LARA WEISIGER

From: Cory Briggs <cory@briggslawcorp.com>
Sent: Tuesday, September 01, 2015 4:56 PM
To: LARA WEISIGER
Subject: File No. 2015-1950: Appeal by UNITE HERE Local 2850
Attachments: 2015-09-01_Opposition Letter_Unite Here.pdf

Dear City Clerk:

Please provide a copy of this letter to the mayor and city council prior to tonight's meeting. Thank you.

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BLC File(s): n/a

1 September 2015

Mayor and City Council
City of Alameda
c/o City Clerk Lara Weisiger
2263 Santa Clara Avenue, Room 380
Alameda, CA 94501

Via E-mail Only to lweisiger@alamedaca.gov

Re: File No. 2015-1950: Appeal by UNITE HERE Local 2850 Challenging Planning Board's Approval of Final Development Plan and Design Review for Construction of 100-Room Hotel at 2350 Harbor Bay Parkway, Mayor Spencer's Call for Review of Planning Board Action, and Adoption of Resolution Documenting the Council Action (Community Development 481001)

Dear Mayor and City Council:

I am writing on behalf of UNITE HERE Local 2850 in support of the above-referenced appeal because adopting the Planning Board's approval of the Final Development Plan and Design Review for Construction ("Proposed Project") violates the California Coastal Act and the California Environmental Quality Act ("CEQA").

CEQA Violations

The Project Is Not Substantially Surrounded by Urban Uses

According to today's agenda, the City has determined that the Proposed Project is exempt from CEQA pursuant to Section 15332 of the CEQA Guidelines: the infill exemption. Public Resources Code Section 21061.3 defines an "infill site" as a site that is either completely surrounded by parcels "that are developed with qualified urban uses" or 75% surrounded by such parcels, where the remaining 25% of the site adjoins "parcels that have previously been developed for qualified urban uses." The actions you're being asked to approve today do not qualify for the exemption.[1]

First and foremost, the proposed property is not surrounded by parcels that were developed for qualified urban uses. One side of the proposed parcel abuts San Francisco Bay, which is not currently and has not previously been "developed for qualified urban uses." The side of the Proposed Project that abuts San Francisco Bay accounts for 27% of the total site perimeter. Even

[1] Even if it did, the exception to the exemption would apply because of unusual circumstances, such as the proximity to the San Francisco Bay and conflicts with the applicable land-use plans and regulations. *See* CAL CODE OF REGS., tit. 14, § 15300.2(c) (significant effect on environment due to unusual circumstance).

if the remaining 73% of the perimeter were adjacent to land developed for qualified urban use, this still falls outside the scope of the infill exemption. The two undeveloped parcels on either side of the proposed parcel are designated as "open space."

The City's Staff Report contends the Proposed Project is subject to the infill exemption pursuant to *Banker's Hill, Hillcrest, Park West Community Preservation v. City of San Diego*, 139 Cal. App. 4th 249 (2006) ("*Banker's Hill*"). This, however, overlooks the substantial differences between the facts of that case, and the Proposed Project at issue here.

In *Banker's Hill,* the project at issue was surrounded on three sides by developed land and the fourth side abutted Balboa Park, "an approximately 1,100-acre developed urban park containing theaters, museums, restaurants and other public facilities." *Banker's Hill*, 139 Cal. App. 4th at 255. The court determined the project fell within the exemption category because Balboa Park was developed as an "urban use." *Id.* at 270-271.

The court's definition of an "urban use" is instructive:

> "'[t]he term 'urban' is 'not fixed, objective, or easily ascertainable,' but it has been 'defined as 'of, relating to, characteristic of, or taking place in a city ... constituting or including and centered on a city ... of, relating to, or concerned with an urban and [specifically] a densely populated area ... belonging or having relation to buildings that are characteristic of cities. . . .' "

Id., citing *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal.App.4th 511, 541 (2000). The court applied that definition and determined Balboa Park to be an "urban use" because it is a "quintessential urban park, heavily landscaped, surrounded by a densely populated area, and containing urban amenities such as museums, theaters and restaurants."

This contrasts starkly with the Proposed Project. Here, approximately 27% of the Project's perimeter is adjacent to San Francisco Bay land. San Francisco Bay is a body of water; there are no museums, restaurants, or theaters located on it. Instead, the body of water comes with its own highly specific set of concerns. The unique nature of the impact of construction and the subsequent pollution on the environment is the entire reason the California Coastal Act and other water specific laws have been enacted. San Francisco Bay is so important to the area that the San Francisco Bay Conservation and Development Commission ("SFBCDC") was created by the California Legislature in 1965 to address broad public concern over the future of San Francisco Bay. *See* http://www.bcdc.ca.gov/permits/faqs.shtml.

The Staff Report attempts to liken San Francisco Bay to Balboa Park by referring to the park as "a 1,200-acre park which includes open space areas, natural vegetation zones, green belts, gardens and walking paths," but this is misleading. The two cannot be more different. As the court made clear, Balboa Park is heavily landscaped and contains urban amenities such as museums, theaters, and restaurant. *Banker's Hill,* 82 Cal.App.4th at 271. And, as someone who lives in San Diego and has been to Balboa Park too many times to count, I can tell you that it is heavily developed as an urban park – unlike San Francisco Bay.

The Staff Report also attempts to diminish the impact of the location of the Proposed Project, stating "the notion that the site is adjacent to water does not preclude the City's ability to properly rely on Section 15332." Actually, it does. The very fact that the Project will be constructed next to the coastline implicates numerous coastal concerns. Bodies of water are completely different from open-air parks. The impact of pollution and run-off on San Francisco Bay can have far-reaching

implications and, as noted above, such implications were recognized by the California Legislature when it created the SFBCDC.

The Project Does Not Meet the Standard of "No Value as Habitat for Endangered, Rare, or Threatened Species"

The Staff Report contends that the January 7, 2015 study, attached as Exhibit 8 to the Agenda, concluded (with my emphasis): "no burrowing owls or other endangered or threatened species are present on the site and that the site provides ***poor quality habitat*** for burrowing owls or other endangered or threatened species." However, the standard pursuant to CEQA is that the project applicant must show that the project site has "no value, as habitat for endangered, rare or threatened species." CEQA Guidelines § 15332(c). The study (both the first one conducted in November and the recent January study) acknowledges that burrowing owls "have been documented to winter (roughly from September through April) in marginal, urban habitat areas in the vicinity of San Francisco Bay."

The study even recommends further observation of the site, just as the first study did. If your own experts and study suggest further review, the Proposed Project cannot and should not move forward.

The Project Falls Within an Exception to the Infill Exemption

The infill exemption "is not intended to be applied to projects which would result in any significant traffic, noise, air quality, or ***water quality effects***." *See* CAL. CODE OF REGS., tit. 14, § 15332 (emphasis added). Notably, the "unusual circumstances exception" provides that "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The Staff Report relies on *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086 (2015) for the proposition the Proposed Project is categorically exempt. However, *Berkeley* provides that if a challenger makes a factual showing to the satisfaction of the lead agency that "unusual circumstances" exist and will result in potentially significant impacts, then the project may fall in the exception. *Id.*

The Supreme Court did not precisely define what a showing of "unusual circumstances" would entail; however, the facts here would certainly fulfill any standard. The Proposed Project is situated on San Francisco Bay. The impacts on the bayfront alone rise to the level of an unusual impact, and the location suggests that the Proposed Project would not fit within the spirit of the infill exemption.

On the whole, the nature and scope of what you're being asked to approve today render the infill exemption inapplicable.

Alameda City Charter

The Planning Board action in this matter was a final action, not a recommendation for action to the City Council. According to the City Charter, the City Council acts by a vote of three members. Therefore, it will take a vote of three Council members to overcome the appeal. A tie vote does not constitute the denial of an appeal under Public Resources Code Section 21151(c). *See Vedanta Soc. of Southern California v. California Quartet, Ltd.*, 84 Cal.App.4th 517, 525 (2000) (holding CEQA determination requires affirmative majority vote of elected decision-making body).

For all these reasons, and for any and all other reasons that may have been or may be offered in opposition to the item today and that are not inconsistent with this letter, I urge you to uphold the appeal and reject the Proposed Project.

Sincerely,

BRIGGS LAW CORPORATION

Cory J. Briggs