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July 3, 2018

VIA E-MAIL AND HAND DELIVERY

Don Tatzin, Mayor
City of Lafayette
3675 Mount Diablo Blvd., #210
Lafayette, CA 94549
E-Mail: dtatzin@lovelafayette.org

**Re: Terraces of Lafayette (L03-11)
3233 Deer Hill Road, Lafayette**

Dear Mayor Tatzin and Honorable Councilmembers:

This firm, along with Allan Moore, of Wendel, Rosen, Black & Dean LLP, represents O'Brien Land Company, LLC and Anna Maria Dettmer in connection with the above-referenced 315-unit apartment project ("Project"). We write to address the two items of "old business" scheduled for the City Council's July 3, 2018 special meeting:

7) Old Business

- A. **Consideration of June 15th letter from O'Brien and next steps for processing the Application and response to the letter.**
Recommendation: Discuss and direct staff.
[Item 7A](#)
- B. **Consideration of Appointing Additional Legal Counsel Regarding Terraces Apartment Project located at 3233 Deer Hill Road**
Recommendation: Discuss and give direction to City Manager

With respect to agenda item 7(A), our clients have diligently resumed processing the Project, pursuant to the Housing Accountability Act (Cal. Govt. Code § 65589.5), as they are authorized to do pursuant to the City Council-approved Terraces Project Alternative Process Agreement and each of the seven amendments thereto (collectively, "Process Agreement"),¹ all of which provide as follows:

¹ Even in the absence of the Process Agreement, we note that the City could have informally agreed to "suspend" processing the Project and allowed our clients to resume processing the Project at any point in time. The Permit Streamlining Act was designed for the protection of developers and nothing in the Act or in any other provision of California law acts as a sword to "kill" development applications that do not proceed within a defined period of time. Moreover, nothing in the Permit Streamlining Act or any other provision of law prevents the City from agreeing to "suspend" processing a development application or otherwise compels denial of an application that is dormant for any particular length of time. In addition, we note the Housing Accountability Act, separate from the Process Agreement, provides that no change to the general plan land use designation or zoning ordinance, after the Project was deemed complete in 2011, would be a basis for denial of the Project. See Govt. Code § 65589.5(d)(5). As further shown herein below, the City has repeatedly confirmed this as well.

In the event of any termination or expiration of this Agreement without approval of the Entitlements as set forth below, City's processing of the Apartment Project Application shall immediately resume, with Applicant and City situated as they were prior to the suspension of processing of the Apartment Project Application pursuant to Section 3.5 below, with all of their respective rights, obligations, causes of action, and defenses related to the Apartment Project Application intact, including, but not limited to, all provisions of the Housing Authority Act (Gov. Code section 65589.5, et seq.)."

The City Council approved the Process Agreement and has never wavered in its understanding of and commitment to our clients' contractual rights pursuant thereto, and we urge the Council not to do so now, particularly at this late date and after the Council has ratified the Process Agreement seven times. In the event the City elects to breach the Process Agreement, however, despite our clients' detrimental reliance thereon for years, we are compelled to note that so doing would expose the City to substantial monetary liability under *Mammoth Lakes Land Acquisition v. Town of Mammoth Lakes*, 191 Cal.App.4th 435 (2011).

In *Mammoth Lakes*, the Town's anticipatory breach of a contract² resulted in an award of \$30 million (increased to \$43 million through inflation) for the breach and nearly \$2.4 million in attorney fees. Simply put, the City cannot avoid processing the Project pursuant to the Housing Accountability Act. But the City certainly can avoid changing its course of conduct over the last four years consistently confirming the Process Agreement is valid, by instead repudiating the Process Agreement and thereby running the risk of a substantial breach of contract award to our clients.

As you surely know, the City has already responded to O'Brien's June 15 letter, and we have relied on that response in the same way we have relied on the Process Agreement from the time of its original approval and through the City Council's ongoing and repeated ratifications of the Agreement. Indeed, the City Manager contemporaneously forwarded to us an email from the City Attorney on June 15 confirming: "Now that we have received this [June 15] request from O'Brien, City Staff will immediately resume processing the Apartment Project as provided for in the Process Agreement."

Thereafter, we met in person with the City Manager, City Attorney, and the Planning Director, on June 19, and staff confirmed unequivocally that the City has resumed processing the Project application. Following the meeting, O'Brien confirmed that discussion by letter dated June 21, and submitted a \$15,000 deposit staff requested

² While the contract at issue in *Mammoth Lakes* was a statutory Development Agreement, a particular type of municipal contract, the underlying action did not hinge on the nature of the contract in question. The Process Agreement is not a Development Agreement, but it is a contract, and the City had the authority to enter it, subject to the Mayor's signature, pursuant to Government Code section 40602. California cases consistently confirm that cities have the authority to enter into contracts that enable them to carry out their necessary functions, including those implied by necessity. See, e.g., *County of Ventura v. City of Moorpark and Broad Beach Geologic Hazard Abatement District*, ___ Cal.App.5th ___ (2018) (settlement agreement) and *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal.App.3d 724, 734 (1976) (annexation agreements).

in connection with such resumed processing. (See attached letter to City dated June 21, 2018 and copy of deposit). City staff have since deposited that check, and it cleared our clients' bank on June 28. In providing the requested \$15,000 deposit and hiring additional consultants to successfully advance the Project, O'Brien has continued to detrimentally rely on the City's representations.

The City has also repeatedly confirmed the applicable provisions of the Housing Accountability Act with respect to the Project, stating that:

"The [apartment] project application was deemed complete in 2011, when the property had a general plan and zoning designation of Administrative Professional Office (APO). Therefore, no subsequent change to the zoning, nor the change to the General Plan (including the change from APO to the current SFR-LD designation), would be a basis for denial of the [Apartment] project under Government Code section 65589.5(d) of the Housing Accountability Act."

(See City Council Staff Reports dated June 11, 2018 and June 13, 2018, and similar statements placed in the minutes of the City Council's meetings on those dates.)

With respect to the agenda item 7(B), we note that Mala Subramanian is an excellent City Attorney who has served Lafayette with distinction for years. Unfortunately, however, it appears there is a coordinated effort by certain members of the community to tarnish her reputation and second-guess her advice given that she concluded, at the City Council's December 14, 2015 City Council meeting, the referendum petition to repeal Ordinance #641 was legally invalid under *deBottari v. City Council*, 171 Cal.App.3d 1204 (1985).

The *deBottari* case provided a bright line rule—a zoning referendum is invalid if it would result in a general plan inconsistency—that prevailed throughout California for decades. The League of California Cities pointed out this fact in its recent amicus curiae brief to the California Supreme Court in *City of Morgan Hill v. Bushey*, 12 Cal.App.5th 34 (2017). *Bushey*, of course, reached the opposite result, concluding that the "reasoning in *deBottari* is flawed" because a referendum does not "enact" an ordinance.

While the California Supreme Court has yet to rule in *Bushey* and thereby resolve this untenable recent split in legal authority, it is important to understand, as did the League, that the *Bushey* decision "unsettles a rule that the League and its member cities and their elections officials have understood and followed for over 30 years."

In light of the fact that *Bushey* was not published until approximately a year and a half after the City Attorney concluded the referendum petition to repeal Ordinance #641 was legally invalid, pursuant to *deBottari*, the City Attorney's advice based on the controlling law at that time was indisputably correct. The opponents of the

Don Tatzin, Mayor
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Homes at Deer hill project were thus essentially gifted the winning case on the eve of briefing the *Save Lafayette* appeal, but that belated change in the law does not warrant any criticism of the City Attorney much less the hiring of additional legal counsel in connection with the Project.

We understand that there is a segment of the community that is vocal in its opposition to the Project. Please be assured, however, that our clients are committed to the Project and look forward to seeing it through to a successful outcome. Notwithstanding the challenges the Project (and the Homes at Deer Hill project alternative) has faced for many years, the City's staff has served the community well and we encourage the City Council to allow its excellent public professionals to do the work the processing of the Project requires.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW/kli

Attachments

cc: Steve Falk, City Manager
Mala Subramanian, City Attorney
Niroop Srivatsa, Director, Planning & Building Services Department
Joeanne Robbins, City Clerk
Dennis O'Brien
Anna Maria Dettmer
Allan Moore, Esq.

O'Brien Land Company, LLC

June 21, 2018

Niroop Srivatsa, Director, Planning & Building Services Department
City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549

Re: Continuation of City Processing of Apartment Project

Dear Niroop:

Thank you and thanks to Steve Falk and Mala Subramanian for meeting with us at the City offices on June 19, 2018 regarding our Apartment Project. In our meeting, the City Staff confirmed that the City already resumed processing the Apartment Project pursuant to the Process Agreement the City Council approved in January 2014. The City Staff's confirmation was/is consistent with the terms of the Process Agreement and with City Attorney's published e-mail dated June 15, 2018, which states:

“City Staff will immediately resume processing the Apartment Project as provided in the Process Agreement.”

Further in our meeting, City Staff confirmed that the Apartment Project application was determined to be “complete” in 2011, when the Apartment Project property had a General Plan and Zoning designation of APO. Again, the City Staff's confirmation was/is consistent with the Planning Staff and City Attorney's statement in her June 11 and June 13 staff reports, as follows:

“The [Apartment] project application was deemed complete in 2011, when the property had a general plan and zoning designation of Administrative/Professional Office (APO). Therefore, no subsequent change to the zoning, nor the change to the General Plan (including the change from APO to the current SFR-LD designation), would be a basis for denial of the project under Government section 65589.5(d) of the Housing Accountability Act.” (Staff Reports dated June 11, 2018 and June 13, 2018.)

In our meeting, City Staff listed the prior hearings for the Apartment Project and confirmed that we would proceed therefrom. No new application is required to resume processing the Terraces of Lafayette Apartment Project (referenced by the City as L03-11, HDP06-11, DR03-11, TP07-11). However, the City requires a \$15,000 deposit for further processing of the application.

Based on all of the above, and in reliance thereon, Dettmer/O'Brien have retained consultants and started work on the further processing of the application. Dettmer/O'Brien hereby submits the \$15,000 deposit requested by the City.

Very truly yours,



Dennis O'Brien

O'BRIEN LAND COMPANY, LLC

FIRST REPUBLIC BANK

908

873 SANTA CRUZ AVENUE, SUITE 204
MENLO PARK, CA 94025

1111 SOUTH EL CAMINO REAL
SAN MATEO, CA 94402

11-8166 / 3210

Date
6/20/2018

Amount
****\$15,000.00**

Pay

Fifteen Thousand Dollars Exactly

VOID

To The
Order
Of

CITY OF LAFAYETTE
FINANCE DEPARTMENT
3675 MT. DIABLO BLVD., SUITE 210
LAFAYETTE CA 94549

Angeli

⑈000908⑈ ⑆321081669⑆ 91600700801⑈

CITY OF LAFAYETTE

3675 MT. DIABLO BLVD. #210
LAFAYETTE, CA 94549 (925) 284-1968

- ADMIN.
- PLANNING
- POLICE
- SCHOOL BUS
- ENGINEERING
-

CUSTOMER'S ORDER NO.		PHONE		DATE JUNE 21 2018	
NAME O'BRIEN LAND COMPANY					
ADDRESS 873 SANTA CRUZ AVE #204 MENLO PARK					
CASH	C.O.D.	CHARGE	ON ACCT.	MDSE. RET'D.	PAID OUT
					15000.00
Deposit for processing LOS-11					
SOLD BY					TAX
RECEIVED BY <u>[Signature]</u>					TOTAL 15000.00

C PRODUCT 609 All claims and returned goods MUST be accompanied by this bill.

21184

Thank You