



January 8, 2020

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

Re: Planning Commission and Transportation Circulation Commission Review of  
forthcoming Traffic Study for Terraces 315 Apartments Application

Dear Mayor Anderson and Members of the City Council:

At the Update on the Terraces of Lafayette Project, City Council agenda April 29, 2019 Item 6A, in response to considerable public comment, the City Council directed the hiring of Impact Sciences to perform further analysis of the draft Addendum dated December 18, 2018 prepared by the consultants directly chosen and hired by developer O'Brien Lands. The developer submitted documents from First Carbon Solutions, including its Appendix F "Updated Traffic Study" prepared by TJKM Transportation Consultants ("TJKM").

Specifically, the City Council adopted the following on April 29, 2019:

**ACTION:** It was M/S/C (Burks/Gerringer) to **direct staff to proceed with hiring Impact Sciences to perform further analysis and review the draft Addendum prepared by the previous consultant** and; to return to the Council with a decision on Supplemental versus Addendum, **as well as the new studies that support it.** Vote: 4-0-1 (Ayes: Anderson, Bliss, Burks, and Gerringer; Noes: None; Absent: Candell). (emphasis added)

The staff report to the City Council for April 29, 2019, page 3 of 4, stated:

(2) The adequacy of the Addendum submitted by the applicant in meeting the requirements of CEQA. As discussed below, **Impact Sciences determined that the Addendum submitted by the Applicant is not adequate and requires substantial revision...**[Section (3)]... **Necessary changes include new or significant revisions to technical studies to analyze the Project's transportation,** air quality, and noise impacts...using methodologies and assumptions recommended by Impact Sciences. **Some of the conclusions made were not accompanied by sufficient evidence or justification...** (emphasis added)

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The Action by the City Council, and the public perception that was established, was that there would be an *independent* review of the developer's submission, as referenced above. *Nowhere* was it stated that the developer's hired consultant, TJKM, technically out of the City's control and retention, would monopolize the review and revisions required on transportation and public safety.

Rather than follow the letter and spirit of the City Council's action on April 29, 2019, Planning staff approved placing TJKM in charge of reviewing its own Appendix F "Updated Traffic Study." To our knowledge, this action has never been publicly reported, placed on the City's website, or discussed in any public hearing of the City Council from April 29, 2019 to date.

As the original DEIR on this project identified, there were multiple significant unavoidable public health and safety impacts of the 315 apartments project. Likewise, Impact Science reported to the City in connection with the April 29, 2019 City Council hearing, that the developer's submission was "*not adequate and requires substantial revision*". No exception was stated to the City Council and public on April 29, 2019 that the traffic component was adequate or that TJKM, now hired by the developer, should control or preempt the review and new studies directed by the City Council.

It is both a violation of the City Council Action on April 29, 2019 and common sense to allow the developer's hired traffic consultant, TJKM, to review its own Appendix F "Updated Traffic Study." A proper *independent* traffic consultant should have been used and now must be hired.

I would ask the City Council to consider the obvious conflict in having TJKM review its own Appendix F Updated Traffic Study. Essentially, TJKM is being asked to critique its own work, placing it in the conflicted position of rejecting development objective of the developer that hired it and potentially maligning its own conclusions.

It is a well-documented provision of Administrative Law that due process suffers if a person or entity is the arbiter of their own position. As famously said in the Federalist Papers No. 10 in 1787, written by James Madison: "**No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.**" That is not just an interesting historical observation, it is a quotation directly cited by the U.S. Supreme Court in due process cases (*Caperton v. A.T. Massey Coal* (2009) 556 U.S. 868, 876 and authorities cited therein) and the California Supreme Court (*Today's Fresh Start, Inc. v. Los Angeles County* (2013) 57 Cal. 4th 197, 223-224). Refer also to *Haas v County of San Bernardino* (2002) 27 Cal. 4th 1017, 1029 [person "**presumed to favor its own rational self-interest**"]; *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal. App. 4th 1012, 1027 [**"A person cannot be a judge in his or her own cause."**]; *Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal. App. 4th 695, 710 [department head improperly "**in the position of judging the correctness of his own decision.**"] (emphasis added).

These cases reflect the improper appearance created by allowing an entity to purportedly conduct an impartial review of its own work. The City Council should take this to heart and direct staff to

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comply with its April 29, 2019 Action and have a traffic consultant independent of O'Brien Land retained to perform this important analysis that directly affects public safety. Any biased report from TJKM will be both legally defective and unsound as a matter of public policy.

Thank you for your consideration.

Respectfully submitted,  
*Michael Griffiths*

President & Co-Founder  
SAVE LAFAYETTE

Cc: Lafayette Planning Commission (all members)  
Lafayette Transportation and Circulation Commission (all members)