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January 22, 2019

VIA EMAIL AND U.S. MAIL

Robert B. Hodil
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Re: Conflict of Interest Issues Regarding City Councilmember Susan Candell with Respect to the Terraces of Lafayette Apartment Project

Dear Rob:

As you know, along with Allan Moore of Wendel, Rosen, Black & Dean LLP, we represent O'Brien Land Company, LLC and Anna Maria Dettmer, in connection with the above-referenced 315-unit apartment project ("**Project**").

We write in connection with the letter Michael Griffiths of "Save Lafayette" provided on January 17, 2019. Mr. Griffiths' letter mischaracterizes the sole and unambiguous focus of our November 30, 2018 letter addressing newly elected Councilmember Susan Candell's bias to the Project as well as to our clients (Attachment 1). We addressed the same impermissible bias in our December 5, 2018 and January 14, 2019 letters (Attachment 2 and Attachment 3, respectively).

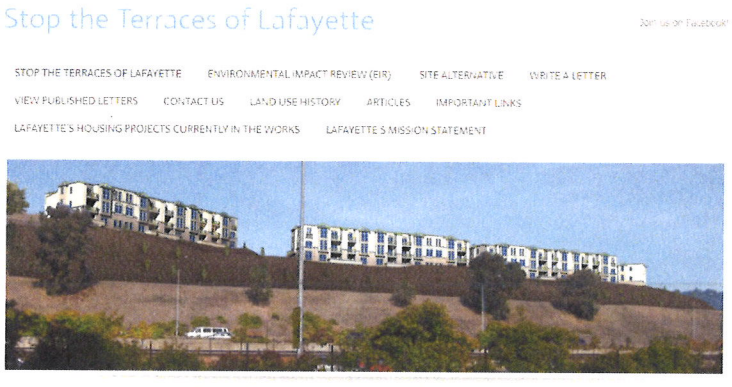
Indeed, the first part of Mr. Griffiths' argument disingenuously focuses on the ballot initiative known as "Measure L," in which the City's voters in June of 2018 rejected a project that proposed 44 single-family homes, known as the "Homes at Deer Hill," as an alternative to the Project. Mr. Griffiths falsely asserts that "O'Brien takes the position that being a participant and/or community leader in the Measure L campaign disqualifies a Councilmember [sic] from participation in any action on O'Brien's development application." Not so.

Our clients did not make that statement, and the fact Councilmember Candell's staunch opposition to the Project continued during the City's consideration of the Homes at Deer Hill does not and cannot cure her bias *against the Project*. In fact, our letters focused squarely on the Project—not on Measure L and not on the Homes at Deer Hill at which Measure L was aimed—and it is Ms. Candell's long held and voluntarily expressed bias *against the Project* that requires her recusal from the City's processing of it. *See, e.g.*, *Woody's Group, Inc. v. City of Newport Beach*, *supra*, 233 Cal.App.4th 1012, 1022-23 (member of city council "strongly opposed" to planning commission decision appealed the commission's decision to the council); *Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th 470, 483 (member of planning commission wrote

article "attacking" project under consideration; member held biased, and commission's decision reversed); *Clark v. City of Hermosa Beach*, *supra*, 48 Cal.App.4th 1152, 1173 (1996) (city council member should have recused himself because proposed project had "direct impact" on the "quality of his own residence"); *Gai v. City of Selma*, 68 Cal.App.4th 213, 219 (1998) (member of personnel commission investigating officer's discharge should have recused himself because he was actually biased against officer); *Mennig v. City Council*, 86 Cal.App.3d 341, 351 (1978) (members of city council who became personally "embroiled" in conflict with police chief should have recused themselves on question of discipline of police chief).

Contrary to Mr. Griffiths' erroneous statements, our November 30 letter expressly focused on "the unequivocally-expressed bias of newly elected City Council member Susan Candell *with respect to the Project*." (Emphasis added). And it noted that "[t]he evidence referenced in this letter omits many other statements Ms. Candell has made *regarding the Project* demonstrating her vehement opposition to it, and it omits almost the entirety of an equally if not more voluminous body of opposition to The Homes at Deer Hill project alternative, which was ultimately defeated in a ballot referendum following a change in the law." (Emphasis added).

As an additional example of such bias *against the Project*, on January 20, 2014, Ms. Candell wrote about the Project to Lamorinda Patch criticizing an alleged "delay" by City staff in advancing a downzoning of the Project site that ultimately failed to prevent our clients from filing the Project application for 315 apartments instead of a handful of single-family homes.[1] Ms. Candell concluded her post against the Project by directing readers to the "Stop the Terraces of Lafayette" page on Facebook and a link to the "Stop the Terraces of Lafayette" website whose homepage shows a misleading representation of the proposed apartments and makes various other false statements against the Project.



In addition, the City Council's July 9, 2018 minutes[2] indicate Ms. Candell supported statements by local resident Eliot Hudson characterizing our clients' June 15, 2018

[1] See https://patch.com/california/lamorinda/terraces-of-lafayette, last visited January 20, 2019.

[2] http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_b070d50cc2a726931718f79256f9d9a0.pdf&view=1

letter resuming processing the Project application as a "very hotly contested legal issue" and urging the Council to respond to the letter "on the assumption it could be held someday to be a new application that requires a 30-day [Permit Streamlining Act 'deemed complete'] deadline." In addition, Ms. Candell urged the Council to take steps "to avoid the possibility that the current application, in whatever state it was when the process agreement was executed, be deemed complete." Continuing her desire to impede any apartment development on the Project site, she concluded that:

> "There are two attorneys with two completely opposite approaches in this, and she fully believes that even if there is the slightest chance the 315 apartments is a resubmittal then the 30 days applies. The Council ought to encompass in the letter all possible scenarios and make the case. If the Council does not do this and it is an actual application, the City will be left wide open for all sorts of new problems."

In his January 17 letter, Mr. Griffiths also elected to use the red herring of mischaracterizing our position regarding Councilmember Candell's bias *against the Project* as a springboard to refer to and rely on legal authority that has nothing to do with the objective facts and is thus irrelevant to the only bias that actually exists—that of Councilmember Candell—and his own baseless speculation intended to smear the balance of the City Council with the same impermissible bias. As attorneys do, however, our correspondence cited only "selected" legal authority because that authority is both relevant and controlling. As a matter of practice, we do not cite authority addressing irrelevant issues, no matter how interesting. Nor did we do so here.

While we understand that Mr. Griffiths is neither a land use attorney, a member of the State Bar of California, or perhaps of any other state bar, the upshot of Mr. Griffiths' strategy, given that applicants for adjudicative land use permits are entitled to procedural due process—*see, e.g.*, *Woody's Group, Inc. v. City of Newport Beach*, 233 Cal.App.4th 1012 (2015); *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470 (2004); and *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1173 (1996))—is that he concedes Councilmember Candell is impermissibly biased. That, of course, is irrefutable, and to everyone's credit no one has tried to refute it.

But having reached the correct and unavoidable conclusion that Councilmember Candell is biased, and thus groping for a way to preserve a committed Project opponent's ability to consider a project Mr. Griffiths and his acolytes wish would "go away," Mr. Griffiths attempts to saddle at least three of the remaining four other City Council members with their own bias to invoke the "rule of necessity," which allows conflicted officials to participate in decisions where the participation is "legally required for the action or decision to be made." *See, e.g.*, *Kunec v. Brea Redevelopment Agency*, 55 Cal.App.4th 511, 520 (1997).[3]

[3] We note that even if there were facts that could give rise to the possibility of attempting to rely on the "rule of necessity"—and there are not—the rule only applies where there is a simultaneous need for unbiased decisionmaking

Mr. Griffiths argues, incredibly, that "[a]t least one member from each alleged 'camp' should be allowed to participate." This transparent ploy is unavailing. Other than perhaps in the minds of Project opponents such as Mr. Griffiths, there are no "camps," and the law does not allow for "camps," particularly in the case of adjudicative land use permitting. But the law *does* require fair and impartial adjudicators, especially from the perspective of project *proponents* such as our clients whose property rights are at stake. *See, e.g.*, *Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th 470, 483 (member of planning commission wrote article "attacking" project under consideration; member held biased, and commission's decision reversed).

Moreover, the "rule of necessity" has nothing to do with these circumstances, and Councilmember Candell's own unavoidable bias cannot be used either to taint the other members of the City Council who have not expressed their own bias, if they have any, or as leverage to threaten the ability of the other Councilmembers to consider the Project so as to revive Councilmember Candell. Councilmember Candell's unequivocal bias stands alone, and it far surpasses the thresholds established in the controlling authority we have cited.

Mr. Griffiths fails to acknowledge that Measure L was a citizens referendum against the Homes at Deer Hill, an entirely different project that happened to be proposed for the same development site as the Project. And following the sharp change in legal precedent that Mr. Griffiths and certain other misguided Project opponents continue to refuse to accept or publicly acknowledge (a reality that ought to speak loudly for various reasons we need not articulate), which the California Supreme Court expressly described as "a change in the law" (*see City of Morgan Hill v. Bushey*, __ Cal.5th __ (2018) (Case No. 243042)), the citizens' majority vote against Measure L successfully thwarted the Homes at Deer Hill project.

Measure L is thus legally irrelevant. So, too, are both Councilmember Candell's position regarding Measure L and her activities to facilitate its demise. Indeed, if Councilmember Candell had only ever expressed her opposition to Measure L, and thus to the Homes at Deer Hill, we would not have raised the sensitive subject of her bias against the Project.

But regardless of Councilmember Candell's opposition to Measure L and to the Homes at Deer Hill, she did express her strident opposition *to the Project*, and she voluntarily did so repeatedly for years. Among other things, Ms. Candell signed two petitions against the Project. She also spoke against the Project at numerous public meetings, wrote lengthy correspondence regarding the Project to the City Council detailing her many objections to it, wrote about the Project, critically, on Lamorinda Patch and on

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and a need for public action and there is no alternative source of decision. The rule would not apply here, however, where the Project's use permit will be approved or denied by the Planning Commission, in the first instance, and would only go to the City Council on appeal. Thus, there is an alternative source of decision (i.e., the Planning Commission) and the City Council's ability to hold a quorum for a potential appeal is not required in order for the City to make a decision regarding the Project. In the event of a biased Council that could not form a quorum for an appeal—a hypothetical circumstance only the Planning Commission's decision would be final, pursuant to Code of Civil Procedure section 1094.6, and any appeal would be to the Contra Costa Superior Court.

social media, and to Lamorinda Weekly, sharing her strident and unwavering objections, and she emphasized the Project's role in igniting her community activism and eventual decision to pursue local elected office. Each of these actions is alone disqualifying; collectively they are overwhelming and far exceed every relevant legal standard.

For those reasons, Councilmember Candell cannot credibly claim to be anything other than a resolute Project opponent, and she thus cannot represent the City *in any capacity* regarding the ongoing processing of the Project, whether in a noticed public meeting, closed session, or otherwise, including in any meetings or communications with City staff or her future Council colleagues. Moreover, once recused, she cannot even resume her role as a private citizen Project opponent. Councilmember Candell's bias has serious consequences, and she and other Project opponents, including Save Lafayette, must live with them.

Although Mr. Griffiths attempts to resuscitate Councilmember Candell by tying Mayor Burks, Vice Mayor Anderson, and Councilmember Gerringer to the Measure L campaign, the critical and legally-relevant difference—even if there are any facts to support that notion—is that those Councilmembers' positions regarding the Project are not known. And we can find no evidence to suggest that any of those officials are biased against, or for, the Project. Accordingly, regardless of the veracity of anything Mr. Griffiths asserted regarding the "role" of any of those Councilmembers in the Measure L campaign and regardless of anything they may have said or done in connection with either Measure L or the Homes at Deer Hill, it is irrelevant. Neither Measure L nor the Homes at Deer Hill has anything to do with the Project currently before the City, and nothing any Councilmember did or said regarding Measure L or the Homes at Deer Hill—including even Councilmember Candell—supports the conclusion that they are biased in any way regarding the Project. There is no credible argument that Mayor Burks, Vice Mayor Anderson, or Councilmember Gerringer—not to mention newly appointed Councilmember Bliss— has any reason to recuse themselves from considering the Project.

Finally, and as a secondary matter only given the controlling fact that only Councilmember Candell has a demonstrated bias against the Project—much less for it—we note that the rights of our clients and of Save Lafayette and its members to procedural due process, are drastically different. *Horn v. County of Ventura*, 24 Cal.3d 605 (1979), upon which Mr. Griffiths relies, involved the county's approval of a tentative subdivision map without notice to adjoining property owners. The plaintiff, who purchased adjoining property before final approval by the board of supervisors, challenged the approval on procedural due process grounds. *Horn* held that subdivision approvals were adjudicatory decisions subject to procedural due process requirements and stated that land use decisions that substantially affect the property rights of owners of adjoining parcels *may* constitute deprivations of property for purposes of procedural due process. *Horn* held that the plaintiff adequately alleged the subdivision would substantially interfere with the use of his property. *Horn* thus

establishes that adjoining property owners whose property interests are *substantially affected* by adjudicatory land use decisions are entitled to procedural due process.

There is no evidence, however, that Mr. Griffiths or other members of Save Lafayette with generalized grievances against the Project have sufficient property interests to be entitled to the same formal procedural rights people such as our clients, who have "skin in the game," are entitled. For the reasons explained above, however, this important legal distinction is irrelevant because the only relevant bias is Councilmember Candell's bias against the Project.

Thank you in advance for your prompt assistance with this important matter. It has been nearly two months since we first addressed this issue, and it is time for Councilmember Candell to acknowledge on the record[4] that she has a bias warranting recusal in the same way former City Councilmember Reilly appropriately recused herself, publicly, several years ago, out of an abundance of caution, merely because she signed a single petition against the Project, as a private citizen prior to her election.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW:kli:mlj

Attachments:
1. November 30, 2018 letter.
2. December 5, 2018 letter.
3. January 14, 2019 letter.

cc: Honorable Mayor Cameron Burks and City Councilmembers
Niroop Srivatsa, Interim City Manager
Greg Wolff, Acting Planning Director
Dennis O'Brien
Caryn Kali
Dave Baker
Anna Maria Dettmer
Allan Moore, Esq.
Arthur F. Coon, Esq.

[4] To that end, we note that Councilmember Candell is a signatory to the City Council's recently adopted policy entitled "City of Lafayette Code of Ethics/Conflict Avoidance for City Council Members" in which, among other things, each Councilmember pledged to avoid conflicts of interest and even the appearance of conflict

ATTACHMENT 1

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November 30, 2018

VIA E-MAIL AND U.S. MAIL

Robert B. Hodil
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1 Montgomery Street, Suite 3000
San Francisco, CA 94104
E-Mail: rhodil@coblentzlaw.com

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

Dear Rob:

Along with Allan Moore of Wendel, Rosen, Black & Dean LLP, we represent O'Brien Land Company, LLC and Anna Maria Dettmer in connection with the above-referenced 315-unit affordable apartment project, the application for which was "deemed complete" in 2011, pursuant to the Permit Streamlining Act (Cal. Govt. Code § 65920 *et seq.)* ("**Project**").

Given the inherent sensitivity in raising such issues, we write with significant reluctance to address the unequivocally-expressed bias of newly elected City Council member Susan Candell with respect to the Project. We are compelled do so because Ms. Candell has been a long, frequent, and ardent adversary of the Project dating at least as far back as 2012 when the City was processing the Project's draft Environmental Impact Report ("**EIR**"). Unfortunately, Ms. Candell's many public statements, including those throughout the summer of 2018 on the cusp of—and even during—her campaign, make clear that she is irretrievably biased against the Project. In addition, she has made clear she also holds material animosity to our clients.

Ms. Candell's dogged opposition easily exceeds the minimum legal standard for disqualification—"an unacceptable probability of actual bias." *See*, e.g., *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470, 483 (2004). Moreover, the representative evidence shown below establishes that Ms. Candell has repeatedly crossed far beyond that critical minimum legal threshold. Indeed, the evidence shows that she is unequivocally and *actually* biased against the Project and has worked tirelessly to attempt to cause its failure.[1]

[1] The evidence referenced in this letter omits many other statements Ms. Candell has made regarding the Project demonstrating her vehement opposition to it, and it omits almost the entirety of an equally if not more voluminous body

Thus, while we certainly wish Ms. Candell a successful tenure on the City Council generally, for the reasons explained herein she cannot—without violating our clients' constitutional rights to due process and statutory rights to fair procedure—lawfully participate in any part of the City's consideration of the Project, whether in an open and noticed public meeting, in a publicly noticed closed session, in private meetings or conversations with City officials or staff, or otherwise.

FACTS

Ms. Candell's opposition to the Project manifests itself in numerous ways. For example, she has characterized the Project as a catalyst for her desire to run. Her campaign website (https://www.susancandell.com/) admits that:

> "My intense civic involvement began 5 years ago with the Deer Hill project, first as 315 Apartments then with 44 Homes. As an engineer, when faced with complicated problems, I knew it was time to roll up my sleeves and delve into the mountain of paperwork for the Homes project. When I discovered that the cancer risk to students at Acalanes High School during construction of the Homes was above allowed limits, I instantly called my friend whose daughter at Acalanes is a cancer survivor, and explained what I had found. She said, 'We have to stop this, Susan.' That's when Mama Bear came out, and my deep civic involvement began."
> (Attachment 1).

Consistent with that voluntary public admission, Ms. Candell explained to the *Lamorinda Weekly*, in an article published September 19, 2018, that "[t]he 315 Apartments at Deer Hill will cause irreparable harm to the environment and gridlock. Lafayette urgently needs to be proactive." (Attachment 2). While this statement alone exceeds the standard the courts have established for constitutionally impermissible bias requiring recusal, there is much more in the same vein.

Predating her run for office by more than half a decade, on January 16, 2012 Ms. Candell signed a petition opposing the Project (signature #86). (Attachment 3). The petition was submitted to the City and made a part of the administrative record for the EIR. Former City Councilmember Traci Reilly signed the same petition (signature #441) and, as explained in the minutes of the City Council's December 9, 2013 meeting,[2] properly recused herself from all aspects of the Project as a result. (Attachment 4).

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of opposition to The Homes at Deer Hill project alternative, which was ultimately defeated in a ballot referendum following a change in the law. *See City of Morgan Hill v. Bushey*, __ Cal.5th __ (2018) (Case No. 243042) ("The Court of Appeal's decision here constituted a change in law . . . ."). Ms. Candell was a key participant and community leader in the "Vote NO on Measure L!" campaign. Although we cannot imagine additional documentation is needed to demonstrate Ms. Candell's probable bias beyond that which is provided with this letter—much less her actual bias— if the City requires more evidence, we are prepared to provide it.

[2] Agenda item 9(B) "Council Reorganization"

On January 7, 2013, Ms. Candell wrote the City a technical letter identifying an earthquake that occurred on the Project site in 2007. (Attachment 5).

Later the same year, on August 5, 2013, Ms. Candell signed another petition urging the City to "approve the FEIR, with its 13 significant and unavoidable impacts." Apparently thinking it would be more difficult to approve a project with additional impacts, she added "that it would be even better if you instead adopt[ed] the Resolution as written by Eliot Hudson" showing 16 significant and unavoidable impacts. (Attachment 6).

Similarly, on August 7, 2013, Ms. Candell wrote a letter to the City Council opposing the Project and asserting, among other things, that the potential of children living in the Project crossing Deer Hill Road "**is clearly a very new and HUGE safety issue. Deer Hill Road is blind. This is an accident waiting to happen.**" (Attachment 7; emphasis in her letter).

And this year, during the summer months leading to her eventual candidacy for the City Council as well as during her campaign, when she might have realized the need to appear to be open-minded with respect to the Project, Ms. Candell attended and spoke at several City Council meetings—including those of June 11, 2018[3] and June 25, 2018[4]—urging the Council to take steps she hoped would kill the Project, including quickly rezoning the Project site, scheduling emergency meetings on 24 hours' notice, and hiring additional outside counsel (i.e., someone other than the long-tenured and well-qualified City Attorney with whom Ms. Candell and other staunch Project opponents have baselessly disagreed about the City Attorney's correct legal advice)[5] to assist the City in its handling of the Project. (Attachment 8 and Attachment 9).

On June 28, 2018, Ms. Candell co-authored (along with Scott Sommer, another active and vocal project opponent) a lengthy technical letter to the City Council and Planning Commission, maligning the "integrity and reputation" of the City's environmental consultant for the Homes at Deer Hill project and arguing that "[a]s concerned citizens, we respectfully submit that the city should select a new qualified EIR consultant for the supplemental environmental work that will be required for the resubmitted Terraces (315 Apartments) application" and that "[t]he Terraces project is an enormous project as compared to the Homes." (Attachment 10).

On July 1, 2018, Ms. Candell provided the City Council another letter, regarding the Council's July 3, 2018 agenda item 7(B) ("Consideration of Appointing Additional Legal

[3] Agenda item 8(A) "Rezoning options for property located at 3233 Deer Hill Road, APN 232-150-027, also known as the "Terraces of Lafayette" and "Homes at Deer Hill" and consideration of potential changes to the general plan designation"

[4] Agenda item 5 "Public Comments"

[5] Examples include (1) Ms. Candell's and other Project opponents' disagreement with the City Attorney's correct determination in December 2015 that the referendum was invalid under *deBottari v. City Council*, 171 Cal.App.3d 1204 (1985), before the law changed; (2) the City Attorney's correct determination that the Process Agreement was valid; and (3) the City Attorney's correct determination that the Permit Streamlining Act is intended for the protection of project applicants and does not operate to cause project denials, the latter two of which you also correctly informed the City Council of during its August 13 meeting (see Attachment 13).

Counsel Regarding Terraces Apartment Project located at 3233 Deer Hill Road"), writing that "[i]n addition, this counsel must have a [sic] very strong arguments for defending the city against the 315 apartments proposal . . . Through the efforts by so many citizens, the City of Lafayette effectively 'set back the clock' for this property. This happened with the defeat of Measure L, proving that the Alternative proposal was also not acceptable for this site." (Attachment 11).

Ms. Candell also addressed the City Council on August 13, 2018,[6] on the same day she filed her official "Candidate Statement of Qualifications" (Attachment 12), to say she "was not sure the Council was finished with this topic, stating the EIR disclosed 13 significant and unavoidable impacts, 5 of which are health and safety and are likely to be the ones investigated under the HAA and see what it would take to make those findings" (i.e., to deny the Project). At the same meeting she stated that the "health and safety impacts of the Terraces dwarfs the Homes at Deer Hill effort . . . The one out of five health and safety impacts which [sic] is the largest is the 30,000 dump truck trips from this site as the hillside is decimated." The minutes for that meeting show that Councilmember Anderson disclosed he had recently met about the Project with Ms. Candell and other active project opponents. (Attachment 13).

Ms. Candell has also posted many statements on Nextdoor (a social networking service for neighborhoods) (a selected and more detailed partial summary of which is included as Attachment 14), including the following:

- "A CEQA lawsuit can be filed if, for example, our city approves the Terraces project in its current form with its 13 significant and unavoidable impacts. Since the HAA may also be at play, if any of the 5 health or safety impacts can be shown to be significant, the project can also be denied. What the issue is TONIGHT is whether the city retains the land use expert attorney to defend that the project also violates the general plan . . . ."
- "It's an overlooked fact that the Terraces Apartments were not totally in compliance with General or Site Specific zoning . . . ."
- "Is O'Brien from Hillsborough somehow our new neighbor? I was cracking up!"
- "I'm also against a developer who has threatened so much that he has kept our city held as hostage for 7 years. I believe the reasoning by Save Lafayette's attorney that we are no longer hostage by Apartments."
- There are many totally valid ways of fighting the 315 Apartments . . . ."

[6] Agenda item 13B(2) "Discussion Regarding Release of Memo from Coblentz Patch Duffy & Bass LLP"

- "City Council Must Not Give Away the 315 Apartments Project to Developer . . . ALL of these efforts will be wasted with a single wrong legal move by the City of Lafayette before July 15 in response to the Terraces Application . . . ."

- "The only way to 'change' the Terraces project and remove these Significant and Unavoidable Impacts is to submit a brand-new project, and then start from the beginning and generate a new EIR. The Terraces project that was just resubmitted does not change anything."

- "I hope the developer comes up with a new proposal that doesn't involve 30,000 dump trucks."

- "[D]uring this unapproved time between when the Homes project started and now, Lafayette's General Plan changed, so there is now a mismatch with the APO zoning for that site and the General Plan. A re-zoning will need to happen to fix this, which is then subject to the referendum process just like was done for the Homes. I feel now extremely confident that we citizens will rise to the vote if the 315 Apartments project comes back!"

- "Same legal issues as the 315 Apartments - a zoning change would need to occur, so again our rights to petition for a referendum works for that too!"

- "[A] No vote will better serve both the historic goals of our community as well as better position us for future challenges[.]"

- "A huge project like Deer Hill . . . ."

- "These next 15 days are CRITICAL. The city must immediately retain legal counsel experienced in land use law, municipal law, and litigation to properly handle the re-zoning and the resubmitted 315 Apartments."

- "[T]wo very important documents need to be produced, the first on [sic] by July 15 in response to the developers resubmission of the 315 apartments, and the other to defend the new rezone."

- "[O]ur Hillside Ordinance, which applies to this site, dictates R65 as the appropriate zoning for this very hilly site."

- "A new lawyer has been hired to get a second opinion, and is very likely to be in opposition to our City Attorney on this exact issue. What we can do - all of this is happening BEHIND CLOSED DOORS, ALONG WITH MEETINGS WITH THE DEVELOPER. WE PUBLIC HAVE NO IDEA AND NO INPUT TO THIS PROCESS. For a matter that clearly has SO MUCH AT STAKE, BOTH IN TERMS OF MONEY AND TIME FOR OUR CITY, IT IS EGREGIOUS THAT THEY CONTINUE TO HOLD MEETINGS BEHIND CLOSED DOORS. It appears it is still 'process as usual' for our City. Secret meetings with developer are happening this week . . . Please, everyone start

demanding that for any change in the current Apartments legal strategy or any change to the Project, including new EIR be discussed in OPEN SESSIONS [sic]."

- "The rezone in 2010 was legal, but not implemented because of failed legal advice. The citizens set back the clock, and this time the rezone by Planning Commission is R65, or 14 Homes, up from the R5 in 2010, or 5 Homes. The vote on that comes back next week. Everything the city is doing this time so far is legal and defensible, but two very important documents need to be produced, the first on by July 15 in response to the developers resubmission of the 315 apartments, and the other to defend the new rezone. These documents must be perfect and they must be quick. An independent counsel with land use expertise can create these. Written well and lawsuits could be averted. Written poorly and lawsuits will fly. Our current attorney is not a land use expert, and Ivor Samson has found the perfect person who can jump in after the vote tonight. This will be money well spent! Please support Ivor and his choice! He is the only attorney on Council, and we are very lucky to have him!"

- "The basic problem for BOTH Apartments and Commercial developments on this site is that the General Plan was modified in 2015 to specify "Low Density" single-family residences for this parcel, which is inconsistent with both Apartments and Commercial projects. So in order for either of them to be approved, the General Plan would have to be modified back to APO as well, and this is a legislative act that is subject to referendum. We citizens that don't want either a big apartment or commercial development there can petition to get it on the ballot and vote against it."

- "The new state housing laws don't effect this site, and Deer Hill was never part of Lafayette's Housing Element. If the developer does try to change anything with that site application, we as citizens still have our rights to petition for a referendum, again. The fear factor over the apartments is what seems to be still driving people's decisions, but if you read Scott's posts, this is simply not true anymore."

PROCEDURAL DUE PROCESS AND APPLICABLE LEGAL STANDARDS

Ms. Candell's extensive comments on and opposition to the Project in light of her pending role on the City Council must be framed in the proper legal context because they directly impact our clients due process rights.

The Due Process Clause of the U.S. Constitution provides that "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, section 1. The equivalent provision in the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law . . . . Cal. Const. art. I, section 7. Code of Civil Procedure section

1094.5 similarly mandates that an applicant for a use permit receive a fair hearing. *See, e.g., Applebaum v. Board of Directors*, 104 Cal.App.3d 648, 657-58 (1980) (biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided).

Numerous cases address whether procedural due process—the requirement that public entities conduct hearings in a fair manner with neutral and unbiased decision-makers— is provided when a member of an adjudicatory body considering a discretionary, quasi-judicial decision is, or may be, biased against a party. *See, e.g., Woody's Group, Inc. v. City of Newport Beach*, 233 Cal.App.4th 1012, 1022-23 (member of city council "strongly opposed" to planning commission decision appealed the commission's decision to the council); *Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th 470, 483 (member of planning commission wrote article "attacking" project under consideration; member held biased, and commission's decision reversed); *Clark v. City of Hermosa Beach*, *supra*, 48 Cal.App.4th 1152, 1173 (1996) (city council member should have recused himself because proposed project had "direct impact" on the "quality of his own residence"); *Gai v. City of Selma*, 68 Cal.App.4th 213, 219 (1998) (member of personnel commission investigating officer's discharge should have recused himself because he was actually biased against officer); *Mennig v. City Council*, 86 Cal.App.3d 341, 351 (1978) (members of city council who became personally "embroiled" in conflict with police chief should have recused themselves on question of discipline of police chief).

The courts have repeatedly held that procedural due process applies to land use permitting. *See, e.g., Woody's Group, Inc. v. City of Newport Beach*, *supra*, 233 Cal.App.4th at 1021-23; *Clark v. City of Hermosa Beach*, *supra*, 48 Cal.App.4th at 1170-73; and *Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th at 483-84. Procedural due process always requires a level playing field, the so-called "constitutional floor" of a fair hearing in a fair tribunal—in other words, a fair hearing before a neutral and unbiased decision-maker:

> "[I]n order to prevail on a claim of bias violating fair hearing requirements, Nasha must establish 'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.' " [citation] A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same "with concrete facts: '[b]ias and prejudice are never implied and must be established by clear averments.' "
>
> *Nasha v. City of Los Angeles*, *supra*, 125 Cal. App. 4th at 483 (quoting *BreakZone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1236 (2000)).

Thus, to prevail on a procedural due process claim, actual bias is not required. Instead, such contention must simply be established by showing that there is "an unacceptable probability of actual bias" on the part of those who have actual decision-making power over the issue at hand.

RELEVANT CASES ADDRESSING BIAS

Nasha v. City of Los Angeles, one of several leading cases in this area, made clear that allowing a biased decision-maker to participate in a discretionary decision is enough to invalidate the decision. There, a city planning director approved a five-residence development project. A neighbor and a conservancy appealed the decision to the planning commission.

Prior to the hearing by the commission, however, one of the planning commission members wrote an unsigned article in a local homeowner's association newsletter advocating "a position against the project" because he perceived the project to be a threat to wildlife migration patterns. He also spoke against the project at a neighborhood association meeting, while asserting that "I feel I can make a fair and impartial decision regarding this matter."

The developer subsequently sought a writ of mandate to overturn the planning commission decision, but the trial court denied it. The Court of Appeal reversed, concluding the planning commission's decision was "tainted by bias and must be vacated," with directions to the trial court to issue an order to the planning commission to reconsider the appeal before "an impartial panel." The *Nasha* Court held the developer had established "an unacceptable probability of actual bias" on the commission member's part.

In particular, the Court was persuaded that the newsletter article alone constituted the concrete fact (singular) necessary to prove an "an unacceptable probability of actual bias." The article was printed in the Court's decision and Court added the italics to signify the troubling language:

> "**MULTIVIEW DRIVE PROJECT THREAT TO WILDLIFE CORRIDOR** [¶] A proposed project taking five legal lots totaling 3.8 acres for five proposed large homes with swimming pools served by a common driveway off Multiview Drive is winding its way through the Planning process. [¶] After wildlife leaves Briar Summit heading eastward they must either head south towards Mt. Olympus or north to the slopes above Universal City. *The Multiview Drive site is an absolutely crucial habitat corridor.* Please contact Paul Edelman with the Conservancy at 310/ . . . or Mark Hennessy who lives adjacent to the project at 323/ . . . if you have any questions."
> (Emphasis in original).

Thus, the Court did not care that the article was unsigned when it appeared in the newsletter. Moreover, the offending portion is somewhat generic in content and tone, which indicates the very low bar with respect to the evidence required to establish an "unacceptable probability of actual bias," which, as noted above, is the relevant legal standard, *not* actual bias.

The evidence of probable bias was more extensive in *Clark v. City of Hermosa Beach.* There, a city council member was held to be biased in connection with a vote denying a condominium project where the council member: (1) prior to being elected had opposed a prior iteration of the project and had appealed the project approval from the planning commission to the city council; (2) resided in an apartment in proximity to the project site; and (3) had demonstrated hostility to the project applicants by urinating on their property and periodically making loud noises in the immediate vicinity of the applicants' property disrupting their quiet enjoyment.

The Court held that the combined effect of these factors was sufficient evidence to warrant a conclusion that the council member could not be an impartial decision-maker and that the council's decision was tainted by his participation. The *Clark* case is farther along the spectrum from *Nasha* in terms of the quantum of evidence a court has relied on to conclude there was impermissible bias. It is useful to note, however, that the courts evaluate all types of indications when determining whether evidence shows an "unacceptable probability of actual bias." In any event, the quantum of evidence of Ms. Candell's bias against the Project is overwhelming and far surpasses the evidence sufficient to meet the legal standards of both *Nasha* and *Clark.*

In sum, the common law rule against bias has been framed in terms of probabilities, not certainties. The law does not require the disappointed applicant to prove actual bias. Rather, a common law conflict of interest will exist where there is concrete evidence that a decision-maker has by words, actions, or otherwise demonstrated that he or she has demonstrated an "unacceptable probability of actual bias" prior to conducting an adjudicatory public hearing on a project.

ANALYSIS

As a private citizen, we acknowledge that Ms. Candell had a right to exercise her free speech and petition rights in opposition to the Project. Our clients have never suggested otherwise, and have never hinted at, much less taken action toward, trying to limit her expression of those rights. In her role as an elected official, however, Ms. Candell will no longer be acting in the capacity of private citizen. Once sworn into office, she will be a voting member of a legislative body charged with fairly considering the Project under the law. And the law requires Ms. Candell to be unbiased on a wide range of subjects—including the Project—or to recuse herself in the event "concrete facts" undermine her neutrality, as they objectively do here.

While the law does not require proof of actual bias, there must not be "an unacceptable probability of actual bias" on the part of a municipal decision-maker or potential decision-maker such as Ms. Candell. *Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th at 483. Probable bias alone is enough to show a violation of the due process right to fair procedure. Unfortunately, Ms. Candell is not only probably biased against the Project, she is actually biased.

> ***"The language of the law is replete with synonyms for fairness: due process, equal protection, good faith, harmless error are all ways of expressing our commitment to fairness."***
>
> *Woody's Group, Inc. v. City of Newport Beach, supra*, 233 Cal.App.4th at 1016.

As shown herein, with but a partial representation of Ms. Candell's tenacious and unrelenting Project opposition, for more than five years she has committed extensive time and effort attempting to thwart the Project as well as The Homes at Deer Hill project alternative that was ultimately defeated by a referendum petition in part through her efforts. Among other things, Ms. Candell signed two petitions against the Project. She has also spoken against the Project at numerous public meetings, written lengthy correspondence regarding the Project to the City Council detailing her many objections to it, written about the Project on social media sharing her strident and unwavering objections, and has emphasized the Project's role in igniting her community activism and eventual decision to pursue local elected office. Her firmly held position against the Project and her animosity to our clients could not be clearer.

Ms. Candell's well- and frequently-publicized opposition began years ago, it continued throughout the summer before she ran for City Council and during her successful campaign, and it endures today in the waning days before she will be asked to take the following oath of office:

> "I, Susan Candell, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter . . . ."

We take Ms. Candell at her word. As shown by the voluminous evidence we have provided, Ms. Candell has expressed extraordinary, long-held, and unshakeable views for an elected decision-maker who might possibly claim to be unbiased regarding the Project. But these are not the typical statements of a person who can credibly maintain any semblance of impartiality. Rather, they are the statements of a tenacious and committed Project opponent, someone who has become deeply embroiled in the issue and long ago made up her mind that the Project must be denied. Thus, this is not a close case under any legal standard, including those established by *Nasha* and *Clark*. We have long known that Ms. Candell disapproves of the Project and would never support it, thus any possible assertion to the contrary belies the objective facts.

And the facts indisputably show that Ms. Candell has crossed the legal threshold of "an unacceptable probability of actual bias," which is all that is needed to require her recusal, and that she is in reality unequivocally, actually, and unapologetically biased against the Project. Thus, even if the Project were not being processed under the

stringent and powerful requirements of the Housing Accountability Act, which severely limits the circumstances under which it could lawfully be denied, our clients are entitled to due process, including consideration and action by fair and open-minded City officials who have not actively, frequently, and directly opposed the Project. Ms. Candell cannot "unring this bell," and we are not aware of any publicly available evidence that she has ever tried to do so.

While Ms. Candell appears well-qualified to represent the City in many of its varied interests generally, she cannot credibly claim to be anything other than a resolute Project opponent, and she thus cannot represent the City *in any capacity* regarding the ongoing processing of the Project, whether in a noticed public meeting, closed session, or otherwise, including in any meetings or communications with City staff or her future Council colleagues.

As noted above, former City Councilmember Reilly appropriately recused herself several years ago, out of an abundance of caution, merely because she signed a single petition against the Project, as a private citizen prior to her election. We expect Ms. Candell to exhibit similar ethics and concern for the City's integrity and legal exposure given her own vastly more extensive, impassioned, and demonstrable opposition to the Project.

CONCLUSION

For all of the foregoing reasons, while we must reluctantly raise these uncomfortable issues given the substantial constitutional and statutory rights at stake, we respectfully request—and, indeed, must demand—that Ms. Candell recuse herself from participating in any part of the City's ongoing processing of the Project and indicate publicly, on the record, that she has so recused herself.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter, AICP

BWW/kli

Attachments:
1. Portion of Susan Candell campaign website.
2. September 19, 2018 *Lamorinda Weekly* article.
3. 2012 petition and relevant signature pages.
4. Relevant portion of December 9, 2013 City Council minutes.
5. January 7, 2013 letter.
6. 2013 petition and relevant signature pages.
7. August 7, 2013 letter.
8. Relevant portion of June 11, 2018 City Council minutes.

9. Relevant portion of June 25, 2018 City Council minutes.
10. June 28, 2018 letter.
11. July 1, 2018 letter.
12. Candidate Statement of Qualifications.
13 Relevant portion of August 13, 2018 City Council minutes.
14. Selected Nextdoor posts.

cc: Honorable Mayor Don Tatzin and City Councilmembers
Steve Falk, City Manager
Dennis O'Brien
Caryn Kali
Dave Baker
Anna Maria Dettmer
Allan Moore, Esq.
Arthur F. Coon, Esq.

ATTACHMENT 2

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January 14, 2019

VIA E-MAIL AND U.S. MAIL

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Re: Conflict of Interest Issues Regarding City Councilmember Susan Candell with Respect to the Terraces of Lafayette Apartment Project

Dear Rob:

As you know, along with Allan Moore of Wendel, Rosen, Black & Dean LLP, we represent O'Brien Land Company, LLC and Anna Maria Dettmer, in connection with the above-referenced 315-unit apartment project ("**Project**"), which requires 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) ("**HAA**"). We write in connection with the closed session recently scheduled for the City Council's January 14, 2019 regular meeting because we remain acutely concerned about the possibility Councilmember Susan Candell might have any role or influence regarding the Project, whether in an open and noticed meeting or otherwise, and whether in a public or private capacity.

The law requires Councilmember Candell to recuse herself from any involvement in the Project, as we documented in correspondence to you dated November 30, 2018 and December 5, 2018. For reasons unknown to us, however, despite her impermissible bias, Councilmember Candell has not yet recused and may well be participating in improper discussions intended to detrimentally affect the Project.

The objective, undisputed, and unassailable facts show that Councilmember Candell has a long history actively opposing the Project and even expressing personal hostility to our clients. As shown in our prior correspondence, with but a partial representation of Ms. Candell's tenacious and unrelenting Project opposition, she has committed extensive time and effort since 2013 attempting to thwart the Project as well as The Homes at Deer Hill project alternative that was ultimately defeated by a referendum petition in part through her efforts. These activities undoubtedly helped catapult her to office.

While we again acknowledge that Ms. Candell had a right to express herself as a private citizen and to advocate against the Project in that context, a right she regularly exercised for half a dozen years, there is a consequence to having done so now that she is a member of the City Council. As a Councilmember, Ms. Candell has various legal obligations. Among them, she is sworn to uphold the law, including compliance with the HAA and to not deprive our clients of their legal rights to impartial adjudicators. But Councilmember Candell cannot comply with her legal obligations here, however, unless she recuses herself, because she is embroiled in her long and spirited battle against the Project and cannot "unring" the bell she voluntarily chose to ring for years.

We understand Councilmember Candell will be out of the country this week and thus will apparently not participate in the closed session, at least in person (and presumably not telephonically). Nevertheless, because the Project is on the eve of its decision hearing and City has scheduled this closed session, following our December 18, 2018 letter and submittal package regarding the Project's Addendum and the HAA, and also following our January 9, 2019 letter regarding the Permit Streamlining Act and the HAA, 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. Such recusal must be total and include open meetings and closed sessions, formal and informal meetings or conversations with other City officials and staff, and otherwise, and it must include a public statement by Councilmember Candell that she has so recused. In fact, once recused, Councilmember Candell cannot even resume her role as a private citizen Project opponent. And until she has publicly recused we have every reason to fear Councilmember Candell will use her role and influence to improperly impede the Project.

Although we do not know what advice you have provided to Councilmember Candell to date, based on our prior correspondence, it is important to note that the City Attorney previously advised then-Councilmember Traci Reilly that she should recuse herself from considering the Project based on the fact Ms. Reilly had signed but a single petition against the Project while still a private citizen. The circumstances underlying Ms. Reilly's recusal were admittedly far less extreme, but the advice the City Attorney provided and the decision Ms. Reilly made in response to that advice were appropriately conservative. Given the sound opinions you provided to the City Council at its August 13, 2018 meeting on other issues related to the Project, we are confident in anticipating you have provided meritorious conflict of interest advice here aimed at ensuring the City's upcoming permitting process for the Project is fair, legally valid, and not tainted by the potential participation of biased adjudicators.

Finally, we note that at the City Council's January 7, 2019 special meeting to interview applicants to fill the vacancy on the Council created by the passing of Councilmember Mark Mitchell, Councilmember Candell was tasked, ironically, with asking each applicant the following revealing question:

8. Have you taken positions, signed petitions or believe that you have any conflicts of interest regarding projects or matters that are before the Council as applications or as the subject of lawsuits? If you have, will you follow the City Attorney's advice if the attorney indicates you should recuse yourself from Council considerations of these issues?

Unsurprisingly, each applicant responded unequivocally that they would follow the City Attorney's advice on conflict of interest issues. At this point, however, given that she has yet to publicly state whether she will recuse herself regarding the Project six weeks after we first raised these critical issues, notwithstanding her long and unabated Project opposition, and the virtual certainty she has been advised to recuse herself as a result, it is unclear what Councilmember Candell will decide to do. It is certainly not clear whether she would follow the City Attorney's conflict of interest advice or yours. The community is well-aware, however, that Councilmember Candell is opposed to the Project and is committed to its demise by any means possible, and it is thus clear that she is required to recuse herself and allow the Project to be considered by the City's unbiased decisionmakers.

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

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW/kli

cc: Honorable Mayor Cameron Burks and City Councilmembers
Niroop Srivatsa, Interim City Manager
Joanne Robbins, City Clerk
Dennis O'Brien
Caryn Kali
Dave Baker
Anna Maria Dettmer
Allan Moore, Esq.
Arthur F. Coon, Esq.

ATTACHMENT 3

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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

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:

> "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

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

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW/kli

cc: Honorable Mayor Don Tatzin and City Councilmembers
Steve Falk, City Manager
Dennis O'Brien
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