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July 23, 2018

Client-Matter: 64662-060

BY HAND DELIVERY AND EMAIL

Councilwoman Lori Ogorchock
CITY OF ANTIOCH
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Re: Comments on Items 6 and 7 By Antioch Property Owner The Zeka Group For City Council Meeting July 24, 2018

Dear Councilwoman Ogorchock:

We write on behalf of our client The Zeka Group Incorporated (the "Zeka Group") with respect to the two initiatives presented to the City Council for consideration at its meeting on July 24 that sharply restrict the planned development of the Sand Creek Area.

As detailed below, both of the initiatives are deeply flawed and they raise numerous issues and questions that should be thoughtfully studied and considered before the City Council makes its ultimate decisions on each of the initiatives. Pursuant to Elections Code section 9212, the Zeka Group respectfully requests that the Council refer both initiatives to the relevant City agencies for further study on the impacts of the initiatives on the Sand Creek Area and the City of Antioch as a whole. By studying the initiatives, the City will be able to better understand—and to better inform the public—about the effects of the initiatives.

If the Council were to adopt either one or both of the proposed initiatives, the substance of those provisions could only be changed by a voter initiative. *See* Elections Code § 9217. In other words, if the Council votes to adopt one or both of the initiatives, then the Zeka Ranch development—indeed, any development that would require an amendment to the zoning set forth in the adopted initiative—would only be able to proceed by voter initiative. Any flexibility in addressing the development and preservation of the Sand Creek Area ***would be forever eliminated***.

Furthermore, to the extent the initiatives are to be placed on the ballot, doing so after the November 2018 election will permit the interested stakeholders time to seek a compromise benefitting all parties, including the City, rather than forcing a strict win-lose paradigm through

the initiative process. Adopting one or both of the initiatives outright, or putting either or both of them on the ballot in November 2018, will simply guarantee protracted, expensive litigation and, should either initiative be enacted, a competing ballot measure for November 2020.

The Zeka Group and Zeka Ranch

The Zeka Group owns the 640-acre Zeka Ranch property, on which they have long planned—with intensive City involvement in the planning process—to build a community of 400-upscale homes. The Zeka Group has been part of the ongoing growth and development plans for the City of Antioch since 1992. The Zeka Group participated in the development and implementation of the 2003 General Plan and has been an integral participant and contributor to the development of Future Urban Area (FUA) #1, and the subsequent Sand Creek Specific Plan Study area, now known as the Sand Creek Focus Area, as well.

As a responsible developer and contributor to the Antioch Community the Zeka Ranch project was the first and only development to advance a footprint that 1) was sensitive to the preservation of trees, 2) maintained habitat zones for the Alameda Whip Snake, including migration corridors and setbacks to Sand Creek, and 3) focused on the preservation of predominate ridgeline elements.

The Zeka Group developed this desirable approach to planning by engaging H.T. Harvey and Associates Ecological Consultants, a well-known and respected firm, specializing in biological resource assessment and determination. H.T. Harvey prepared a full biological assessment for the entire Zeka Ranch project. The assessment was utilized as a planning tool to judiciously locate the final development footprint to minimize impacts and to avoid biological assets identified by the final biological assessment. The biological assessment was generated at great financial expense to the Zeka Group. The Zeka Group's management team spearheaded by Louisa Zee Kao believes that the unique setting and geography of the site warranted the expense of the assessment, and its inclusion in the planning process.

In addition, plans for the Zeka Ranch were created by the same architect and land planner that laid out the map for the successful Blackhawk development, Doug Dahlin of the Dahlin Group. The Zeka Group hired the Dahlin Group to ensure the highest quality of new home development in Antioch. In response to comments from the City and the community, the Zeka Ranch plans have been reduced from 1,100 homes to 400 homes on the ranch's 640 acres.

The Zeka Group has invested over $25 million in Antioch by purchasing the ranch, paying property taxes, developing plans, and paying city fees, all while following the guidelines as set down by the voters of the county, the voters of Antioch, city staff, the East Bay Regional Parks District, planning commissioners and city council members.

The Zeka Group looks forward to continuing its responsible development in the Antioch community as it continues to grow and flourish, with the development of Zeka Ranch. The opportunity for the cooperatively established Zeka Ranch development would be stolen from the citizens of Antioch and The Zeka Group, if either of the two competing initiatives before the Council are adopted.

The Proposed Initiatives are Deeply Flawed

The first initiative is entitled Let Antioch Voters Decide: The Sand Creek Area Protection Initiative, and is presented by Let Antioch Voters Decide, a front group for Save Mount Diablo. The initiative purports to prohibit the development of all of the Sand Creek Area west of Deer Valley Road, including the entirety of Zeka Ranch. The initiative area is entirely within the Urban Limit Line.

The second initiative is entitled the West Sand Creek Tree, Hillside, and Open Space Protection, Public Safety Enhancement, and Development Restriction Initiative. It is presented by national developer Richland Communities, the owner and developer of a proposed 551.5 acre development called "The Ranch" consisting of over 1,300 single family homes and 54,000 square feet of commercial space, West of Deer Valley Road and East of Empire Mine Road, and next to Zeka Ranch. The Ranch's initiative would not-so-coincidentally preserve the developability of its land, while effectively eliminating the development potential of Zeka Ranch. Richland Communities does not have local ties to the Antioch community. Indeed, Richland won't be involved with the actual development in Antioch. Rather, their business model is to entitle the property, and then to sell it to the highest bidder, leaving Antioch holding the bag for the negative consequences of its hastily drafted and poorly reasoned initiative.

The inevitable result of adopting either initiative, or directing that either initiative be placed on the ballot, would be to create myriad legal issues that will inevitably spur extensive litigation both before and after the initiative election, and would leave the City facing extensive liabilities. The potentially avoidable legal issues the City will confront if it enacts one or both of the initiatives include, but are not limited to, the following:

Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from depriving a person of life, liberty, or property without due process of law. The touchstone of substantive due process is the protection of the individual against arbitrary government action, and the due process clause was intended to prevent the government from abusing its power or employing it as an instrument of oppression. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992). A violation of substantive due process occurs where the government action is either (1) irrational or arbitrary; or (2) not rationally related to a legitimate government interest. *Lingle v. Chevron*, 544 U.S. 528 (2005).

Both initiatives violate the Due Process Clause, subjecting the City to liability if it either were enacted. The law is clear and well-established: a planning or zoning regulation ***cannot*** be aimed at, or discriminate against, a particular property owner or applicant. *See G&D Holland Construction Co. v. City of Marysville*, 12 Cal. App. 3d 989, 994 (1970); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-1156 (9th Cir. 1990). Indeed, multiple courts have looked at substantially similar situations—the effective downzoning of a particular owner's property to prevent development—and determined that such efforts are patently unconstitutional.

- *Arnel Development Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330, 337 (1981): the court ruled that the enactment of an initiative measure downzoning property was arbitrary and discriminatory where enacted without considering appropriate planning criteria and for the sole and specific purpose of defeating a single development.

- *Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990): allegations that city council approved a 190 unit project with conditions that had been substantially met, then same council members abruptly changed course and rejected the project motivated not by legitimate regulatory concerns, but by political pressure from neighbors to preserve property as open space, could constitute arbitrary and irrational conduct.

- *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987): rejection of subdivision and subsequent downzoning of property violated property owner's due process rights given evidence that county's general plan/subdivision inconsistency determination was irrational and arbitrary and aimed at defeating particular development project.

In addition, the Save Mount Diablo initiative also would violate the Due Process Clause because it fails to provide the City with an adequate legal standard to apply. *See Morrison v. State Board of Education*, 1 Cal. 3d 214, 231 (1969) (laws "must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies"). The initiative leaves open broad issues for application unbounded by specific standards. *See, e.g.*, §§ 7, 18. Furthermore, the Save Mount Diablo initiative improperly impedes the executive, prosecutorial authority of the City by mandating how the City exercises its enforcement discretion. *See* § 19; 7 Ops. Cal. Atty. Gen. 85, 87 (1946); 80 Ops. Cal. Atty. Gen. 315, 318 (1997).

Equal Protection

The Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. *See also* Cal. Const., art. I, sec. 7. The concept of equal protection has been defined to mean that no person or class of persons may be denied the same protection of law that is enjoyed by other persons or other classes in like circumstances. *Hawn v. County of Ventura*, 73 Cal. App. 3d 1009, 1018 (1977). "[A] deliberate, irrational discrimination, even if it is against one person (or other entity) rather than a group, is actionable under the equal protection clause." *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 538 (7th Cir. 2009).

The term spot zoning is used to describe a zoning action that violates the principle of equal protection because of its discriminatory nature. *See, e.g., Ross v. City of Yorba Linda*, 1 Cal. App. 4th 954 (1991); *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454 (1958). Here, both initiatives—and especially the Richland initiative—violate equal protection because they treat Zeka Ranch differently than the Richland-owned land adjacent to Zeka Ranch. Although the initiatives both give lip service to the purported justifications for the differential treatment, those justifications aren't borne out by the facts. At the very least, the City has a duty to investigate the justifications for the differential treatment to determine whether they pass muster, or whether the initiatives violate Zeka Ranch's right to equal protection under the law.

Single Subject Rule

The initiatives violate the California Constitution's single subject rule, which provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal. Const. art. II, § 8(d). The single subject rule requires that all

parts of an initiative "be reasonable germane to a common theme, purpose, or subject." *Californians For An Open Primary v. McPherson*, 38 Cal. 4th 735, 764 n.29 (2006). Thus, the single subject rule "forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" *Id.*; *see also California Trial Lawyers Assn. v. Eu*, 200 Cal. App. 3d 351, 355-360 (1988).

Here, both initiatives are directed at the subject of the development (or, more accurately, the prohibition on development) in the Sand Creek Area. Yet both initiatives also tackle another, unrelated issue: the urban limit line. The urban limit line is irrelevant to the initiatives' prohibition of development in the Sand Creek Area: the Area lies within the urban limit line, and will remain within the urban limit line even if one of the initiatives is enacted.

Indeed, it appears that the language relating to the urban limit line was added as a marketing ploy to encourage voters to adopt the initiatives: it is generally well-understood that the citizens of Antioch value the urban limit line and favor retaining its current placement. Thus, the initiative backers are relying on this extraneous addition to help sell the public on the proposed, unrelated restrictions on development in the Sand Creek Area—precisely the type of multi-subject initiative that is prohibited by the single subject rule.[1]

General Plan Inconsistency

The General Plan is the governing document for a city's future development. "[T]he general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Gov. Code § 65300.5. This principle "has been uniformly construed as promulgating a judicially reviewable requirement that the elements of the general plan comprise an integrated internally consistent and compatible statement of policies." *Concerned Citizens of Calaveras County v. Board of Supervisors*, 166 Cal. App. 3d 90, 96-97 (1985) (internal quotation marks omitted).

Here, both of the initiatives would make numerous amendments to the City's General Plan, but the purported amendments do not, and cannot, resolve the inherent inconsistencies created by enacting the initiatives when the initiatives are fundamentally at adds with the over 20 years of planning for the development of the Sand Creek Area—***known as Future Urban Area #1***—that are enshrined in the General Plan. These inconsistencies—and the many additional

[1] Indeed, as discussed below, the enactment of one of the initiatives is very likely to result in the City expanding the urban limit line in order to accommodate the growth required by the Regional Housing Needs Allocation.

potential inconsistencies with the General Plan and the updated Housing Element—are precisely the types of issues that should be referred to the City's professional staff for additional study.

Indeed, the Save Mount Diablo initiative makes clear that the initiative drafters aren't sure whether they have actually made the initiative consistent with the General Plan, inserting a provision that purportedly nullifies "any provision of the General Plan, whether adopted before or after this Initiative becomes effective, . . . to the extent that it is inconsistent with the Initiative . . . ." (§ 18(a).) That vague suggestion that anything in the General Plan is invalid to the extent it is inconsistent with the initiative is unenforceable. It is the initiative drafter's job to ensure that the initiative is consistent with the General Plan by amending all pertinent portions of the General Plan to ensure inconsistency. As demonstrated above, neither initiative complies with this requirement. And, at the very least, the City should refer the issue to staff to determine the scope of the differences between the General Plan and these initiatives before determining whether to adopt the initiatives or put them on an upcoming ballot.

Violation of State Housing Laws

A local government is not permitted to adopt ordinances that conflict with the State Planning and Zoning Law, Government Code § 65000 *et seq.* *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 547 (1990). As just one example of the problems with the initiatives, the elimination of the long-planned development at Zeka Ranch could result in the City's inability to meet its regional housing needs allocation. *See* Gov. Code § 65913.1(a). In particular, the City has long-recognized a need to develop additional executive housing so that it can provide housing for "all income categories" pursuant to State law. *Id.* The Zeka Ranch development is one of the few planned developments that would construct such executive housing, yet the initiatives would effectively take that possibility off the board for the City. Before allowing the voters to consider the initiatives, the City must study whether one or both could result in the City's failure to meet its responsibilities under State housing laws.

Breach of Contract/Estoppel

To date, the Zeka Group has spent tens of millions of dollars in reliance on (1) the 1993 Annexation Agreement; (2) the City's approved land use designations; and (3) the City's long-standing plans and approvals in support of the eventual residential development of Zeka Ranch. As a result, the City would be in breach of contract and/or estopped from enacting the proposed initiatives. *See, e.g.*, *Hock Investment Co. v. City and County of San Francisco*, 215 Cal. App.

3d 438, (1989). Indeed, in the 1993 Annexation Agreement, the City promised to develop a specific plan that would guide the orderly development of the area. That specific plan has never been completed, a clear breach of the agreement. The City should study the potential liability arising from its breach of contract and estoppel before enacting either of the initiatives so the public can understand what it is they are buying by voting for or against each respective initiative.

Unconstitutional Taking

Finally, the enactment of either initiative will inevitably result in expensive regulatory takings litigation and a significant judgment against the City for the taking of the value of Zeka Ranch.

The takings clause of the Fifth Amendment to the United States Constitution and Article I, section 19 of the California Constitution require a governmental entity to pay just compensation when it "takes" private property for public use. A regulatory taking—such as would be caused by the initiatives—occurs when a "regulation goes too far," such that it is effectively the equivalent of a physical taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13 (1994) ("a 'regulatory taking' . . . results from the application of zoning laws or regulations which limit development of real property").

Here, after decades of planning and collaboration with the City for the orderly development of the Zeka Ranch, including the expenditure of millions of dollars, the initiatives would pull the rug out from under the planning process and dramatically reduce, if not eliminate, the economically viable use of the property. The City would be on the hook for the corresponding reduction in value, which could reach into the hundreds of millions of dollars. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Conclusion

The thoughtful development and preservation of the Sand Creek Area is critical to Antioch's future. That is why the City, Zeka Ranch and interested community members have spent significant time over many years developing plans to appropriately develop the Zeka Ranch area—all of which is within the voter-approved ULL—while preserving the natural beauty of Antioch. Indeed, the City is set to begin a General Plan update in the near future that is

intended to be a comprehensive planning document for the City's future. The City cannot plan in a comprehensive manner when areas are spot zoned without consideration of the whole of Antioch.

These two initiatives, prepared by special interest groups based outside the City, should be viewed skeptically. Neither Save Mount Diablo nor Richland Communities have the interests of Antioch at heart, and their attempts to get around years of planning decisions by Antioch and its community members—and to preclude comprehensive planning in the next General Plan iteration—must be carefully studied and reviewed before this Council can make a well-considered decision.

Indeed, the initiative process guarantees that there will be a winner, and a loser, with no collaboration, compromise, or input from the City and its expert staff members. That is the very nature of the initiative process, and it is particularly damaging in the context of the City's ongoing, comprehensive land use planning. By instructing staff to study the issues further, the involved parties—and the City—will have the benefit of Antioch experts' views on the effects of these initiatives. And, by putting the initiatives on the ballot after 2018, it will allow the stakeholder to seek the consensus, compromise, and thoughtful study that is hallmark of good, comprehensive land use regulation.

Very truly yours,

Andrew A. Bassak

cc: Honorable Mayor Sean Wright
Mayor Pro Tem Lamar Thorpe
City Manager Ron Bernal
Councilwoman Monica Wilson
Councilman Tony Tiscareno
Interim City Attorney Derek Cole
Louisa Zee Kao, President, The Zeka Group
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