

# August 20, 2020

Mayor Mike Anderson (manderson@lovelafayette.org) Vice Mayor Susan Candell (scandell@lovelafayette.org) Councilmember Steven Bliss (sbliss@lovelafayette.org)

Councilmember Cameron Burks (cburks@lovelafayette.org ) Councilmember Teresa Gerringer (tgerringer@lovelafayette.org) c/o City Clerk Joanne Robbins Urobbins@c i.lafayette.ca.us)

City of Lafayette

3675 Mt. Diablo Blvd., Suite 210

Lafayette, CA 94549

**Re: Recommended Action on L0J-11 Terraces of Lafayette (Deer Hill); City Council Agenda August 24, 2020**

# Dear Mayor Anderson, Vice Mayor Candell, and Members of the City Council :

At the close of the hearing on August 10, the city council made it clear that it had listened to the public comment, reviewed the materials, and was ready to deliberate on this matter. Save Lafayette does not intend to submit more consultant materials, but reserves the right to respond if new and additional materials are submitted by the city's consultants, the developer, or third parties.

RECOMMENDED ACTION

We would like to provide our position on the proper decision to be made by the council. This recommendation is shaped by several unavoidable factors:

First, it is abundantly clear that the 'addendum' document fails to adequately address multiple environmental and public safety issues and does not comply with the rigorous requirements of CEQA. The 'addendum' must be disapproved as it fails to comply with CEQA.

Second, staff inadvisedly combined the hearings on the application with the hearings on the addendum and requirements of CEQA, even though this was not required . The HAA fully leaves the requirements of CEQA intact (note, for example, that the city council voted on the original EIR in 2013 *without* combining it with a hearing on approving or denying the project). This has placed great and unnecessary pressure on

the public and city council. Nevertheless, we are at the point at which the applicant insists there have been five hearings and there must be an up-or-down vote. Although Save Lafayette does not agree the five-meeting rule applies, it does not think it prudent to extend the proceedings to a sixth meeting and for the city to become embroiled in a legal controversy on this point.

Third, city staff continues to ignore the inconsistency of this application with the Low Density Single Family Land Use Designation (SFR-LD) enacted on August 10, 2015 , and R-65 zoning enacted in 2018. A general plan amendment and zoning amendment are required to process the application, but the developer failed to seek this.

Accordingly, for the protection of the Lafayette public and to comply with CEQA and other laws, Save Lafayette urges the following be adopted by the city council:

1. That it is determined the addendum to the EIR is not adequate and violates the requirements of CEQA, with findings that (i) wildfire safety issues have not been adequately addressed, (ii) there has been a failure to establish that during wildfire emergency and evacuation conditions the purported school bus evacuation plan would protect students at Acalanes and Springhill, and two preschools in the area, nor has this evacuation proposal been cleared and approved by said schools, (iii) the purported traffic mitigation is based upon a third traffic lane to the freeway that will require an exception or amendment of the Gateway policy that has not occurred and the city does not control, (iv) there has not been a reliable showing there will not be delays to emergency responders in violation of the General Plan standards, Ch. VI, Policy S-4.1.1 [improve response time of emergency response vehicles], S-4.1.3 ["five minute response time"], and inaccurate assumptions of an "emptynetwork" and traffic volumes for evacuation calculations (v) there would be a violation of General Plan standards , Ch. VI, Policy S-8.1.3 [Maintain designated emergency evacuation routes in a passable condition at all times], Policy Goal S-4 [Minimize risks to Lafayette residents and property from fire hazards], and other written city standards, (vi) there has been a failure to address protection and mitigation measures for at least six special status species photographed on the site in 2020, (vii) the addendum failed to utilize appropriate downgradient air monitoring under foreseeable conditions near Acalanes high school, with the result that applicable air quality standards would, in fact, be violated; **(viii)** it has been demonstrated that the massive 500,000 cubic yard earthmoving required by the project would establish a cancer risk nine times above the BAAQMD significance threshold 200 meters downwind, near Acalanes High School; **(ix)** there has been a failure to adequately evaluate indoor air quality impacts; (x) the impact on more protected trees than addressed in the 2013 EIR is potentially significant and has not been analyzed ; **(xi)** failure to preserve wildrye areas; **(xii)** multiple inconsistencies with the policies and ordinances of the general plan were not evaluated in the addendum; and (xiii) further findings to be developed by staff and legal counsel, to be brought back to the city council for adoption.
2. Further, the city council determines that the procedural and substantive protections of a subsequent EIR pursuant to Pub. Res . Code section 21166 and CEQA Guideline 15162 are required by law.
3. Further, on the information and showing before it, the city council determines that it would not have sufficient information before it to be able to fully analyze mitigation measures and make the findings for a statement of overriding considerations under CEQA , Pub. Res. Code section 21081(a) and (b).
4. Further, under the impetus of the so-called five-meeting rule of Gov. Code section 65905.5(a) cited by the applicant, the city council denies the pending application under the HAA on the basis that a completed and approved CEQA process has not occurred, as required by law, including CEQA and the HAA, Gov. Code sections 65589.5(d) and 65589.5(0)(6) .
5. In addition, the 2011 substantially complete determination on the original project application expired 180 days after the certification of the EIR in 2013 pursuant to the Permit Streamlining Act, Gov. Code sections 65950(a) and 65957, a deadline that is not subject to waiver or continuance by Act of the Legislature. Upon resubmittal of the application by the applicant in 2018, a new 30-day substantially complete determination occurred under the Permit Streamlining Act, Gov. Code section 65943(a). At that time,

(i) pursuant to Resolution no. 2015-51, a General Plan land use designation of Low Density Single family Residential (SFR-LD), and (ii) pursuant to Ordinance no. 668, Single Family Residential District-65 zoning, codified in LMC 6-7121, were applicable to the site. General plan and zoning amendments were not sought by the applicant and would be required for consideration of this application.

FURTHER DISCUSSION ON FAILURE OF THE APPLICATION WITH THE 2015 SFR-LD GENERAL PLAN LAND USE DESIGNATION AND R-65 ZONING

We will repeat legal authorities previously cited to the city council:

*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570:

*[T]he propriety of virtually any local decision affecting land use and development* ***depends upon consistency with the applicable general plan and its elements.***

*Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal. App.3d 950, 957-958:

*Thus , local government entities* ***cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans.*** ... *Issuance of* a *permit* ***inconsistent with zoning ordinances or the general plan may be set aside and invalidated as ultra vires.***

# The Terraces application fails to comply with the General Plan designation for the property of Low Density Single Family Residential (SFR-LD) enacted August 10, 2015 by Resolution no. 2015-51 and Single Family residentialDistrict-65 (R-65) adopted July 23, 2018, and is deficient for failure to seek a General Plan amendment and zoning change.

The entirety of the position of staff and the developer is that a 'substantially complete application' determination was made on the original application in 2011 under the Permit Streamlining Act. That is true, but the effect of the certification of the EIR in 2013 and mandatory 180-day deadline under the Permit Streamlining Act has been utterly ignored.

Under the Permit Streamlining Act, certification of the original project EIR occurred on August 10, 2013. Under Gov. Code section 65950(a), a mandatory 180-day deadline then accrued, which expired on January 27, 2014. On January 22, 2014, the developer 'suspended' the application. However, the mandatory deadline under the Streamlining Act could not be waived or continued. The developer had the right to submit or resubmit the application, but new deadlines would accrue.

The Legislature made this absolutely clear in response to a 1997 case, *Bickel v. City of Piedmont,* which had held the deadline under the Streamlining Act was for the benefit of the applicant. The following legislative session, the Legislature *disapproved Bickel* and held the deadlines were *" established for* a *public reason* [which] *cannot be waived or circumvented by private act or agreement.'* Refer to SB no. 2005 (FIRST ATTACHMENT). *Bickel* was no longer good law after 1998 and the absolute 'public reason' deadlines control (SECOND ATTACHMENT).

# Save Lafayette submitted this issue to the city multiple times, including April 9, 2018, May 14, 2018, August 11, 2019 , May 13, 2020, and August 3, 2020, and constituents have publicly commented on the city's failure to address the Permit Streamlining Act's deadlines. The city has never responded with any explanation of its disregard of state law.

On resubmittal of this application by the developer in 2018, a *new* substantially complete determination and new processing deadlines became applicable under the Permit Streamlining Act, Gov. Code section 65943(a) (THIRD ATTACHMENT) . It is the current substantially complete determination, subject to the 2015 Low Density Single Family Residential (SFR-LD) land use designation and 2018 Single Family residential District-65 (R-65) zoning, that is before the city.

To consider apartments, the general plan and zoning must be "amended by the legislative process.'' *Land Waste Management v. Contra Costa Board of Supervisors, supra,* 222 Cal. App.3d at 958. Of course, a general plan amendment required to approve the apartments project is a legislative act subject to referendum. Gov. Code section 65301.5.

It is therefore appropriate that the inconsistency of the application with the General Plan land use designation and zoning be included in the city council's decision.

CONCLUSION

Thank you for your consideration of the foregoing. Very, truly yours,

Treasurer/CFO Save Lafayette

Attachments:

1. SB no. 2005, enacted by the California Legislature in 1998 (emphasis added)
2. *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1439 (emphasis added) (discussing effect of Legislature's enactment of SB no. 2005)

# Permit Streamlining Act, Gov. Code section 65943(a) (emphasis added)

FIRST ATTACHMENT

Senate Bill no. 2005 (1998 Session) disapproving Bickel case and declaring the Legislative intent that the deadlines under the Permit Streamlining Act, Gov. Code section 65957.5, to be “established for a public reason” and “cannot be waived or circumvented by private act or agreement.”

(see p. 2-3)

**LOCAL AGENCIES—DEVELOPMENT PROJECTS—PERMITS, 1998 Cal. Legis. Serv....**

1998 Cal. Legis. Serv. Ch. 283 (S.B. 2005) (WEST)

CALIFORNIA 1998 LEGISLATIVE SERVICE

1998 Portion of 1997-98 Regular Session Additions are indicated by <<+ Text +>>; deletions by

<<- \* \* \* ->>. Changes in tables are made but not highlighted.

CHAPTER 283

S.B. No. 2005

LOCAL AGENCIES—DEVELOPMENT PROJECTS—PERMITS

AN ACT to amend Sections 65940.5, 65950, 65951, and 65957 of the Government Code, relating to land use. [Approved by Governor August 10, 1998.]

[Filed with Secretary of State August 10, 1998.]

LEGISLATIVE COUNSEL’S DIGEST

SB 2005, Kopp. Permit Streamlining Act.

1. Under the Permit Streamlining Act, a state or local agency and a public agency that is the lead agency for a development project are required to act upon an application for a development project within specified time periods prescribed by the act and may not include a waiver of these time periods, as specified, as a condition of accepting or processing the application for a development project.

This bill would add the term “extension” to these provisions and would declare the Legislature’s intent to clarify that the act does not provide for the application of the common law doctrine of waiver by either its purpose or statutory language.

1. Existing law authorizes a lead agency to waive specified time limits where a combined environmental impact report-environmental impact statement is being prepared on a development project, and requires the lead agency to approve or disapprove the project within 60 days after the statement has been completed and adopted.

This bill would repeal the lead agency’s authority to grant a waiver and would extend the period within which to approve or disapprove the project to 90 days.

1. Existing law also authorizes a lead agency and a project applicant to mutually agree to waive these specified time periods and to agree to a one-time 90–day extension of certain time limits specified by law.

This bill instead would authorize the lead agency and the project applicant to extend these time limits once upon their

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mutual written agreement for a period not to exceed 90 days from the date of the extension, and would provide that no other extensions, continuances, or waivers may be granted, except as specified.

The people of the State of California do enact as follows: SECTION 1. Section 65940.5 of the Government Code is amended to read:

<< CA GOVT § 65940.5 >>

65940.5. (a) No list compiled pursuant to Section 65940 shall include<<-\* \* \*->> <<+an extension or+>> waiver of the time periods prescribed by this chapter within which a state or local agency shall act upon an application for a development project.

1. No application shall be deemed incomplete for lack of<<-\* \* \*->> <<+ an extension or+>> waiver of time periods prescribed by this chapter within which a state or local government agency shall act upon the application.
2. Except for the <<+extension+>> of the time limits pursuant to <<+ Section+>> 65950.1<<-\* \* \*->>, no public agency shall require<<-\* \* \*->> <<+an extension or+>> waiver of the time limits contained in this chapter as a condition of accepting or processing the application for a development project.

SEC. 2. Section 65950 of the Government Code is amended to read:

<< CA GOVT § 65950 >>

65950. (a) Any public agency that is the lead agency for a development project shall approve or disapprove the project within whichever of the following periods is applicable:

* 1. One hundred eighty days from the date of certification by the lead agency of the environmental impact report if an environmental impact report is prepared pursuant to Section 21100 or 21151 of the Public Resources Code for the development project.
  2. Sixty days from the date of adoption by the lead agency of the negative declaration if a negative declaration is completed and adopted for the development project.
  3. Sixty days from the determination by the lead agency that the project is exempt from the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) if the project is exempt from the California Environmental Quality Act.

1. Nothing in this section precludes a project applicant and a public agency from mutually agreeing <<+in writing+>> to an extension of any time limit provided by this section <<+pursuant to Section 65957+>>.
2. For purposes of this section, “lead agency” and “negative declaration” shall have the same meaning as those terms are defined in Sections 21067 and 21064 of the Public Resources Code, respectively.

SEC. 3. Section 65951 of the Government Code is amended to read:

<< CA GOVT § 65951 >>

65951. In the event that a combined environmental impact report-environmental impact statement is being prepared on a development project pursuant to Section 21083.6 of the Public Resources Code, a lead agency<<-\* \* \*->> shall approve or disapprove <<+the+>> project within <<+90+>> days after the combined environmental impact report-environmental impact statement has been completed and adopted.

SEC. 4. Section 65957 of the Government Code is amended to read:

<< CA GOVT § 65957 >>

65957. The time limits established by Sections 65950, 65950.1, <<+ 65951,+>> and 65952 may be extended once <<+upon mutual written agreement of the project applicant and the public agency+>> for a period not to exceed 90 days<<-\* \* \*->>

<<+from the date of the extension+>>. <<+**No other extension, continuance, or waiver of these time limits either by the project applicant or the lead agency shall be permitted,** except as provided in this section and Section 65950.1. Failure of the lead agency to act within these time limits may result in the project being deemed approved pursuant to the provisions of subdivision (b) of Section 65956.+>>

SEC. 5. The Legislature finds and declares that it is aware of the California Supreme Court’s decision in Bickel v. City of Piedmont (1997), 16 Cal. 4th 1040. **In enacting this act, it is the intent of the Legislature to clarify that the Permit**

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**Streamlining Act** (Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code) **does not provide for the application of the common law doctrine of waiver by either the act’s purpose or its statutory language.**

CA LEGIS 283 (1998)

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SECOND ATTACHMENT

Case of *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1439, acknowledging *Bickel* case superseded by Act of Legislature and that time limits of Permit Streamlining Act are not subject to extension, continuance, or waiver.

**Riverwatch v. County of San Diego, 76 Cal.App.4th 1428 (1999)**

91 Cal.Rptr.2d 322, 99 Cal. Daily Op. Serv. 9933, 1999 Daily Journal D.A.R. 12,743

project being deemed approved pursuant to the provisions of subdivision (b) of Section 65956.”

DISCUSSION

In making these amendments to section 65957, the Legislature made the following finding: “The Legislature finds and declares that it is aware of the California Supreme Court’s decision in *Bickel v. City of Piedmont* (1997), 16 Cal.4th 1040, 68 Cal.Rptr.2d 758, 946 P.2d

427. **In enacting this act, it is the intent of the Legislature to clarify that the Permit Streamlining Act (Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code) does not provide for the application of the common law doctrine of waiver by either the act’s purpose or its statutory language.” (Stats.1998, ch. 283, § 5.**)

I

*Permit Streamlining Act*

1. *Automatic Approval*

**[1]** The PSA requires a public agency to approve or disapprove a development project within one year after an application for a permit is deemed complete. (§ 65950.) In general, if a public agency fails to approve or disapprove a development project within the statutory period, the application will be deemed approved by the agency. (§ 65956, subd. (b).) The purpose of the PSA is “to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects.” (§ 65921.) **The goal of the act is to relieve**

**permit applicants from protracted and unjustified**

## delays in processing their permit applications. (*Bickel* Cal.Rptr.2d 758, 946 P.2d 427.)

***v. City of Piedmont* (1997) 16 Cal.4th 1040, 1046, 68**

**\*1439** By mutual consent of the applicant and the agency, the time in which to act on an application may be extended once for a period of 90 days. (§ 65957.) Our Supreme Court initially found that in addition to the extension expressly provided by section 65957, a project applicant could waive its right to automatic approval by cooperating with an agency’s lengthy processing of its application. (*Bickel v. City of Piedmont, supra,* 16 Cal.4th at p. 1051, 68 Cal.Rptr.2d 758, 946 P.2d 427.) **However,**

**in response to the holding in *Bickel v. City of Piedmont,* in 1998 the Legislature amended section 65957. It now provides as follows: “The time limits established by**

**\*\*329 Sections 65950, 65950.1, 65951, and 65952 may be extended once upon mutual written agreement of the project applicant and the public agency for a period not to exceed 90 days from the date of the extension. No other extension, continuance, or waiver of these time limits either by the project applicant or**

**the lead agency shall be permitted,** except as provided in this section and Section 65950.1. Failure of the lead agency to act within these time limits may result in the

Although the amended version of section 65957 only became effective on January 1, 1999, because on its face it clarified rather than altered the previous provisions of the PSA, Palomar argues that the amended version applies to its initial 1987 application for an MUP. (See *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211, 221 Cal.Rptr. 728; *Re–Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1510–1511, 46 Cal.Rptr.2d 822.) In light of the amendment, Palomar argues its 1987 application for an MUP was approved by operation of law.

Notwithstanding the amendments to the PSA, the record discloses two circumstances that prevent us from applying the act’s automatic approval provision to Palomar’s initial MUP application.

1. *Environmental Exception*

In arguing for strict interpretation of the PSA, which was eventually adopted by the Legislature, Justice Baxter noted in his dissent in *Bickel:* **\*1440** “The Act has long made provision for the extra time necessary to consider more complex projects which involve significant environmental issues. At the time pertinent here, the Act required final approval or disapproval within six months after ‘comple[tion]’ of the application in cases involving negative declarations under CEQA, but doubled the decision time to one year if an EIR was required. [Citation.] Since 1983 the Act has also made clear that if an EIR is required, and the time to prepare and certify this document has been extended pursuant to CEQA, the deadline for final approval or disapproval will not run until 90 days after certification of the EIR. [Citation.] Furthermore, the current version of the Act measures *all* time limits for final approval or disapproval in terms of

THIRD ATTACHMENT

Gov. Code section 65943(a), providing that upon receipt of any resubmittal of an application, a “new 30-day period” for determination the application is substantially complete shall begin.

**Gov. Code 65943 (version in effect Jan. 1 1990 to Jan. 1 2020)**

1989 Cal. Legis. Serv. 612 (West)

CALIFORNIA LEGISLATIVE SERVICE 1989-90 REGULAR SESSION (1989 Laws)

Additions are indicated by <<+ UPPERCASE +>> Deletions by <<- \*\*\* ->>

CHAPTER 612

A.B.No. 1838

DEVELOPMENT PROJECTS—INCOMPLETE APPLICATIONS—FEES

AN ACT to amend Section 65943, as amended by Section 3 of Chapter 985 of the Statutes of 1987 of, and to repeal Section 65943, as added by Section 4 of Chapter 985 of the Statutes of 1987 of, the Government Code, relating to development projects.

[Approved by Governor September 20, 1989.] [Filed with Secretary of State September 21, 1989.]

The people of the State of California do enact as follows:

CA GOVT § 65943

SECTION 1. Section 65943 of the Government Code, as amended by Section 3 of Chapter 985 of the Statutes of 1987, is amended to read:

65943. (a) Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. If the written determination is not made within 30 days after receipt of the application, and the application includes a statement that it is an application for a development permit, the application shall be deemed complete for purposes of this chapter. **Upon receipt of any resubmittal of the application, a new 30-day period shall begin, during which the public agency shall determine the completeness of the application**. If the application is determined not to be complete, the agency’s determination shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete, including a list and thorough description of the specific information needed to complete the application. The applicant shall submit materials to the public agency in response to the list and description.

1. Not later than 30 calendar days after receipt of the submitted materials, the public agency shall determine in writing whether they are complete and shall immediately transmit that determination to the applicant. If the written determination is not made within that 30-day period, the application together with the submitted materials shall be deemed complete for purposes of this chapter.
2. If the application together with the submitted materials are determined not to be complete pursuant to subdivision (b), the public agency shall provide a process for the applicant to appeal that decision in writing to the governing body of the agency or, if there is no governing body, to the director of the agency, as provided by that agency. A city or county shall provide that the right of appeal is to the governing body or, at their option, the planning commission, or both.

There shall be a final written determination by the agency on the appeal not later than 60 calendar days after receipt of the applicant’s written appeal. The fact that an appeal is permitted to both the planning commission and to the governing body

**Gov. Code 65943 (version in effect Jan. 1 1990 to Jan. 1 2020)**

does not extend the 60-day period. Notwithstanding a decision pursuant to subdivision (b) that the application and submitted materials are not complete, if the final written determination on the appeal is not made within that 60-day period, the application with the submitted materials shall be deemed complete for the purposes of this chapter.

1. Nothing in this section precludes an applicant and a public agency from mutually agreeing to an extension of any time limit provided by this section.

<<-\* \* \*->>

<<+(E) A PUBLIC AGENCY MAY CHARGE APPLICANTS A FEE NOT TO EXCEED THE AMOUNT REASONABLY NECESSARY TO PROVIDE THE SERVICE REQUIRED BY THIS SECTION. IF A FEE IS CHARGED PURSUANT TO THIS SECTION, THE FEE SHALL BE COLLECTED AS PART OF THE APPLICATION FEE CHARGED FOR THE DEVELOPMENT PERMIT.+>>