



January 17, 2019

Via Electronic Transmission (cburks@lovelafayette.org)

Mayor Cameron Burks and Members of the Lafayette City Council
City of Lafayette
3675 Mt. Diablo Blvd. #210
Lafayette, CA 94549

Re: Challenge of O'Brien Land Company to Lafayette City Council dated November 30, 2018

Mayor Burks and Members of the Lafayette City Council:

Save Lafayette is a local organization of concerned citizens dedicated to protecting Lafayette's character and the integrity of its governmental processes. Since its establishment in 2014 it has stood for protecting the right of Lafayette citizens to be heard and considered on local land use decisions as reflected in the decision of the California Court of Appeal in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657 protecting the people's right to referendum. As you know, the Court ruled that the "City Improperly Interfered with the Referendum Process" and ordered the election thereafter known as Measure L in which Lafayette voters rejected the proposed development at Deer Hill by a 55% vote.

We have reviewed the correspondence dated November 30, 2018 from Bryan Wenter, attorney for O'Brien Land Company LLC ("O'Brien") challenging the right of recently elected Councilmember Susan Candell, who received the highest number of votes in the November 2018 City Council election, to participate in any action involving the O'Brien apartment application. O'Brien takes the position that Councilmember Candell has an "unacceptable probability of actual bias" because of her civic activities relating to O'Brien's proposed development on the Deer Hill property, including that "Ms. Candell was a key participant and community leader in the 'Vote No on Measure L' campaign". The O'Brien letter includes references and attachments of Councilmember Candell's comments at city council meetings and during the Measure L campaign, and previous O'Brien apartment application including air quality impacts of the proposed soil export involving effect of 30,000 dump truck trips on local schools.

There are many instances in which O'Brien misstates or distorts the activities of Councilmember Candell and it is not the purpose of this letter to exhaustively review each and every statement in O'Brien's 11 page letter and 14 attachments totaling over 50 pages. For example, Councilmember Candell's concern as a private citizen over air impacts on local schools was

directed to construction practices and sought monitoring, and was not necessarily in opposition to the apartments application. The correction she obtained from the Bay Area Air Quality Management District related to the lack of onsite air monitoring at the proposed \$3 Million public children's playing field, tot lot, and public not the homes, and was based on the undisputed fact that O'Brien's EIR consultant was involved in election activities and submitted a project description to the BAAQMD that was incomplete and different from the actual project description, leading the BAAQMD to issue a correction on May 31, 2018 that the public project area "is in the purple zone on the [BAAQMD Planning Healthy Places] online maps" and that a statement that there is "no health risk to children playing on that field is *inaccurate*". Encouraging the hiring of specialized independent land use counsel is not an act of opposition to a project, unless it is assumed the City Attorney improperly favors O'Brien.

Nevertheless, O'Brien takes the position that being a participant and/or community leader in the Measure L campaign disqualifies a Councilmember from participation in any action on O'Brien's development application. Save Lafayette does not necessarily agree with many of the statements and characterizations of O'Brien in the November 30, 2018 letter, but does agree that parties involved in land use hearings are entitled to administrative due process including a fair and impartial hearing process free from a probability or appearance of bias. In any event, for purposes of this letter, Save Lafayette will take the O'Brien objections at face value as presented by Mr. Wenter.

Of course, O'Brien's previous position in 2015 was that Lafayette citizens were not entitled to a referendum under the California Constitution, a position that the City Attorney erroneously adopted and which was soundly rejected by a unanimous Court of Appeal in the *Save Lafayette* case. It is obvious that the O'Brien objection to Councilmember Candell is similarly misguided and has the sole objective of skewing and restricting the remaining City Council to members that it thinks (accurately or not) will favor its project.

In referencing *selected* authorities on due process, O'Brien omits the important consideration that the due process guarantee extends to Lafayette citizens who are concerned about and may ultimately oppose the O'Brien apartments or certain aspects of the impacts of the project on traffic, air quality, schools, and the view corridors of the City. The California Supreme Court has made abundantly clear that administrative due process protects other landowners and citizens whose property rights can be affected, including the right to an impartial hearing. *American Tower v. City of San Diego* (9th Cir. 2014), citing *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612, 617. The City has a due process obligation to *other* landowners and citizens, including "a duty to hear their views, and a duty to consider the proposed development with respect to its effect on *all* neighboring property owners." *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549 (emphasis in original). Given the broad potential unmitigated impacts of additional traffic on public safety and convenience, including delays in excess of federal and state standards on emergency responders for fire, police, and emergency services, air quality impacts on nearby residents and schools, and views in one of the most conspicuous corridors in the City, this includes many, if not most, of the citizens of Lafayette, and certainly many members and

supporters of Save Lafayette. The due process doctrine cited by O'Brien protect *both* applicant and affected citizens in the future hearing process.

In presenting its objections to Councilmember Candell, even if valid, O'Brien ignores the role of three other elected Councilmembers who were key participants and leaders in the Measure L campaign. Mayor Burks was a co-chair of the 'Yes on Measure L' campaign and actively campaigned for and worked with the O'Brien political consultants who used his name and image in materials distributed in a six-figure political campaign, the most expensive in Lafayette history. Councilmember Gerringe likewise endorsed and campaigned for O'Brien, and allowed her name and image to be used in materials promoting the O'Brien and Yes on Measure L. O'Brien makes an issue of Councilmember Candell's role on the BAAQMD correction on air quality, but Councilmember Gerringe was observed at a campaign event handing out the earlier BAAQMD statement procured by the O'Brien environmental consultant, prior to the BAAQMD correction. Councilmember Anderson also endorsed Measure L, and allowed his name to be used on O'Brien campaign materials and advertisements distributed repeatedly to Lafayette citizens.

The foregoing summary is not intended to be exhaustive, and it is incumbent on Mayor Burks and Councilmembers Gerringe and Anderson to disclose *all* of their activities and communications with O'Brien. Save Lafayette may supplement this correspondence when such disclosure is made.

Accordingly, given O'Brien's attempt to improperly skew the Council by objecting *solely* to Councilmember Candell, Save Lafayette, on its own behalf and on behalf of the citizens of Lafayette who will be affected or potentially affected by the O'Brien proposed project, hereby poses similar objections to Mayor Burks and Councilmembers Gerringe and Anderson. Save Lafayette does this with great reluctance, and solely because of and in response to the objection made by O'Brien. In the event that O'Brien conclusively withdraws its objection to Councilmember Candell, Save Lafayette will consider withdrawing the objections to Mayor Burks and Councilmembers Gerringe and Anderson.

The result, of course, is that four, and possibly five, of the Councilmembers have potential conflicts and a probability or appearance of bias on the grounds originally asserted by O'Brien. This results in the absence of a quorum or ability to conduct business and hearings on O'Brien and the Deer Hill property. This, in turn, invokes and leads to the so-called Rule of Necessity or Rule of Legally Required Participation, found in both California caselaw and the California Government Code.

As stated in *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 520, and cases cited therein, California common law developed the rule of necessity to prevent the vital processes of government from being halted or impeded when multiple officials concurrently have conflicts of interest in the matters before them. It applies where multiple conflicts would otherwise prevent a city council from establishing a quorum and taking any action on a matter. It applies where participation is legally required for the action or decision to be made and there is

no alternative source of decision. 55 Cal.App.4th at 520. Refer also to *Gonsalves v. City of Dairy Valley* (1968) 265 Cal.App.2d 400, 404.


As explained in In the Matter of: Opinion Requested by Kathryn J. Tobias, Chief Counsel (September 10, 1999), CA FPPC Opinion O-99-156, 13 FPPC Op. 5, the Fair Political Practices Commission, citing *Kunec* and other cases, explained that California Government Code section 87101 provides that the prohibition of section 87100 does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is legally required to form a quorum and for the action or decision to be made.

The Rule of Necessity has also been applied in instances when Dianne Feinstein was mayor of San Francisco (*Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484) and Jerry Brown was mayor of Oakland (*Brown v. Fair Political Practices Commission* (2000) 84 Cal.App.4th 137), so that they could participate as mayor in City Council decisions notwithstanding conflicts of interest.

In the context of the present issue of O'Brien, Save Lafayette is of the view that it would not be proper to eliminate all of the Councilmembers allegedly perceived to oppose or support O'Brien. At least one Councilmember from each alleged 'camp' should be allowed to participate. Alternatively, all Councilmembers, as elected by the voters, should be allowed to participate. This is a complex question and it is difficult to predict how a court would react to the situation in which at least four Councilmembers have alleged conflicts. In any event, the O'Brien challenge to Councilmember Candell is of no effect.

Thank you for your consideration and we look forward to receiving the City's response.

Very truly yours,



Michael Griffiths, President
Save Lafayette

Cc: Joanne Robbins, City Clerk
Councilmember Mike Anderson
Councilmember Steve Bliss
Councilmember Susan Candell
Councilmember Teresa Gerring