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February 11, 2015

Via Fed-Ex and Email to mbiddle@emeryville.org

Michael G. Biddle
City Attorney
City of Emeryville
1333 Park Avenue
Emeryville, California 94608

Dear Mr. Biddle:

Anton Development Company, LLC (“Anton Development”) is the developer of the proposed residential, mixed use real estate project in the City of Emeryville located at 6701-6707 Shellmound Street, Emeryville, CA (“Project”). The purpose of this letter is to provide the City of Emeryville (“City”) and the Emeryville City Council with Anton Development’s formal objection to the City’s proposed moratorium on all current and future housing projects in Emeryville.

As background, Anton Development and its predecessors first began working with City Staff on a plan for the Project in the summer of 2013 and the first study session was held in late 2013. This Project in the City of Emeryville is now in its third calendar year of a formal planning process. Anton Development has incurred hundreds of thousands of dollars in connection with this process. As part of the planning process and at the request of the City, the Project has been revised to include larger “family” units. On March 26, 2015, the City is scheduled to give final plan approval of the Project. The Council’s proposed adoption of a moratorium on all housing developments - **including all ongoing planning activities and the processing of in process applications** – is patently unfair to the specific circumstances applicable to the Project, and as noted below, violates Government Code §65858. We trust that the City and the City Council will reconsider this proposal, and, at a minimum, allow public hearing on the proposal after valid and proper notice.

I. The City Council Failed to Give Proper Notice to the Public of Its Proposal At the February 3, 2015 City Council Meeting.

Without advance warning and only after hearing reports of proposed action by the City Council, Anton Development and its legal counsel viewed the City Council’s February 3, 2015 meeting and the Agenda thereto. As surprising as the City Council’s drastic proposal to stop all current and future construction

it, it is perhaps more shocking that the proposal was raised by the City Council without any public notice whatsoever. A development moratorium was proposed at the end of the third hour into its February 3 regular meeting. This happened 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." (http://emeryville.legistar1.com/emeryville/meetings/2015/2/938_A_City_Council_15-02-03_Agenda.pdf.) There were no further details, staff reports or attachments relating to this item. Yet, upon viewing the events relating to the moratorium discussion by the City Council, there is no doubt that the discussion of a ban on all current and future residential construction was carefully orchestrated for discussion sometime before the February 3rd meeting. Within less than a minute of beginning the "discussion," Councilmember Asher made a very specific proposal which was at least in part based on prior discussions with the City Attorney (who offered testimony on the subject) to impose a moratorium on all residential development *effective immediately* on both existing applications and new ones. She later directed staff that she intended her proposal to also expressly prohibit City staff from working with applicants to prepare environmental documents and conduct similar planning activity.

Councilmembers did not discuss any other aspects of the proposed agenda item as it was identified in the published agenda, except for the proposed moratorium. The City Council concluded these discussions within a very short time of beginning it and without the benefit of considering any adverse consequences of such a decision; clearly with the intention of voting to impose the ban, with immediate effect, the next time they were available to meet. With the exception of those few members of the public who happened to be viewing the third hour of the Council's meeting, likely for reasons other than 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.

Moreover, the City Council - without providing notice to the public, without conducting public hearings and without following normal procedures through the Community Planning Department and the Planning Commission - seeks a building moratorium during a specially scheduled Council meeting that will take place this Friday evening, just before a three-day holiday weekend. The City Council to date has not informed the public of its intentions, and has failed to solicit or otherwise permit input from Emeryville residents and businesses, before it moves ahead to impose this ban. Instead, the Council plans to 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. The intended consequence of the Council's actions is to deter public discourse on this significant topic.

Further, there is no legal basis for the City Council to implement this accelerated procedure. Certainly, there is no emergency sufficient to suffocate all public discussion on this hugely important topic, and one that will cost the City hundreds of thousands of dollars in lost revenue and deprive its residents with well-paying jobs and available housing. At no point during the Council's discussion did Councilmembers consider why this emergency action was necessary to address concerns that 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 instead of or at least before the imposition of a moratorium. Based on lack of adequate notice and public hearing, and without the legal basis to proceed as proposed, the City's moratorium proposal must be rejected.

II. The City's Moratorium Ordinance Will Violate Government Code §65858.

California law requires a city to conduct public hearings before it takes a zoning or planning action. 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.” (Cal. Gov. Code § 36937(b)). The City has an established procedure for considering important planning decisions, including, among other steps, public notice and review by the Planning Commission. (See, e.g., Emeryville Municipal Code § 9-7.103).

Under California Government Code §65858, a city or a county may adopt an interim ordinance to temporarily prohibit certain land uses, including particular types of businesses, in the community. This type of ordinance is commonly referred to as a “moratorium ordinance.” The purpose of a moratorium ordinance is to give the locality time to study the potential impact of particular activities and figure out whether and how these activities should be regulated. Several municipalities without existing laws regarding smoking lounges, hookah bars, or electronic cigarette retailers have adopted such urgency ordinances after receiving inquiries from individuals interested in opening these businesses. The rationale for an urgency ordinance that takes immediate effect is to prevent a “land rush” of applications to establish new uses before standards can be put in place. The delay in permits allows the city or county to subject all new uses to the new standards after such standards are developed.

Perhaps most importantly, California law requires that a moratorium ordinance contain findings stating why the ordinance is needed to address a current and immediate threat to public health, safety, or welfare. Here, as Councilmembers and staff acknowledged at the February 3 meeting, neither the Council nor staff have any specific planning or zoning proposals in mind; stating only that staff will generally “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. Moreover, the statute provides no support for including within the city’s ban those types of planning activities, such as EIR preparation, that Councilmember Asher explained to staff she intends for her proposal to prohibit. These planning activities are not a “use,” and therefore they are not activities the City may prohibit by urgency ordinance under this statute. Contrary to the proposal made by the City Council, the drastic legislative action of emergency moratorium is not a lawful planning tool pursuant to which the study of issues that are germane to land use policy is to be routinely implemented.

Further, the Council never set forth any basis or other findings of “immediate threat to public health, safety and welfare.” To the contrary, the City Attorney expressed to the Council that there was no particular urgency, saying that he “wasn’t concerned about anyone jumping the gun in advance of” the city’s normal meeting schedule. Instead, Councilmembers expressed their generalized desire that future residential development should create different types of housing opportunities based on what they perceive as evolving community needs and priorities. These considerations do not pose any “immediate threat to public health, safety or welfare.” Nor did the Councilmembers discuss why they had concluded that approving even one new additional housing permit (much less continuing to process an application for the next 45 days) would result in such an “immediate threat.”

Since the effect of any urgency ordinance expires in 45 days if not extended, the significant cost and disruption caused by the urgency ordinance would be entirely pointless unless the Council later properly

acts to extend the moratorium. 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. The Council could only extend a moratorium on all residential development if it concluded 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." It must further find that this complete ban is "necessary" – not merely useful or convenient – to mitigate that impact. 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. 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, the City is acting beyond Section 65858's limited scope to impede the development of much-needed new housing.

There is ample caselaw to invalidate the City's actions. For example, in Hoffman Street, LLC v. City of West Hollywood (2009) 179 Cal. App. 4th 754, Hoffman Street, LLC (Hoffman), and Harper Project, LLC (Harper) (collectively "Petitioners"), sought to redevelop their properties in the City of West Hollywood. The city adopted an interim ordinance restricting development in areas zoned for multifamily residential uses. After the city council extended the interim ordinance for one year, Petitioners challenged the extension of the interim ordinance. After a hearing on the merits seeking a writ of mandate, the trial court entered a judgment denying the petition and denying any relief on the complaint. Petitioners appealed the judgment. The Court of Appeal reversed, stating:

We conclude that the city council failed to make findings required under Government Code section 65858, subdivision (c) upon extending the interim ordinance and that the extension therefore was contrary to law and invalid. As a result, the trial court's denial of Petitioners' petition for a writ of mandate was improper thus requiring a reversal of the judgment as to the first count of Petitioners' combined pleading. ..

Id., at 75

The Hoffman Court also determined that an interim moratorium must be based on legislative findings of immediate threat to the public health, safety, or welfare:

An interim ordinance may not be adopted or extended "unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and 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." (Gov. Code, § 65858, subd. (c).) Additional requirements apply if the legislative body seeks to extend an interim ordinance "that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing." (*Ibid.*) The legislative body may extend such an interim ordinance only "upon written

findings adopted by the legislative body, supported by substantial evidence on the record, that *all* of the following conditions exist:

"(1) The continued approval of the development of multifamily housing projects would have a specific, adverse impact upon the public health or safety. 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 that the ordinance is adopted by the legislative body.

"(2) The interim ordinance is necessary to mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1).

"(3) There is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1) as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance." (Gov. Code, § 65858, subd. (c), *italics added*.)

Id., at 764-765.

As set forth above, the City Council failed to provide any basis on legislative findings of immediate threat to the public health, safety, or welfare to support the interim moratorium. Additional requirements apply if the legislative body seeks to extend an interim ordinance "that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing". (*id.*, subd. (c)) Here, where the City seeks to deny approvals for multifamily housing, no such findings have been made.


In sum, a city or county may adopt an interim ordinance to prevent development that would be inconsistent with a contemplated land use plan or zoning proposal if the legislative body, by a four-fifths vote, finds that such development would pose an immediate threat to the public health, safety, or welfare. (Gov. Code, § 65858, subs. (a)-(c).) But here, the City failed to present any evidence of an immediate threat to the public health, safety, or welfare. Second, the legislative body cannot extend an interim ordinance "that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing" (*id.*, subd. (c)) unless the legislative body makes the findings set forth in Government Code paragraphs (1) through (3) of section 65858, subdivision (c). No such findings have been made by the City Council. The moratorium is legally deficient and must be rejected.

III. The Acute Housing Shortage In Emeryville Diminishes The City's Basis for A Moratorium.

California, and particularly the Bay Area and Emeryville, are all in the midst of an acute housing crisis. Any moratorium on residential building is entirely counterproductive to solving this significant problem. Additionally, the proposed action to impose a moratorium on residential development punishes responsible developers who have worked closely with the City, listened to their desires for more family-friendly communities with improved unit mixes, and altered plans to adhere to the City's concerns. As discussed above, the Anton Development Project is now in its 3rd year of the planning process with all

stakeholders having provided input during the process. The Anton Development application has been deemed complete and is set for final plan approval on March 26, 2015. An interim moratorium and any extension thereof would prevent the Project from moving forward to the extreme detriment of those who have worked diligently and responsibly on the Project. At a minimum, the Project should be allowed to proceed without disruption from any possible moratorium. Any delay of the Project by the proposed moratorium will cause Anton Development serious financial losses without any legal justification for doing so. Based on the foregoing, Anton Development objects to the City Council's proposed moratorium and will be fully ready to formally discuss these objections to the Council at any properly noticed meeting for such purpose.

Sincerely,



Andrew F. Sackheim

cc: Emeryville City Council (via email)
Sabrina Landreth, City Manager (via email)
Charles Bryant, Emeryville Community Development Director (via email)
Anton Development Company, LLC (via email)