consideration for the Single-Family Project; and (iii) provide for the owner/applicant to return to the Apartment Project (with all rights intact) in the event the entitlements for the Single-Family Project could not be obtained. (See Process Agreement, Recital E; Section 2.)

4 The urgency ordinance statute cannot be utilized to prohibit the application of a development application.

The citizens at the June 11 hearing requested that the City rezone the Property immediately, in order to "stop" the Apartment Project. The urgency ordinance procedure cannot be used to prohibit the processing of a development application. See *Building Industry Legal Defense Foundation v. Superior Court* (72 Cal. App. 4th 1410) (1999). The Court in *Building Industry* states:

We conclude Government Code section 65858 is clear. It authorizes a city to prohibit any uses which may be in conflict with a [general plan being studied] so long as the city makes a finding the approval of additional subdivisions and other

entitlements of use would result in a current and immediate threat to the public health, safety or welfare. *Nothing in that section permits a city to prohibit the formal processing of development applications, such as a tentative subdivision map . . .*(Emphasis added.)

5. Incorporation of our June 11, 2018 letter

At the June 11, 2018 hearing, the Council directed the Planning Commission to consider R-20, R-40 and R-65 zoning. These comments incorporate all the statements and claims set forth in our June 11, 2018 letter to the City, including our statement that a downzoning of the Property will result in a “taking” of all economically beneficial use of the Property.

Very truly yours,


WENDEL, ROSEN, BLACK & DEAN LLP

Allan C. Moore

cc: City Attorney
Clients