3220 Ronino Way
Lafayette, CA 94549

Mayor Mike Anderson
Lafayette City Council
3675 Mt. Diablo Boulevard #210
Lafayette, CA 94549

August 11, 2019

Re: Inconsistency of the Terraces 315 Apartments Application with Lafayette General Plan SFR-LD Designation and R-65 Zoning

Dear Mayor Anderson and Members of the City Council:

Save Lafayette and members of the public have addressed the City Council previously concerning the inconsistency of the resubmitted Terraces 315 Apartments application (the "Application") with the Lafayette General Plan designation and applicable zoning for the property. In particular, please refer to the correspondence of our attorney, Mr. Garfinkle, dated May 14, 2018 and April 9, 2018, copies of which are attached.

On behalf of its members, affected residents, and the electorate in Lafayette, Save Lafayette is greatly concerned with the proper processing of the Application by the City. This correspondence shall review the issues and request that the City take action to deny the Application as submitted as inconsistent with the applicable General Plan designation and zoning.

BACKGROUND

On August 10, 2015, by Resolution no. 2015-51, the Lafayette City Council adopted a General Plan Amendment for the Deer Hill property of Low Density Single Family Residential (SFR-LD), which allows up to 2 dwelling units per acre. The zoning adopted for the property on September 14, 2015 by Ordinance no. 641 was set aside by the Measure L election on June 5, 2018. In accordance with the directive of the California Court of Appeal in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, and Govt. Code section 65860(c) ["zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended"], on July 23, 2018, by Ordinance no. 668, the City adopted zoning for the property of Single Family Residential District-65 (R-65), codified in LMC 6-7121.

THE DEVELOPER IS ATTEMPTING TO EVADE THE APPLICABLE SFR-LD GENERAL PLAN DESIGNATION AND R-65 ZONING, CITY'S DEFENSES UNDER THE HAA, AND ANOTHER CITIZENS REFERENDUM

However, as detailed in Mr. Garfinkle's correspondence, the developer and Lafayette City Attorney have incorrectly taken the position that the developer has vested rights that render inoperable all General Plan and zoning amendments after 2014 based on a Terraces Project Alternative Process Agreement dated January 22, 2014, which references a Tolling Agreement dated September 23, 2013, which was further amended (collectively the "Process Agreement"). Refer to City Attorney memo, City Council agenda of May 14, 2018, Item 8B. The City Attorney also took the position that therefore there would be no legislative act to develop the 315 apartments project that would be subject to referendum of the voters. The developer has pursued the resubmitted application on this basis and unfortunately City staff has not, to date, correctly applied the General Plan and zoning to the resubmitted application.

This position is not only incorrect as was explained by Mr. Garfinkle, but the effect would be to negate the will of the Lafayette electorate and evade the decision of the Court of Appeal in *Save Lafayette v. City of Lafayette.*

The Process Agreement does not contain any provision freezing the General Plan and zoning. No such explanation about vesting rights was given to the public at the time the Process Agreement was entered into in 2014, and the public notices required for that action in 2014 under the Brown Act Open Meeting Law did not notify the public of any such purported effect. Note the comment in *California Alliance for Utility Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1031, treating a city's agreement on utility undergrounding as a "violation" of the Brown Act because "the agenda materials prepared by the city failed to fully disclose the nature and scope of the settlement being considered for public adoption by city." This would also be the case with the hearing on approval of the Process Agreement by the City Council in 2014. Whatever may have been said to the City Council about a threat of litigation and the proposed Process Agreement in closed session, the City Council could not lawfully enter into a settlement agreement which would have affected and purportedly compromised the City's land use authority that can only be exercised through lawful public hearings. See *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 186.

In addition, when the City Council adopted the General Plan amendment to SFR-LD on August 10, 2015, Resolution no. 2015-51 was *unconditional* and contained *no* exception or reference to continuation of the previous General Plan designation or zoning, assuming that would have been legally possible. The staff report and all publicly available materials were likewise silent on this topic. The City Attorney's opinion is contradicted by the face of Resolution 2015-51, which controls as the City's most recent legally enforceable public action on the General Plan designation.

The Lafayette electorate was given no notice at any time prior to May 14, 2018 of any claim or contention that the Process Agreement purportedly froze the General Plan and zoning designation as of 2014 and that the subsequent public hearing and action taken by their elected

representatives in August 2015 adopting the General Plan SFR-LD designation would be subject to exception.

The Application should, but to date does not, request a General Plan amendment and zoning amendment. Such action would be subject to referendum of the voters. Refer to the authorities cited at page 2 of Mr. Garfinkle's letter dated April 9, 2018. It is the objective of the developer and City Attorney, even after the decisive ruling by the Court of Appeal in Save Lafayette ["The City Improperly Interfered with the Referendum Process"], to engage in more improper manipulation of this constitutional right of the Lafayette electorate. This should not be allowed by our elected City Council representatives.

The City Attorney's incorrect characterization of the resubmitted application as still being complete years after the fact is evasive under Govt. Code section 65589.5(d)(5), which provides a separate ground for denial of the Terraces 315 apartments application based on the applicable SFR-LD General Plan designation and R-65 zoning. Section 65589.5(d)(2) provides one ground for denial for significant and unavoidable public health and safety impacts in the certified Apts EIR. Govt Code 65589.5(d)(5) provides a second defense if the multi-family project is inconsistent with both the jurisdiction's [i] zoning ordinance and [ii] general plan land use designation …as it existed on the date the application was deemed complete, and the jurisdiction has [iii] adopted a revised housing element in accordance with Govt. Code section 65588 that is in substantial compliance with this article.

The City's website reports that the City housing element has been approved through 2022. The General Plan SFR-LD designation and R-65 zoning provide a defense under the HAA that the City Attorney's position improperly places at risk.

THE CITY ATTORNEY'S ARGUMENT THAT THE PROCESS AGREEMENT FROZE THE GENERAL PLAN AND ZONING IS ERRONEOUS

The City Attorney's memo is based on a series of erroneous statements about the effect of the Permit Streamlining Act ("PSA") to reach a conclusion that the Process Agreement somehow vested rights to the 2011 APO General Plan designation and zoning in perpetuity.

1. The Permit Streamlining Act does not provide for a vesting of a right to the General Plan or zoning at the time an application is deemed complete.

There is no language in the PSA freezing the General Plan or zoning at the time of an application, nor has any court so interpreted the PSA to so provide. To the contrary, the City has the right to adopt and amend a General Plan during the pendency of an application. Refer to the citations in Mr. Garfinkle's letter dated May 14, 2018, p. 2; it was made clear by the California Supreme Court in *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 786, 789-791, that a developer's rights cannot vest until issuance of permits and performance of substantial work on the property in reliance on lawfully issued permits. Otherwise, "it is beyond question that a landowner has no vested right in existing or anticipated zoning." *Id.*, 17 Cal.3d at 796.

The PSA does *not* apply to legislative acts such as zoning amendments. *Land Waste Management v Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950, 959 ["The Permit Streamlining Act cannot be used to compel legislative changes to a zoning ordinance or a general plan because the act is limited to projects that are adjudicatory in nature"]; refer also to *Golden Gate v County of Contra Costa* (2008) 165 Cal.App.4th 249, 258 n.3 ["it is settled an application for rezoning may not be deemed approved by operation of law under the time limitation provisions of the act [Permit Streamlining Act]"].

A purported 'vesting' of rights under a 2011 version of the General Plan and associated zoning does not exist under the PSA in the first place.

2. The Permit Streamlining Act, Govt. Code section 65950 *et seq*., has very strict deadlines that expired on the 315 apartments application on April 27, 2014.

Whatever effect, if any, the PSA had on the original submitted Application has expired. The Terraces EIR was certified by the City Council on August 10, 2013 over the developer's objection. That started a 180 day timeline under Govt. Code section 65950(a) which would have expired on January 27, 2014. On January 22, 2014, the developer agreed to "suspend" the 315 apartments application and "toll" the processing of the application. However, there could be an extension only "once" for a period of 90 days under Govt. Code section 65957 ["No other extension, continuance, or waiver of these time limits by either the project applicant or lead agency shall be permitted…"].

This absolute allowance of only one 90 day extension is explained in *California Land Use Practice* (CEB/Regents Univ. Calif. 2018), section 15.31. At one point, the California courts interpreted the deadline under the PSA as being a provision solely for the benefit of an applicant which an applicant could waive, rather than "a law established for a public reason [which] cannot be waived or circumvented by a private act or agreement." *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049. Concluding that the dominant intent was for the benefit of the developer, the court held the time limit could be waived if the developer agreed. However, in 1998 the Legislature enacted SB No. 2005, which noted the *Bickel* case and clarified the Legislature's intent that the Permit Streamlining Act "does not provide for the application of the common law doctrine of waiver by either the act's purpose or its statutory language". Stats 1998, Ch 283 section 5. The current language conclusively controls, providing only for a 90 day extension "once" and that "No other extension, continuance, or waiver of these time limits either by the project applicant or the lead agency shall be permitted…" [subject to two exceptions which do not apply to Deer Hill].

The Legislature's disapproval of the *Bickel* case and current applicable language of section 65957.5 make it clear the City Attorney's position that there could be further extensions by agreement past the one 90 day period, and indeed for an indefinite period extending years in the future, is contrary to the statute and express declaration of intent by the Legislature. The City of Lafayette is controlled by state law and has no authority to circumvent 65957.5 with a contrary legal creation. "Under established law, local government agencies are *powerless* to issue land-

use permits which are inconsistent with governing legislation" (emphasis in original). *Land Waste Management* v. *County of Contra Costa* (1990) 222 Cal.App.3d 950, 959**.** The Legislature has declared the time limit of section 65957.5 is established for a public reason which cannot be waived or circumvented.

The Process Agreement had the effect of extending the deadline to April 27, 2014 because that was the maximum extension or waiver allowed under section 65957. Further extensions were of no effect to continue even applicable land use policies (the PSA does not limit general plans as discussed, *ante*) because the City only has the power and authority conferred by the Legislature, and these statutory time limits control and preempt any contrary act of the City.

Of course, the developer can and has resubmitted the Application for consideration. But the Application will not be under any of the original policies, requirements, general plan, or zoning from 2011 or 2014. The resubmitted Application started a new 'substantially complete' determination under Govt Code 65943(a)["Upon receipt of any resubmittal of the application, a new 30-day period shall begin"].

3. <u>An agreement providing that General Plan designations and zoning thereafter enacted would not be applicable, is invalid and unenforceable as contrary to public policy.</u>

Apart from the other legal defects in the City Attorney's position, an agreement that would purport to provide that later enacted General Plan and zoning provisions would not be applicable is invalid. As stated by the California Supreme Court in *Avco*:

> *Land use regulations…involve the exercise of the state's police power and it is settled that the government may not contract away its right to exercise the police power in the future. Thus, even upon the dubious assumption that the [Agreement] constituted a promise by the government that zoning laws thereafter enacted would not be applicable to [the property], the agreement would be invalid and unenforceable.* 17 Cal.3d at 800 (citations omitted)

Refer also to *Carty v. City of Ojai* (1978) 77 Cal.App.3d 329, 342:

> *The police power being in its nature a continuous one…cannot be barred or suspended by contract or irrepealable law. It cannot be bartered away even by express contract. It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.* (citations omitted)

In *Trancas, supra*, the agreement with a developer that purportedly provided for a contractual exemption from the city's zoning, the subject of a closed session that violated the Brown Act, was also held to be an unlawful retraction of the city's zoning authority under *Avco*. 138 Cal.App.4th at 181-182.

The only exception to this rule provided by the Legislature is the Development Agreement Statute, which the City and developer did not utilize. Refer to section 5, *post*.

4. The City's defenses under the Housing Accountability Act are preserved.

Note also that the Process Agreement, sections E and 2, preserve and do not waive all "defenses" of the city, including those under the Housing Accountability Act. The words 'general plan' or 'zoning' do not appear in the text. It is being presented by staff in an inaccurate and one-sided fashion artificially favorable to the developer. As aptly pointed out by Mr. Garfinkle in his correspondence to the city dated May 14, 2018 at p. 3, the portion of the Housing Accountability Act, section 65589.5(d)(5) cited by the city attorney about a change to zoning or the general plan subsequent to an application being deemed substantially complete shall [in and of itself] constitute a valid basis to disapprove, was *added in 2018*. It *did not exist* at the time the Processing Agreement was signed in 2014. It is fatally incongruous for the city attorney to argue that the processing agreement froze the parties' rights and defenses in 2014 but then selectively cite a statutory provision that did not then exist. Again, as pointed out by Mr. Garfinkle in his letter at p. 2, zoning and general amendments can and do operate retroactively.

5. The Developer did not take advantage of the exclusive means provided by the Legislature to continue the 2011 General Plan designation and zoning.

The effect claimed in the City Attorney's memos on Measure L and the staff memo for June 11, 2018 agenda item 8A, that the developer can resubmit the Application in 2018 but be subject to the General Plan designation and zoning in effect in January 2014, is not legally possible as noted above under the PSA or Process Agreement. The *only* way the Legislature has provided to avoid "change in any applicable general or specific plan, zoning..." is by use of a *development agreement* under Govt. Code section 65865.4 (refer generally to Govt Code 65864-65869.5).

The City and the developer did not enter into a development agreement nor begin to comply with the multiple requirements for content under 65865.2, including term, periodic review at least every 12 months, notice to the public, recordation, or even reference the words 'development agreement.' In effect, the City Attorney argues that the benefit of a development agreement applies to the developer's 315 apartments application even though the formalities and substance of a development agreement were not used. The City does not have the power and authority to rewrite or ignore binding State statutes and disregard the Legislature.

As noted, the City is *powerless* to issue land-use permits which are inconsistent with governing legislation. *Land Waste Management* v. *County of Contra Costa, supra*, 222 Cal.App.3d at 959. The developer and City did not utilize the *exclusive* means allowed by the Legislature by which a contract to freeze the General Plan designation and zoning of 2014 could have been entered into.

6. City has no alternative to enforcing the law and current General Plan SFR-LD designation and R-65 zoning.

Whatever claims may be made by the developer, they cannot overcome the binding legal requirements outlined herein. As a local agency, the City "lacks the power to waive or consent to violation of the zoning law." *Hansen Brothers Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 564. Any temporary misinterpretations (or errors by the City Attorney) do not nullify a strong rule of policy adopted for the benefit of the public. *Id*. The overriding interest of the public and affected residents in eliminating nonconforming uses or adverse precedent controls and prevents City from allowing any violation of zoning laws. *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 260.

REQUESTED ACTION

The effect of the City Attorney's memo has been to violate the law and artificially support the Application to the detriment of the Lafayette citizenry; not just those that voted to reject Measure L, but all citizens. The City Attorney takes the position that the 2011 General Plan designation will apply, even though no waiver of the ordinary Govt. Code General Plan amendment and Brown Act requirements were or legally could be made. This attempt to try to avoid the citizens' right of referendum is without merit.

That the city attorney adopts this position to defeat the citizens' right of referendum is especially egregious after the previous attempt to defeat the citizens right of referendum was declared improper. *Save Lafayette v City of Lafayette,* 20 Cal.App.5th at 663 ["The City Improperly Interfered with the Referendum Process"].

Save Lafayette requests the City Council enforce the law and determine that the Application must be denied for violation of applicable General Plan designation SFR-LD and R-65 zoning. Save Lafayette reserves all legal rights under California law to challenge any approvals or entitlements of the Terraces 315 apartments project.

Respectfully submitted,
Michael Griffiths

President and Co-Founder
SAVE LAFAYETTE

Attachments:
Correspondence dated May 14, 2018
Correspondence dated April 9, 2018