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June 9, 2020

VIA EMAIL AND FIRST CLASS MAIL

Sean Wright, Mayor for the City of Antioch
and Members of the City Council
City of Antioch
200 H Street
Antioch, CA 94509-1285

Re: Consideration of the placement of 'Let Antioch Voters Decide Initiative,' on General Election Ballot for November 3, 2020

Honorable Mayor and Council Members:

On behalf of our client The Zeka Group Incorporated ("Zeka Group"), we submit the following comments to the City Council's "Consideration of the placement of the 'Initiative to Change General Plan Designations within the Sand Creek Focus Area And Permanently Require Voter Approval of Amendments To Urban Limit Line,' also known as the 'Let Antioch Voters Decide Initiative,' on the November 3, 2020 General Election Ballot per California Elections Code section 9215(b)." This matter is scheduled to be addressed by the Council at the June 9, 2020 public hearing.

The City Council should **not** vote to place the Let Antioch Voters Decide Initiative on the November 3, 2020 ballot for three reasons: (1) the Elections Code does not authorize the City Council to vote to place the Initiative on the ballot nearly two years after the Council first considered the Initiative; (2) while the Contra Costa Superior Court judgment that voided the City's adoption of the Initiative does direct the City to place the Initiative on the ballot—that judgment has been appealed and is therefore stayed; and (3) the Initiative is fundamentally flawed and, if placed on the ballot, will be subject to avoidable costly pre-election litigation.

Background of the Let Antioch Voters Decide Initiative

The Mayor and Council Members are well aware of the history of the Let Antioch Voters Decide Initiative, and we will not repeat that history in detail. To summarize, the Initiative was presented for approval to the City Council on July 24, 2018. Pursuant to Elections Code section 9215(c), at that hearing the Council chose to send the Initiative out for further study. Following receipt of the 9215 Report, on August 28, 2018, the City Council voted to adopt the Initiative, rather than sending it to the November 2018 ballot.

The Initiative then was challenged in Contra Costa County Superior Court by both the Zeka Group and another neighboring developer, Oak Hill. The challenges were successful, and the Court found that the City Council's adoption of the Initiative was improper and void. The Court's Judgment also required the City Council to place the Initiative on the ballot. That Judgment is

now stayed, originally pursuant to the City's appeal, which was later dismissed, and now pursuant to Initiative proponent Let Antioch Voters Decide's appeal, which is currently pending.

The City Does Not Have Authority to Place the Initiative on the Ballot Pursuant to Elections Code section 9215(b)

Elections Code section 9215 provides, in full:

If the initiative petition is signed by not less than 10 percent of the voters of the city, according to the last report of registration by the county elections official to the Secretary of State pursuant to Section 2187, effective at the time the notice specified in Section 9202 was published, or, in a city with 1,000 or less registered voters, by 25 percent of the voters or 100 voters of the city, whichever is the lesser number, the legislative body shall do one of the following:

(a) Adopt the ordinance, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented.

(b) Submit the ordinance, without alteration, to the voters pursuant to Section 1405.

(c) Order a report pursuant to Section 9212 at the regular meeting at which the certification of the petition is presented. When the report is presented to the legislative body, the legislative body shall either adopt the ordinance within 10 days or order an election pursuant to subdivision (b).

Here, the City voted to follow the process in subsection (c). The City Council requested a report, which was received by the Council at a special meeting on August 21, 2018. Seven days later, on August 28, 2018, the Council adopted the Let Antioch Voters Decide Initiative. Pursuant to section 9215(c), the last day for the City to place the Initiative on the ballot was August 31, 2018. It is now far too late for the City to place the Initiative on the ballot under any of the provisions in section 9215.

The Contra Costa County Superior Court Judgment is Stayed

It is clear that the City is not permitted to place the Let Antioch Voters Decide Initiative on the November ballot pursuant to Elections Code section 9215(b). Rather, the City appears to be relying on the Court's Judgments in Zeka Ranch and Oak Hill's litigation that challenged the Initiative. That reliance is misplaced. Although the Judgment does instruct the City to place the Initiative on the ballot, the Judgment is automatically stayed by operation of law during the pendency of Let Antioch Voters Decide's appeal.

Code of Civil Procedure section 916(a) provides, with some exceptions not relevant here: "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . ." The enforcement of the judgment is automatically stayed through the resolution of Let Antioch Voters Decide's appeal. (See also Code Civ. Proc. § 1094.5(g) ["If an

appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order.”].)

The stay on enforcement is particularly reasonable here, where the City is faced with potentially spending hundreds of thousands of dollars of its limited financial resources in order to place the Initiative on the ballot, where the entire issue could be mooted based on the outcome of the appeal.

The Initiative Is Fundamentally Flawed and Subject to Additional Pre-election Challenge

Finally, if the City places the Initiative on the ballot now, it will be subject to pre-election challenge based on procedural issues identified above. In addition, the Initiative is subject to potent substantive challenges. Most importantly, the Initiative runs afoul of SB 330, which prohibits local initiatives that result in changes to land use designations to less intensive uses. (Gov. Code § 66300 *et seq.*) That is, of course, the entire goal of the Initiative—to change land use designations in the Sand Creek area to minimally intensive uses (i.e., open space).

Conclusion

The City is not permitted to place the Let Antioch Voters Decide Initiative on the November ballot during the pendency of Let Antioch Voters Decide’s appeal. Indeed, the appeal could moot the issue entirely, or result in a new or different requirement for City Council action. Placing the initiative on ballot now will result in inevitable challenges and the waste of finite City resources during a time when all available resources should be wholly focused toward addressing these unprecedented and uncertain times. The Zeka Group requests that the City table the Let Antioch Voters Decide Initiative until the appeal is decided.

Respectfully submitted,



Andrew A. Bassak

cc: Joy Motts, Mayor Pro Tem
Monica E. Wilson, Council Member
Lamar Thorpe, Council Member
Lori Ogorchock, Council Member
Arne Simonsen, City Clerk
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Thomas Lloyd Smith, City Attorney
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