PERKINSCOIE

505 Howard Street
Suite 1000
San Francisco, CA 94105-3204

T +1.415.344.7000
F +1.415.344.7050
PerkinsCoie.com

August 24, 2021

Matthew S. Gray
MGray@perkinscoie.com
D. +1.415.344.7082
F. +1.415.344.7282

Hon. Mayor Erica Pezold
Hon. Mayor Pro Tempore Donald Sedgwick
Hon. Councilmember Jeanine Heft
Hon. Councilmember Bill Hunt
Hon. Councilmember Donald Wheeler
Interim City Manager Kenneth Rosenfield

Re: Village at Laguna Hills, Housing Accountability Act, Housing Crisis Act

Dear Mayor Pezold, Mayor Pro Tempore Sedgwick, Councilmember Heft, Councilmember Hunt, Councilmember Wheeler, and Interim City Manager Rosenfeld:

I am writing on behalf of MGP Fund X Laguna Hills, LLC (MGP) to notify you that MGP is prepared to engage, for a limited time, in further discussions of a development agreement, but also to reiterate that the City is required to approve the Village at Laguna Hills project, as embodied in the Site Development Permit, Master Sign Program, Conditional Use Permits, and Vesting Tentative Tract Map that have been before the City Council for approval at three meetings beginning on April 27, 2021. Approval is required under the Housing Accountability Act, Government Code section 65589.5.[1] Furthermore, an extended delay would amount to a violation of the Housing Crisis Act of 2019, Government Code section 66300.

At its June 29, 2021 meeting, the City Council decided to continue our item for an unreasonable amount of time, nearly 6 months, and to seek proposals from and hire a second negotiator to engage with MGP on an extensive Council wish list of items for the development agreement. Despite the fact MGP negotiated the development agreement in good faith with Council-designated staff and a Council-designated City consultant for over a year to reach consensus on terms, the Council has decided to reopen that agreement to renegotiation. MGP will engage with a second negotiator but will do so for a limited time.

A. The Housing Accountability Act Requires Approval of this Project.

The Housing Accountability Act emphasizes "the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."

[1] All citations are to subdivisions of Government Code section 65589.5 unless otherwise stated.

As the Legislature notes in subdivision (a), "the excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing."

1. Findings of a Specific Adverse Impact to Health & Safety Based Upon Objective Standards Would Be Required to Deny the Project.

As the City's staff, consultants and City Attorney have explained, when, as here, the project is deemed consistent with objective general plan, specific plan and zoning standards, the City has no discretion to deny the project unless it makes both of the following findings. Specifically, subdivision (j) precludes denial unless the City adopts findings that:

> (1)(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
>
> (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

Further, pursuant to subdivision (h), the only relevant standards the City may consider are those "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official."

Thus under subdivisions (j) and (h), for the City even to consider denying this project, it would have to identify and produce "objective, identified written public health or safety standards, policies, or conditions" relevant to the project. Moreover, only those standards that were in

effect on the date this project application was deemed complete on January 22, 2021 would be relevant.

This limitation is required not only by the Housing Accountability Act, but also by the Subdivision Map Act. The City cannot invent or apply unwritten policies to this project that were not formally adopted prior to January 22, 2021. *Bright Development v. City of Tracy*, 20 Cal. App. 4th 783 (1993) (court rejected City's attempt to apply a "long-standing" policy to interpret its regulations to require undergrounding of utilities, when no such formal, written regulation existed on the date the map application was deemed complete).

The City's record shows no relevant public health or safety standards that were in effect on January 22, 2021, that were available to and knowable by MGP, and with which the project does not conform.

2. The City Does Not Have Its Usual Discretion to Weigh and Balance Evidence In Attempting to Deny the Project.

In deciding whether to adopt findings that would justify denying the project, the City cannot employ its usual broad discretion to weigh and balance evidence. While the mere presence of substantial evidence is sufficient to support findings for many land use decisions, that is not the case under the Housing Accountability Act. The City must instead base its decision upon a *preponderance* of the evidence. Moreover, in any subsequent litigation, the City would bear the burden of proving that its findings were supported by a preponderance of the evidence.

3. The Project is Deemed Consistent with General Plan, Specific Plan and Zoning as a Matter of Law.

As the City's staff, consultants and City Attorney have noted, subdivision (j) applies when a project is consistent with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards." This project qualifies, because it is deemed consistent with the General Plan, Specific Plan and Zoning as a matter of law.

Under subdivision (j)(2), if a city contends a project is inconsistent with "an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision," then "it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity . . . . [w]ithin 60 days of the date that the application for

the housing development project is determined to be complete." Here, it is undisputed both that the City provided a letter dated January 22, 2021 confirming that the application was complete, and that the City did not provide any written documentation regarding any claimed inconsistencies within 60 days. Subdivision (j)(2) requires that "***the housing development project shall be deemed consistent,*** compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

The June 29 motion, rejected by a 3-2 vote of the Council, attempting to contravene this overriding State Law by withdrawing the completeness letter would not have changed the outcome even had the motion passed. First, actions taken in June 2021 could not have affected the fact that the City did not assert any inconsistency claims before the 60-day deadline expired in March 2021. Second, there is nothing in the Housing Accountability Act that would allow the City unilaterally to negate State Law deadlines by granting itself an unauthorized extension of time. Third, even if the Council could have invented some procedure that would negate the January completeness letter, the result would be the same. Even if that letter had never existed, the project application would still be deemed complete as a matter of law. Gov't Code § 65956(b) (application is deemed complete if City fails to provide a letter specifying incomplete items within 30 days).

Accordingly, re-arguing the City's long-established interpretation of the UVSP is simply a waste of time. As a matter of law, the project is deemed consistent with the UVSP.

4. The City Cannot Use CEQA to Violate the Housing Accountability Act.

As required by the Housing Accountability Act, subdivision (e), the City has complied with CEQA by issuing a Fifth Addendum to the 2009 General Plan EIR. That Addendum studies in detail the differences between the Village at Laguna Hills and Five Lagunas, the previous version of the project that the City approved in 2016 based upon its Third Addendum to the General Plan EIR. The Fifth Addendum answers the only CEQA question presented now: whether any changes in the project or surrounding circumstances, or significant new information that could not have been known earlier, shows new or substantially more severe significant impacts than those previously identified. Based on substantial evidence, the Fifth Addendum finds no such change in environmental impacts.

While the Housing Accountability Act requires compliance with CEQA, subdivision (j) also sets forth the *only* grounds on which this project could be denied. See *Sequoyah Hills Homeowners Association v. City of Oakland*, 23 Cal. App. 4th 704 (1993) (holding that "the only way" Oakland

could support denial under subdivision (j) would be to establish that the project would have a "specific, adverse impact upon the public health or safety"; in the absence of such evidence, the city did not abuse its discretion by rejecting any decreased density alternative as legally infeasible). This limitation is fully consistent with CEQA, which itself states the intent of the Legislature that agencies give major consideration to preventing environmental damage "while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code § 21000(g). This limitation also implements the Legislature's acknowledgement that CEQA does not expand an agency's powers, and that decisions regarding mitigating or avoiding impacts are "subject to the express or implied constraints or limitations that may be provided by law." Pub. Res. Code § 21004.

Accordingly, the Legislature has already determined that any environmental concerns other than those set forth in subdivision (j) are outweighed by the need to address the problems identified in the Housing Accountability Act. Those problems include the ones listed in subdivision (a), which references California's "housing supply and affordability crisis of historic proportions," the "discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration" and the "lack of supply and rising costs [that] are compounding inequality and limiting advancement opportunities for many Californians." Thus, while the City must evaluate (and has evaluated) whether any new or substantially more severe significant impacts would arise compared to those identified in 2016, the City cannot use that evaluation to deny the project based on considerations other than those referenced in subdivision (j).

5. The City Could be Responsible For Attorneys' Fees and Fines for Violating the Housing Accountability Act.

Under subdivision (k), should a court determine that the City violated the Housing Accountability Act, it "shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section." Thus, the City would be responsible not only for its own attorneys' fees, but also for those of MGP.

Moreover, upon finding a violation, the court would issue an order requiring compliance, and the City would have only 60 days to comply. If the City acted in bad faith (as would be apparent should the City deny the project despite being advised by the applicant and by its own staff of the requirements of the Housing Accountability Act), that order may include a direction to

approve the project. If the City failed to comply with any order within 60 days, the court "shall impose" a fine in the minimum amount of ten thousand dollars ($10,000) per housing unit in the project.

Under subdivision (l), if the City acted in bad faith in denying the project, including "an action that is frivolous or otherwise entirely without merit," then the fines are to be multiplied five-fold.

B. The Housing Crisis Act Prohibits Extended Delay In Project Approval

The City cannot continue to delay action on the Village at Laguna Hills without running afoul of the Housing Crisis Act of 2019, which severely restricts the City's ability to impose a moratorium "or similar measure" that restricts approval of housing developments. The State Department of Housing and Community Development has determined that the City is an "affected city" subject to the Housing Crisis Act.[2] Government Code section 66300(b)(1) states:

> [A]n affected city shall not enact a development policy, standard, or condition that would have any of the following effects:
>
> . . .
>
> (B)(i) Imposing a moratorium or similar restriction or limitation on housing development, including mixed-use development, within all or a portion of the jurisdiction of the affected county or city, other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium or for projects specifically identified as existing restricted affordable housing. . . .

The statute continues: "It is the intent of the Legislature that this section be broadly construed so as to maximize the development of housing within this state." Gov't Code § 66300(f)(2).

As made clear in our prior correspondence and discussed at length during the Council's June 29th hearing, the Project applications were deemed complete nearly eight months ago. The Council refused to take action at the culmination of the first hearing on April 27th, in part

[2] *See* Gov't Code § 66300(a)(1), (e); Dep't of Housing and Community Development, Affected Cities, https://www.hcd.ca.gov/community-development/docs/affected-cities.pdf.

because at least one Councilmember conceded that he had simply failed to review the relevant materials. Rather than returning to consider the item at its next scheduled hearing, the Council delayed further deliberation by nearly two months. At the end of an extraordinary third hearing, the Council communicated to MGP that the City wishes to renegotiate the fundamental terms of a development agreement that MGP spent over one year negotiating with the Council's appointed staff and consultant in good faith and to mutual satisfaction. The City's further delay in approval of the project would have the same effect as an explicit moratorium, violating the Housing Crisis Act in addition to the Housing Accountability Act.

C. The City Must Act On the Project in a Maximum of Two More Hearings, Regardless of How the City Characterizes those Hearings.

Under Government Code section 65905.5, and "notwithstanding any other law" the City is prohibited from conducting more than five hearings on a housing project, such as this one, that does not require General Plan, Specific Plan or zoning amendments. Section 65905.5 expressly notes that a "continued hearing shall count as one of the five hearings allowed under this section." It defines "hearing" to include "any public hearing, workshop, or similar meeting conducted by the city . . . with respect to the housing development project, whether by the legislative body of the city or county, the planning agency established pursuant to Section 65100, or any other agency, department, board, commission, or any other designated hearing officer or body of the city or county, or any committee or subcommittee thereof."

Accordingly, there are no loopholes the City can use to evade this law. Regardless whether it characterizes its meetings as new hearings, continued hearings or workshops, the City is limited to five meetings.

Section 65905.5 applies to all adjudicatory approvals for the project. It does not encompass "a legislative approval required for a proposed housing development project." The Development Agreement application does not make section 65905.5 inapplicable under this provision, since a Development Agreement is not "required for a proposed housing development"; Development Agreements are purely voluntary.

The City has already held three hearings. Accordingly, with or without also considering the Development Agreement, the City is obligated under section 65905.5 to wrap up its consideration of this project within the next two hearings.

* * *

There is ample time between now and the scheduled December 14, 2021 City Council meeting to complete the additional Council-requested negotiations of the development agreement. To avoid a violation of the Housing Crisis Act, the Council should be prepared to vote on the merits of the project at its scheduled December 14, 2021 meeting.

Sincerely,

Matthew S. Gray