

MEASURE L: CORRECT INFORMATION ABOUT 315 APARTMENTS

Some voters are confused by comments that if Measure L is rejected the developer might resubmit the original 315 apartments application that was suspended on 1/13/14. Instead of being distracted by this vague threat, voters should evaluate the Homes project on the merits of its traffic impacts, view impacts, and \$3M of city money for a children's play area and sport field on a major traffic corridor with air quality issues. The city has the legal authority to deny that project as detailed below.

1. THE APTS APPLICATION WAS NEVER APPROVED. IT WAS SUSPENDED IN 2014 WHEN THE CITY CERTIFIED THE APTS EIR WITH 13 SIGNIFICANT UNAVOIDABLE ENVIRONMENTAL IMPACTS INCLUDING 5 PUBLIC HEALTH AND SAFETY IMPACTS. THE CALIFORNIA HOUSING ACCOUNTABILITY ACT, GOVERNMENT CODE ("Govt. Code") 65589.5(d)(2) AUTHORIZES DENIAL OF APARTMENTS FOR ADVERSE IMPACTS ON PUBLIC HEALTH AND SAFETY.

At the City Council meeting on 5/14/18, when asked about whether there were significant unavoidable public health and safety impacts that authorized denial of a resubmitted apts application under Govt. Code 65589.5(d)(2), the city attorney replied "*I haven't looked at it in some time*", nor did her memo of the same date go into these impacts.

The Housing Accountability Act, Govt. Code 65589.5(d)(2) authorizes the city to deny the 315 apts application if resubmitted. The Apts EIR, certified by the City Council 8/12/13, lists five significant unavoidable public health and safety environmental impacts, two of which are air quality and three are traffic. The specific definition in (d)(2) is "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." The two air impacts were based on federal and state Nitrogen (NOX) standards meeting the 65589.5(d)(2) definition, which are exceeded as analyzed in the Apts EIR. The three traffic impacts were based on Level of Service F, also a definite written standard meeting the 65589.5(d)(2) definition, supplemented by agencies commenting about delays to emergency responses for public safety.

The Apts EIR was certified on 8/10/13 with five significant unavoidable public health and safety impacts and the developer is stuck with that. If you go to the city website, city council, meetings 2014, 1/13/14 meeting, agenda 11A, staff report exhibit no. 2, the city manager summarizes the decision to "suspend" the Apts application. The developer threatened to file a lawsuit to challenge certification of its own project EIR. To win that, the developer would have to establish the EIR's administrative record on *all five* of the subject impacts is 'arbitrary' and not supported by any reasonable evidence (referred to as the 'substantial evidence' test) under the California Environmental Quality Act (CEQA). That's a very high burden on documented environmental impacts. Go through the Apts EIR ex. P and you will see the developer disputed lower zoning and similar things, but did not show the air impacts were arbitrary, and on traffic mainly argued the city should widen Pleasant Hill Road, which the city had no obligation to do.

The administrative record on the five significant unavoidable public health and safety impacts is not arbitrary. 65589.5(d)(2) applies, the administrative record on the project establishes the requisite impacts under 65589.5(d)(2), and the city has the power to deny the 315 apts application if resubmitted. This is the answer to the question of 315 apartments.

Other issues relating to 315 apartments:

2. THE CONTROLLING GENERAL PLAN DESIGNATION FOR THE PROPERTY BECAME LOW DENSITY SINGLE FAMILY RESIDENTIAL 2 UNITS/ACRE (“LDSFR”) ON 8/10/15, WHICH DOES NOT ALLOW APTS. IF RESUBMITTED, THE APTS APPLICATION WOULD REQUIRE A GENERAL PLAN AMENDMENT, WHICH IS A LEGISLATIVE ACT UNDER GOVT. CODE 65301.5 AND SUBJECT TO ANOTHER VOTER REFERENDUM.

As stated by the Court of Appeal in *Save Lafayette v. City of Lafayette* (Feb. 21, 2018) 20 CA5th 657, 661, on 8/10/15 the city council amended the "general plan designation from 'Administrative Professional Office' (APO) to 'Low Density Single Family Residential'". 315 apts would require a General Plan amendment to change from this LDSFR to apartments, a legislative act.

Govt. Code 65301.5 provides: “The adoption of the general plan ...or the adoption of any amendment...is a legislative act”, which is subject to the voters’ constitutional right of referendum. The city has already lost one case trying to deny Lafayette voters their constitutional right to referendum.

3. THE DEVELOPER ARGUES THERE IS ADMINISTRATIVE PROFESSIONAL OFFICE ZONING (APO) ON THE PROPERTY FROM BEFORE 2015, BUT THIS IS TEMPORARY AND UNENFORCEABLE. PER GOVT. CODE 65860(c). THE ZONING IS SUBORDINATE TO THE LDSFR GENERAL PLAN DESIGNATION. THE CITY COUNCIL IS ALREADY MAKING PLANS TO AMEND THE APO ZONING TO LOW DENSITY RESIDENTIAL IF MEASURE L IS REJECTED BY THE VOTERS.

The Yes campaign argues the property has APO zoning. However, the General Plan designation was amended to low density LDSFR on 8/10/15. As stated by the Court of Appeal in *Save Lafayette v. City of Lafayette* (Feb. 21, 2018) 20 CA5th 657, 666, the old APO zoning “shall be amended within a reasonable time so that it is consistent with the general plan as amended”, citing Govt. Code 65860(c). Listen to the audio of the 5/14/18 city council meeting, and you will hear the Mayor announce a correction to low density residential zoning will be on the city council agenda in June if the voters reject Measure L. Zoning classifications are subordinate to and must be consistent with a general plan, which is a city’s master land use document.

4. A 2014 TOLLING AGREEMENT AND PROCESSING AGREEMENT WOULD NOT ALLOW THE CITY TO DISREGARD STATE LAW AND THE STRICT DEADLINES OF THE PERMIT STREAMLINING ACT WHICH EXPIRED ON THE APTS APPLICATION IN 2014.

Another argument is that a tolling and processing agreements to extend the statute of limitations for a suit on the developer's Apts EIR in 2013 and 2014 operate to preserve the earlier APO general plan designation and avoid the requirement for a general plan amendment to allow apts, and thereby prevent another voter referendum if 315 apts were approved. Here’s how that works.

That Apts EIR certification on 8/12/13 started a 180 day timeline under the Permit Streamlining Act, Govt. Code 65950(a)(1), which governs how cities process development applications. On 1/13/14 the developer decided to “suspend” the application. That 180 day deadline is absolute under the Permit Streamlining Act and can only be extended “once” for an additional 90 days under Govt. Code 65957 [“No other extension, continuance, or waiver of these time limits by either the project applicant or lead agency shall be permitted...”]. The city only has the power and authority conferred by the State Legislature, and these statutory time limits control. The time limits expired in 2014.

If the 315 apts application is resubmitted, all new time limits start again under Govt Code 65943(a) ["Upon receipt of any resubmittal of the application, a new 30-day period shall begin" (subject to all current requirements)]. The tolling and processing agreements don't even mention the general plan designation, or even contain the words "general plan", nor does the Streamlining Act preempt amendment of general plans. But even if they did, the city has no power to extend past the 180 days plus one 90 days extension under 65950(a)(1) and 65957. The city has no legal power to extend Streamlining Act deadlines in perpetuity.

This issue was very effectively addressed in a letter dated 5/14/18 to the city council from Gary Garfinkle, the attorney that handled the Court of Appeal case, which can be found [here](#).

5. APPROVAL OF MEASURE L WILL ESTABLISH PRECEDENTS ON TRAFFIC IMPACTS AND HILLSIDE DEVELOPMENT THAT WILL ADVERSELY AFFECT THE CITY'S RESIDENTS ON FUTURE LAND USE APPLICATIONS

Cities are generally afforded broad discretion in approving and denying land use projects, but a problem arises if a project is denied on grounds which are inconsistent with precedents established on earlier applications. The Happy Valley area discovered this the hard way two years ago when the Contra Costa Superior Court ruled the city improperly denied approval of a 10,000 square foot house on a ridgeline. The developer's attorney successfully cited Lafayette's earlier approval of a home on another ridgeline, arguing that the denial was inconsistent and arbitrary. The court agreed.

If Lafayette voters approve Measure L, precedents will be established that will make it hard for the city to reject future projects with major traffic impacts or development on prominent hillsides, whether further along Deer Hill Road or elsewhere throughout the city. Voters considering a Yes vote should realize that approving these impacts at Deer Hill will establish precedents that may compromise the General Plan and lead to approval of projects that will bring more traffic congestion and invade hillsides and ridgelines in the city's jurisdiction.

6. THE CITY BREACHED A MANDATORY DUTY TO VOTERS AND IMPROPERLY INTERFERED WITH THE REFERENDUM PROCESS

In reviewing the arguments of the city attorney and developer, it is important to remember that the Court of Appeal held that "The City Improperly Interfered with the Referendum Process" in December 2015 and ordered the city to place the Homes project before the voters in this election. 20 CA5th at 666. The developer, supported by the city attorney that advised the city council to breach its mandatory duty to the voters, is engaging in legal arguments now that are just as incorrect.

7. CONCLUSION

Future outcomes in litigation cannot be predicted with absolute certainty. All that can be done is to make an evaluation of legal issues based on the strengths and weaknesses of the various arguments. In the case of Measure L, the arguments being put forward about apartments are weak. Voters should decide how to cast their vote based on the merits of the Homes project and not be misled.