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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 questions raised by Council members during the hearing of the appeals for the above-captioned Projects on March 1, 2018 (the "March hearing"). In particular, we address why the CEQA review of the Projects was legally sufficient, and why the Housing Accountability Act compels approval of the Projects.

There is No "Substantial Evidence" of Significant Environmental Impacts

As we have noted in previous correspondence, 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.)

No substantial evidence was advanced at the March hearing to justify the Appellants' demand for further environmental review. Certain Council members raised concerns about whether the Projects should have been analyzed cumulatively as one Project, i.e., that the Projects were improperly "piecemealed." The underlying policy 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.) Cases involving improper piecemealing often involve a developer who has tried to hide the true scope of his or her project, which is the opposite of what has occurred here.

That is, three Projects were submitted at the same time at the request of the City, so that the Planning Commission could analyze all three Projects together. To the extent that a cumulative analysis was required, it has already occurred. The Supplemental Reports for the appeal hearing confirm this, 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, emphasis added.)

The expert reports prepared during the Initial Studies phase addressed the Projects cumulatively. The Preliminary Grading and Drainage analysis for each Project addressed the Projects as a whole, in addition to potential individual impacts for each Project. Similarly, the Historical Resources Survey *and* the Biological Survey prepared by WRA Environmental Consultants analyzed all three Project lots together. And in advance of the March hearing, expert letters were submitted to the Council demonstrating that the Projects were analyzed cumulatively where appropriate. In particular:

- Chad Moll, the Projects' civil engineer, confirmed that he and Planning Department staff assessed soil and drainage issues for the Projects on a cumulative basis, and that the Projects will have no significant effect, whether cumulatively or individually. Mr. Moll also refuted the incorrect contentions advanced by the Appellants' engineer, Mr. Machi.

- A second engineer, Timothy Schram, conducted a peer review and confirmed Mr. Moll's analysis and refutation of Mr. Machi's contentions.

- John Meserve, the arborist who conducted the tree study, clarified that he "considered all the sites together as if they were one project," and there will be no significant cumulative impact associated with tree removal.

- The Projects' architect, Clare Walton, confirmed that at the request of the Planning Commission she conducted a cumulative aesthetic analysis for Lots 227 and 228. The Fourth Street East Project was not required to be included in the visual modeling because it is entirely screened from the public view.

- The Projects were peer-reviewed by a Sonoma architect, Paul Berger of Paul Berger & Associates. Mr. Berger concurred with Ms. Walton's analysis, noting that the Projects comply with the intent of the Hillside Development Guidelines, which is to "preserve views to and from the Hillside."

A question was raised at the March hearing about who retained these experts. At the request of the Planning Department, our client retained experts to prepare reports at the Initial Studies and MNDs stage. This is the normal procedure for CEQA review, and it is appropriate for project applicants to retain experts to assist the Planning Department. As the Court of Appeal has held, it is even acceptable for a developer's expert or lawyer to draft a project's Environmental Impact

Report, provided the public agency exercises independent review and participates in the drafting process. (Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco (1980) 106 Cal.App.3d 893, 908; Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal. App.4th 357, 369-370.) Here, the experts' reports were independently reviewed by Planning staff, who drafted the Initial Studies and MNDs. The fact that our client retained the experts provides no basis to impugn their credibility or conclusions.

In short, there is ample evidence before the Council that the Projects will have no significant impact, whether individual or cumulative. The Appellants have not advanced any new "substantial evidence" about environmental impacts associated with the Projects.

If the Council intends to grant the appeals based on CEQA, the Council must identify the specific effects it claims will arise from the Projects, explain why it believes the effects would occur, and explain why it believes the effects would be significant (14 CCR §15204(b).) It would be unlawful for the Council to grant the appeals based on a general, unarticulated concern about cumulative effects, particularly in light of the evidence to the contrary.

The Housing Accountability Act Compels Project Approval

The HAA Applies to Market Rate Housing

At the March hearing, the Appellants' lawyer suggested that the Housing Accountability Act ("HAA") does not apply to the Projects because the Act is only concerned with affordable housing. This characterization of the HAA is flat wrong and was rejected by the Court of Appeal in Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066. In this case, the County contended that the HAA did not apply to market-rate housing developments. The County lost the lawsuit, with the Court of Appeal finding that the HAA was enacted to "facilitate the development of housing adequate for the needs of "all economic levels" of the population." (Honchariw at 1076.) There is no doubt that the HAA applies to market-rate housing developments, such as these Projects.

Ms. Zoia also argued that the HAA does not apply to single-family housing. This argument similarly has no legal basis. California statutory interpretation does not support such a reading, as we explained in our letter dated March 1, 2018. The purpose of the HAA is to significantly increase the supply of *all* types of housing, at all economic levels. (Gov't Code § 65589.5(a)(2)(K).) The HAA must 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't Code § 65589.5(a)(2)(L).) Moreover, given that the City treated the Projects as one development at the environmental review stage, it would be an opposite position for the City to say these are now individual homes, to support a position that ignores the Housing Accountability Act.

The Lot Pad Grading Guideline is not an "Objective Standard" under the HAA

At the March hearing, it was suggested that the Projects' alleged noncompliance with the lot pad grading guideline absolves the City of its HAA obligations (Mun. Code § 19.40.050.E.2). This is not correct. The lot pad grading guideline cannot be used to circumvent the HAA because the

guideline is not an objective "standard." To the contrary, it is one of nine "suggestive" guidelines related to hillside development, and a Project is approvable even if it does not comply with one or more of the guidelines (Mun. Code 19.01.060). This type of requirement is entirely discretionary; it is not an objective "standard" and cannot be used under the HAA to deny or condition a project. Requiring the Projects to strictly comply with *all* guidelines would destroy the distinction between "standards" and "guidelines" set out in the Sonoma Municipal Code.

The Projects Comply with All Standards

The Planning Department found the Projects complied with all guidelines, except the most conservative interpretation of the lot pad grading guideline. But staff recommended approval of the Projects on the basis that the proposed grading is "within the range of land disturbance associated with other hillside development in the immediate vicinity."

In any case, the Projects comply with all objective standards and guidelines, including the lot pad grading guideline. The question asked by the Appellants is whether the 5,000 square foot pad size restricts individual pads to 5,000 square feet, or the total aggregate size of all pads on the site. The Planning Commission determined the aggregate approach is correct; as Chairman Cribb noted, in light of the coverage allowances applicable to Hillside properties it makes more sense to read the guideline as applying to any individual lot pad, rather than an aggregate.

The only purported "evidence" to the contrary advanced by the Appellants is a letter from former Council members, in which they provide a post hoc explanation of their intent. There is nothing on the record that corroborates this letter. For instance, the contemporaneous City Council minutes contain no reference to how the 5,000 square foot limit should be interpreted. If the former Council members *had* intended their suggested interpretation, they would have made this clear in drafting the guideline. Similarly, the former Council chose to express the grading and pad sizes as a suggestive guideline rather than an objective standard. This letter also advances no evidence regarding what should be included in the definition of a pad. A non-contemporaneous statement of intent, especially one which is devoid of specific details, cannot be relied on to effectively amend legislation fifteen years after the fact.

In addressing this issue, it is instructive to consider how the lot pad grading guideline has been applied throughout its history. Following the enactment of the Hillside Development Guidelines, no Project has ever been built that complied with the Appellants' interpretation of the lot pad grading guideline. On the contrary, *every* Project approved in the Hillside Residential Development zone had an aggregate pad area greater than 5,000 square feet, including at least one of the Appellants' properties (see the attachment to the Staff Reports prepared for the appeals, entitled "Comparison of Hillside Projects"). Compliance with the lot pad grading guideline was not raised as a problem for *any* of these Projects. This past interpretation of the lot pad grading guideline is evidence of the guideline's true meaning.

It is ironic that our client is facing opposition to his Projects from neighbors who benefited from our correct interpretation of the guideline. The only difference here is the vocal opposition from the Appellants, who will apparently only be satisfied if nothing is built on the Project sites. We urge the Council to apply the guidelines in a fair and consistent manner. The City cannot

arbitrarily deny the Projects based on a novel interpretation of the Hillside Development Guidelines, to which no previous project has been subjected.

As the Staff Reports prepared in advance of these appeals note, the City Council's interpretation of the guidelines should be "consistent with past practice." Developers are entitled to rely on consistent previous applications of the Municipal Code. Should the Council wish to redefine the lot pad grading guideline to deny these Projects, it would require legislative action and CEQA review. The City would need to consider how to avoid deleterious impacts such as increasing fire danger and rendering lots unbuildable. The City would also need to justify reducing secondary water options for fire protection if it includes pools, and reducing defensible space options if it includes non-graded yards in the "pad" definition. A redefinition of the guideline may also violate state Accessory Dwelling Unit ("ADU") laws by making it impossible to build ADUs, and implicate the Americans with Disabilities Act.

The Staff Reports also advise that, while consistent definitions must be used, the application of each of the Hillside Development Guidelines is site-specific and discretionary, relating to the unique circumstances of the individual property (149 Fourth Street East Report, pp. 14-15). The Staff Reports also identify "other factors" beyond the 5,000 square foot provision, which may be used in weighing compliance with the lot pad grading guideline. These factors all support approval of the Projects. In particular:

- The Projects have negligible visibility from public views.
- The proposed design is the most appropriate option for the slope conditions of the development sites.
- The Projects have achieved a trade-off between single-story and two-story construction, resulting in less visible houses with larger pad sizes.
- Even if under the most conservative, novel, definition, the Projects exceed the 5,000 square foot guideline, the exceedances would be well within the range of pad sizes and land disturbance on adjacent properties.
- The nature of the pad areas supports approval, because a large portion of the alleged exceedance of the 5,000 square foot guideline is made up of features that will not be visually intrusive, such as yard areas. There is a qualitative difference between a graded yard area and an area with a structure on it.

In assessing compliance with the lot pad grading guideline, the Council must consider the guideline and the intent of the Hillside Development Guidelines as a whole.

Substantial Reasons Exist to Justify Any Non-Compliance

At the March hearing, Council Members suggested there are no findings as to "substantial reasons" justifying non-compliance with the lot pad grading guideline. No such findings have ever been required for previous, non-conforming projects in the Hillside Residential Development zone. In any case, the Planning Commission and staff *have* identified "substantial reasons" in their discussion of the Projects. For example, elements such as the swimming pool and yard area enhance the fire protection the Projects provide to the City of Sonoma, as Bill

Weisgerber confirmed in his March 25, 2018 letter to Council. Similarly, Mr. Moll has confirmed that from an engineering perspective, the Appellants' approach would make it impossible to achieve a safe and appropriate drainage design for the sites, and would be detrimental to the fire protection for the property and the safety of the surrounding area.

Importantly, the Projects satisfy the overall intent of the guidelines. In the August 10, 2017, hearing, Commissioner Sek noted that the "low-profile design protected the viewshed, which is the main objective of the Hillside regulations." Similarly, Commissioner McDonald noted that the proposed design solution was "most suited to maintain the view corridor," and is much less intrusive than nearby houses" (Minutes from 08/10/17 Planning Commission Meeting, p. 7).

As Ms. Walton has confirmed in her letter dated April 4, 2018, this low-profile design would not be achievable if the Council required strict adherence to the Appellants' interpretation of the 5,000 square foot limit. That is, "strict adherence to one of the guidelines may make compliance with the whole practically impossible." For example, an overly restrictive application of the lot pad grading guideline would result in a "more vertically driven" project. This would be more visually intrusive and contrary to the "Design and Location" guideline. (Mun. Code § 19.40.050.E.5.) The Appellants have fixated on one element of one guideline and taken it out of the overall context of the Hillside Development Guidelines. It is important that the City Council does not lose sight of the overarching purpose of the guidelines: "to preserve and protect views to and from the hillside areas within the city, to preserve significant topographical features and habitats, and to maintain the identity, character, and environmental quality of the city."

The Projects meet the objectives of, and achieve compliance with, the Hillside Development Guidelines. Even if the Appellants' novel interpretation of the lot pad grading guideline were correct, and the Council more restrictively defined a pad, this is not an objective standard that can be used to deny the Project under the HAA. That is, the HAA does not require compliance with the Hillside Development Guidelines. The Projects comply with all "objective general plan, zoning, and subdivision standards and criteria, including design review standards," and must be approved (Gov't Code § 65589.5(j)). Moreover, § 65589.5.(f)(4) of the HAA provides that a housing development:

> . . .shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity.

The Projects Comply with Site Coverage Limits

Finally, it emerged following the March hearing that Planning staff had apparently applied an incorrect definition of "site coverage" in assessing the Projects. This resulted in a finding that the site coverage associated with the proposed development of 149 Fourth Street East exceeds the 15% limit associated with development in the Hillside Residential zone by 1.3%. As soon as our client was made aware of the Planning Department's revised approach, he proposed amendments to the 149 Fourth Street Project to achieve compliance with this new definition of site coverage,

without conceding its veracity. Thus, all Projects remain in compliance with all objective standards under any interpretation.

Conclusion

In short, the only option available to the City is to deny the appeals and allow the Projects to proceed. If the City grants the appeals, our client will have standing to immediately file suit. (Pub. Res. Code § 21168; Code Civ. Proc. § 1094.5.) Mr. Jasper would prefer to work with the City to agree on a way forward and has already made significant revisions to the Projects' design in order to satisfy the concerns of neighbors and City staff. City Council has ignored these revisions and ignored Mr. Jasper's overtures at the March hearing, when he expressed willingness to make further concessions.

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,

ZACKS, FREEDMAN & PATTERSON, PC

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