February 23, 2017

(*Sent via electronic mail*)

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Re: Objection to Orcem/VMT Project Appeal

Dear Honorable Vallejo Officials and Staff:

Our law firm represents Fresh Air Vallejo concerning the above-referenced Project. I have reviewed the February 8, 2017 "Appeal of Staff Decision" submitted by Mr. Steve Bryan and Mr. Matt Fettig ("Appeal"), as well as the February 7, 2017 letter attached thereto written by counsel for Orcem and VMT, Mr. Arthur F. Coon ("Coon Letter"). These documents were obtained by my clients on February 22, 2017 in response to a request for public records. For the reasons set forth, below, the Appeal and Coon Letter are both procedurally and substantively erroneous, and should be rejected.

The Project applicants submitted their self-styled "formal appeal pursuant to Vallejo MCS 16.102.030," which provides:

> The applicant or any party adversely affected by an administrative decision of the planning manager rendered under authority conferred by this title may within ten days after rendition of such decision appeal in writing to the planning commission.

At this point, however, no "administrative decision of the planning manager rendered under authority conferred by this title" has been made, and the Appeal is therefore a legal nullity. Rather, the City Development Services Director has rendered a recommendation to the Planning Commission. Indeed, the staff report and recommendation at issue clearly states that:

> In accordance with VMC §16.90.050(D) which "*allows that whenever the Development Services Director finds that the decision on any application [for a site development plan/permit]is beyond his or her purview of authority, the application shall be forwarded to the Planning Commission for its determination."* Development Services Director (Planning Manager) has found the site development plan/permit application for the proposed project to be beyond her purview and has elected to transfer her authority to the Planning Commission to render a determination on the application.

This is not a minor distinction, but rather, is a central premise underlying the faulty CEQA arguments raise by the Coon Letter, addressed below. Because no administrative decision on the project has been rendered, there is no decision to appeal, and the applicant's February 8, 2017 Appeal must be rejected as procedurally defective.

To offer legal argument supporting their Appeal, the applicants further submitted a February 7 letter from their attorney, Arthur Coon. While the Coon Letter is high on bombastic rhetoric, it is bereft of legal authority. That is because the process followed by City staff here was unequivocally endorsed by the California Court of Appeal in 2009, explaining that:

> CEQA applies only to projects that a public agency proposes to carry out or approve, and does not apply to projects that the agency rejects or disapproves. (Pub. Resources Code, § 21080, subds. (a), (b)(5).)
> . . .
> [The project applicant] argues that Public Resources Code section 21061 establishes a mandatory duty for a public agency to complete and certify an EIR before approving or rejecting any project.
> . . .
> [The project applicant] also argues that Guidelines section 15270 requires a public agency rejecting a project to do so either before initiating environmental review under CEQA or after completing and certifying an EIR, and not at any time between those two events. Section 15270, subdivision (a) states, "CEQA does not apply to projects which a public agency rejects or disapproves." Subdivision (b) states, "This section is intended to allow an initial screening of projects on the merits for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved." Las Lomas cites the Natural Resources Agency's discussion of section 15270, which states, in relevant part, "This exemption was originally added to CEQA because some applicants claimed that a public agency could not turn down a permit application without first preparing an EIR or Negative Declaration. The agencies believed that they should be able to reject an application if they could determine from a quick initial screening that the project was incompatible with existing zoning or some other requirement so that the agency would be without legal authority to approve the project. The Guidelines codify this interpretation that was the common understanding among people involved with the bill that created the exemption."
>
> **Neither Guidelines section 15270 nor the discussion expressly states that a public agency that has initiated environmental review of a proposed project must complete and certify an EIR**

> **before rejecting the project.** Section 15270, subdivision (b), describes a particular circumstance that the statutory exemption of Public Resources Code section 21080, subdivision (b)(5) addresses, but does not suggest that the exemption is limited to only that particular circumstance. In light of our discussion above, we reject such a construction of either section 21080, subdivision (b)(5) or Guidelines section 15270. **To the contrary, we conclude that *if an agency at any time* decides not to proceed with a project, CEQA is inapplicable from that time forward.**

(*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal. App. 4th 837, 848-852 [emphasis added].) The Coon Letter repeats a number of arguments squarely rejected by *Las Lomas*, which do not bear repeating again here.

Against this controlling law, the Coon Letter simply grasps at straws. The first true citation to authority provided by the Coon Letter relies upon the City's own "Environmental Review, Planning Handout No. PH-13." While the City's own handout is no doubt relevant guidance, it falls far short of the grave statutory and constitutional mandates of which the Coon Letter intones. In fact, the City would ordinarily be entitled to substantial deference in interpreting its own guidance document. Here, the Coon Letter seizes upon the Handout's statement that "Action on the project can follow certification if all other City requirements have been satisfied." This Handout statement in no way limits the City's authorities. While true that action "*can* follow certification," this plainly *does not* state that disapproval *must* follow certification. In fact, the Handbook further conditions action following certification upon "all other City requirements hav[ing] been satisfied." Here, the staff report recites numerous City requirements not satisfied, supporting disapproval. The Handout plainly and simply does not say that "the Planning Commission can only take action on the Project after EIR certification has occurred," as the Coon Letter erroneously asserts.

Next, the Coon Letter inaccurately describes the present procedural posture, arguing that "staff has absolutely no legal authority to approve or disapprove the project." Again, staff expressly has not approved or disapproved the project, but rather, has rendered a recommendation to the Planning Commission for consideration. Surely the Coon Letter does not argue that the Planning Commission lacks authority to approve or disapprove of a project, nor that the planning staff lacks authority to provide the Commission with a *recommendation*. This clearly erroneous description of the procedural posture also forms the basis of Mr. Coon's October 3, 2016 letter to you unsuccessfully attempting to distinguish this matter from *Las Lomas*.

The Coon Letter further relies upon Mr. Coon's October 3, 2016 letter to you, regarding the City's contractual obligations to VMT/Orcem. The October letter mounts its entire contract argument upon one excerpted passage:

> The proposed [Orcem/VMT] Project will be subject to a comprehensive planning and environmental review process, which will include completion of a single combined Initial Study and Environmental Impact Report (collectively, the "EIR") which will be prepared to concurrently evaluate both the [Orcem/VMT] Project and the adjoining [VMT/Orcem] Project.

Nothing in this passage expressly mandates that a Final EIR be certified, and nothing should be interpreted to exceed or abrogate the City's normal CEQA duties and functions, as affirmed by the Court of Appeal in *Las Lomas*. It is settled law that an agency may cease all work on an EIR as soon as it determines that a project is denied, and it is ordinary and expected that planning staff would provide a planning commission with a staff report and recommendation prior to the commission rendering a determination. Thus, there is no reason to believe that a reviewing court would interpret this contract language to require anything other than compliance with CEQA. Alternatively, the City's "substantial compliance" defense against a claim for breach of this provision would be exceedingly strong, given the lengthy environmental review process here, culminating in a draft final EIR that informed the detailed staff recommendations for rejecting the Project.

In sum, and as will be supported by additional testimony for the 27 February hearing, Fresh Air Vallejo supports the pending recommendation to disapprove of the Project and discontinue work on the Project EIR. The City's exercise of authority in this regard is procedurally and substantively proper, and sound public policy in furtherance of public and environmental health, and limited City resources.

Thank you for your continuing and earnest consideration of these issues.

Jason Flanders
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