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February 12, 2015

Michael C. Biddle, Esq.
City Attorney
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Re: Proposed Moratorium On Housing Projects

Dear Mr. Biddle:

We submit this letter on behalf of our client, LMC Emeryville Investors, LLC, which has submitted an application to the City of Emeryville (the "City") for the development of a mixed-use project (the "Project") on the site of the former Sherwin Williams paint processing plant. We are writing with respect to the special meeting that is scheduled for Friday, February 13, in order to consider adopting a forty-five-day moratorium (the "Moratorium") on all housing projects within the City that are not entirely comprised of affordable housing projects. Based on previous comments made by members of the City Council, as well as representations in the staff report for the February 13 hearing (the "Staff Report"), it appears that the goal of the Moratorium is to halt housing projects from moving forward while the City Council considers changes to the City's regulatory scheme with respect to affordable housing, rental/ownership mix, and the City's relatively new density bonus program. However, in our view, the imposition of the Moratorium would suffer from myriad legal flaws, and indeed is not needed in order to achieve the City Council's stated goals. These reasons are discussed in more detail below.

A. The Moratorium Would Not and Could Not Affect Application Processing.

We agree with the conclusion in the Staff Report (*see* pages 10-11) that, although the Moratorium would temporarily halt all City actions to *approve* housing projects, it could not halt the City's *processing* of housing project applications (including the pending application for the Project). Government Code Section 65858, which regulates the adoption of interim ordinances (also known as moratoria), states in subsection (a) that such ordinances may be adopted to prohibit *uses* that may conflict with land use proposals being contemplated by a city or county – it does not state that such ordinances may be adopted to prohibit the *processing of applications* for such

uses. This very issue was considered in *Building Industry Legal Defense Foundation v. Superior Court*, 72 Cal.App.4th 1410, 1420 (1999), in which the court specifically concluded that "nothing in [the State Code provision regulating moratoria] permits a city to prohibit the formal processing of development applications." In addition, the contemplated "freeze" on processing all housing project applications would conflict with the required time limits applicable to the processing of applications under the California Environmental Quality Act ("CEQA"). (*See* California Public Resources Code Sections 15100-15112) Thus, even if the Moratorium were adopted, the City would be obligated legally to continue to review, comment on, and circulate for public review (as applicable) any submitted housing project applications and documentation. In the context of the Project, this means that the City must continue to process the already-submitted application for a Planned Unit Development, as well as pursue the preparation of an environmental impact report to evaluate the environmental impacts of the Project.

B. A Forty-Five-Day Moratorium Is Not Legally Warranted.

Pursuant to the Government Code, a moratorium may only be adopted "to protect the public safety, health, and welfare," and can only prohibit "uses that 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." (Government Code § 65858(a)) No such proposal has yet been advanced, so there is no basis for concluding that any pending housing project is actually in conflict with it. The Staff Report states that the Moratorium is necessary in order to allow the City to "develop, consider and adopt a comprehensive zoning proposal," but no such proposal exists; the Staff Report references the City's Design Guidelines, but they are just that – guidelines. They do not come within the scope of the proposals that are permitted to be used as the basis for a moratorium. The Staff Report states that the Planning Commission also wishes to review the City's Development Bonus System, but there are no specific proposals yet regarding any changes that might be made.

In addition, Government Code Section 65858 states that any interim ordinance imposing a moratorium must contain:

> 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 to comply with a zoning ordinance would result in that threat to public health, safety, and welfare.

(Government Code § 65858(c) (emphasis added)) No evidence has been provided, nor could it be, to establish that there exists *any* "current and immediate threat" to the public health, safety, or welfare from the approval and construction of housing projects. The Staff Report claims generally that the ongoing approval of housing projects in the absence of the Moratorium would lead to such a threat, but supplies no facts to support that allegation.

The City already has a number of powerful mechanisms to regulate affordable housing (*e.g.,* Planning Code requirements for inclusionary housing, General Plan policies, development fees), and its density bonus program was established too recently for there to be any data suggesting that it is inadequate. Furthermore, the City Council's other stated goal of requiring ownership as opposed to rental units would not be permitted by law in any event, so a moratorium would not advance that goal. In fact, in light of the extreme jobs/housing imbalance that currently exists in Emeryville, and the possibility that three housing applications representing approximately 50% of the City's 2014-2022 Regional Housing Needs Allocation ("RHNA") could soon be presented for City approval (*see* page 3 of the Staff Report), a moratorium that would impede the approval of additional housing projects in a timely manner would *itself* constitute a "current and immediate threat" to the public health, safety, or welfare.

C. A Moratorium Beyond Forty-Five Days Would Not Be Legally Supportable.

Even if a forty-five-day moratorium were adopted initially, as noted by Charlie Bryant, Emeryville's Planning Director, at the City Council's February 3 hearing, forty-five days would be insufficient time to formulate and adopt any legislative changes. Because much more study and documentation would be needed to effect any kind of regulatory change pertaining to the City's housing supply, the City Council inevitably would look to extend the initial forty-five-day moratorium for a substantial time. However, doing so would be legally impermissible in light of the high bar placed upon moratoria affecting multi-family housing. Specifically, moratoria that would have the effect of "denying approvals needed for the development of projects with a significant component of multifamily housing" may not be extended unless they include:

> 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.

(Government Code § 65858(c) (emphasis added)) This hurdle is intentionally high, because the Legislature places paramount importance on the escalating problem of providing sufficient housing for California's population. In 2013, 55,000 new housing units were developed in the state – at that rate, only 825,000 new housing units would be available to accommodate the approximately *2.7 million new households* that are expected to be formed in California over the next fifteen years.

In the present situation, there simply would be no legal justification for finding that (a) a continuation of the Moratorium would be necessary in order to avoid any specific, adverse impact, and (b) there is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact as well or better, with a less burdensome or restrictive effect, than the extension of the Moratorium.[1] First and foremost, there is no evidence that the ongoing approval of housing projects would generate a quantifiable, unavoidable impact to health and safety based on written standards. The City Council's general opinion that it would be good to have larger housing units, more ownership housing, and/or a revised density bonus structure does not correlate to a numeric health or safety threat, nor does it infer that the existing process to approve housing projects is in any way harmful to human health or safety. In fact, the City recently *relied* on the existing process for considering project approvals when concluding in its revised Housing Element that sufficient housing was planned to meet the City's RHNA. Furthermore, it is impossible to argue that the ongoing approval of housing projects within the City is inconsistent with existing "objective, identified written public health or safety standards, policies, or conditions," as it is evident that all existing standards, policies, and conditions that are pertinent to the issue have been adopted to *facilitate* (not impede) the approval of housing. Finally, the City cannot find that there exists no

[1] As noted on page 9 of the Staff Report, "These are very high evidentiary standards [for] which the City will bear the burden of proof."

less restrictive option than the Moratorium to alleviate the (unproven) threat to human health and safety. All in all, the City will not be able to sustain its burden to make and support the necessary findings to extend the Moratorium. Thus, it seems foolhardy to enact the Moratorium at all.

D. The Moratorium Is Inconsistent With The City's Housing Element.

As we are sure you recall, over the past year, the City has undertaken a comprehensive update of its Housing Element. The Housing Element was formulated to meet the requirements of State housing law (Government Code Sections 65580 through 65589.8), which among other things requires "an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing." (*Emeryville Housing Element,* page 1-2) The City's Housing Element represents the results of a tremendous effort of data collection and analysis, including an online survey, several study sessions, a roundtable discussion "intended to serve as a forum to discuss the housing needs of lower-income households and other underserved populations," Planning Commission meetings, and City Council meetings. (*See* the *Emeryville Housing Element,* pages 1-4 to 1-6) The finished product includes a housing needs assessment, a review of potential constraints on housing development (which, incidentally, does not mention a potential moratorium), an evaluation of the resources available to meet the City's housing needs, and the goals, policies, and programs to be implemented to address those needs.

The Housing Element contains a number of policies meant to support affordable and family-friendly housing. For instance, Policy H-6-1 of the City's Housing Element, together with its implementing programs, read as follows:

> ***Policy H-6-1. support the development of a variety of housing types for families, the provision of family-friendly amenities, and family-friendly design in housing developments.***
>
> *Program H-6-1-1. Adopt and implement an amendment to the City's Design Guidelines that provides standards for the development of family-friendly housing. The guidelines will address site design as well as unit design, including unit sizes and layouts, relationship of units to outdoor areas, and other unit and community features.*

> *Program H-6-1-2. Continue to evaluate City-controlled sites for potential redevelopment as affordable family-friendly housing, specifically designed to attract families with children. As opportunities are identified, partner with qualified affordable housing developers to provide site design, construction, and management.*

The Planning Department, Planning Commission, and City Council were all listed as responsible entities for these programs, for which guidelines are planned to be adopted "by 2015," and which would be implemented as projects are proposed. These programs have been under consideration for some time (in fact, the Staff Report notes that proposed Design Guidelines revisions will be considered by the Planning Commission on February 26), and it has never before been suggested that a moratorium would be necessary in order to implement them.

By letter dated January 28, 2015, the California Department of Housing and Community Development ("HCD") accepted the City's updated Housing Element as being "in full compliance with the State housing element law." That letter, a copy of which is attached for your reference, specifically noted that HCD's acceptance finding "was based on, among other reasons, the element demonstrating adequate sites to accommodate the City's regional housing needs allocation." One of these key sites is the Project site, on which the City's Housing Element assumes the development of 460 units. (*Emeryville Housing Element,* p. 4-3) We are sure that HCD did not expect the City to adopt a moratorium that would cripple the City's ability to meet the housing needs allocation a mere two weeks after this finding was made. Indeed, HCD could well determine that by adopting the Moratorium, the City was no longer in compliance with its own Housing Element, and thus could be out of compliance with State housing laws.

E. The Moratorium Could Jeopardize Housing-Related Funding.

The January 28 letter from HCD noted that the City "now meets specific requirements for several State funding programs designed to reward local governments for compliance with State housing element law." These funding programs include grants for cities that encourage such efforts as housing rehabilitation, new housing construction, infrastructure improvements, and affordable housing. Since these programs typically entail evaluations of whether HCD has approved the housing element for the relevant jurisdiction, if the City were found to be out of compliance with its Housing Element, the City could lose out on these monies, much of which would have been earmarked for affordable housing. In addition, one funding program that

depends on Housing Element compliance is the Housing Related Parks Program; if the funds associated with this program were withdrawn, the City could be in a position of lacking money to undertake key parks and recreation improvements, such as the Shellmound overcrossing and associated park improvements.

F. The City Has Exhausted Its Powers With Respect To Affordable Housing.

There are no further regulations that the City could legally enact with respect to affordable housing, as its actions to date already fully occupy the field of affordable housing regulation. The City has in place requirements with respect to the minimum percentage of inclusionary housing that must be developed within ownership projects. Also, even though California courts have held that cities cannot require rental projects to contain a specified percentage of affordable housing (*see Palmer/Sixth Street Properties v. City of Los Angeles,* 175 Cal.App.4th 1396), the City has since undertaken exhaustive and comprehensive nexus studies and enacted an aggressive fee structure so that rental projects must either provide on-site housing or pay in-lieu fees to enable the construction of off-site housing. That fee structure, which was adopted just a few months ago, was the culmination of many months of analysis and years of discussion and debate. By implementing these requirements for both ownership and rental housing, the City has already regulated affordable housing to the legal limit of its powers. Since no further regulations could be enacted in this regard, any concerns over affordable housing requirements or mechanisms cannot be used to support the Moratorium.

G. The City Cannot Require Ownership Over Rental Housing.

There was some discussion at the February 3 City Council meeting, as well as in the Staff Report, that one of the goals of the Moratorium would be to explore requiring the development of ownership housing instead of rental housing. However, the City has no legal authority to impose such a requirement, as it would constitute an impermissible restraint on the use of property. Furthermore even if it were possible to prohibit the development of rental housing, doing so could well countermand the City Council's stated goal to encourage more "family friendly" housing, since so many people cannot afford to buy homes. In fact, homeownership rates in California have *dropped* during the past ten years.[2] In any event, since the City has no authority to require ownership housing only and to preclude rentals, this desired regulatory change could not form the basis for the Moratorium.

[2] In 2006, the homeownership rate in California was 58.6 percent; by 2011, that rate had dropped to 55.3 percent and has continued to drop. In 2012, it was approximately 54 percent.

H. The City Cannot Favor "Family-Friendly" Housing.

The City Council's stated goal to implement legislation that would favor individuals who are part of families over single individuals violates both State and federal law. Among other things, it would violate Government Code Section 65008(a), which among other things prohibits actions that would "[deny] to any individual or group of individuals the enjoyment of residence, landownership, [or] tenancy" on the basis of familial status. It would also violate Section 804(a) of the Fair Housing Act of 1968, which states in pertinent part that it shall be unlawful to "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Therefore, since the City cannot legally favor "family-friendly" housing, this desired regulatory change could not form the basis for the Moratorium.

I. Discretionary Approval Processes Render The Moratorium Unnecessary.

Virtually every multi-unit housing project that could be constructed within the City first requires discretionary approvals pursuant to the City's Planning Code. Even if a conditional use permit and/or variance were not necessary, most projects would at least require design review, and many large-scale housing project proposals also request development bonuses (which themselves require conditional use permit approval). For instance, the Project proposed by our client would require a General Plan amendment (merely to shift open space locations), a Planned Unit Development approval, and development bonuses. Each of these entitlements is discretionary in nature, which means that the City may impose conditions upon the project in question, or even deny it outright.

Conclusion

Our client has been listening to the City Council's opinions and working with the City to ensure that the Project incorporates affordable and family-friendly components. If it is feasible to develop ownership units as part of the Project, our client plans to do so; in fact, Lennar (one of the partners in LMC Emeryville Investors) is one of the largest developers of ownership units in the United States. As discussed in detail above, a special meeting and the abrupt adoption of the Moratorium is neither the correct way – nor the legally supportable way – to respond to those efforts. Thank you for your consideration.

Very truly yours,

Anna C. Shimko

ACS
Attachments

cc: Mayor Ruth Atkin and Members of the Emeryville City Council
Sabrina Landreth
Charlie Bryant
Gillian Cho
Bruce Dorfman
Joe Ernst
Kevin Ma
Alex Waterbury

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EDMUND G. BROWN JR., Governor

January 28, 2015

Ms. Sabrina Landreth
City Manager
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Dear Ms. Haydon:

RE: Emeryville's 5th Cycle (2015-2023) Adopted Housing Element

Thank you for submitting the City of Emeryville's housing element adopted November 18, 2014, which was received for review on December 1, 2014. Pursuant to Government Code Section 65585(h), the Department is reporting the results of its review.

The Department is pleased to find the adopted housing element in full compliance with State housing element law (Article 10.6 of the Government Code). The adopted element was found to be substantially the same as the revised draft element the Department's August 26, 2014 review determined met statutory requirements. The Department's finding was based on, among other reasons, the element demonstrating adequate sites to accommodate the City's regional housing needs allocation.

Please note, Emeryville now meets specific requirements for several State funding programs designed to reward local governments for compliance with State housing element law. For example, the Housing Related Parks (HRP) Program, funded by Proposition 1C, provides grant funds to eligible local governments for every qualifying lower income unit permitted since 2010. The HRP Program 2014 Notice of Funding Availability (NOFA), released December 10, 2014, announced the availability of approximately $35 million in grant funds to eligible applicants. Applications are due **February 5, 2015**. Further information about the HRP Program is available on the Department's website at http://www.hcd.ca.gov/hpd/hrpp/.

The Department wishes the City of Emeryville success in implementing its housing element and looks forward to following its progress through the General Plan annual progress reports pursuant to Government Code Section 65400. If the Department can provide assistance in implementing the housing element, please contact James Johnson, of our staff, at (916) 916-263-7426.

Sincerely,

Glen A. Campora

Glen A. Campora
Assistant Deputy Director