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Michael G. Biddle
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Via FedEx and email at mbiddle@emeryville.org

Dear Mr. Biddle:

Our client, AG-CCRP Public Market, LP, the owner of the Public Market, recently learned that the Emeryville City Council (“Council”) is considering adopting a moratorium on all housing development, ***including all ongoing planning activities and the processing of in-process applications*** related to housing, throughout the entire City of Emeryville (“City”), and that this moratorium would go into effect as early as this week. We understand that the Council is proposing to take this dramatic step without following its normal procedures through the Community Planning Department and the Planning Commission. We further understand that the Council may take this action after providing only the bare minimum notice to the public, during a specially scheduled but as-yet-unannounced Council meeting that will take place this Friday evening, just before a three-day holiday weekend. Before the Council takes this step, our client has asked that we share with you our preliminary legal research and findings.

1. This Action Would Violate State Housing Law, the City’s Own General Plan, and the City’s Just-Approved Housing Element.

The City’s just-completed 2015-2023 Housing Element emphasizes that the City’s laws “provide ample opportunities for residential development.”¹ The Housing Element heavily relies upon the development of future planned projects to justify the City’s claim to have adequate sites to meet its Regional Housing Need Assessment (RHNA). Specifically, the Housing Element features Phases IA, II, and III of Public Market (also known as “Marketplace Redevelopment”)

¹ Emeryville Housing Element 2015-2023, at 3-3.

at the very top of the list of projects the City will see through to completion in order to meet the City's obligations under state law.² It was on the basis of these and other representations that the State Department of Housing and Community Development determined, just two weeks ago, that the City's Housing Element conforms to the State's Housing Element Law.³ A moratorium on all housing development stands in direct contradiction to these representations.

The City's compliance with its own General Plan, and with State housing law, would be significantly imperiled if, just after securing the significant federal and state funding opportunities that the State's certification provides, the City abruptly decided to significantly disrupt the progress of in-process projects that have been identified in the Housing Element, and to provide *no* opportunities for housing development in the entire City.

2. Section 65858 of the California Government Code Does Not Authorize the Council to Take This Action.

For obvious reasons, California law – to say nothing of responsible public policy – requires a city to conduct public hearings before it takes a zoning or planning action like this one.⁴ California law also prohibits cities from adopting ordinances that take immediate effect unless the council makes specific findings that an urgency ordinance is necessary “[f]or the immediate preservation of the public peace, health or safety.”⁵ And like most cities, Emeryville has an established procedure for considering important planning decisions, including, among other steps, public notice and review by the Planning Commission.⁶

It was suggested at the Council's February 3 meeting that the Council might be able to shortcut all of these legal requirements and rush through a development moratorium on all residential development under Section 65858 of the Government Code (“Section 65858”). That law is designed to allow cities to meet immediate threats to public health and safety. It does not authorize the action the Council is contemplating.

To begin with, the California Court of Appeal has specifically held that Section 65858 **does not authorize the City to prohibit the processing of ongoing applications.**⁷ Moreover, Section 65858 only allows the Council to adopt an interim ordinance to “prohibit[] any *uses that*

² *Id.* at 4-2 through 4-5.

³ January 28, 2015 letter from HCD Assistant Deputy Director Glen A. Compora to City Manager Sabrina Landreth, available at http://www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/alaemeryville012815.pdf

⁴ See, e.g., Cal. Gov. Code § 65090. While the 2014 Emeryville City Charter grants the City new powers over municipal revenue, the Charter states “in all other respects, the powers of the City shall remain as they were previously and therefore shall be constrained by, subject to, and governed by the general laws of the State of California.” <http://www.ci.emeryville.ca.us/8/City-Council> (accessed 11:40 a.m., February 11, 2015).

⁵ Cal. Gov. Code § 36937(b).

⁶ See, e.g., Emeryville Municipal Code § 9-7.103.

⁷ *Building Industry Defense Foundation v. Superior Ct.*, 72 Cal.App.4th 1410, 1420 (4th Dist.1999) as modified on denial of reh'g (July 19, 1999) (“[S]ection 65858 is clear. . . . Nothing in that section permits a city to prohibit the formal processing of development applications . . .”)

may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.”⁸ It is our understanding that the Council is not currently studying any specific zoning proposal, but intends to possibly study a future proposal that will “address unit mix, family friendliness, ownership and density bonuses in new residential developments.” But whatever planning proposal the Council intends to study, it is impossible that *all residential development in the entire city* will be “in conflict with” that proposal. Since Public Market does not plan to utilize density bonuses, it will not be “in conflict” with any proposal to change the city’s density bonus ordinance, and there is ample opportunity to work with the Council on the project’s unit mix and family friendliness as it proceeds through the normal approval process.

Second, in keeping with the principle that accelerated procedures such as these are generally appropriate only for emergency situations, Section 65858 only permits the Council to adopt a 45-day development moratorium if there is *both* (1) “***a current and immediate threat to the public health, safety, or welfare,***” and (2) “that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance ***would result in that threat to public health, safety, or welfare.***”⁹ Not once in the Council’s February 3 discussion did any Councilmember articulate an “immediate threat to public health, safety and welfare.”¹⁰ Instead, Councilmembers supporting the proposal expressed their generalized desire that future residential development should create different types of housing opportunities, based what they perceive as evolving community needs and priorities. These are laudable goals, ones that we know our client shares, and we would welcome the opportunity to dialogue with the Council about the best ways to achieve them. But while we do not mean to diminish the Council’s sense of urgency in meeting a crisis in affordable housing, a desire to “do better,” as Councilmember Asher put it, cannot under any reasonable interpretation be considered the type of “*immediate threat to public health, safety or welfare*” contemplated in this statute.¹¹

⁸ Cal. Gov. Code § 65858(a) (emphasis added).

⁹ Cal. Gov. Code § 65858(c).

¹⁰ The Council cannot overcome this obstacle by now claiming a new rationale for the moratorium which is different than the one clearly expressed in the February 3 meeting. Courts look quite unfavorably upon local agencies tailoring their findings to justify decisions they have already made. “Findings are not supposed to be a post hoc rationalization for a decision already made.” *Bam, Inc. v. Bd. of Police Comm’rs*, 7 Cal. App. 4th 1343, 1346, (1992); *see also T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 816, n. 3 (U.S. 2015) (a court reviewing local agency action must review findings “to ensure that those reasons are not post hoc rationalizations”).

¹¹ When courts have affirmed local governments’ authority to impose moratoria under this provision, the local government has cited specific, imminent, and impactful threats. *See, e.g., 216 Sutter Bay Associates v. County of Sutter*, 58 Cal.App.4th 860, 868-89 (3d Dist. 1997) (affirming Board of Supervisors’ authority to impose interim moratorium because immediately pending development of four new towns and influx of 140,000 people into area previously used as farmland “could alter—in a radical and fundamental manner—the current way of life for Sutter County residents” and dramatically affect the “peaceful and largely pastoral quality of life in Sutter County”). Note that this decision preceded the Legislature’s 2001 amendments to Section 65858, which significantly raised the bar on extending any development moratoria which restrict the development of multifamily housing. Stats. 2001, Ch. 989.

Nor did the Councilmembers discuss why they had concluded that approving even one new additional housing permit (much less continuing to process applications for the next 45 days) would result in an “immediate threat.” It would be particularly difficult for the City to justify this claim with regard to currently pending applications. The City’s very recently approved Housing Element, far from describing new housing development as an “immediate threat” to the City, specifically describes the approval of in-progress housing developments as critical to the City’s goal of providing capacity to meet the City’s Regional Housing Need Assessment.¹² When it approved the Housing Element which contained those projects, the Council specifically made the finding that the Housing Element “will contribute to the public health, safety, and general welfare or will be of benefit to the public” because it “will facilitate the development, maintenance, and improvement of adequate and affordable housing for new and existing residents.”¹³ With regard to Public Market specifically, the Council found in 2008 that amending the General Plan to allow the project was “in the public interest of the people of the City and the surrounding region,”¹⁴ and found that the Preliminary Development Plan for the project “will provide for a cohesive, integrated, well-planned development which will contribute to the general well-being of the surrounding neighborhood and community.”¹⁵ The Council cannot now justify a claim that proceeding with the development of Public Market poses a “current and immediate threat to the public health, safety and welfare.”

Third, since the effect of any interim ordinance expires in 45 days if not extended, ***the significant cost and disruption caused by an interim ordinance would be entirely pointless and needlessly disruptive unless the Council could later act to extend the moratorium.***¹⁶ And before the Council may extend the moratorium past 45 days, it must meet an even higher legal burden, since California’s housing laws highly disfavor actions such as these which would impede or delay the much-needed development of multifamily housing.¹⁷ In 2001, the California Legislature specifically added strict limits on cities imposing moratoria affecting multifamily housing, and ***a moratorium on all housing would not survive the heightened scrutiny that applies to development moratoria of longer than 45 days.*** The Council could only extend a moratorium on all residential development if it concludes that there is “substantial evidence” that approving *any* new multifamily housing in the City would have a “significant, quantifiable, direct, and unavoidable impact” on “public health or safety,” as defined in “objective, identified written public health or safety standards, policies, or conditions.”¹⁸ It must further find that this

¹² Emeryville Housing Element 2015-2023, at 4-2 through 4-5.

¹³ City Council Resolution, adopted November 19, 2014.

¹⁴ City Council Resolution No. 08-127 (July 15, 2008).

¹⁵ City Council Ordinance 08-004, adopted August 8, 2008

¹⁶ Cal. Gov. Code § 65858(a). At the February 3 meeting, City planning staff advised the Council that no revisions to the planning code could possibly be adopted within 45 days.

¹⁷ Cal. Gov. Code § 65858(c).

¹⁸ Cal. Gov. Code § 65858(c)(1). Note that, unlike the initial 45-day moratorium, a threat to public “welfare” will not suffice. The Council must find that approving any new multifamily housing in the city poses a threat to “public health or safety.”

complete ban is “necessary” – not merely useful or convenient – to mitigate that impact.¹⁹ And finally, it must find that there is “no feasible alternative,” short of banning all housing, through which those impacts to public health and safety can be mitigated.²⁰

This is a heavy burden. Respectfully, whatever goals the Council might want to achieve to ensure that new housing developments better meet community needs, we do not understand why the Council would view the development of all multifamily housing to pose a threat to “public health or safety.” Even if the Council did express this regrettable view of multifamily housing, the Council would still need to demonstrate that there is nothing short of a complete ban on all housing that could mitigate this impact. Courts have not hesitated to strike down development moratoria where, as here, cities act in excess of Section 65858’s limited scope to impede the development of much-needed new housing – even when the city imposes the moratorium with the goal of creating or improving opportunities for affordable housing.²¹

3. The Council’s Intended Procedure for Adopting the Moratorium Departs from the Principles of Transparency and Open Government.

In addition to the foregoing legal issues, we note that the procedure the Council is contemplating using to take this dramatic action would represent a very sudden departure from general principles of transparency and open government. A sudden ban on all residential development and all planning activities related to pending applications will significantly affect the lives and livelihoods of countless Emeryville residents, businesses, and community stakeholders. Indeed, many members of the public are currently hard at work on the kinds of activities the Council apparently intends to prohibit. The process on which the Council has embarked provides no meaningful opportunity for these members of the public to learn about this proposal and to make their views known to the Council.

Councilmembers proposed a development moratorium for the first time towards the end of the Council’s February 3 regular meeting, during a portion of the meeting described vaguely on the agenda as “Discussion Of Unit Mix, Family-Friendliness, And Ownership In New Residential Development Project,” with no further details, staff report or attachments.²² The discussion was not open-ended. Within less than minute of beginning the “discussion,” Councilmember Asher made a very specific proposal: to impose a moratorium on all residential

¹⁹ Cal. Gov. Code § 65858(c)(2).

²⁰ Cal. Gov. Code § 65858(c)(3). This standard is phrased very similarly to the highly demanding standard of review referred to in federal jurisprudence as “strict scrutiny.” See *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (U.S. 2014) (to satisfy strict scrutiny, an act “must be the least restrictive means of achieving a compelling state interest”); see also Robert S. Logan, *The Reverse Equal Protection Analysis: A New Methodology for “Special Needs” Cases*, 68 GEO. WASH. L. REV. 447, 464 (2000) (“[i]n practice,” to satisfy strict scrutiny, “there must be *no feasible alternative* to the use of the suspect classification”) (emphasis added).

²¹ See *Hoffman Street, LLC v. City of West Hollywood*, 179 Cal. App. 4th 754, 772 (2d Dist. 2009) (holding that a “need for affordable housing” does not constitute “a specific, adverse impact upon the public health or safety”).

²² See http://emeryville.legistar1.com/emeryville/meetings/2015/2/938_A_City_Council_15-02-03_Agenda.pdf (accessed 11:40 a.m., February 11, 2015).

development throughout the City - effective immediately, and with a scope as broad as possible.²³ Councilmembers did not discuss *any other aspects* of the proposed discussion item except for the proposed moratorium, and concluded their discussions within a very short time with the apparent intention of voting to impose the ban, with immediate effect, the next time they were available to meet. With the exception of those members of the public who happened to be viewing the third hour of the Council's meeting in the off chance that this innocuous-sounding discussion item might suddenly ripen into legislative action, no members of the public would have any idea such dramatic action was contemplated.

Indeed, the Council *still* has taken no action to inform the public of its intentions, and to solicit input from Emeryville residents and businesses, before it moves ahead to impose this ban. Our client only learned of this action by word of mouth. Instead, we understand that the Council will vote on this proposal outside of its normal meeting schedule, at a specially scheduled Friday evening meeting that falls just before a three-day holiday weekend that is observed by most employers, including the City of Emeryville.²⁴ As of the date of this letter (two days before the meeting), neither the existence of this meeting, nor the proposal on which the Council intends to vote, has been posted to the Council's website, and it is our understanding that the Council may wait until just twenty-four hours before the meeting to notify the public.²⁵ While we are sure it is not by design, this accelerated timeline and inconvenient schedule will have the effect of shutting out the public from having any meaningful opportunity to provide input into this very important decision.

Whether or not it is legal for the Council to operate in this manner (and we believe it is not), it simply should not do so. Imposing a moratorium on all housing development is not the sort of action that should be taken on twenty-four hours' notice. Public input and public disclosure are critical to good governance, and accelerated procedures like these are best reserved for *true emergencies*. At no point during the Council's meeting did Councilmembers have any meaningful discussion of the consequences of this action to stakeholders, why this action could not proceed through the City's normal planning procedures or why there is insufficient time to hold public hearings and solicit input from the Emeryville community before a moratorium is imposed. Certainly, no Councilmembers explained what immediate urgency justified taking this action with no more than twenty-four hours' notice to the public and to the stakeholders who would be directly affected by the proposal. Even if it were legal for the Council to adopt the proposed moratorium (which it is not), it would be inappropriate for the Council to proceed to approve it in this rushed manner.

²³ In response to a question from Mayor Atkin, Councilmember Asher initially stated that the ban "wouldn't cover the affordable housing development," and that a specified project would be exempt. But Councilmember Asher later stated that she was "not looking to carve out a particular development," and in her motion she described her proposal as "a moratorium on residential development in our city."

²⁴ See <http://www.ci.emeryville.ca.us/calendar.aspx?eid=1807> (accessed 11:40 am, February 11, 2015).

²⁵ <http://www.ci.emeryville.ca.us/88/Video-Agendas-Reports-Minutes-Archive> ("Video, Agendas, Reports & Minutes Archive" page, which as of 11:40 a.m. on February 11, 2015, describes the Council and Successor Agency regular meeting on February 17 as the only "Upcoming Event").

Given the short timeline, this letter does not include all potential legal issues with this action. However, in addition to the foregoing, other statutory limitations, as well as federal and state constitutional guarantees, limit the Council's authority to take sweeping measures that disrupt the legitimate, investment-backed expectations of Emeryville businesses and community stakeholders who have been working diligently with the City for years to meet their obligations under Emeryville law.

We hope this information is helpful. Please feel free to contact us if you would like to discuss this matter further.

Sincerely yours,

HOLLAND & KNIGHT LLP

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