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February 27, 2019

VIA E-MAIL AND U.S. MAIL

Michael Griffiths
President
Save Lafayette
3220 Ronino Way
Lafayette, CA 94549

Re: Response to January 17, 2019, Letter Regarding Potential Conflicts of Interest of Mayor
Cameron Burks, Vice Mayor Mike Anderson, and Councilmember Teresa Gerringer

Dear Mr. Griffiths:

On behalf of our client, the City of Lafayette, this letter responds to your letter dated January 17, 2019, alleging a common law conflict of interest for Mayor Cameron Burks, Vice Mayor Mike Anderson, and Councilmember Teresa Gerringer.

To summarize, your letter contends that Mayor Burks, Vice Mayor Anderson, and Councilmember Gerringer ("Councilmembers") have a common law conflict of interest that disqualifies them from making governmental decisions related to the pending application for the Terraces of Lafayette Project.

The City has carefully examined these allegations and disagrees with your conclusions. We have analyzed the facts and applicable law, and concluded that the facts do not show that Mayor Burks, Vice Mayor Anderson, or Councilmember Gerringer have a disqualifying conflict of interest under the common law conflict doctrine. This investigation was completed prior to the closed session held by the City Council on February 25, 2019.

The legal standard for determining whether or not a public official should recuse himself or herself from participating in a decision due to a common law conflict of interest (*i.e.*, a conflict of interest that is not financial in nature) is whether or not "an unacceptable probability of actual bias" exists. *Nasha L.L.C. v. City of L.A.*, 125 Cal. App. 4th 470, 483 (quoting *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1236-37 (2000)). The following showing is necessary for an applicant to prevail on a claim of bias violating fair hearing requirements:

[The applicant] must establish "an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims." A party seeking to show bias or prejudice on the part of an administrative decision maker

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is required to prove the same "with concrete facts: "[b]ias and prejudice are never implied and must be established by clear averments."

Nasha, 124 Cal. App. 4th at 483 (quoting *BreakZone Billiards*, 81 Cal. App. 4th at 1236-37).

Nasha provides an example of circumstances in which a court held that a public official needed to recuse himself or herself from hearing a matter. It concerned a Planning Commissioner who anonymously authored a newsletter article advocating against a development project before the Commission's hearing, and sought to rally residents to support an appeal to disapprove the project. The Commissioner, who was the president of a neighborhood association, also introduced a project opponent to speak at one of the association's meetings. At the hearing on the project, the Commissioner failed to disclose his authorship of the article or contact with the project opponent. *Nasha*, 125 Cal. App. 4th at 476-77.

The court concluded that the Commissioner's newsletter article was not merely informational, but advocated a position against the project. The court held that this gave rise to an unacceptable probability of actual bias, and was sufficient to preclude him from serving as a reasonably impartial, noninvolved reviewer. Therefore, he "clearly" should have recused himself from hearing the matter. *Nasha*, 125 Cal. App. 4th at 484.

Another example is found in *Woody's Group, Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1021 (2015), which concerned a City Councilmember who appealed the Planning Commission's decision on a permit application to the Council by sending an email to the City Clerk saying he "strongly believed" the application was inconsistent with the character of the area and relevant General Plan policies. 233 Cal. App. 4th at 1017. At the hearing, the Councilmember proposed a motion to overturn the Planning Commission's decision and gave a lengthy, well-organized, and well-researched speech regarding why it should be overturned, which he had prepared before the meeting. *Woody's Group*, 233 Cal. App. 4th at 1019.

The court held that there was an "unacceptable probability of actual bias" on the Councilmember's part. His email appealing the Commission's decision showed he was strongly opposed to the project, and that he took a position against the project, as in *Nasha*. He was the one to propose the motion to overturn the lower court decision and his speech was written out beforehand. *Woody's Group*, 233 Cal. App. 4th at 1022-23.

In a contrasting case, *BreakZone Billiards*, the owner of a billiard hall sought a permit to expand the business and to serve alcoholic beverages. 81 Cal. App. 4th at 1209. The project was opposed by the police department and community members due to alleged criminal activity. The applicant asserted that one City Councilmember had exhibited bias by filing the appeal to the Council of a lower decision approving the project, which the Councilmember had stated he did because of significant community concern about the proposal. *BreakZone Billiards*, 81 Cal.

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App. 4th at 1215. At the appeal hearing before the Council, that Councilmember made the first substantive presentation regarding the project. *BreakZone Billiards*, 81 Cal. App. 4th at 1234.

The court held that the Councilmember who had filed the appeal was not required to recuse himself, as he had stated that he filed the appeal because of the level of community concern, that he had not predetermined how he would vote, he would give the matter a fair hearing, hear the appeal with an open mind, and make his decision based upon the facts and the law. *BreakZone Billiards*, 81 Cal. App. 4th at 1217, 1235-41.

Unlike the public officials in the *Nasha* and *Woody's Group* cases, there is no evidence that Mayor Burks, Vice Mayor Anderson, or Councilmember Gerringe have made any statements taking a position for or against the 315-apartment Terraces of Lafayette project. Although Mayor Burks, Vice Mayor Anderson, and Councilmember Gerringe supported Measure L, which would have enabled development of the different, 44-45 single-family residence Homes Project, mere support of the Homes Project does not rise to the level of an unacceptable probability of bias in considering the substantially larger and different Terraces of Lafayette apartment project.

We have not been provided or seen any evidence of statements by Councilmember Gerringe referencing the Terraces of Lafayette project at all. Mayor Burks and Vice Mayor Anderson both made statements during the Measure L campaign expressing a preference for the Homes Project over the Terraces of Lafayette project, but none of those statements gave any indication whatsoever as to whether either the Mayor or Vice Mayor would support or oppose the Terraces of Lafayette project if approving the Homes Project were no longer an available option. As in *BreakZone Billiards*, there is no indication, let alone concrete factual evidence, that Mayor Burks, Vice Mayor Anderson, or Councilmember Gerringe have an unacceptable probability of actual bias with respect to, or have predetermined how they would vote on, the Terraces of Lafayette apartment project. In contrast, the public officials in the *Nasha* and *Woody's Group* cases took clear positions opposing the project that was before them.

Accordingly, the City has determined, based on the facts and our advice as counsel to the City with respect to the Terraces of Lafayette Project, that the common law conflict of interest doctrine does not require Mayor Burks, Vice Mayor Anderson, or Councilmember Gerringe to recuse themselves from participating in any matter or action related to the Terraces of Lafayette Project.

Very truly yours,



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Patch Duffy
& Bass LLP

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cc: Mayor Cameron Burks
Vice Mayor Mike Anderson
Councilmember Steve Bliss
Councilmember Teresa Gerring
Niroop Srivatsa, Interim City Manager
Greg Wolff, Acting Planning & Building Director
Joanne Robbins, City Clerk