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VIA U.S. MAIL AND EMAIL

Honorable Mayor Madolyn Agrimonti and
Members of the Sonoma City Council
City Hall
No 1 The Plaza
Sonoma, CA 95476
madolyn.agrimonti@sonomacity.org

Re: 149 Fourth Street East / APN 018-091-018 (Lot 2); Brazil Street / APN 018-051-012 (Lot 227); Brazil Street / APN 018-051-007 (Lot 228)
Approval of Housing Development Projects

Dear Mayor Agrimonti and City Council Members:

We write to address the arguments recently advanced by opponents of the above-captioned Projects. In particular, we respond to the opponents' incorrect legal analysis of the Projects' impacts, the Projects' modifications, the Housing Accountability Act ("HAA"), and the Lot Pad Grading guideline.

The Projects Were Properly Analyzed

The onus is on the Appellants to produce **substantial evidence** that the Projects, even as mitigated, may have a significant effect on the environment. Substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly inaccurate or erroneous . . ." (North Coast Rivers Alliance v. Kawamura (2015) 243 Cal.App.4th 647). The Planning Commission's CEQA determinations must be given "substantial deference and [be] presumed correct." (Sierra Club v. County of Napa (2007) 121 Cal.App.4th 1490.) The arguments advanced by the Appellants are speculative at best and intentionally misleading at worst.

For example, the Appellants claim the visual effects of the Projects are "unknown because they have not yet been analyzed." In reality, our client's architect prepared a carefully modeled projection of the Projects' aesthetic impact, based on vantage points requested by Planning Staff. The Planning Commission found that the Projects fit the landscape well and effectively reduced the visual impact to a point of insignificance. The Appellants' only purported "evidence" to contradict this analysis is an inaccurately photo-shopped image that overstates the Projects' visibility. Any objections from the neighboring Appellants based on privacy or alleged

interference with their private views do not constitute a "significant impact" for the purposes of CEQA (Association for Protection etc. Values v. City of Ukiah (1991) 2 Cal.App.4th 720.)

Similarly, the Appellants claim there has been no soil analysis, when in reality a Geotechnical Investigation *and* a Supplementary Soil Analysis were prepared. The Appellants also challenge the Drainage and Detention analyses, which were developed in close consultation with Planning Staff and peer-reviewed. As the Supplemental Reports note, the drainage plans for the Projects will in fact *improve* existing conditions.

The Appellants assert that further environmental review is needed, despite the fact the Projects have undergone a much more intensive review than required for a single family home. The Projects should have been treated as categorically exempt from CEQA because they involve the construction of single family residences (14 CCR § 15303(a)). There are no "unusual circumstances" or any "cumulative impact" that would trigger an exception to the categorical exemption for single family residences (14 CCR § 15300.2).

No substantial evidence was presented to the Planning Commission at the March 2017 hearing to require the preparation of a full EIR, or even an Initial Study. The Staff Reports for the Projects recommended approval under a categorical exemption. According to the minutes from that meeting, the primary impetus for the Initial Studies was the Commissioners' concerns about tree impacts. The Commission Members discussed the visual impacts but were satisfied that the Projects had minimized such impacts. The Commission appears to have contemplated targeted studies addressing "impacts on tree preservation" and, for the 4th Street East property, "the visual impacts of the garage." The Initial Studies prepared were much broader and considered the full range of potential impacts.

The Appellants assert that the Projects were improperly piecemealed because they are adjacent to each other, and that our client has "chopp[ed] a large project into many little ones." But the test for improper piecemealing is not simply whether multiple Projects are adjacent. The Supreme Court set out the test in Laurel Heights Improvement Assn. v. Regents of UC (1988) 47 Cal.3d 376:

> We hold that an EIR must include [an] analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project.

In Banning Ranch Conservancy v. City of Newport Beach (2012) 211 Cal.App.4th 1209, the Court of Appeal confirmed that each of the above factors must be present before improper piecemealing arises. If a different action or project is not a "consequence" of the project being considered, the projects can be analyzed separately. The Court in Banning Ranch identified two main categories of improper piecemealing: (1) the reviewed project is to be the first step for a future development; and (2) the reviewed project legally compels or presumes completion of another action. The Projects here do not fit into either of these categories. It cannot be said that

any of the Projects is a "consequence" of the others, so the first prong of the Laurel Heights test is not met.

The Planning Director expressly addressed the piecemealing concerns at the Planning Commission hearing in September 2017, and said Planning Staff had done their "very best" to avoid piecemealing. The Director confirmed Staff had "certainly not ignored the fact there are links between these three projects." The Supplemental Reports for the appeal hearing reiterate this cumulative analysis, noting that the environmental review for each Project:

> . . . was designed and presented in a matter intended to ensure that the potential impacts of development on all three parcels was accounted for in the analysis performed on each application.
>
> (Supplemental Reports, § 14.)

The underlying concern about improper piecemealing is that it avoids a comprehensive analysis of all potential Project effects (McQueen v. Bd. of Dirs. (1998) 202 Cal.App.3d 1136, 1143.) As outlined above, to the extent that a cumulative analysis may be required, this analysis has already been completed. Potential cumulative impacts do not require the preparation of a single Initial Study for multiple projects, provided that the separate Initial Studies each consider whether any "cumulative impact is significant and whether the effects of the project are cumulatively considerable." (14 CCR § 15064(h)(1).) Moreover, a project's contribution to a significant cumulative impact can be rendered less-than-significant through project-specific mitigation measures. (14 CCR § 15064(h)(2).)

Here, each Initial Study required Planning Staff to make findings about whether each Project would have "cumulatively considerable" impacts "when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." The Initial Study for each Project found there would be no significant cumulative impact and that the Projects "would not result in cumulative impacts deemed considerable." Moreover, implementation of project-specific Mitigation Measures reduced the magnitude of any potential cumulative impacts to a less-than-significant level.

The expert reports prepared to inform the Initial Studies and MNDs considered cumulative effects where appropriate. For example, the grading and drainage plan included in the Initial Studies was the same for each Project and addressed any drainage issues common to the Projects. The Historical Resources Study and Biological Survey analyzed all three lots together. The arborist considered all three sites as if they were one Project when drafting his Reports, as did the peer review of the Arborist Reports.

An MND may be adopted where there is "no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (Pub. Resources Code, § 21064.5) Here, the "whole record" before the City Council includes all three Initial Studies and MNDs, which contain the required cumulative analysis. There is no substantial evidence of any individual potentially significant effect arising from the Projects, so that it is reasonable to conclude that the Projects will have no significant

adverse cumulative effect. (Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal.App.3d 1337, 1358.)

The Appellants have not advanced any new "substantial evidence" about environmental impacts – cumulative or otherwise – associated with the Projects. The CEQA Guidelines require the Appellants to identify the specific cumulative effects they claim will occur, explain why they believe the effect would occur, and explain why they believe the effect would be significant (14 CCR §15204(b).) The Appellants have not done so. Therefore, the Planning Commission's decisions must be upheld.

Modifications to the Projects

The Appellants have suggested that because the Projects have been modified, the Mitigated Negative Declarations ("MNDs") may need to be re-circulated. This is not correct. The CEQA Guidelines provide that an MND does *not* need to be re-circulated where:

> New project revisions are added in response to written or verbal comments on the project's effects identified in the proposed negative declaration which are not new avoidable significant effects.
>
> (Cal. Code Regs § 15073.5(2).)

The modifications to the Projects were outlined in statements from the Projects' architect dated January 8, 2018 (attached). *All* modifications were designed to minimize site impacts and to reduce the Projects' scale and visibility. For example, the use of elevated wood framing rather than slab foundations for portions of the Projects will involve less grading and soil displacement. Other modifications have reduced the visible Project areas for 227 and 228 Brazil Street by 33% and 46% respectively.

These modifications were made "in response to written or verbal comments on the project[s'] effects" that were identified in the MND for each Project. Accordingly, no new Initial Study or MND is required.

The Housing Accountability Act Applies to the Projects

The Appellants' analysis of the HAA's definition of "housing development project" is incorrect. For instance, Ms. Zoia wrongly asserts in both of her letters that because there is no case law applying § 65885.5(j) to a single family residence, the HAA does not apply to the Projects. In fact there are very few reported cases applying the HAA. Nevertheless, the plain language of the statute is clear.

The HAA is a remedial statute, and it must be construed broadly and "consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians." (Gov. Code § 65589(d).) "It is the policy of the State that [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of,

and the approval and provision of, housing." (Gov. Code, § 65589.5(a)(1)(L).) Government Code § 65589(h)(2) states:

> (2) "Housing development project" means a use consisting of any of the following:
>
> (A) Residential units only.
>
> (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
>
> (C) Transitional housing or supportive housing.

A simplistic reading would say that "units" is plural, therefore a housing development project must comprise at least two units. However, California statutory interpretation does not support such a reading. As a fundamental principle of statutory interpretation, words in the plural form may apply to a single subject when necessary to effectuate the Legislature's intent. "These rules reflect the common understanding that the English language does not always carefully differentiate between singular and plural word forms, and especially in the abstract, such as in legislation prescribing a general rule for future application." (2A Singer, Sutherland Statutory Construction (7th ed. 2015) § 47.34.)

In Del Cerro Mobile Estates v. City of Placentia (2011) 197 Cal.App.4th 173, 183, the Court of Appeal stated:

> Statutory interpretation is a question of law (Florez v. Linens 'N Things, Inc. (2003) 108 Cal.App.4th 447, 451) in which we ascertain the Legislature's intent " 'with a view to effectuating the purpose of the statute, and construe the words of the statute in the context of the statutory framework as a whole' " (Holcomb v. U.S. Bank Nat. Assn. (2005) 129 Cal.App.4th 1494, 1504). A litigant may not make a "fortress out of the dictionary" (Cabell v. Markham (2d Cir.1945) 148 F.2d 737, 739 (Hand, J. Learned)), nor similarly employ the rules of grammar (see, e.g., Burris v. Superior Court (2005) 34 Cal.4th 1012, 1017 [neither grammar nor canons of construction dispositive in construing statutes, but rather are "guides to help courts determine likely legislative intent"]).

In this regard, it is a "basic rule that unless the provision or context otherwise requires, the singular number includes the plural and the plural the singular. . . ." (San Dieguito Partnership v. City of San Diego (1992) 7 Cal.App.4th 748, 758, citing Gov't Code §§ 5, 13) Gov't Code § 13 states: "The singular number includes the plural, and the plural the singular." Here, the purpose of the HAA is to increase the supply of all types of housing:

> The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to significantly *increase the approval and construction of new housing for all economic segments of California's communities* by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing

development projects and emergency shelters. That intent has not been fulfilled.

(Gov't Code sec. 65589.5(a)(2)(K), emphasis. added)

Further, both "units" and "developments" are expressed in the plural and should therefore be interpreted as referring generally to the housing development categories covered by the HAA, rather than mandating a minimum number of housing units. Subsection (2)(B) does *not* require a minimum number of residential units in a mixed used development, but instead refers to "residential use." Excluding single family home projects from subsection (2)(A) would create an absurd inconsistency, whereby the HAA would apply to a mixed-use development with one residential unit, but not to a single family home by itself.

The cases relied on by the Appellants significantly pre-date the current version of § 65889.5. The cases cited by Ms. Zoia were decided when the HAA applied only to low- and moderate-income developments. (Chandis Sec. Co. v. City of Dana Point (1996) 52 Cal.App.4th 475; Toigo v. Town of Ross (1998) 70 Cal.App.4th 309; and Sequoyah Hills Homeowners Assn. v.City of Oakland (1993) 23 Cal.App.4th 704.) Subsequent amendments to the HAA broadened its application, so that it "applies to housing development projects generally." (Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066, citing North Pacifica, LLC. v. City of Pacifica (2002) 234 F.Supp.2d 1053.) The Appellants rely on outdated cases. The HAA now applies to *all* housing development projects, including market rate homes. A single-family dwelling constitutes a housing development project under the HAA.

The Lot Pad Grading Guideline Cannot be Invoked to Deny or Condition the Projects

For the reasons set out in our letters dated January 26 and February 19, 2018, the Projects comply with the Hillside Design Guideline, section 19.40.050.E.2. The Planning Commission determined that the recommended size limit of 5,000 square feet applies to individual pad areas and should not be construed as an aggregate limit on all pads associated with a proposed project. Further, the Projects have been revised to use stepped foundations. This will reduce land disturbance associated with the work and ensure the total pad area for each Project does not exceed 5,000 square feet, by any definition.

In any event, because the HAA applies to the Projects, the extensive debate about the correct interpretation of the Lot Pad Grading guideline is moot. This guideline is not a "standard" under the HAA. Nor is it "objective." This means the City Council cannot rely on the Lot Pad Grading guideline to deny the Projects.

As noted in our previous correspondence, there is an important distinction between *guidelines*, such as the Hillside Design Guidelines, and *standards*. A project *must* comply with standards, whereas guidelines are discretionary. The Lot Pad Grading guideline is not a mandatory "standard" under the HAA and cannot be invoked to deny or condition the Projects. Planning Staff noted this distinction at the Planning Commission hearing in August 2017 and in the Supplemental Reports for this hearing (see § 7 of each Supplemental Report).

Further, the Lot Pad Grading guideline is not "objective." The City Council "has flexibility in how guidelines are applied" (Supplemental Reports, § 7). The application of the Lot Pad Grading guideline is "site-specific" and requires the Council to exercise its subjective judgment based on the "unique circumstances of the individual property" (Supplemental Reports, § 11). The City Council may consider a range of factors beyond pad sizes in weighing compliance with this guideline, including visibility, slope conditions, and the nature of the pad areas. That is, regardless of how the term "pad" is interpreted, the Lot Pad Grading guideline raises subjective considerations beyond pad sizing. The HAA prohibits denial of a project based on subjective guidelines.

As the Supplemental Reports acknowledge, the Lot Pad Grading guideline leaves room for interpretation. The Appellants have produced a letter from former Council Members, in which they provide a post hoc explanation of their intent fifteen years after the fact. Yet the same Council chose to express the grading and pad sizes as a suggestive guideline, rather than an objective standard. If the Council chooses to deny or condition the program based on this guideline, the Council would need to provide a clear definition of section 19.40.050.E.2 of the Hillside Design Guidelines, and what a "pad" means in this context. The Council would also need to address the inherent conflict between strict adherence to pad size limits and minimizing a project's visual impact. For instance, a single story home should be allowed larger lot pads than a two-story home due to the reduced visual impact, but the Appellants' approach would not allow this. Similarly, there is a qualitative difference between a graded yard area and an area with a structure on it.

Moreover, multiple residential developments have been built in the same hillside area with pad sizing well in excess of 5,000 square feet (see Attachment 3 to the Supplemental Reports). These developments were approved by the Planning Commission in accordance with our client's interpretation of the Lot Pad Grading guideline, and the Staff Reports did not raise pad sizes as a concern. For example, the Sebastiani Project at 175 4th Street East has an "aggregate pad area" of over 31,000 square feet. However, it was not reviewed for compliance with the Hillside Development Guidelines because the site was mostly flat – as is the Project site at 149 4th Street East. Under the Planning Staff's definitions and according to the Staff Reports, our client's Projects are "within the range of land disturbance associated with other hillside development in the immediate vicinity." It would be arbitrary and capricious for the City Council to apply the Lot Pad Grading guideline in a novel and unprecedented way as a pretext for denying the Projects.

Ms. Patri, in her letter dated January 26, 2018, requested an emergency moratorium on hillside development to allow the Hillside Development Ordinance to be amended. Any future moratorium or code amendment cannot be used to deny or condition the Projects. The HAA prohibits the retrospective application of new standards to a Project, as it compels approval of a housing development project if it "complies with objective general plan, zoning, and subdivision standards and criteria, including design review standards, **in effect at the time that the . . . application is determined to be complete**." (Gov't Code § 65589.5(j), emphasis added.) The City cannot amend the Hillside Ordinance to prevent the Projects' approval.

The Applicant is Prepared to Revise the Projects

The Projects currently before the City Council are the result of numerous revisions and iterations based on feedback from the Planning Commission and Staff. Notwithstanding our client's strong legal position and the many concessions already made to satisfy the City and the neighbors, our client is prepared to make further revisions to obtain final approval of the Project. Such revisions are conditional on the City Council approving the Projects on March 1 and directing Staff to oversee the implementation of the revisions.

Conclusion

The Appellants have advanced no substantial evidence or legal analysis that supports the denial of the Projects. We request that the City Council dismiss the appeals and affirm the Planning Commission's Mitigated Negative Declarations and approval of the Projects. Please contact me if you would like to discuss this matter further.

Very truly yours,

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