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May 23, 2019

VIA EMAIL AND U.S. MAIL

Robert B. Hodil
Coblentz Patch Duffy & Bass LLP
1 Montgomery Street, Suite 3000
San Francisco, CA 94104
Email: rhodil@coblentzlaw.com

Re: Terraces of Lafayette Apartment Project Affordability

Dear Rob:

On behalf of our client, O'Brien Land Company, LLC ("**O'Brien**"), we write to confirm O'Brien's recent decision to shift the affordability level of the above-referenced 315-unit apartment project ("**Project**"). O'Brien first addressed the Project's affordability in a letter dated August 15, 2011 (Attachment 1), following the City's commencement of a potential downzoning several weeks after the Project application was submitted on March 21, 2011.

From the time of its August 15 letter until recently, O'Brien intended for 100% of the Project's housing units to be "sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of [the Government Code], pursuant to the provisions of the Housing Accountability Act ("**HAA**"). Gov't Code §§ 65589.5 and 65589.5(h)(3)(B). At this point, however, O'Brien now intends for "at least 20 percent" of the Project's 315 total housing units to "be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code." Gov't Code § 65589.5(h)(3)(A). This change in the Project's affordability is O'Brien's to make and it has no effect on the underlying application (which remains protected by the HAA), the required Project approvals, the California Environmental Quality Act compliance process, or any other matter over which the City has any discretion under California law or the Lafayette Municipal Code.

In connection with this change in the Project's affordability, we note that since 2015, according to the City's 2018 Annual Housing Element Progress Report,¹ the City has

¹ See March 25, 2019 City Council Regular Meeting Agenda Item #8(E) – "Annual Housing Report for 2018" – available at https://lafayette.granicus.com/MetaViewer.php?view_id=3&clip_id=4329&meta_id=100239.

“over-produced” above moderate-income housing, as measured by its share of the Regional Housing Needs Allocation (“RHNA”), has made only incremental progress in satisfying its RHNA for moderate-income housing, and has made essentially no progress satisfying for low- or very low-income housing. In particular, as shown in Table B of the Annual Housing Element Progress Report (Attachment 2), the City’s above moderate-income RHNA since 2015 is 99 units, and the City has permitted 129 above moderate-income units. The City has permitted 24 moderate-income units of 85 that were allocated, leaving a RHNA balance of 61 moderate-income units. Moreover, the City has permitted only one low-income unit since 2015, of 78 low-income units allocated, and has not permitted *any* of the 138 units of very low-income units allocated to the City. Thus, while the City has substantial unmet RHNA in all affordable categories, it is making essentially no progress in satisfying the deepest levels of affordability. The Project’s shift to provide 20% lower income housing will make a meaningful dent in the City’s satisfaction of these RHNA obligations.

For the reasons we have explained in detail in prior correspondence, including in particular our December 18, 2018 letter discussing the Project Addendum and the HAA, we remind the City that the HAA imposes a “substantial limitation” on the City’s discretion to deny the Project’s requested use permit “by setting forth the *only* conditions under which [the use permit] may be disapproved.” *North Pacifica, LLC v. City of Pacifica*, 234 F.Supp.2d 1053, 1059-60 (N.D. Cal. 2002) (Emphasis in original). Nevertheless, O’Brien remains committed to working productively with the City to advance the Project and to ultimately providing the City a factual basis to demonstrate to Sacramento that the City is not only committed to, but is actually complying with, the many state laws intended to facilitate and expedite the construction of housing, including the HAA, perhaps the most important of these laws.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP

BWW:kli

Attachments

cc: Honorable Mayor Mike Anderson 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.



August 15, 2011

Ann Meredith
Special Projects Manager
City of Lafayette
3675 Mt. Diablo Blvd, Ste 210
Lafayette, CA 94549

Re: Terraces of Lafayette Project
L03-11; HDP 06-11; DR-03-11; TP 07-11

Dear Ms. Meredith:

As you are well aware, the O'Brien Land Company submitted an application for a multi-family housing project designated as the "Terraces of Lafayette" on March 21, 2011. The project is to be developed on land owned by Anna Maria Dettmer as Trustee of the AMD Family Trust. The project application was actually complete no later than May 25, 2011; belatedly, you confirmed the status of the application as complete by letter dated July 5, 2011.

The O'Brien Land Company and its consultants have now been working with your office for some time with respect to processing the Terraces of Lafayette for entitlements and completing CEQA review. All required City fees have been promptly paid and numerous expert reports have been furnished as a part of the Environmental Impact Report process. Obviously, development of this type of project is a major effort and a costly endeavor.

This letter has been submitted to you concurrently with the first step in a planned City-initiated downzoning of the AMD Family Trust Property and others. The City Council gave instruction to staff to proceed with a change in zoning as to the subject property from APO to LR5 at a meeting held just a few short weeks ago after the Terraces application had been filed. The effect of the changed zoning would be to reduce the permitted density of the Dettmer Family Trust parcel from 770 housing units to 4. The staff report for the Planning Commission hearing of the City downzoning project has noted that the proposed downzoning would be completely inconsistent with the development of Terraces of Lafayette. [While it is recognized that you are not the assigned staff for the proposed legislative downzoning of the subject property, I have assumed that you must be aware of that pending action and I am disappointed that you would process the subject application and accept related fees when it should have been obvious that either the City's downzoning project or the Terraces Project might proceed to hearing—but not both.]

There has been no prior discussion regarding the potential tenant market for the apartments which the O'Brien Land Company proposes to construct. Obviously, the tenant mix of any such property has little if anything, to do with its physical layout and attributes. In this

instance, the tenant designation of the project changes absolutely nothing in terms of the application already filed.

Pursuant to Government Code Section 65589.5; 65589.5(h)(3)(B), and related laws and ordinances, the O'Brien Land Company has determined to restrict Terraces of Lafayette Residential Units to moderate-income households. This determination is without any effect on project plans, reports, architecture and similar matters. The determination does have a material impact upon the scope of discretionary review for proposed entitlements, however. The City's discretion to review and deny (or reduce the density) of a project is specifically limited by 65589.5. In the context of the planned downzoning of the AMD Family Trust property, the foregoing determination means that: (a) inconsistency of the Project with the Zoning Ordinance or General Plan Use designation (in the event of downzoning) cannot be deemed to be a specific adverse impact upon the public health or safety which might provide a basis for project denial; and (b) for purposes of Section 65589.5(j) and related sections, the Zoning Ordinance and General Plan Land Use designation as they existed on the date the application was deemed complete are the relevant points of inquiry rather than any subsequent downzoning.

This letter has been made a part of the Administrative Record applicable to both the Terraces of Lafayette entitlement process and to the City-initiated downzoning project. The determination to restrict rental units to moderate income households provides a means of reconciling the inconsistency between the Terraces Project and downzoning, since the belated proposed downzoning, by itself, cannot provide legal grounds for Project denial.

Sincerely,
O'Brien Land Company, LLC



David Baker
Vice President

ANNUAL ELEMENT PROGRESS REPORT
Housing Element Implementation
 (CCR Title 25 §6202)

Jurisdiction	Lafayette
Reporting Year	2018 (Jan. 1 - Dec. 31)

This table is auto-populated once you enter your data. Please contact HCD if your data is different than the material supplied here

Table B													
Regional Housing Needs Allocation Progress													
Permitted Units Issued by Affordability													
		1	2									3	4
Income Level		RHNA Allocation by Income Level	2015	2016	2017	2018	2019	2020	2021	2022	2023	Total Units to Date (all years)	Total Remaining RHNA by Income Level
Very Low	Deed Restricted	138	0		0	0	0	0	0	0	0	0	138
	Non-Deed Restricted		0	0	0	0	0	0	0	0	0		
Low	Deed Restricted	78	0		1	0	0	0	0	0	0	1	77
	Non-Deed Restricted		0	0	0	0	0	0	0	0	0		
Moderate	Deed Restricted	85	0	0	0	0	0	0	0	0	0	24	61
	Non-Deed Restricted		3	10	9	2	0	0	0	0	0		
Above Moderate		99	13	62	25	29	0	0	0	0	0	129	0
Total RHNA		400											
Total Units 44			16	72	35	31	0	0	0	0	0	154	276

Note: units serving extremely low-income households are included in the very low-income permitted units totals
 Cells in grey contain auto-calculation formulas