MILLER STARR REGALIA

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrlegal.com

Bryan W. Wenter AICP
Direct Dial: 925 941 3268
bryan.wenter@msrlegal.com

June 13, 2020

VIA E-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 (L03-11) Affordable Apartments; Planning Commission Continuance to June 29 and Potential Implications for Failing to Comply with the Time Limits Specified in the Housing Accountability Act and Permit Streamlining Act

Dear Rob:

On behalf of O'Brien Land Company ("O'Brien), we write to address the timing of the City's impending but much belated decision on O'Brien's application for the 315-unit Terraces of Lafayette apartment project ("Project") at 3233 Deer Hill Road in Lafayette ("Project Site"). The City has delayed the Project's hearings under Senate Bill 330 four times this year and at the current pace could be perilously close to accomplishing a *de facto* disapproval for failure to act within the 90-day time period to approve or disapprove the Project specified in the Housing Accountability Act (Gov. Code § 65589.5; "HAA") and the Permit Streamlining Act (Gov. Code §§ 65920 *et seq*.; "PSA").

The HAA defines the term "disapprove the housing development project" to include any instance in which a local agency does either of the following:

- Votes 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; and

- Fails to comply with the time periods specified in subdivision (a) of Section 65950.

(Gov. Code § 65589.5(h)(6)(A) and (B)).

The first of the five hearings allowed under SB 330 (*see* Gov. Code § 65950.5) was a joint meeting of the Planning Commission and Transportation & Circulation

Commission that occurred on January 21, 2020. The second SB 330 hearing was initially scheduled for March 16, rescheduled to April 6, rescheduled again to April 27, and finally rescheduled yet again and occurred on May 18. Many of these delays were due to the fact the City rejected the addendum O'Brien filed and took fourteen months to prepare a new addendum, at great expense to O'Brien. And after all of that time and analysis, the City's addendum confirms the conclusion of O'Brien's legally adequate December 18, 2018 addendum: a subsequent or supplemental environmental impact report ("EIR") is not required or allowed. (Pub. Res. Code § 21166; 14 Cal. Code Regs. §§ 15162 and 15164).

Now that the City has delayed the Project yet again—moving the continued public hearing from June 15 to June 29 for additional study and analysis that will have no bearing on its obligation to approve the Project under the requirements of the HAA—it is imperative that we discuss the potential consequences of failing to comply with the PSA's 90-day period to approve or disapprove the Project.

Should the City Council not render a final decision approving or disapproving the Project by the PSA's applicable deadline, which we believe to be —90 days after May 4, or August 3, there is a strong argument that the Project would have been *de facto* disapproved for failure to comply with the PSA time periods. (See Gov. Code § 65950(h)(6)(B)). And if that occurs it would ripen litigation under the HAA, with the burden of proof on the City (Gov. Code §§ 65589.5(d) and (i), including all of the following:

1. preparation of the voluminous administrative record at City expense within 30 days (Gov. Code § 65589.5(m));

2. payment of the City's own attorney's fees (Code Civ. Proc. § 1021; *Graham v. DaimlerChrysler Corp*., 34 Cal.4th 553 (2004));

3. payment of O'Brien's attorney's fees if O'Brien prevails because a court either orders the City to comply with the HAA or issues an order or judgment directing the City to approve the Project if the court finds that the City acted in bad faith when it disapproved the Project (Gov. Code § 65589.5(k)(1)(A)(ii)); and

4. potential fines in the amount of $15.75M (Gov. Code. §§ 65589.5(k)(1)(B)(i) and 65589.5(l)).

Although we expect the Planning Commission to finally make a decision to approve or disapprove the Project on June 29—the third SB 330 hearing—we equally expect that whoever is dissatisfied with the Commission's decision—Save Lafayette or O'Brien—will appeal to the City Council. The Council will then have the remaining two SB 330 hearings available to it to resolve the appeal, ultimately approving or disapproving the Project. But the Council will also be working against a fast-moving "shot clock," most of which will have been gobbled up by the Planning Commission

before the Council has its first of potentially two SB 330 appeal hearings—numbers four and five.

We agree that the PSA's deadlines for approval or disapproval of a development project are triggered after compliance with the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq*.; "CEQA"). That much is certainly unassailable "black letter" land use and environmental law. Indeed, the time periods established in the PSA run from different points in time depending on whether an EIR (Gov. Code § 65950(a)(1-3)) or negative declaration (Gov. Code § 65950(a)(4) has been prepared or whether a project has been determined to be exempt from CEQA (Gov Code § 65950(a)(5)). The PSA plainly makes reference to those environmental documents and to an exemption determination and does not refer to addendums. But this does not lead to the reasonable conclusion that the time periods never run when an addendum is involved.

Given that the purpose of an addendum is to make minor changes to a previously certified EIR without recirculating the EIR (*see, e.g., Save Our Heritage Organisation v. City of San Diego*, 28 Cal.App.5th 656 (2018)), it would appear unreasonable to conclude a project requiring only an addendum would be treated more adversely under the PSA than one requiring an "environmental document."[1] It is much more reasonable to conclude that the time periods established under the PSA begin to run from some point in time, even in the case of an addendum, and in this matter quite possibly from May 4, the date the City belatedly published the Project addendum.

It thus appears likely that the City Council will be pressed to resolve the appeal by August 3. We acknowledge that we do not know with certainty when the PSA time periods run in the case of an addendum, but neither does the City. It is beyond unreasonable, however, to conclude that they *never* run. And the risk that they do run, including potentially from May 4, is quite consequential. Thus, in the event there are two appeal hearings, in order to timely resolve the likely appeal of the Planning Commission's anticipated June 29 decision within the remaining 35 days allowed under the HAA and PSA, the Council would need to schedule at least one special meeting.

---

[1] Addendums are not "environmental documents." An "environmental document" is a term of art that CEQA Guidelines section 15361 defines narrowly to include only initial studies, negative declarations, and EIRs. Addendums are not included in that definition, and that makes sense given that under CEQA Guidelines section 15164 addendums are merely to make minor changes to "environmental documents" such as EIRs or negative declarations. The "environmental document" here is the Project EIR, not the addendum.

The notion that the City must exercise its "independent judgment" when it "adopts" the addendum is also incorrect. and plagues the City's handling of the Project. The term "independent judgment" is also a term of art, as set forth in Public Resources Code section 21082.1(c)(3) and CEQA Guidelines sections 15074(b), 15084(d)(3) and (e), and 15090(a)(3), all of which require a lead agency to exercise its "independent judgment" with respect to "environmental documents" such as EIRs and mitigated negative declarations. With respect to addendums CEQA Guidelines section 15164(d) requires something much different: a lead agency must simply "consider" an addendum before it approves a project. Addendums require none of the formality of "environmental documents"—there are no required public hearings, no required public comments and responses to comments, and no required exercise of "independent judgment."

As much as O'Brien does not wish to test these issues in court, the City should be working overtime to ensure O'Brien is not put in that avoidable position. Rather than continuing to placate Save Lafayette and other Project opponents who will raise any issue they can imagine regardless of how implausible under California land use law, the City ought to be prepared to take all actions necessary to schedule any remaining SB 330 hearings expeditiously, including by scheduling at least one special meeting, to ensure that a timely decision by the City Council is made to resolve any appeal and finally approve or disapprove the Project no later than August 3 and thereby ensure compliance with the time limits established in the HAA and PSA.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW

cc: Niroop Srivatsa, City Manager
Greg Wolff, Planning Director
Joanne Robbins, City Clerk
Dennis O'Brien
Caryn Kali
Dave Baker
Arthur F. Coon, Esq.
Allan C. Moore, Esq.