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May 14, 2018

By Email and Hand Delivery
Don Tatzin, Mayor
Cameron Burks, Vice Mayor
Mike Anderson, Councilman
Mark Mitchell, Councilman
Ivor Samson, Councilman

Re: Response to City Attorney's "Supplemental Update" on Terraces Proposal

Dear Mayor Tatzin and City Council Members,

This letter addresses the city attorney's "supplemental update" on the suspended "Terraces" apartment proposal (Item 8B on the May 14 consent calendar).

In 2015, the City Council adopted the city attorney's mistaken advice that the current referendum (Measure L) was "invalid" due to an inconsistency with the 2015 general plan amendment. The Council followed her recommendation to refuse to allow Lafayette residents to vote on the duly certified referendum. The Court of Appeal repudiated that ploy and held "The City Improperly Interfered with the Referendum Process." (*Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 663-671.)

The city attorney now supports the "Yes on L" campaign's attempt to scare residents into believing that a "No" vote will result in approval of 315 apartments. She first asserted in April that a resurrected apartment proposal is not subject to referendum. Save Lafayette responded on April 9 with a detailed letter which demonstrates: (a) the suspended apartment proposal was doomed by a devastating 2013 Environmental Impact Report (EIR), rejection by two City commissions and intense public opposition — all of which would again confront a resurrected proposal; and (b) any approval by the Council would include elements which are subject to both referendum and meritorious litigation. (A copy of Save Lafayette's April 9 response is attached for your convenience.)

The city attorney now argues, again incorrectly, that: (a) the Process Agreement and Housing Accountability Act (HAA) render the current general plan designation irrelevant; (b) the HAA virtually requires approval of the apartment project; and (c) no legislative act subject to referendum is required. The mistaken advice should be rejected.

**A. The apartment proposal is fatally inconsistent with the current General Plan**

Save Lafayette's April 9 letter demonstrates that the apartment proposal is fatally inconsistent with the 2015 general plan amendment's specification of "Low Density Single Family Residential ... up to 2 dwelling units per acre" for the sensitive parcel between Deer Hill Rd., Pleasant Hill Rd. and Highway 24. The city attorney now acknowledges that another general plan amendment to allow apartments would be a legislative act subject to referendum. She argues, nonetheless, that the apartments can be approved without another amendment despite the undisputed inconsistency.

**1. The Process Agreement does not dispense with the current General Plan**

The city attorney argues the application for the apartments was "deemed complete in 2011," the 2014 "Process Agreement" leaves "all respective rights ... intact" and, as a result, no new application or general plan amendment is needed to resume "processing."

First, the 2011 application can no longer be processed without complying with current land use requirements. The Council's 2013 certification of the EIR triggered a 180-day timeline for processing. (Gov. Code, § 65950(a)(1).) The time can only be extended "once" for an additional 90 days. "No other extension ... or waiver of these time limits by either the project applicant or lead agency shall be permitted ...." (*Id*., § 65957.) Thus, the apartments proposal would have to be resubmitted. That would trigger a new requirement to determine whether the resubmitted proposal is "complete" under current requirements in 2018. (*Id*., § 65943(a).)

Second, the city attorney does not refute our April 9 showing that "a property developer is vulnerable to shifts in zoning or other land use regulations .... [The developer] must comply with the ordinances in effect at the time he secures a building permit." (*Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 975.) There is no "right" to the former general plan designation; and the 2015 general plan amendment specifying Low Density Single Family Residential "may operate retroactively to require a denial of the application." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1179.)

And because the requirement of consistency with the general plan is statutory (Gov. Code, § 65860), the Process Agreement could not lawfully waive it for that reason as well. Indeed, the City strenuously argued that consistency with the general plan is of paramount importance in land use decisions. That is one point that the City got right on the *Save Lafayette v. City of Lafayette* appeal.

Third, independent of the current general plan, the apartment proposal would face virtually insurmountable obstacles. Before the 2013 suspension, the Council certified a devastating EIR which establishes 53 "significant adverse impacts" — 13 of which are "unavoidable" even with feasible mitigation, including at least 5 which adversely impact health and safety. In the ensuing five years, the significant unavoidable health and safety impacts have increased as to traffic congestion, safety and toxic pollution due to the unique location surrounded by Highway 24, Pleasant Hill Rd. and Deer Hill Rd. Facing sure defeat, the developer threatened a dubious lawsuit and agreed to suspend the proposal. But the same obstacles would confront a resurrected apartment proposal.

**2. Nor does the Housing Accountability Act avoid the current General Plan**

The city attorney mistakenly claims the HAA renders the 2015 amended general plan irrelevant. She recites language from a 2018 amendment that a change in zoning or general plan designation after the application was "deemed complete" shall not constitute a valid basis to disapprove or condition approval of the project. (Citing Gov. Code, § 65589.5(d)(5).) But the language she relies upon was not effective until 2018. It is elementary that legislation is presumed to apply prospectively only. (*County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 50-51.)

Because that provision was not in effect in 2011, it does not apply to the original application. And if the proposal is resubmitted, a new "deemed complete" determination as of 2018 would be necessary. Thus, the 2015 general plan amendment will not be a "change" after the resubmitted application is deemed completed (if it ever is).

**B. The HAA does not require approval of the apartments**

As our April 9 letter shows, the HAA neither requires the Council to approve the apartments, nor restricts the People's right to overrule an approval by referendum and/or litigation. The city attorney argues "the City would need to find the project would have "a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact ....'" (Gov. Code, § 65589.5(d)(2).) ***But the City Council already made such findings*** when it certified the 2013 EIR — including specific significant unavoidable adverse impacts upon the public health and safety. And increased traffic, safety and toxic impacts during the subsequent five years provide further support for those findings.

Because of the identified significant adverse impacts, the City "may not approve the project unless it finds that changes have been made in the project to avoid these effects, or, if the mitigation measures or alternatives identified in the EIR are not feasible,

there are overriding benefits that outweigh the impact on the environment." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 185.) But the certified EIR finds that significant adverse impacts on health and safety are "unavoidable." And any finding that the apartments have "overriding benefits that outweigh the impact on the environment" would not pass the smell test.

Even independent of the adverse impacts, the HAA does not mandate approval where a city has adopted a housing element and already is in substantial compliance with related requirements. (Gov. Code, § 65589(d)(1). We understand that recently developed apartment complexes in other areas of Lafayette establish such compliance.

**C. The apartments proposal is subject to referendum and meritorious litigation**

The city attorney recites a general standard for distinguishing legislative acts (which are subject to referendum) from adjudicatory or administrative acts (which generally are not). However, she fails to acknowledge that cases establish nuances which make make it difficult to predict how a court will view a specific action. As shown in Save Lafayette's April 9 letter, several aspects of the apartments project would support, if not outright dictate, a ruling that an approval is subject to the People's referendum power, as well as meritorious litigation.

The city attorney does not directly dispute that showing. Remarkably, however, she asserts, "no legislative act that is subject to referendum is required for the applicant to develop." She is wrong for reasons stated in the April 9 letter.

Moreover, even to the extent the HAA might restrict ***the City's*** ability to deny a project, it would not restrict ***the People's referendum power***. Our Supreme Court has established a strong presumption that restrictions on local government do not restrict the People's constitutionally reserved power absent circumstances not present here. The High Court recently held that a constitutional initiative restricting local government's taxation powers does not restrict ***the People's power*** to do precisely the same thing by an initiative. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934-944.)

Indeed, a case that the city attorney cites on a different point holds that a citizen-generated initiative or referendum does not need to comply with CEQA. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785-786, 795-796; see also, e.g., *Friends of Sierra Madre*, *supra*, 25 Cal.4th at pp. 190-191 [initiative generated by local government must comply with CEQA even though citizen-generated initiative is exempt].)

circumstances. (Gov. Code, § 65589.5(d).) Nothing in the HAA purports to restrict the People's power.

Further, reasonable doubts must be resolved in favor of the People's power. "Declaring it 'the duty of the courts to jealously guard this right of the people,' the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.' '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged . . . . If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'" (*Rossi v. Brown* (1995) 9 Cal.4th 688, 695.)

If the City again interferes with the People's power — like the Council did when it followed the city attorney's advice and recommendation to refuse to put the current referendum on the ballot — the courts must liberally construe the People's power and narrowly construe any restrictions. (*California Cannabis Coalition*, *supra*, 3 Cal.5th at pp. 935-936, 946.) Any additional interference will be highly suspect in light of the Court of Appeal's holding that this City improperly interfered with the referendum process in the *Save Lafayette v. City of Lafayette* decision.

For all of these reasons, including those in the April 9 letter, the city attorney, and the two councilmen who signed the ballot argument claiming that the apartment project is not subject to referendum, should stop supporting the "Yes" campaign's scare tactic. The contrived notion that a "No on L" vote will result in approval of the suspended apartments application is not worthy of your support.

Respectfully submitted,

/s/ Gary S. Garfinkle
Attorney for Save Lafayette

cc: Steven Falk, City Manager
Joanne Robbins, City Clerk
Malathy Subramanian, City Attorney

**ATTACHMENT:**

**SAVE LAFAYETTE APRIL 9, 2018 LETTER**

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April 9, 2018

By Email and Hand Delivery
Don Tatzin, Mayor
Cameron Burks, Vice Mayor
Mike Anderson, Councilman
Mark Mitchell, Councilman
Ivor Samson, Councilman
City of Lafayette

Re: Lafayette City Council Meeting, April 9, 2018, Item 7F

Dear Mayor Tatzin and City Council Members,

The Save Lafayette organization hereby responds to the city attorney's misleading "Informational Update Regarding whether Terraces of Lafayette Apartment Project could be subject to a Referendum." She states that the Terraces proposal sought permits which are administrative and, she claims, not subject to referendum. But she ignores essential provisions which would indeed be "legislative" acts subject to the constitutionally protected power of the People to override the Council by both referendum and litigation.

Supporters of the "Homes at Deer Hill" proposal attempt to scare voters into believing that a "No" vote on Proposition L will result in the Terraces project with 315 apartments on the sensitive parcel between Deer Hill Road, Pleasant Hill Road and Highway 24. The truth, however, is that the apartment project has never been approved; and it would face the same extreme obstacles as before if the developer elects to resurrect it — including but not limited to the People's referendum power.

The certified Environmental Impact Report (EIR) for the Terraces proposal describes 53 "significant adverse impacts," 13 of which would be "unavoidable" even with permissible mitigation. The EIR is so devastating to the developer that it appealed the Planning Commissions's certification of the EIR and then threatened a lawsuit when the Council affirmed the certification in 2013.

As Mayor Tatzin explained, "the Council has taken no position with regard to the project. All the Council has done is certify the EIR ...." (City Council Minutes, Sept. 23, 2013, p. 55.) And when the Council decided to shelve the Terraces application, then-Vice Mayor Andersson declared, "there are places where the original 315-unit project would be a great project, but this was not the place and people came out and made that point clearly

and overwhelmingly ....” (City Council Minutes, Jan. 22, 2014, p. 16.)

Thus, the possibility of the Council approving the Terraces apartments is highly problematic at best. And if it were to do so, the citizens of Lafayette could override that approval by referendum and/or litigation.

**First**, a project of this magnitude commonly includes a development agreement to establish the rights and duties of the developer and the City. (See Gov. Code, § 65864 et seq.) While not mandatory, the agreement has important benefits to the City and “allows a developer to make long-term plans for development without risking future changes in the municipality’s land use rules, regulations, and policies.” (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239, 1255, fn. 2.) Thus, the current Deer Hill Homes project has a lengthy detailed development agreement.

Government Code section 65867.5(a) provides, “A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum.” Specifically, a “development agreement .... is subject to referendum, which allows the electorate to overturn approval of the agreement.” (*San Francisco Tomorrow*, *supra*, 228 Cal.App.4th at p. 1255, fn. 2.)

**Second**, the Terraces apartments cannot lawfully be approved without a general plan amendment — which also is subject to referendum. It is elementary that “ ‘the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.’ ” (*San Francisco Tomorrow*, 228 Cal.App.4th at p. 1248.) The City vehemently asserted that very point in its failed attempt to justify its improper interference with the Referendum process. (*Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 663-665.)

In 2015, the Council amended the general plan to specify “Low Density” single-family residences “up to 2 dwelling units per acre” for the sensitive parcel between Deer Hill Road, Pleasant Hill Road and Highway 24. That is utterly inconsistent with the Terraces proposal’s high density apartment use.

“It is settled that the adoption or amendment of a general plan is a legislative act subject to referendum.” (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 773, citing, e.g., *Yost v. Thomas* (1984) 36 Cal.3d 561, 570; accord, *San Francisco Tomorrow*, 228 Cal.App.4th at p. 1248, in turn citing Gov. Code, § 65301.5 [“The adoption of the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or element thereof is a legislative act”]; *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 367.)

As the Court of Appeal explained when repudiating the Council's improper interference with the referendum process, Government Code section 65860(c) provides, "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, ... the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended." (*Save Lafayette v. City of Lafayette*, *supra*, 20 Cal.App.5th at pp. 665-666.) To that end, the court specifically cited the Low Density Residential LR-5 designation, which the Council previously approved but deferred while considering the developer's application. (*Save Lafayette*, at p. 667.)

Accordingly, if and when the People defeat the Deer Hill project in the court-mandated Proposition L referendum, the City will be required to restore consistency between the general plan and zoning — which will require a legislative act subject to referendum.

Nor does it matter that the former APO general plan designation was in effect at the time of the Terraces application. Absent unique circumstances not present here, "a property developer is vulnerable to shifts in zoning or other land use regulations occurring during the preparatory stages of his project. [Citations.] By issuing approvals preparatory to a building permit, the government makes no representation that the developer will be exempt from changing land-use regulations; he must comply with the ordinances in effect at the time he secures a building permit." (*Raley v. California Tahoe Regional Planning Agency* (1977) 68 Cal.App.3d 965, 975.)

As noted, nothing in the Terraces proposal has been approved except the EIR which cites numerous significant and unavoidable adverse impacts. Thus, there is no vested right under the former APO designation; and the current general plan "may operate retroactively to require a denial of the application." (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1179.)

Nor does the 2013 "tolling agreement" preserve the former APO general plan designation. The agreement exists to preserve the developer's right to legally challenge the EIR certification. It does not purport to preserve zoning and general plan provisions, for which the developer has not acquired any vested right.

**Third**, any other contract or policy determination would be subject to referendum. "'"Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power...."'" (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1113.) More specifically, "'"the award of a contract, and all the acts leading up to the

award, are legislative in character."'" (*Id*. at p. 1114.)

**Fourth**, remarkably, the ballot argument rebuttal by councilmen Anderson and Burks and others mistakenly asserts, without explanation, that the apartments project "is prevented by the Housing Accountability Act from being put to a vote." That is simply incorrect.

The HAA neither requires the Council to approve the apartments, nor restricts the People's right to overrule an approval. The HAA authorizes rejection where the proposed project "would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development ... financially infeasible." (Gov. Code, § 65589.5, subd. (d)(2).) As previously noted, the EIR cites numerous significant and unavoidable adverse impacts.

Thus, both the Council and the citizens have ample authority to deny the apartments proposal.

Even assuming the HAA may limit the Council's discretion, such restrictions on local government would not restrict the People's constitutionally reserved power of referendum. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 935 [restriction on local government taxation does not restrict the People's power], citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785 [statutory CEQA review is not required for voter initiative]; *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1036 [CEQA review not required where local body directly adopts voter initiative].)

**Fifth**, the People also would have ample authority to overturn an approval of the Terraces apartment project in the courts. "[L]ocal government entities cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans." (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 957-958; accord, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782-787, 789.)

In *Endangered Habitats*, the court set aside approval of a project that would cause an unacceptable increase in traffic, conflict with the policy that new developments must comply with all specific plans, and exempt the project from otherwise mandatory, more stringent, requirements regarding tree preservation, grading, and open space. (131 Cal.App.4th at pp. 783-787, 789.) The Terraces apartments proposal deviates in all of the

above, and several other extreme respects, from numerous objectives, policies and land use provisions.

For all of these reasons, it is unconscionable for supporters of the Homes project to attempt to scare the voters into believing that a "No" on Proposition L would result in the even more intensely opposed apartments on the sensitive parcel. The city attorney's simplistic and misleading support for the scare tactic should be rejected.

Respectfully submitted,

Gary Garfinkle
Attorney for Save Lafayette

cc: Steven Falk, City Manager
Joanne Robbins, City Clerk
Malathy Subramanian, City Attorney