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Our File No. 49011.0048

December 26, 2022

VIA ELECTRONIC MAIL

Beverly Grossman Palmer
Strumwassser & Woocher LLP
1250 6th Street, Suite 205
Santa Monica, CA 90401

Re: **Referendum of Ordinance No. 1461**

Dear Ms. Grossman Palmer,

On December 20, 2022, NUWI Sierra Madre, LLC ("Developer") submitted a preliminary application under Senate Bill No. 330 ("SB 330 Application") and a filing fee for a new development at 700 N. Sunnyside Avenue in Sierra Madre ("Property"). Attached as Exhibit A is a copy of the application. The application will be posted to the City's website on January 3, 2023, when staff returns to City Hall.

I analyzed the SB 330 Application and reached the following tentative conclusions:

- The Developer's SB 330 Application was made possible by the referendum proponents' decision to referend the Ordinance No. 1461, but not Resolution No. 22-58;
- The City is required to process the Meadows Project and New Project simultaneously pursuant to the Permit Streamlining Act and Housing Accountability Act;
- The Developer's SB 330 Application locks in the City's existing development standards and limits future hearings to a total of five;
- The Housing Accountability Act limits the City's discretionary review of the New Project;
- The Density Bonus Law allows the Developer to circumvent many of the City's development standards;

- While the City has yet to complete an initial study, the New Project is unlikely to require a full Environmental Impact Report ("EIR"); and
- The referendum proponents will not be able to referend the City's quasi-adjudicative decisions regarding the New Project.

I close with a plea on behalf of the City to be conveyed to your clients — please withdraw the referendum. I am available at your convenience to discuss the matter.

1. *The Developer's SB 330 Application was made possible by the referendum proponents' decision to referend Ordinance No. 1461, but not Resolution No. 22-58*

The referendum does not seek to overturn the City Council's decision to adopt Resolution No. 22-58, which:

(1) Certified the Environmental Impact Report for The Meadows at Bailey Canyon ("Meadows Project");

(2) Adopted findings of fact and a mitigation and monitoring program under the California Environmental Quality Act ("CEQA");

(3) Approved a General Plan land use map amendment; and

(4) Approved a lot line adjustment.

The referendum only seeks to overturn the City Council's decision to adopt Ordinance No. 1461, which approved:

(1) a zoning map amendment,

(2) a special plan, and

(3) a development agreement.

As a result, the effective date of the zoning map amendment is suspended during the pendency of the referendum, while the General Plan land use map amendment took effect on September 20, 2022. Currently, the General Plan designation for the Property is Residential Low-Density and the zoning designation is Institutional. The General Plan and zoning designations are inconsistent.

Government Code section 65589.5, subdivision (j)(4), states:

> For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan.

Since the General Plan land use designation for the site is now Residential Low-Density, the Developer was able to submit a SB 330 Application for a 50-unit housing development project ("New Project").[1]

Per the Housing Accountability Act section cited above, the New Project cannot be rejected as inconsistent with the underlying Institutional zoning standards and criteria for the Property if the New Project is consistent with the "objective general plan standards." This reading is confirmed by a recent decision by Judge Chalfant in the case of *YIMBY v. City of Los Angeles*[2] — attached as Exhibit B. While Judge Chalfant's decision is not binding precedent, it is a clear statement of the current law, and we expect any reviewing court to find it persuasive. Staff is still reviewing the application to determine compliance with the Residential Low-Density designation's objective standards and other applicable objective standards.

Assuming that the New Project is consistent with those objective standards, the Housing Accountability Act states that the New Project "shall not require a rezoning." That means the New Project will not require the Planning Commission to recommend and the City Council to approve the adoption of an ordinance. Neither can the City insist upon the adoption of a specific plan or development agreement to impose limits on the development. The New Project will only require an environmental review, a tentative tract map, and a design review permit, all of which are quasi-judicial actions approved via resolution — with only the tentative tract map requiring City Council approval.

2. *The City is required to process the Meadows Project and New Project simultaneously pursuant to the Permit Streamlining Act and Housing Accountability Act*

Neither the Sierra Madre Municipal Code nor State law prevent an applicant from submitting multiple development applications for the same parcel of land. The Planning Department is required to process all of them pursuant to the Permit Streamlining Act and Housing Accountability Act. The Developer now has 180 days to submit a complete

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[1] Gov. Code, § 65589.5, subd. (h)(2)(A).

[2] *YIMBY v. City of Los Angeles* (Case No. 21-STCP-03883 Cal. Super. Ct. July 29, 2022)

application, and the City will need to determine whether the application is complete within 30 days.[3]

Election Code section 9241 states, in part:

> If the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters.

The one-year ban on reenacting an ordinance applies to the City Council and is intended to "protect the right of the people to exercise legislative power by preserving the status quo until a referendum can be held."[4] The one-year ban does not extend to the Developer's submission of a new application under existing law — especially where the new application will not require an ordinance to process. In fact, this was contemplated in *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1084, where the California Supreme Court ruled that "a referendum petition satisfying the statutory prerequisites suspends the effective date of the challenged zoning ordinance amendment until a majority of voters approve the amendment" but that a property subject to the referendum may still "undergo development, or legal rights may vest in development of the property before an initiative can be brought to a vote."

3. *The Developer's SB 330 Application locks in the City's existing development standards and limits future hearings to a total of five*

Government Code section 65589.5, subdivision (o)(1), states:

> Subject to paragraphs (2), (6), and (7), and subdivision (d) of Section 65941.1, a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application including all of the information required by subdivision (a) of Section 65941.1 was submitted.

The purpose of the preliminary application is to lock into place existing ordinances, policies, and standards, which includes "general plan, community plan,

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[3] Gov. Code, § 659411, subd. (d)(1)

[4] *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1107.

specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency, . . . including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions."[5] As noted, the existing development standards are those related to the Residential Low-Density General Plan designation. Therefore, the City can no longer amend the General Plan and Zoning Code to limit the development standards relevant to the New Project. The City Council's hands are tied.

Subject to further study, the exceptions under the statute do not appear to apply. Given that an EIR was already approved for the Meadows Project, and that the New Project is similar to the Meadows Project in density, intensity, and layout, the City believes the exceptions under paragraphs (2) and (6) of the same section may not apply. Additionally, the exception under paragraph (7) of the same section and Government Code section 65941.1, subdivision (d), are not relevant to the discussion at this point.

Furthermore, the review of the three entitlements will be limited to five public hearings. Government Code section 65905.5, subdivision (a), states:

> Notwithstanding any other law, if a proposed housing development project complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, after the application is deemed complete, a city, county, or city and county shall not conduct more than five hearings pursuant to Section 65905, or any other law, ordinance, or regulation requiring a public hearing in connection with the approval of that housing development project. If the city, county, or city and county continues a hearing subject to this section to another date, the continued hearing shall count as one of the five hearings allowed under this section. The city, county, or city and county shall consider and either approve or disapprove the application at any of the five hearings allowed under this section consistent with the applicable timelines under the Permit Streamlining Act (Chapter 4.5 (commencing with Section 65920)).

The Meadows Project underwent 13 separate hearings before receiving approval. The New Project will be limited to 5 hearings between both the Planning Commission and City Council.

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[5] *Id.*, § 65589.5, subd. (o)(4).

4. *The Housing Accountability Act limits the City's discretionary review of the New Project*

Government Code section 65589.5, subdivision (j)(1), states:

> When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:
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> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
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> (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

The Housing Accountability Act severely constrains the City's ability to deny the New Project or reduce its density if staff determines the New Project complies with the Residential Low-Density objective standards and criteria.[6] This limitation will apply to both the City's review of the required tentative tract map and design review permit applications.[7] Without the ability to deny a project based on subjective findings, the City's tentative tract map and design review procedures will be of little practical significance as

[6] Gov. Code, § 65589.5, subd. (j)(1).
[7] Gov. Code, § 65589.5, subd. (h)(6).

the Planning Commission and City Council will be limited to reviewing only the objective standards reviewed by City staff.

The findings required to defensibly disapprove the New Project or impose conditions that reduce the New Project's density would be very difficult to make. First, it would be difficult for the City to identify specific, adverse impacts upon the public health or safety that cannot be mitigated where it has already approved an EIR for a similar project (the Meadows Project). Second, the City would have the burden, in the event of litigation, of supporting the findings with a preponderance of the evidence — a higher judicial burden of proof than otherwise required for land use decisions.

These limitations did not exist in the Planning Commission and City Council's review of the specific plan and development agreement for the Meadows Project. During those hearings, both bodies exercised their full discretionary review to control the design and development standards of the Meadows Project. The New Project will not benefit from that same level of review. The City's hands will be tied.

5. *The Density Bonus Law allows the Developer to circumvent many of the City's development standards*

The New Project contemplates 50 single-family units. Here's how the Developer achieved that figure:

Government Code section 65915, subdivision (f), states:

For the purposes of this chapter, 'density bonus" means a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, no increase in density.

The Developer submitted a SB 330 Application under the R-1-15 development standards — the most restrictive zoning designation consistent with a Residential Low-Density development. Under R-1-15, the Developer is limited to 1 single-family residential dwelling unit on 15,000 square foot lots. The density bonus calculation calls for using the "gross residential density," which looks to the total lot size without deducting for roads, drainage improvements, etc. The total lot size is approximately 17.3 acres (753,588 square feet). Therefore, the "otherwise maximum allowable gross residential density" would be 753,588/15,000 which equals 50.24 or 51 units rounding up.

The New Project proposes 47 market rate units and 3 units affordable to very low-income households. With 6 percent of the New Project reserved for very low-income households, the Developer qualifies for the following benefits:

- A 20 percent density bonus (resulting in an additional 10 units);[8]
- one incentive/concession;[9]
- an unlimited number of waivers or reductions of development standards that will have the effect of physically precluding the construction of a development meeting the densities or with the concessions or incentives permitted;[10] and
- favorable parking ratios based on the number of bedrooms.[11]

Based on the SB 330 Application, it appears the Developer does not intend to avail itself of the density bonus. However, the Developer will be seeking an incentive to increase the allowable gross floor area. Additionally, the Developer seeks waivers of the minimum lot size, lot coverage, front setback, and angle plane requirements of the R-1-15's development standards because, it claims, "Compliance with the aforementioned development standards would physically preclude development of the project as proposed with the incentives granted by Gov. Code Section 65915." The City's ability to deny the requested incentive and concession is very limited.

6. *The New Project is unlikely to require a full Environmental Impact Report*

While further environmental review would be required for any new project, the scope of the review remains uncertain. Another environmental impact report is likely not required for the New Project as one has already been performed for the Meadows Project, which is similar in density, intensity, and layout. Staff expects the New Project, subject to further review via the initial study process, to result in similar environmental impacts.

Under Public Resources Code section 21166 and section 15162 of title 14 of the California Code of Regulations, once the lead agency certifies an EIR and approves the project, the lead agency may not require a subsequent or supplemental EIR for a later discretionary approval unless:

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[8] Gov. Code, § 65915, subd. (f)(2).
[9] Gov. Code, § 65915, subd. (d)(2)(A).
[10] Gov. Code, § 65915, subd. (e)(1).
[11] Gov. Code, § 65915, subd. (p)(1).

- Substantial changes are proposed in the project that will require major revisions of the EIR;
- Substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions in the EIR; or
- New information of substantial importance to the project that was not known and could not have been known when the EIR was certified as complete becomes available.

California courts have interpreted these provisions as establishing a presumption against additional review after an initial EIR is certified. In *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049 a court ruled that "after a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review."[12] The California Supreme Court concurs, holding, "Once a project has been subject to environmental review and received approval, section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency."[13] Here – the City Council's adoption of Resolution No. 22-58 certified the EIR. The referendum does not seek to overturn Resolution No. 22-58, thus the EIR is forever certified. If additional environmental review is required for the site, it would likely take the form of a subsequent EIR, supplemental EIR, or addendum, as determined through the outcome of the initial study and environmental review process.[14]

7. *The referendum proponents will not be able to referend the City's decision quasi-adjudicative decisions regarding the New Project*

Courts have created "a general dichotomy between a governing body's legislative acts, which are subject to initiative and referendum, and its administrative or executive acts, which are not."[15] Approval of a zoning amendment, specific plan, and development agreement are clearly legislative acts subject to referendum. But the approval of a

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[12] Pub. Res. Code, § 21166; *San Diego Navy Broadway Complex Coalition v City of San Diego* (2010) 185 Cal.App.4th 924, 934; *Melom v City of Madera* (2010) 183 Cal.App.4th 41, 48; *Moss v County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049.

[13] *Friends of the College of San Mateo Gardens v San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 949.

[14] *See* Cal. Code Regs. 14 § 15162-4.

[15] *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.

tentative tract map[16] and design review permit[17] have been held to be administrative acts. Therefore, if the Planning Commission and City Council render a quasi-adjudicative decision on the New Project, the opponents of the New Development will not have an opportunity to referend the decision.

8. *While the City has yet to complete an initial study, the New Project is essentially the same as the Meadows Project, except slightly denser and devoid of the benefits conferred to the City*

A side-by-side comparison of the Meadows Project and the New Project illustrates the limitations imposed on the City.

	Meadows Project	New Project
Density	42 Units	50 Units
Number of Hearings	13	5
Full Discretionary Review	Yes	No
Basis for Deviation from Underlying Development Standards	Specific Plan & Development Agreement	Density Bonus Law
Environmental Review	Environmental Impact Report	Subsequent EIR, Supplemental EIR, or Addendum (TBD)
Possible to Referend	Yes	No
Public Park	Yes	No
Conservation Easements	Yes	No
$983,500 Payment for Net Zero Water	Yes	No

16 *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 610.
17 *Wilshire v. Superior Court* (1985) 172 Cal.App.3d 296, 304.

$250,000 Payment for Public Safety Purposes	Yes	No
Development Schedule Under Development Agreement	Yes	No

9. *Concluding request on behalf of the City*

At this point, what does your client stand to gain from pursuing the referendum? If the election proceeds and the referendum fails, the City will process the Meadows Project. If the election proceeds and the referendum succeeds, the City will process the New Project. Under both scenarios, the Developer proceeds with a housing development project. Under both scenarios, the City will incur a substantial expense in underwriting an election.[18]

On behalf of the City, I respectfully request that your clients please withdraw the referendum petition. Under Elections Code section 9237.2, "The proponent of a referendum may withdraw the referendum at any time before the 88th day before the election, whether or not the petition has already been found sufficient by the elections official." We still have time.

City Manager Jose Reynoso is requesting a meeting with your clients. Roberta Malfitano, the City Manager's Executive Assistant, will be contacting the referendum proponents next week to schedule a meeting for the first week of January. Unfortunately, I will be unable to attend that meeting, but the City Manager is aware of my concerns.

Please let me know your thoughts and if you have a different interpretation of the applicable law.

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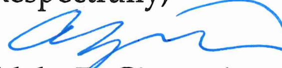
[18] We are waiting on a final, written estimate from Los Angeles County, but the oral estimate we received exceeds $300,000. Statutorily, that expense must be borne by the City, and the Developer has already indicated its unwillingness to cover that expense.

Respectfully,



Aleks R. Giragosian
City Attorney

Enclosed:	Exhibit A Exhibit B
cc:	Jose Reynoso, Sierra Madre City Manager