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August 22, 2019

VIA E-MAIL AND U.S. MAIL

Mayor Mike Anderson
City of Lafayette
3675 Mount Diablo Blvd., #210
Lafayette, CA 94549
E-Mail: manderson@lovelafayette.org

Re: Terraces of Lafayette (L03-11)

Dear Mayor Anderson and Honorable Members of the Lafayette City Council:

We write on behalf of our client O'Brien Land Company, LLC ("**O'Brien**") to address Save Lafayette's August 11, 2019 letter to you. Purportedly authored by Michael Griffiths, the letter is yet another weak attempt to create distractions and pressure the City to disapprove the proposed 315-unit Terraces of Lafayette housing development project ("**Project**"). Although the City has already addressed these claims at least once already, including in Rob Hodil's remarks to the City Council at its August 13, 2018 regular meeting confirming the valid advice previously provided by the City Attorney,[1] we will address the Save Lafayette's specious claims once again. Briefly, however, and as shown below, Save Lafayette's letter demonstrates a complete lack of understanding of the laws it attempts to use in order to impede the Project, and it ought to merit as little of your attention as it does ours.

What is the Process Agreement?

The Terraces Project Alternative Process Agreement ("**Process Agreement**") is a contract entered into between the City, O'Brien, and Anna Maria Dettmer pursuant to the City's police power under Article XI, section 7 of the California Constitution. The Process agreement is not a settlement agreement nor a development agreement and does not purport to be either.

Did the Process Agreement create any vested rights or otherwise "freeze" the General Plan land use designation and zoning for the Project site?

No. The Process Agreement (1) provided a process for consideration of the 44-45 single-family home, with substantial public amenities, "Project Alternative"

[1] *See* Minutes of August 13, 2018 Lafayette City Council Regular Meeting, agenda item #13(B)(2), *available at* http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_50bdc5e7624009e1aa5a53dd9d83a1ad.pdf&view=1.

commonly known as the Homes at Deer Hill, (2) suspended the processing of the Project while the City considered the Project Alternative, and (3) preserved O'Brien's and the City's rights and defenses with respect to the Project until the City took action on the Project Alternative. But the Process Agreement does not prevent the City Council from exercising its authority to make any changes to the General Plan or zoning, nor does it create any vested rights under the development agreement statute, Government Code section 65864 *et seq.* Even if the Process Agreement was treated as a development agreement, however, the 90-day period to challenge such agreements expired on April 22, 2014.

Was the City's notice for the Process Agreement deficient because it "failed to fully disclose the nature and scope of the settlement being considered for adoption by the City?"

No. The Ralph M. Brown Act requires that "[a]t least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a *brief general description* of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words." *See* Gov't Code § 54954.2(a)(1) (Emphasis added). The description must merely be sufficient to provide interested persons with an understanding of the subject matter that will be considered. *See. e.g., Carlson v. Paradise Unified School Dist.*, 18 Cal.App.3d 196, 200 (1971).

Item 9(A) of the City's January 22, 2014 special meeting agenda, at which the Process Agreement was unanimously adopted, was as follows:

> 9) OLD BUSINESS
>
> A. Steven Falk, City Manager Terraces Project Alternative Process Agreement
>
> Recommendation: Receive public comment, discuss the revised draft agreement and enter into the Process Agreement. This action would suspend the 315-unit multifamily Project and allow the City to process and consider the 44-45 unit single family Project Alternative.

Consistent with the Brown Act's minimal "brief general description" notice requirements, this agenda description adequately informed the public about the subject matter under consideration so that they could determine whether to monitor, attend, or participate in the City Council hearings.

The adequacy of the City's agenda description is underscored by the fact that the City Council conducted three separate public hearings regarding the Process Agreement, first on December 9, 2013, at which nine members of the public spoke, second on January 13, 2014, at which 38 members of the public spoke (including

Mr. Griffiths), and finally on January 24, 2014, at which 25 members of the public spoke.

Do the SFR-LD General Plan land use designation and R-65 zoning apply to the Project site?

Yes. Under City Council Resolution No. 2015-51, the Project site's General Plan land use designation was changed from Administrative / Professional Office (APO), which permits multiple-family residential up to 35 dwelling units per acre to Low Density Single Family Residential (SFR-LD), which permits single-family residential up to 2 dwelling units per acre. Similarly, under Ordinance No. 668, the Project site's zoning was changed from Administrative / Professional Office (APO) to Single-family Residential District-65 (R-65).

If the SFR-LD General Plan land use designation and R-65 zoning apply to the Project site, is that a valid basis to disapprove the Project?

No. Although the Project site currently has the foregoing General Plan land use designation and zoning, those regulations are not a valid basis to disapprove the Project. The Housing Accountability Act establishes a special form of statutory vested rights that protects housing development projects, such as the Project, based on the applicable general plan land use designation and zoning in force at the time the application is deemed complete. Gov't Code § 65589.5(i). The Project application was deemed complete on July 5, 2011, when the General Plan land use designation and zoning were each APO, allowing multiple-family residential up to 35 dwelling units per acre upon the issuance of a land use permit.

Does the Project require any legislative approvals that could be the subject of a voter referendum?

No. The Project application was deemed complete on July 5, 2011, when the General Plan land use designation and zoning were each APO, allowing multiple-family residential up to 35 dwelling units per acre upon the issuance of a land use permit. Voter referendums only apply to acts that are strictly legislative in character, such as general plan amendments and rezonings, not to non-legislative acts such as the issuance of land use permits. *See, e.g., San Bruno Committee for Economic Justice v. City of San Bruno*, 15 Cal.App.5th 524 (2017).

Does the Housing Accountability Act provide the City with any "defenses?"

No. The Housing Accountability Act ("**HAA**"; Gov't Code § 65589.5) is a housing production statute that must be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." Gov't Code § 65589.5(a)(2)(L). The HAA is intended to severely limit local control and make it nearly impossible for a city or county to deny a housing development project except under unusual and limited circumstances. Such circumstances "arise infrequently" and are not present here. Gov't Code

§ 65589.5(a)(3). The HAA does not contain any "defenses" to a city or county's obligation to comply with state housing law and, in fact, places a heavy burden of proof on any city or county that might attempt to deny a housing development project subject to the HAA's protections. In particular, a city or county may not disapprove a housing development project unless it makes certain prescribed findings "based upon a preponderance of the evidence in the record." Gov't Code § 65589.5(d).

Does the HAA allow the City to disapprove the Project based on environmental impacts?

No. As explained in detail in our July 9, 2019 letter to the City,[2] the HAA establishes "the *only* conditions under which [the Project's 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). Moreover, the City is required to broadly interpret and apply the HAA in favor of approving the Project, and the City must harmonize the HAA and CEQA. Thus, in order to harmonize the HAA and CEQA, if the CEQA review process identifies any significant and unavoidable environmental effects then the City will be required to approve a statement of overriding considerations.

Do recently added provisions of the HAA apply to the Project?

Yes. The HAA has been amended 19 times since its adoption in 1982, each time to make the law stronger. In 2017 three bills were enacted that increased the burden of proof on cities and counties for disapproving housing development projects, increased the availability of attorney's fees and other penalties, and tightened the definition of objective standards, among other things. Another HAA amendment was enacted in 2018 that explains the legislature's intent that the circumstances under which a housing development project might validly be denied "arise infrequently." Those amendments are currently in effect and apply to the Project.

While legislation is generally presumed to apply prospectively only, *County of Sonoma v. Cohen*, 235 Cal.App.4th 42, 50-51 (2015), the HAA's findings requirements apply at the time the City votes on the Project, which has yet to occur. The HAA clearly defines "[d]isapprove the housing development project" to mean "any instance" when the City "[v]otes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit." Govt. Code § 65589.5(h)(5).

[2] Letter from Miller Starr Regalia to City, dated July 9, 2019, *available at* https://www.lovelafayette.org/Home/ShowDocument?id=5920.

Does the Permit Streamlining Act ("PSA") contain any deadlines that can have a negative effect on the Project or its various applications?

No. While the PSA has various timing requirements, including "maximum time limits for approving or disapproving development projects," an agency's failure to comply with those time limits does not work against project applicants. Gov't Code § 65953. Indeed, the PSA provides that "[a]ny disapproval of an application for a development project shall specify the reasons for disapproval *other than the failure to timely act* in accordance with the time limits specified in this chapter." Gov't Code § 65952.2 (Emphasis added). Moreover, the PSA also provides that the "[f]ailure of the lead agency to act within these time limits may result in the project being *deemed approved* . . . ." Gov't Code § 65957 (Emphasis added). Nothing in the PSA penalizes an applicant or causes a project disapproval in the event the time limits established in the PSA are exceeded for any reason.

Has O'Brien resubmitted the Project application?

No. Pursuant to the Process Agreement, O'Brien *resumed* processing the Project that was suspended while the City considered the Project Alternative. Even if the City could validly treat the Project application as having been resubmitted in June of 2018 when O'Brien notified the City it was resuming processing the Project, then the supposedly "resubmitted" application would be deemed complete under the PSA (Gov't Code § 65943(a)) and the City would still be required to act on the same Project already analyzed in a certified Environmental Impact Report in 2013 subject to the stringent limitations on further environmental review established in Public Resources Code section 21166 and CEQA Guidelines section 15162.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter /kli

Bryan W. Wenter, AICP

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