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June 2, 2014

Paul M. Davis
Attorney at Law
448 Ignacio Blvd., Suite 201
Novato, CA 94949-6085

Re: ***Egger, et al. v. Gardner***, Marin County Superior Court case no. CV1401740
Letter from Paul Davis to Town Attorney received May 19th, 2014

Dear Mr. Davis:

The Town of Fairfax has begun the process of repealing Ordinance 778 and we are deeply disappointed that you are not willing to engage in a discussion which will allow us to resolve this matter without litigation. We believe that this approach is unproductive and contrary to the manner in which cases are encouraged to be conducted under local rules.

You state, without explanation, that the petitioners are not inclined to grant an extension of time to file and serve a response to the Petition. The Marin County Superior Court encourages all attorneys to abide by the Marin County Bar Association Code of Civility. (Marin County Rule, Miscellaneous 7.2.) "Consistent with existing law and court orders, a lawyer should agree to reasonable requests for extensions of time within which to respond to pleadings...." (Marin County Bar Assn. Code of Civility, Section 2 [Continuances and Extensions of Time].) As the case management conference is not until September 25, 2014, there is no benefit to either party in rigid insistence that the Town file a formal response to the Petition when informal, but focused, discussions between counsel could lead to a resolution of the issues before the court. Insisting that the Town file a formal response merely drains legal time and resources that could more productively be used addressing the issues in controversy.

In addition to denying the most common of courtesies, your letter makes baseless accusations of "fraud" and "bad faith" not only on the part of the Town Clerk, but also the Town Council, without a shred of fact or evidence as support. You conclude that "something untoward is afoot" simply because Ms. Gardner will not stipulate to a writ that would compel her to certify your client's defective referendum petition. As Ms. Gardner stated in her letter, in rejecting the petition, she simply did what the law requires. A local elections official has a ministerial duty to reject petitions not only for insufficient voter signatures, but also for any violations of procedural

SUPPLEMENT
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requirements under the Elections Code. (*Billig v. Vogues* (1990) 223 Cal.App.3d 962, 969.) Hence, Ms. Gardner did not act contrary to the law, she merely followed it.

It is also unfortunate that your letter threatens to run up "hundreds of thousands of dollars" in attorney fees in order to force the Town to certify a defective referendum petition when the precipitating cause of the impasse was an error committed by petitioners themselves. Likewise, your threat to seek "pendent lite" relief will not push Ms. Gardner or the Town to act contrary to what the law requires, especially where, as here, there is no risk of irreparable harm absent injunctive relief.

That the Town Council has been conciliatory is demonstrated by its direction to staff to begin the process to repeal the ordinance. The first step was consideration of the repeal by the Planning Commission which took place last Thursday evening. The Council also directed staff to schedule a forum in July to provide an opportunity for the community to engage in a dialogue regarding the General Plan, including the Housing Element. Finally, staff has repeatedly offered to sit down with your clients and review any and all parts of the ordinance that raise concerns or warrant review.

Despite the above, we are willing to accept your clients' offer to meet with Councilmembers. While the Council is prevented by the Brown Act from meeting with your clients as a group, they are willing to designate two representatives to attend a meeting with your clients.

Finally, we have noted that you stated you would be out of the state from May 19th through May 22nd and also from June 11th through June 18th. *Tenderloin* notices of unavailability such as that in your letter no longer carry any force or effect in the courts of this state. (*Carl v. Superior Court* (2007) 157 Cal.App.4th 730.) However, as a matter of professional courtesy, something we strongly believe in, we will do what we can to accommodate your schedule.

We look forward to working together more cooperatively going forward.

Very truly yours,

Janet E. Coleson

Janet E. Coleson
Town Attorney
Town of Fairfax

cc: Michele Gardner, Town Clerk and Elections Official
Garrett Toy, Town Manager

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PAUL M. DAVIS
ALSO ADMITTED IN THE
DISTRICT OF COLUMBIA
AND THE
STATE OF WASHINGTON

May 16, 2014

Janet Coleson
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San Francisco, California 94104-4811

In re: Egger, et al. v. Gardner
Marin Superior Court no. CV1401704

Dear Ms. Coleson:

Following our telephone conference yesterday I was able to communicate with Mr. Egger in Italy. Mr. Egger indicated that he is not inclined to grant an extension of time within which to serve and file an Answer to the Petition.

We have in our possession declarations signed by all the circulators who attest to the fact they were eighteen years of age or older at the time they circulated the Referendum Petition. I therefore submit that the mere oversight of not including the attestation with the signature pages of the Referendum Petition was not a material departure from the statutory scheme and thus not fatal to the Referendum Petition. Moreover, these declarations could easily have been supplied to the town clerk prior to the expiration of the thirty days had she brought that minor oversight to Mr. Egger's attention. Nevertheless, we verily believe that not only did the town clerk act in bad faith by rejecting the Referendum Petition, she deliberately delayed, for the sole and singular purpose of attempting to justify her unlawful rejection of the Referendum Petition, bringing the alleged defect to Mr. Egger's attention in a more timely manner so that he could have easily supplied the attestations. We believe her conduct will not be well-received by the Court. Perhaps more importantly, however, is that the Referendum Petition more than substantially complied with the statutory requirements at the time Mr. Egger filed it with the town clerk and she had no authority to reject it. The town clerk's responsibility begins and ends with verifying the signatures on the Referendum Petition, which she delegated to the county's chief elections officer. Once that task was completed, the town clerk had a ministerial duty to certify the Referendum Petition to the Town Council for action as required by statute. The law of this state more than amply supports my clients' position in that regard. Accordingly, we believe the Court will issue a Writ of Mandate and order the town clerk to certify the Referendum Petition to the Town Council as she should have done in the first place.

While indeed we appreciate that the Town Council is allegedly in the process of repealing the offending ordinance (Fairfax Ordinance No. 778), we nevertheless have significant concerns over such process and the persons involved in it. The process of will take time, provide no guarantee of repeal and, in the event of repeal, there will be no one year moratorium in place to prevent any attempt to renew the offending ordinance for at least one year.

When I asked you if the town clerk would simply stipulate to the issuance of the writ and certify the Referendum Petition to the Town Council for action to either repeal the ordinance or put it before the voters you indicated that the town clerk would not do so. That process, unlike the repeal process presently being followed, would effectively and immediately suspend the ordinance, which is facially valid at this time, so that no permits could be issued. As it exists today permits could arguably be issued under Ordinance 778. Accordingly, the town is forcing us into the unfortunate position of having to seek *pendente lite* relief from the court, in the form of a temporary restraining order followed by a preliminary injunction during the pendency of the writ proceeding, absent adequate assurances from you that no permits of any kind will be issued under Ordinance 778. You indicated that you could not agree to that because, you correctly argue, the ordinance is valid until or unless it is repealed. Will the Town Council consider adopting an emergency ordinance suspending enforcement of Ordinance 778? Again, these issues can be avoided if the town clerk were to stipulate to the issuance of the writ and simply certify the Referendum petition to the Town Council. But for curious reasons that are not clear[1] we thus conclude that the Town Clerk and the Town Council are acting in bad faith and in an attempt to commit a fraud upon the residents of Fairfax. Hence, we submit, that the refusal to stipulate to the writ, and instead proceed with the present repeal process, leads us to conclude that something untoward[2] is afoot in Fairfax. Quite frankly, it makes no sense that, if the Town Council is willing to repeal Ordinance 778, why the town clerk would not simply stipulate to the issuance of the writ in order to expedite the process and provide a degree of finality. The reasons appear rather obvious.

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[1] Permits can be issued at this time making it more difficult to repeal the ordinance because of vested rights.

[2] The town allegedly adopted Ordinance 778 so it could receive about $300,000 in MTC funds. Such a position is a red herring and is clearly false and deceptive. First, the actual cost to the town would far exceed the one-time infusion of $300,000 in MTC funds. Second, the costs the town will incur in the writ proceeding itself will far exceed the $300,000 as well. So, the town council should be candid and truthful with the public and not put forth the false facts it has been marshaling solely for the purpose of adopting an ordinance popular with a few council members, but wholly unpopular with most of the residents of the town they were elected to represent, under the guise of revenue.

The law is clear that, in connection with Referendum and Initiative petitions, the only task of the town clerk is to verify that such petitions contain at least the minimum number of valid signatures of registered voters on it. Once that sole and singular task is complete the town clerk has a ministerial duty to certify it to the town council for the action prescribed by law. It is neither the prerogative nor privilege of the town clerk to act as a judicial officer to determine whether or not the Referendum Petition "complies" with state law. That function resides solely with the judiciary, not the executive.

The Town Council needs to be keenly aware that my clients' resolve here is to proceed with the writ, which will obviously be at great cost and expense to the town. Moreover, the town has great exposure to substantial attorney's fees under Code of Civil Procedure § 1021.5. Such fees could easily run into the hundreds of thousands of dollars between the trial and appellate courts. The clerk's willingness to expose the town to the expenditure of substantial fees and costs on its own behalf, as well as the exposure to being ordered to pay the costs and expenses under the private attorney general theory, could all be avoided by stipulating to the issuance of a writ of mandate. Does the town council really want this kind of exposure?

Please ensure that Michele Gardner's answer to the Petition is timely served and filed.

When Mr. Egger returns from Italy he would be willing to meet with council members to discuss this matter. Please let me know.

Finally, please note that I will be out of the state and unavailable for all purposes from May 19 through 22, 2014, and from June 11 through June 18, 2014. (*Tenderloin Housing Clinic v. Sparks* (1992) 8 Cal.App. 4th 299 [10 Cal.Rptr. 2nd 371])

Thank you for your courtesies and cooperation herein.

Very truly yours,

PAUL M. DAVIS

cc: Frank Egger
Niccolo Caldararo, Ph.D.