



August 3, 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)
City Clerk Joanne Robbins (jrobbins@ci.lafayette.ca.us)
City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549

Re: L03-11 Terraces of Lafayette (Deer Hill); City Council Agenda August 10, 2020

Dear Mayor Anderson and Members of the City Council:

There are a number of grounds for denial of the Terraces application including, but not limited to, the failure of the 'Addendum' to comply with CEQA, and specific, adverse impacts upon the public health or safety under the Housing Accountability Act (HAA), Government Code section 65589.5(d)(2), which have been covered in other correspondence and reports submitted to the city. Please refer also to the correspondence of our attorney being submitted for the August 10 hearing.

There are two other important threshold grounds for denial of the current Terraces apartments application which are not being addressed by staff. This letter will focus on these two grounds and request that these two issues be specifically addressed at the hearing on August 10.

As you and the public consider these issues, it is important to understand that staff in this matter is not being objective, but presenting one-sided advocacy in favor of the project. That includes not just ignoring the issues addressed in this letter, but also obvious things such as failing to mention that staff's recommended statement of overriding considerations under CEQA is not required and is entirely discretionary with the city, and subverting the HAA discussion by failing to mention that Lafayette's housing element is in "full compliance" with state 5th cycle requirements for the period 2015-2023. There once was a policy in Lafayette that staff would objectively present all pros and cons of an application and the decisionmakers would reach an informed public decision. The city council should order a return to that practice on the Terraces and all other land use matters before the city for consideration.

1. FAILURE TO COMPLY WITH THE SFR-LD GENERAL PLAN LAND USE DESIGNATION AND R-65 ZONING

The city is required to apply the General Plan and zoning applicable to the Deer Hill site and is powerless to approve a project in violation of the General Plan land use designation and zoning. As stated by the California courts:

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

The general plan has been aptly described as the “constitution for all future developments” within the city or county. “[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (citations omitted.)

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. (citations omitted)

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 residential District-65 (R-65) adopted July 23, 2018, and is deficient for failure to seek a General Plan amendment and zoning change.

It is undisputed that the current General Plan land use designation and zoning for the Deer Hill site do not allow apartments. Accordingly, 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.

Noncompliance with the General Plan was addressed in correspondence of our attorney, Gary Garfinkle, dated April 9, 2018 and May 14, 2018. Save Lafayette further addressed this issue in correspondence dated August 11, 2019. By correspondence dated May 13, 2020 we requested the Planning Commission and staff to address the inconsistency with the General Plan land use designation and zoning of Low Density

Single Family Residential. We sent further correspondence dated June 10, 2020. Notwithstanding these multiple requests, staff has not addressed this issue and the process before the Planning Commission was accordingly compromised. Copies of our correspondence is attached and incorporated herein by reference. Please review and direct your staff to review these materials, especially the legal authority cited in our correspondence dated August 11, 2019 and attachments thereto.

In particular, the city council and public must understand:

- The Terraces Project Alternative Process Agreement dated January 22, 2014 and Tolling Agreement dated September 23, 2013 as extended do not contain any provision purporting to freeze the Lafayette General Plan and zoning. The words “General Plan” do not even appear, and all of the city’s legal defenses were expressly reserved.
- The agendas, staff reports, attachments, and Brown Act notices relating to the Process Agreement make no mention whatsoever of freezing the General Plan. The city council legally could take action only on what was on the agendas.
- The General Plan amendment to SFR-LD and Resolution 2015-51 enacted on August 10, 2015 were unconditional and contained no exception for continuation of the previous land use designation for apartments, even assuming that would have been legally possible.
- The Permit Streamlining Act does not provide for any vesting of a right to a General Plan land use designation. Indeed, that Act contemplates there will be General Plan and zoning amendments and the developer can request notice (Gov. Code 65945).
- By act of the Legislature the strict 180-day and only one 90-day extension deadlines under the Permit Streamlining Act cannot be waived. Those dates expired on the original Terraces application on April 27, 2014. There is no extension in perpetuity. The Terraces application *resubmitted* in 2018 started a *new* 30-day period to become substantially complete (Gov. Code 65943).
- The California Supreme Court is clear in the landmark *Avco Community Developers* case that a landowner has no vested right in a General Plan and zoning and a city has no power to contract away its police power right to change a General Plan and zoning.
- The Process Agreement, sections E and 2, preserve and do not waive all of the “defenses” of the city, including under the HAA.
- The exclusive legal means provided by the Legislature to continue or ‘lock-in’ a General Plan and zoning classification, which are by a Development Agreement or Vesting Tentative Map, were not used here.
- The city lacks the legal power to waive or consent to violation of the General Plan and zoning.¹

¹ Nor should there be any confusion concerning the provision in SB 330 (Ch. 12, Div. 1, Title 7 of the Gov. Code) at Gov. Code 66300(b)(1)(A) restricting an affected city, *after*

We are aware of only one time the city attorney purported to say the Terraces application would be processed under an earlier General Plan, during the Measure L campaign. *No legal authority was provided.* It would violate the law and public policy for the city council to base any decision on such a facially defective statement.

A legislative act is required to approve the project on the merits (Gov. Code §65301.5). It would appear that the city is ignoring the noncompliance with the General Plan and zoning because it does not have a response. As difficult as it is to believe after the decision in *Save Lafayette v. City of Lafayette* (2018) 20 Cal. App. 5th 657, 663 [“The City Improperly Interfered with the Referendum Process.”], the city appears to be embarked on another strategy to mishandle the application so as to purportedly avoid the necessary legislative act. This is in violation of the citizens’ rights and the decision of the court.

In addition to the conflict of the Terraces application with the 2015 General Plan land use designation and 2018 zoning, the proposed project has always conflicted with the goals, policies, and programs of the General Plan, as staff admits. Refer to the Staff Report dated November 25, 2013 reciting inconsistency with 19 of 21 applicable General Plan provisions.

Accordingly, we again request that you direct staff to address these issues in its staff report and at the upcoming hearing on August 10 including a detailed point-by-point response to the legal authorities in our letters.

2. THE PROJECT SHOULD BE DENIED UNDER 65589.5(d)(5)

The HAA, Gov. Code section 65589.5 provides for denial as follows:

*(d)(5) The housing development project ... **is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.** For purposes of this section, a change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project...*

January 1, 2020 through January 1, 2025, from changing the intensity of land use below what was allowed in 2018. Here, the General Plan and zoning changes were enacted respectively five and two years before the effective date of 66300(b)(1)(A). Also, under 66300(f)(4), section 66300 does not apply in a very high fire hazard severity zone like the Deer Hill site.

As set forth in our correspondence dated August 11, 2019, p 4-5, under the Permit Streamlining Act, the Terraces application expired by April 27, 2014. The General Plan land use designation was adopted August 10, 2015. The developer resubmitted the application in 2018, but by the time it was to be deemed complete the city had imposed a moratorium and enacted the R-65 zoning. The applicable General Plan SFR-LD land use designation and R-65 zoning existed as of the date in 2018 the *resubmitted* Terraces application became substantially complete under the Permit Streamlining Act, Gov. Code section 65943(a) ["Upon receipt of any resubmittal of the application, a new 30-day period shall begin"].

The city's 5th cycle (2015-2023) Adopted Housing Element was approved as "in full compliance" with the HAA by correspondence from the California Department of Housing and Community Development dated March 26, 2015 (copy attached hereto).

Subdivision (d)(5) is applicable under subpart (d)(5)(A) thereof because the Deer Hill site is not identified as suitable or available for very low, low, or moderate income housing on the city's housing element. Under subpart (d)(5)(B), (d)(5) is also applicable because the city has identified a sufficient inventory of land in its housing element for the planning period (2015-2023); in fact, the land zoned and identified for multi-family is close to double the necessary inventory.

Accordingly, all elements for denial under 65589.5(d)(5) are present. Refer to our correspondence dated June 10, 2020, p. 5-6. It has only been staff's unsupported disregard of the applicable General Plan SFR-LD land use designation and R-65 zoning that has masked the applicability of 65589.5(d)(5) for denial.

The basis for denial under 65589.5(d)(5) is, of course, is cumulative to denial under 65589.5(d)(2) for the specific, adverse impacts upon the public health and safety, including delays to first responders and emergency vehicles in violation of the written standards set forth in the Lafayette General Plan, as addressed in other materials.

CONCLUSION

We would add that under Gov. Code 65905.5, recognition that the Terraces application does not comply with the "applicable, objective general plan and zoning standards in effect at the time an application is deemed complete" frees the city from the so-called five-hearings rule. That is another thing staff has not been telling the city council and public. Likewise, the five-hearing rule would not apply, in any event, to the CEQA proceedings now before the city council.

Thank you for your consideration of the foregoing. We look forward to reviewing the city's response on these two issues in the next staff report and at the hearing on August 10.

Very truly yours,

Michael Griffiths

President, Save Lafayette

Attachments:

1. Save Lafayette letter dated August 11, 2019, including letters dated April 9, 2018 and May 14, 2018
2. Save Lafayette email correspondence dated May 13, 2020
3. Save Lafayette correspondence dated June 10, 2020
4. California Dept. of Housing and Community Development correspondence dated March 26, 2015



3220 Ronino Way
Lafayette, CA 94549

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

August 11, 2019

Re: Inconsistency of the Terraces 315 Apartments Application with Lafayette General Plan SFR-LD Designation and R-65 Zoning

Dear Mayor Anderson and Members of the City Council:

Save Lafayette and members of the public have addressed the City Council previously concerning the inconsistency of the resubmitted Terraces 315 Apartments application (the “Application”) with the Lafayette General Plan designation and applicable zoning for the property. In particular, please refer to the correspondence of our attorney, Mr. Garfinkle, dated May 14, 2018 and April 9, 2018, copies of which are attached.

On behalf of its members, affected residents, and the electorate in Lafayette, Save Lafayette is greatly concerned with the proper processing of the Application by the City. This correspondence shall review the issues and request that the City take action to deny the Application as submitted as inconsistent with the applicable General Plan designation and zoning.

BACKGROUND

On August 10, 2015, by Resolution no. 2015-51, the Lafayette City Council adopted a General Plan Amendment for the Deer Hill property of Low Density Single Family Residential (SFR-LD), which allows up to 2 dwelling units per acre. The zoning adopted for the property on September 14, 2015 by Ordinance no. 641 was set aside by the Measure L election on June 5, 2018. In accordance with the directive of the California Court of Appeal in *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, and Govt. Code section 65860(c) [“zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended”], on July 23, 2018, by Ordinance no. 668, the City adopted zoning for the property of Single Family Residential District-65 (R-65), codified in LMC 6-7121.

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THE DEVELOPER IS ATTEMPTING TO EVADE THE APPLICABLE SFR-LD
GENERAL PLAN DESIGNATION AND R-65 ZONING, CITY'S DEFENSES
UNDER THE HAA, AND ANOTHER CITIZENS REFERENDUM

However, as detailed in Mr. Garfinkle's correspondence, the developer and Lafayette City Attorney have incorrectly taken the position that the developer has vested rights that render inoperable all General Plan and zoning amendments after 2014 based on a Terraces Project Alternative Process Agreement dated January 22, 2014, which references a Tolling Agreement dated September 23, 2013, which was further amended (collectively the "Process Agreement"). Refer to City Attorney memo, City Council agenda of May 14, 2018, Item 8B. The City Attorney also took the position that therefore there would be no legislative act to develop the 315 apartments project that would be subject to referendum of the voters. The developer has pursued the resubmitted application on this basis and unfortunately City staff has not, to date, correctly applied the General Plan and zoning to the resubmitted application.

This position is not only incorrect as was explained by Mr. Garfinkle, but the effect would be to negate the will of the Lafayette electorate and evade the decision of the Court of Appeal in *Save Lafayette v. City of Lafayette*.

The Process Agreement does not contain any provision freezing the General Plan and zoning. No such explanation about vesting rights was given to the public at the time the Process Agreement was entered into in 2014, and the public notices required for that action in 2014 under the Brown Act Open Meeting Law did not notify the public of any such purported effect. Note the comment in *California Alliance for Utility Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1031, treating a city's agreement on utility undergrounding as a "violation" of the Brown Act because "the agenda materials prepared by the city failed to fully disclose the nature and scope of the settlement being considered for public adoption by city." This would also be the case with the hearing on approval of the Process Agreement by the City Council in 2014. Whatever may have been said to the City Council about a threat of litigation and the proposed Process Agreement in closed session, the City Council could not lawfully enter into a settlement agreement which would have affected and purportedly compromised the City's land use authority that can only be exercised through lawful public hearings. See *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 186.

In addition, when the City Council adopted the General Plan amendment to SFR-LD on August 10, 2015, Resolution no. 2015-51 was *unconditional* and contained *no* exception or reference to continuation of the previous General Plan designation or zoning, assuming that would have been legally possible. The staff report and all publicly available materials were likewise silent on this topic. The City Attorney's opinion is contradicted by the face of Resolution 2015-51, which controls as the City's most recent legally enforceable public action on the General Plan designation.

The Lafayette electorate was given no notice at any time prior to May 14, 2018 of any claim or contention that the Process Agreement purportedly froze the General Plan and zoning designation as of 2014 and that the subsequent public hearing and action taken by their elected

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representatives in August 2015 adopting the General Plan SFR-LD designation would be subject to exception.

The Application should, but to date does not, request a General Plan amendment and zoning amendment. Such action would be subject to referendum of the voters. Refer to the authorities cited at page 2 of Mr. Garfinkle's letter dated April 9, 2018. It is the objective of the developer and City Attorney, even after the decisive ruling by the Court of Appeal in *Save Lafayette* ["The City Improperly Interfered with the Referendum Process"], to engage in more improper manipulation of this constitutional right of the Lafayette electorate. This should not be allowed by our elected City Council representatives.

The City Attorney's incorrect characterization of the resubmitted application as still being complete years after the fact is evasive under Govt. Code section 65589.5(d)(5), which provides a separate ground for denial of the Terraces 315 apartments application based on the applicable SFR-LD General Plan designation and R-65 zoning. Section 65589.5(d)(2) provides one ground for denial for significant and unavoidable public health and safety impacts in the certified Apts EIR. Govt Code 65589.5(d)(5) provides a second defense if the multi-family project is inconsistent with both the jurisdiction's [i] zoning ordinance and [ii] general plan land use designation ...as it existed on the date the application was deemed complete, and the jurisdiction has [iii] adopted a revised housing element in accordance with Govt. Code section 65588 that is in substantial compliance with this article.

The City's website reports that the City housing element has been approved through 2022. The General Plan SFR-LD designation and R-65 zoning provide a defense under the HAA that the City Attorney's position improperly places at risk.

THE CITY ATTORNEY'S ARGUMENT THAT THE PROCESS AGREEMENT FROZE THE GENERAL PLAN AND ZONING IS ERRONEOUS

The City Attorney's memo is based on a series of erroneous statements about the effect of the Permit Streamlining Act ("PSA") to reach a conclusion that the Process Agreement somehow vested rights to the 2011 APO General Plan designation and zoning in perpetuity.

1. The Permit Streamlining Act does not provide for a vesting of a right to the General Plan or zoning at the time an application is deemed complete.

There is no language in the PSA freezing the General Plan or zoning at the time of an application, nor has any court so interpreted the PSA to so provide. To the contrary, the City has the right to adopt and amend a General Plan during the pendency of an application. Refer to the citations in Mr. Garfinkle's letter dated May 14, 2018, p. 2; it was made clear by the California Supreme Court in *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 786, 789-791, that a developer's rights cannot vest until issuance of permits and performance of substantial work on the property in reliance on lawfully issued permits. Otherwise, "it is beyond question that a landowner has no vested right in existing or anticipated zoning." *Id.*, 17 Cal.3d at 796.

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The PSA does *not* apply to legislative acts such as zoning amendments. *Land Waste Management v Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950, 959 [“The Permit Streamlining Act cannot be used to compel legislative changes to a zoning ordinance or a general plan because the act is limited to projects that are adjudicatory in nature”]; refer also to *Golden Gate v County of Contra Costa* (2008) 165 Cal.App.4th 249, 258 n.3 [“it is settled an application for rezoning may not be deemed approved by operation of law under the time limitation provisions of the act [Permit Streamlining Act]”].

A purported ‘vesting’ of rights under a 2011 version of the General Plan and associated zoning does not exist under the PSA in the first place.

2. The Permit Streamlining Act, Govt. Code section 65950 *et seq.*, has very strict deadlines that expired on the 315 apartments application on April 27, 2014.

Whatever effect, if any, the PSA had on the original submitted Application has expired. The Terraces EIR was certified by the City Council on August 10, 2013 over the developer's objection. That started a 180 day timeline under Govt. Code section 65950(a) which would have expired on January 27, 2014. On January 22, 2014, the developer agreed to “suspend” the 315 apartments application and “toll” the processing of the application. However, there could be an extension only “once” for a period of 90 days under Govt. Code section 65957 [“No other extension, continuance, or waiver of these time limits by either the project applicant or lead agency shall be permitted...”].

This absolute allowance of only one 90 day extension is explained in *California Land Use Practice* (CEB/Regents Univ. Calif. 2018), section 15.31. At one point, the California courts interpreted the deadline under the PSA as being a provision solely for the benefit of an applicant which an applicant could waive, rather than “a law established for a public reason [which] cannot be waived or circumvented by a private act or agreement.” *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049. Concluding that the dominant intent was for the benefit of the developer, the court held the time limit could be waived if the developer agreed. However, in 1998 the Legislature enacted SB No. 2005, which noted the *Bickel* case and clarified the Legislature’s intent that the Permit Streamlining Act “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 section 5. The current language conclusively controls, providing only for a 90 day extension “once” and that “No other extension, continuance, or waiver of these time limits either by the project applicant or the lead agency shall be permitted...” [subject to two exceptions which do not apply to Deer Hill].

The Legislature’s disapproval of the *Bickel* case and current applicable language of section 65957.5 make it clear the City Attorney’s position that there could be further extensions by agreement past the one 90 day period, and indeed for an indefinite period extending years in the future, is contrary to the statute and express declaration of intent by the Legislature. The City of Lafayette is controlled by state law and has no authority to circumvent 65957.5 with a contrary legal creation. “Under established law, local government agencies are *powerless* to issue land-

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use permits which are inconsistent with governing legislation” (emphasis in original). *Land Waste Management v. County of Contra Costa* (1990) 222 Cal.App.3d 950, 959. The Legislature has declared the time limit of section 65957.5 is established for a public reason which cannot be waived or circumvented.

The Process Agreement had the effect of extending the deadline to April 27, 2014 because that was the maximum extension or waiver allowed under section 65957. Further extensions were of no effect to continue even applicable land use policies (the PSA does not limit general plans as discussed, *ante*) because the City only has the power and authority conferred by the Legislature, and these statutory time limits control and preempt any contrary act of the City.

Of course, the developer can and has resubmitted the Application for consideration. But the Application will not be under any of the original policies, requirements, general plan, or zoning from 2011 or 2014. The resubmitted Application started a new ‘substantially complete’ determination under Govt Code 65943(a)[“Upon receipt of any resubmittal of the application, a new 30-day period shall begin”].

3. An agreement providing that General Plan designations and zoning thereafter enacted would not be applicable, is invalid and unenforceable as contrary to public policy.

Apart from the other legal defects in the City Attorney’s position, an agreement that would purport to provide that later enacted General Plan and zoning provisions would not be applicable is invalid. As stated by the California Supreme Court in *Avco*:

Land use regulations...involve the exercise of the state’s police power and it is settled that the government may not contract away its right to exercise the police power in the future. Thus, even upon the dubious assumption that the [Agreement] constituted a promise by the government that zoning laws thereafter enacted would not be applicable to [the property], the agreement would be invalid and unenforceable. 17 Cal.3d at 800 (citations omitted)

Refer also to *Carty v. City of Ojai* (1978) 77 Cal.App.3d 329, 342:

The police power being in its nature a continuous one...cannot be barred or suspended by contract or irrepealable law. It cannot be bartered away even by express contract. It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement. (citations omitted)

In *Trancas*, *supra*, the agreement with a developer that purportedly provided for a contractual exemption from the city’s zoning, the subject of a closed session that violated the Brown Act, was also held to be an unlawful retraction of the city’s zoning authority under *Avco*. 138 Cal.App.4th at 181-182.

The only exception to this rule provided by the Legislature is the Development Agreement Statute, which the City and developer did not utilize. Refer to section 5, *post*.

4. The City's defenses under the Housing Accountability Act are preserved.

Note also that the Process Agreement, sections E and 2, preserve and do not waive all “defenses” of the city, including those under the Housing Accountability Act. The words ‘general plan’ or ‘zoning’ do not appear in the text. It is being presented by staff in an inaccurate and one-sided fashion artificially favorable to the developer. As aptly pointed out by Mr. Garfinkle in his correspondence to the city dated May 14, 2018 at p. 3, the portion of the Housing Accountability Act, section 65589.5(d)(5) cited by the city attorney about a change to zoning or the general plan subsequent to an application being deemed substantially complete shall [in and of itself] constitute a valid basis to disapprove, was *added in 2018*. It *did not exist* at the time the Processing Agreement was signed in 2014. It is fatally incongruous for the city attorney to argue that the processing agreement froze the parties’ rights and defenses in 2014 but then selectively cite a statutory provision that did not then exist. Again, as pointed out by Mr. Garfinkle in his letter at p. 2, zoning and general amendments can and do operate retroactively.

5. The Developer did not take advantage of the exclusive means provided by the Legislature to continue the 2011 General Plan designation and zoning.

The effect claimed in the City Attorney’s memos on Measure L and the staff memo for June 11, 2018 agenda item 8A, that the developer can resubmit the Application in 2018 but be subject to the General Plan designation and zoning in effect in January 2014, is not legally possible as noted above under the PSA or Process Agreement. The *only* way the Legislature has provided to avoid “change in any applicable general or specific plan, zoning...” is by use of a *development agreement* under Govt. Code section 65865.4 (refer generally to Govt Code 65864-65869.5).

The City and the developer did not enter into a development agreement nor begin to comply with the multiple requirements for content under 65865.2, including term, periodic review at least every 12 months, notice to the public, recordation, or even reference the words ‘development agreement.’ In effect, the City Attorney argues that the benefit of a development agreement applies to the developer’s 315 apartments application even though the formalities and substance of a development agreement were not used. The City does not have the power and authority to rewrite or ignore binding State statutes and disregard the Legislature.

As noted, the City is *powerless* to issue land-use permits which are inconsistent with governing legislation. *Land Waste Management v. County of Contra Costa*, *supra*, 222 Cal.App.3d at 959. The developer and City did not utilize the *exclusive* means allowed by the Legislature by which a contract to freeze the General Plan designation and zoning of 2014 could have been entered into.

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6. City has no alternative to enforcing the law and current General Plan SFR-LD designation and R-65 zoning.

Whatever claims may be made by the developer, they cannot overcome the binding legal requirements outlined herein. As a local agency, the City “lacks the power to waive or consent to violation of the zoning law.” *Hansen Brothers Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 564. Any temporary misinterpretations (or errors by the City Attorney) do not nullify a strong rule of policy adopted for the benefit of the public. *Id.* The overriding interest of the public and affected residents in eliminating nonconforming uses or adverse precedent controls and prevents City from allowing any violation of zoning laws. *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 260.

REQUESTED ACTION

The effect of the City Attorney’s memo has been to violate the law and artificially support the Application to the detriment of the Lafayette citizenry; not just those that voted to reject Measure L, but all citizens. The City Attorney takes the position that the 2011 General Plan designation will apply, even though no waiver of the ordinary Govt. Code General Plan amendment and Brown Act requirements were or legally could be made. This attempt to try to avoid the citizens’ right of referendum is without merit.

That the city attorney adopts this position to defeat the citizens’ right of referendum is especially egregious after the previous attempt to defeat the citizens right of referendum was declared improper. *Save Lafayette v City of Lafayette*, 20 Cal.App.5th at 663 [“The City Improperly Interfered with the Referendum Process”].

Save Lafayette requests the City Council enforce the law and determine that the Application must be denied for violation of applicable General Plan designation SFR-LD and R-65 zoning. Save Lafayette reserves all legal rights under California law to challenge any approvals or entitlements of the Terraces 315 apartments project.

Respectfully submitted,
Michael Griffiths

President and Co-Founder
SAVE LAFAYETTE

Attachments:

Correspondence dated May 14, 2018
Correspondence dated April 9, 2018

GARFINKLE LAW OFFICE

Gary S. Garfinkle, Certified
Appellate Law Specialist
Maria J. Garfinkle

Attorneys at Law
1205 Via Gabarda
Lafayette, California 94549

(925) 932-3737
Fax: 932-2048
ggarfinkle@comcast.net

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 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

GARFINKLE LAW OFFICE

Gary S. Garfinkle, Certified
Appellate Law Specialist
Maria J. Garfinkle

Attorneys at Law
1205 Via Gabarda
Lafayette, California 94549

(925) 932-3737
Fax: 932-2048
ggarfinkle@comcast.net

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

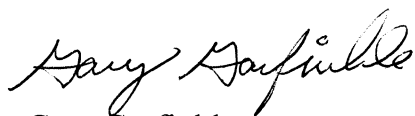
Don Tatzin, Mayor
City Council Members

April 9, 2018
Page 5

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,

A handwritten signature in black ink, appearing to read "Gary Garfinkle". The signature is fluid and cursive, with the first name "Gary" being more prominent than the last name "Garfinkle".

Gary Garfinkle
Attorney for Save Lafayette

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

From: MICHAEL GRIFFITHS <mgriffiths7@yahoo.com>
To: Robbins Joanne <jrobbins@ci.lafayette.ca.us>
Sent: Wednesday, May 13, 2020, 04:23:42 PM PDT
Subject: Letter for the Planning Commission, the Mayor and the City Council

May 13, 2020

Mayor Mike Anderson (manderson@lovelafayette.org)
Council Member Susan Candell (scandell@lovelafayette.org) Council Member
Steven Bliss (sbliss@lovelafayette.org)
Council Member Cameron Burks (cburks@lovelafayette.org) Council Member
Teresa Gerringer (tgerringer@lovelafayette.org) c/o City Clerk Joanne Robbins,
City Clerk
City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549

Chair Kristina Sturm
Members of the Planning Commission
Planners: Greg Wolff (gwolff@lovelafayette.org); Nancy Tran
(ntran@lovelafayette.org) City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
planningcommission@lovelafayette.org

**Re: L03-11 Terraces of Lafayette (Deer Hill); Planning Commission Agenda
May 18, 2020**

Dear Mayor Anderson and Members of the City Council, Chair Sturm and
Members of the Planning Commission:

For two years Save Lafayette and others have been objecting that the 315
apartments application resubmitted by the developer in 2018 is inconsistent with
the 2015 Lafayette General Plan designation and low density single family
residential zoning adopted 2018.

As the resubmitted application goes before the Planning Commission on May 18,
2020, Save Lafayette hereby reiterates this objection. I attach copies of our letter
dated August 11, 2019 and attachments thereto. I again request the City to
respond appropriately and deny the resubmitted application as inconsistent with
the General Plan and zoning.

I would add that at no time has the City or its legal counsel provided a substantive response to these objections, which we hereby demand again. This should not be a superficial denial, but a meaningful response to the legal authorities in our letters, including citation of statutes and case law point by point. Apparently the City is unable to provide such a response.

In addition to the Brown Act-based objection to the hearing on May 18, 2020, we hereby request that the issue of inconsistency with the General Plan and zoning be taken up at whatever time a Brown Act-compliant hearing occurs. This is an 'emperor' clothes' type moment; your staff and the developer have been pretending that they can ignore this substantive defect in the application. The citizens of Lafayette deserve better.

Yours very truly,

Michael Griffiths

President, Save Lafayette



Process
Agree...119.pdf



Garfinkle
Respo...sal.pdf



June 10, 2020

Mayor Mike Anderson (mmanderson@lovelafayette.org)

Council Member Susan Candell (scandell@lovelafayette.org) Council Member Steven Bliss (sbliss@lovelafayette.org)

Council Member Cameron Burks (cburks@lovelafayette.org) Council Member Teresa Gerringer (tgerringer@lovelafayette.org) c/o City Clerk Joanne Robbins, City Clerk
City of Lafayette

3675 Mt. Diablo Blvd., Suite 210

Lafayette, CA 94549

Chair Kristina Sturm

Members of the Planning Commission

Planners: Greg Wolff (gwolff@lovelafayette.org); Nancy Tran (ntran@lovelafayette.org)
City of Lafayette

3675 Mt. Diablo Blvd., Suite 210

Lafayette, CA 94549

planningcommission@lovelafayette.org

**Re: Roadmap for Denial: A Summary of the Grounds for Denial of Application
L03-11 Terraces of Lafayette (Deer Hill); Planning Commission Agenda June 15,
2020**

Dear Mayor Anderson and Members of the City Council, Chair Sturm and Members of the Planning Commission:

It is the purpose of this correspondence to provide an 'executive summary' or roadmap, with citation to the supporting materials in the record, of the grounds on which the City should deny the pending Terraces application when considered by the Planning Commission on June 15.

1. FAILURE TO COMPLY WITH THE GENERAL PLAN AND ZONING.

A. Failure to Comply with 2015 General Plan and Zoning.

The 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 residential District-65 (R-65) adopted July 23, 2018, and is deficient for failure to seek a General Plan amendment and zoning change.

Staff and the developer have submitted no legal authority for this failure to apply the General Plan and zoning. Save Lafayette is aware of only a superficial memo from the city attorney during the Measure L campaign vaguely referring to the 2014 process agreement with the developer, but no legal authority was provided. That agreement does not mention the General Plan, let alone recite it would be indefinitely preserved. Such an effect, even if it could be read into that agreement, would have been beyond the power of the city council under state law. Refer to the correspondence of Save Lafayette dated August 11, 2019 and attachments.

Save Lafayette recently requested that staff and the Planning Commission explain and cite legal authority for ignoring the General Plan and zoning at the May 18 hearing. The request was ignored.

A General Plan amendment is required to approve the project on the merits, but would be a legislative act subject to referendum (Gov. Code §65301.5). This position of the developer and staff is obviously designed to again avoid the people's right of referendum, notwithstanding the City's loss in the court case of *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 657, 663 ["The City Improperly Interfered with the Referendum Process"].

A General Plan is the blueprint that guides and controls a city's land use decisions. It is adopted subject to detailed requirements of state law, Gov. Code §§65300 et seq. Staff has pointed to no exceptions in any of the controlling documents, including the California Planning and Zoning Law, applicable caselaw, or local ordinance, which authorizes disregard of the current General Plan. Accordingly, the application should be denied as inconsistent with the General Plan and zoning.

Supporting Materials: Save Lafayette correspondence dated August 11, 2019, repeatedly submitted thereafter including my letter of May 13, 2020.

B. Failure to Comply with Previous General Plan.

In addition, the project does not even comply with the policies, goals, and requirements of the previous superseded General Plan.

Supporting Materials: Refer to November 25, 2013 Staff Report to the Design Review Commission authored by Greg Wolff recommending denial of the 315 apartments project as inconsistent with 19 of 21 applicable goals, policies, and programs; Letter dated May 14, 2020 from Guy Atwood, Chair of the General Plan Advisory Committee that wrote the current General Plan, explaining inconsistencies of the project with the General Plan, including a General Plan goal calling for all multi-family development to be in the downtown.

2. THE ADDENDUM DOES NOT COMPLY WITH CEQA SECTION 21166 AND CEQA GUIDELINES 15162 AND 15164.

The 'Addendum' submitted in support of the application fails to comply with CEQA and cannot be approved. A subsequent EIR within the meaning of CEQA, Public Resource Code §21166 and CEQA Guideline 15162(a)(3), is required but has not been submitted. There are multiple unmitigated significant and unavoidable public health and safety impacts that have not been adequately addressed. It will be a violation of CEQA to approve the Addendum and proceed to determine the application on the merits.

The new information of substantial importance, not known at the time of the original EIR prepared prior to 2013, includes the enhanced wildfire danger, very high fire risk adopted for the area, the October 27, 2019 fire in the vicinity of the project that destroyed the Lafayette Tennis Club and adjacent hillsides and required aerial tankers and dozens of firefighters to extinguish, the Sōnoma and Paradise fires that have added new understanding of wildfire risks to life and property, the PGE Public Safety Power Shutoff Policy of September, 2019, the biological impacts surveyed in 2020 by Dr. Smallwood not considered in 2013, additional tree destruction over the original project, impacts on Pleasant Hill Road and evacuation planning, air quality, traffic impacts including the report from Elite Transportation, and General Plan and Zoning inconsistency.

SB 330, Gov. Code §65589.5(e) and (o)(6), does not lessen the requirements of CEQA nor authorize in any manner any shortcuts in the CEQA process, including, but not limited to, any purported substitution of an 'Addendum' in derogation of Public Resource Code §21166 and CEQA Guideline 15162(a)(3).

The clear path for determination of the Terraces application is under CEQA, by finding the Addendum fails to comply with applicable law. The developer's assertion of the Housing Accountability Act, Gov. Code §65589.5 and purported penalties is not reached unless and until CEQA review of the project is completed and approved. CEQA

precludes any finding that the Addendum complies with applicable requirements. This should be the determination of the Planning Commission and City Council.

Supporting Materials: Refer to the correspondence of Lozeau Drury LLP dated May 18, 2020 pp. 5-23 and documents referenced and attachments; Elite Transportation Report; correspondence sent April 2, May 17 and June 10, 2020.

3. ABSENCE OF GROUNDS FOR ADOPTION OF STATEMENT OF OVERRIDING CONSIDERATIONS.

In addition to the violation of CEQA by the inadequate and misdirected Addendum, staff has also failed to properly advise the City about the issue of the statement of overriding considerations under CEQA required to consider approval of the Terraces application. The staff report admits some significant and unavoidable public health and safety impacts, and there are many more unaddressed or inadequately addressed in the Addendum as addressed above and in the supporting materials.

There is *absolutely no legal requirement whatsoever* that the City adopt a statement of overriding considerations under CEQA, Pub. Resource Code §21081, CEQA Guidelines 15191-15193, necessary to move the application to approval. SB 330, Gov. Code §65589.5(e) and (o)(6), does not lessen the obligation to comply with CEQA nor require adoption of overriding considerations.

The City's Adopted Housing Element, 5th Cycle (2015-2023), was certified as being "in full compliance" with state law by the California Department of Housing and Community Development, by letter dated March 26, 2015. The City has adequate zoning and land available for compliance with all RHNA requirements. The project site has significant and unavoidable impacts on wildfire safety, evacuation, traffic, protected trees, air quality, the plans and goals of the General Plan and Hillside Development Ordinance, etc. There are multiple policy and legal reasons for denial of the statement under §21081 and CEQA Guidelines 15191-15193, which is purely a matter of local discretion. Issuance of a statement of overriding considerations will violate the General Plan and set a precedent that will seriously damage local land use control and the quality of life in Lafayette. It would be an unnecessary gift to the developer.

Supporting Materials: Refer to the correspondence of Lozeau Drury LLP dated May 18, 2020, pp. 8-9.

4. MISSTATEMENT OF RHNA REQUIREMENTS UNDER THE HOUSING ACCOUNTABILITY ACT IN THE STAFF REPORT AND EXISTING GROUND FOR DENIAL UNDER HAA §65589.5(d)(5).

At p. 7-8, the May 18, 2020 staff report presents a largely irrelevant review of Regional Housing Needs Allocation (RHNA) goals and delivered units. The Housing Accountability Act, Gov. Code §§65588 and 65589.5 are based on compliance of the city's "housing element," not these numbers at a particular point in time.

As addressed above, the California Department of Housing and Community Development certified that Lafayette's Housing Element was "in full compliance" with state law for the period 2015-2023. The Terraces application was resubmitted in 2018, and is subject to this certification.

The City's Housing Element therefore satisfies the standard for denial of a project under HAA §65589.5(d)(5) ["the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article [the HAA]].

The staff report completely fails to advise the Planning Commission and public that the Housing Element meets the requirements of state law and that HAA §65589.5(d)(5) provides for denial of the Terraces Application. Denial is appropriate also for policy reasons as multiple appropriate sites for multi-family housing are currently zoned in Lafayette that do not have the significant and unavoidable public health and safety impacts and other negative effects of this massive hillside development in a Low Density Single Family Residential Zone.

Supporting Materials: Letter dated March 26, 2015 from Department of Housing and Community Development.

5. DENIAL UNDER HAA §65589.5(d)(2) AND (d)(5).

As addressed above, the Terraces project should be denied on CEQA grounds, and the HAA should never be reached under the current application and the 'Addendum' which fails to meet CEQA requirements.

Apart from this, §65589.5(d)(2) of the HAA, as currently in effect for the period of January 1, 2020 to January 1, 2025, provides for denial because the project would have "specific, adverse impact upon the public health or safety." It is to be underscored that the standards for the public health and safety impacts of delay to emergency responders and

wildfire risks are specifically documented in section 6 of the Lafayette General Plan, as well as other documentation. *This is another point the staff report dated May 18, 2020 fails to address.*

§65589.5(d)(5) provides for denial as the Lafayette Housing Element is in compliance with state law. As for staff's reference to the original submission of the apartments application, note that the operative date is 2018 when the developer resubmitted the application. Refer to explanation in the Save Lafayette correspondence dated August 11, 2019 of the rigid non-waivable time limits under the Permit Streamlining Act, under which the developer's Terraces application timed-out on January 27, 2014.

Supporting Materials: Save Lafayette correspondence dated August 11, 2019, Letter dated March 26, 2015 from Department of Housing and Community Development, correspondence of Lozeau Drury LLP dated May 18, 2020 pp. 23-25.

6. BROWN ACT VIOLATION.

The meeting format of the May 18, 2020, coupled with the closing of the public comment, violates the Brown Act.

Supporting Materials: Correspondence of Lozeau Drury LLP dated May 11, 2020 and June 9, 2020.

7. CONCLUSION.

Save Lafayette respectfully submits that the City is required to make a finding that the 'Addendum' does not comply with the requirements of CEQA, and the application denied on that basis.

In addition, under CEQA, there are no legal or policy reasons the City should adopt a statement of overriding considerations- this is a violation of sound public policy and would be an unwarranted gift to the developer that injures the public interest.

Lastly, although it should not be reached given the failure of the Addendum to comply with CEQA, the application, when and if ultimately considered, should be denied under §§65589.5(d)(2) and (d)(5) of the HAA.

Very truly yours,



March 26, 2015

Mr. Steven Faulk, City Manager
City of Lafayette
3675 Mount Diablo Boulevard, Suite 210
Lafayette, CA 94549

Dear Mr. Faulk:

RE: Lafayette's 5th Cycle (2015-2023) Adopted Housing Element

Thank you for submitting the City of Lafayette's housing element which was adopted March 9, 2015 and received for review on March 18, 2015. Pursuant to Government Code (GC) Section 65585(h), the Department is reporting the results of its review.

The Department is pleased to find the adopted housing element in full compliance with State housing element law (GC, Article 10.6). The adopted element was found to be substantially the same as the revised draft element the Department's January 23, 2015 review determined met statutory requirements. ✓

Please note Lafayette now meets specific requirements for several state and regional funding programs designed to reward local governments for compliance with State housing element law. For example, the Housing Related Parks Program includes housing element compliance as a threshold requirement. Please see the Department's website for specific information about these and other State funding programs at http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf.

The Department appreciates the dedication and cooperation Ms. Niroop Srivatsa, Planning Department Director; Mr. Greg Wolff, Senior Planner; Ms. Linda Chan, Senior Planner; and Ms. Diana Elrod, Consultant; provided throughout the course of the housing element review. The Department wishes Lafayette success in implementing its housing element and looks forward to following its progress through the General Plan annual progress reports pursuant to GC Section 65400. If the Department can provide assistance in implementing the housing element, please contact Robin Huntley, of our staff, at (916) 263-7422.

Sincerely,

A handwritten signature in cursive script that reads "Glen A. Campora".

Glen A. Campora
Assistant Deputy Director