Reese, Latasha

Subject: FW: Correspondence

From: Richard McDonald [mailto:rmcdonald@carlsonnicholas.com]
Sent: Friday, April 12, 2019 12:28 PM
To: Mermell, Steve <smermell@cityofpasadena.net>
Cc: Novelo, Lilia <lnovelo@cityofpasadena.net>; Jomsky, Mark <mjomsky@cityofpasadena.net>; Reyes, David <davidreyes@cityofpasadena.net>; Fuller, Brad <bfuller@cityofpasadena.net>; Burke Farrar <BFarrar@odysseypasadena.com>; McDougall, Paul@HCD <Paul.McDougall@hcd.ca.gov>
Subject: RE: City Council Agenda

Steve and Mark – Thank you. Please provide the following statement to the Council:

Dear Mayor Tornek and Members of the City Council:

The applicant discovered this matter being called-up when it saw the City Council's Agenda for the first time late yesterday afternoon. Before that, we were not informed of it, nor given any notice. Unfortunately, both Burke and I are out of town next week and unable to attend. Since our request for a continuance has been denied, we therefore wish to state the following points on behalf of our client in opposition to the request to call-up this matter.

First, this project is in District 6. Since Councilmember Madison has not called it up, we question why it is being called-up at all.

Second, while we understand calls-up are appropriate to help non-profits and financially indigent appellants, the appellants in this case are the Madison Heights Neighborhood Association (MHNA"), which represents the wealthiest part of the City. We fail to understand why any member of the City Council believes the MHNA is unable to afford the cost of an appeal or should not have to pay for it. If you grant this request for a call-up, you might as well just eliminate the appeal fee altogether since everyone else in this City is financially indigent compared to these people.

Third, we ask that the Mayor's request be withdrawn and that the Mayor recuse himself from this matter. More specifically, city councils and commissions often act in an adjudicatory capacity in a role similar to judges when deciding applications for land use permits. *Woody's Group, Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 1021 (2015) (holding that the trial court erred in not granting request for writ of mandate restoring the original planning commission's grant of application). When so doing, they are required to be "neutral and unbiased" to ensure that the hearing process is fair. *Id.* Under California law, if a member of a City Council or Planning Commission shows an "unacceptable probability of bias," he or she violates the applicant's due process rights. As the Court observed in *Nightlife Partners, Ltd. v. City of Beverly Hills,* 108 Cal. App. 4th 81 (2003), "the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that such hearings are fair." *Id.* at 90. *See also, Nasha, LLC v City of Los Angeles*, 125 Cal. App. 4th 470 (2004) ("Procedural due process in the administrative setting requires that the hearing be conducted 'before a reasonably impartial, noninvolved reviewer.' "); *Gai v. City of Selma*, 68 Cal. App. 4th 13, 219 (1998) (concluding that the Planning Commission's decision was tainted by bias; prehearing bias of one planning commission member was enough to invalidate a planning commission decision that had overruled an approval of a project).

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California courts also have provided numerous examples of what actions or statements constitute an "unacceptable probability of basis." For example, in *Woody's Group, supra*, a councilmember prepared remarks before the city council meeting and gave an "extraordinarily well-organized, thoughtful and well-reserved presentation why the planning commission decision needed to be overturned." *Id* at 1019. Because the councilmember "took 'a position against the project,'" there was an unacceptable probability of bias on part of that councilmember that violated the restaurant owner's right to a fair hearing. *Id.* at 1022-23. Furthermore, the fact that he had written out his speech to the council demonstrated the falsity of his self-serving comment at the hearing that he had no bias in the matter. *Id.* at 1023.

Similarly, in *Nasha, supra,* prior to the appeal hearing on a proposed development project, one of the planning commissioners authored a published article that attacked the project under consideration, describing it as a "threat" to a wildlife corridor. *Nasha,* 125 Cal. App. 4th at 476, 483. The Court found that the article "clearly advocated a position against the project," and that the Commissioner's authorship of it showed an "unacceptable probability of actual bias," and thus was sufficient to preclude the decision maker from serving as a "reasonably impartial, noninvolved reviewer." *Id.* at 484 (noting that the commissioner "clearly" should have recused himself from hearing the matter). The Court concluded that the claim of bias was "well founded," and that the developer had established an "unacceptable probability of actual bias." *Id.* at 473, 481.

Here, having called up the Affordable Housing Concession Permit ("AHCP") for the project on the adjacent property of 245 S. Los Robles, which resulted in the affordable units being dropped from the project, and having made numerous public pronouncements and proposals at the June 11, 2018 City Council meeting, among others, to limit the use and scope of AHCPs, we believe the Mayor has demonstrated his bias against such projects, particularly when opposed by fellow residents of District 7. Since an applicant need only show that the situation is one in which " 'experience teaches [us] that the probability of actual bias on the part of the ... decisionmaker is too high to be constitutionally tolerable" (*Morongo*, at p. 737, 88 Cal.Rptr.3d 610), we believe recusal is necessary to protect our client's due process rights.

Fourth, similarly, we ask that Council Member Wilson recuse himself. Documents produced by the City in October 2018 in response to Public Records Act requests by Burke Farrar show Councilmember Wilson asking staff directly to provide copies of the Keyser Marston financial analysis and traffic reports for the 253 S. Los Robles to Erica Foy of the MHNA, the declared opponent of the project and one whom he had earlier contacted to help him "take up the issue" of opposing affordable housing concession permits. The documents further show him stating in no uncertain terms his feelings about density bonus projects by using such words as "abomination", "super-size", "downzoning", "massively out of scale", and pushing staff to "squeeze the extra height and massing out of this project". Under California law, his statements show that he is not impartial, nor unbiased as required. As such, recusal is necessary to protect our client's due process rights.

Fifth, the application for this AHCP was filed on May 9, 2017, i.e., 23 months ago. It seeks simply to raise the FAR from 2.25 to 2.65 (i.e., a mere 0.4), and to raise the height from the height-averaging permitted 75 feet to 80 feet, which is still much less than the adjacent project to the north. In all other respects the project is by-right and fully complies with the Zoning Code and General Plan. The AHCP will allow the applicant to construct 8 very low income units on site.

On June 9, 2017, the application was deemed incomplete, but that was one day after the June 8, 2017, 30-day deadline imposed under the Permit Streamlining Act ("PSA"). As such, the application was deemed complete as a matter of law on June 8, 2017. Regardless, the applicant filed the additional material requested by the City on August 10, 2017, i.e., 20 months ago. On January 18, 2018, the applicant received a letter deeming the application complete, which was 5 months after the additional material was delivered to the City and thus well beyond the PSA deadlines. On January 23, 2018 and March 12, 2018, all of the environmental and financial consultant fees were paid, i.e., 15 and 13 months ago respectively.

The Hearing Officer approved the AHCP on November 7, 2018, and the Madison Heights Neighborhood Association (MHNA") appealed it to the Board of Zoning Appeals("BZA"). The BZA heard the matter on February 6, 2019, and subsequently upheld the HO approvals on April 3, 2019. None of the arguments on appeal had any merit, factually or legally. It was, quite simply, the old guard of MHNA objecting once again to any affordable housing.

So, today, 23 months after the application was filed, 22 months after the application was deemed complete as a matter of law, and 20 months after all the information requested by the City was delivered, the applicant has been told that its application is on hold pending a decision on whether to conduct yet another hearing. If granted that hearing would be after the two year anniversary of the application being filed.

While we understand the City Council's concerns about the impact of State's Density Bonus Law, the law simply does not allow for these, or any other, extraordinary delays. In particular, California Government Code Section 65915.a.2 specifically states, "A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section." The EIR desired by the appellants for this by-right project thus violates this Section as no such study would be required but for the request of the concessions permit.

Similarly, Section 65915.a.3 states that, "In order to provide for the ***expeditious*** processing of a density bonus application, the local government ***shall*** do all of the following:

(A) Adopt procedures and timelines for processing a density bonus application.

(B) Provide a list of all documents and information required to be submitted with the density bonus application in order for the density bonus application to be deemed complete. This list shall be consistent with this chapter.

(C) Notify the applicant for a density bonus whether the application is complete in a manner consistent with Section 65943."

The extraordinary delays associated with this project demonstrates that there are no "timelines for processing density bonus applications" in accordance with State law.

Section 65915.f.5 further provides that, "The granting of a density bonus shall not require, or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, ***or other discretionary approval***." Section 65915.j.1 further states, "The granting of a concession or incentive shall not require or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, ***study, or other discretionary approval.*** For purposes of this subdivision, "study" does not include reasonable documentation to establish eligibility for the concession or incentive or to demonstrate that the incentive or concession meets the definition set forth in subdivision (k)." (Emphasis added). Last, the burden of proof is squarely on the City, not the applicant.

Nonetheless, the City's procedures for processing AHCP applications are in Municipal Code section 17.43.050.C, and require them to be processed like minor variance applications, subject to a Hearing Officer's approval. That section also states that the HO has the discretion to deny such applications and allows such decision to be appealed or called-up. As such, 17.43.050.C violates the State law by requiring discretionary

approvals. That City Council members have decided to routinely call up such applications also violates the mandate as it suggests they have some sort of discretion they have been repeatedly they do not have.

As the Court stated in *Wollmer v. City of Berkeley*, (2009) 179 Cal. App. 4th 933, "[I]n our view the language of Section 65915 is clear and unambiguous. If a developer agrees to dedicate a certain percentage of the overall units in a development to affordable or senior housing, the Density Bonus Law requires the municipality to grant the developer a density bonus of *at least* a certain percentage, ranging from a low of 5 percent (for moderate-income housing) or 20 percent (for senior and all other affordable housing) to a maximum of 35 percent, depending on the number of affordable-housing units provided over the minimum number necessary to qualify for a bonus. ([ ] § 65915, subd. (g).) Because the statute imposes a mandatory duty on local governments, and provides a means for developers to enforce this duty through civil proceedings ([ ] § 65915, subd. (d)(3)), it is clear that 35 percent represents the maximum amount of bonus a city is *required to provide,* not the maximum amount a developer can ever obtain. The entire aim of Section 65915 is to provide incentives to developers to construct housing for seniors and low-income families. (See Stats.1979, ch. 1207, §§ 1–6, p. 4738 [legislative findings and declarations supporting enactment of [ ] § 65915].)"

In this case, the extraordinary delays, the repeated requests for further studies, and the failure to approve these applications within 24 months demonstrates an effort to thwart the construction of the affordable units in violation of State law.

Sixth, we simply do not understand why affordable housing is acceptable in Districts 1, 3 (e.g., the debate over it for the YWCA and the use of the YMCA), 4 (i.e., the Space Bank site), 5, and 6 (e.g., Union Station and Habitat for Humanity), but not when MHNA and residents of D7 object even if it is outside that District. A quick review of City records shows that only two AHCP permits have been approved in D7 in the past ten years and only one of those has been built to provide 2 low income units.

We, therefore, request that the call for review be rejected.

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