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MEMORANDUM

TO: Marie Weber, CMC, City Clerk

CC: Jason R. Alcala, City Attorney

FROM: Craig A. Steele

DATE: July 8, 2022

SUBJECT: Potential Referendum Against the Adoption of Resolution No. 2022-085

Summary

The City Attorney has asked me to advise you whether the proposed referendum of Livermore City Council Resolution No. 2022-085 is an appropriate use of the referendum power. I have concluded that Resolution No. 2022-085 was an administrative act of the City Council, and not a legislative act, and thus not an appropriate subject of a referendum. Further, this referendum is precluded because the City Council was acting as the administrative arm of the State in implementing the City's State-approved plan for the disposition of housing assets as a part of the required wind-up of its redevelopment agency, an administrative act to which the power of referendum does not apply. It is our opinion, in which the City Attorney concurs, that the City may decline to process the referendum petitions.

Background

The City Council action that is the subject of the referendum effort is Resolution No. 2022-085 (the "Resolution"), a resolution adopted by the City Council on May 24, 2022, "Authorizing Execution of an Amended and Restated Disposition, Development and Loan Agreement ('DDLA') with Eden Housing, Inc. for Development of the Downtown Multi-Family Housing Site."

For the purposes of this memorandum, it is important to note that the Resolution is one step in long process of developing 130 units of affordable workforce housing on a property that is currently owned by the City, located in Livermore's downtown area, and that has been planned for the development of affordable housing since at least 2009. The following timeline and description of actions by the City is excerpted directly from the City Attorney's edited summary

of the Resolution, prepared pursuant to Elections Code Section 9283, and incorporated into the referendum proponents' petition without any objection of which I am aware.

"Introduction. This resolution implements the City Council's prior legislative acts to approve a specific approximately 2.0-acre City-owned property in the Downtown Core Area ("the Property") for the development of affordable workforce housing.

The Property is listed as a housing asset of the City of Livermore ("City") in the Long-Range Property Management Plan proposed by the City and approved by the State of California on December 28, 2015, for the development of affordable housing.

Background. This resolution approves a contract for the City to sell the Property to Eden Housing Inc. for development of the affordable workforce housing component of the Downtown Plan that was approved by the City Council on January 29, 2018.

On January 29, 2009, the State of California required that a deed restriction be recorded against the Property to require its use for the development of affordable housing.

On January 29, 2018, the City Council approved a Downtown Plan that included the affordable housing component for the Property. The affordable housing component planned for 130 affordable workforce housing units to be located on the Property.

In May of 2018, the City issued a request for qualifications to identify a qualified developer for the 130-unit, multi-family workforce housing component of the approved Downtown Plan for the Property.

On November 27, 2018, the City and Eden Housing, Inc. ("Eden") entered into a Disposition, Development and Loan Agreement ("DDLA") with respect to the Property to enable the future development of a 130-unit, affordable, multifamily, "workforce" housing project (the "Project").

On May 25, 2021, the City approved land use entitlements for the Project, including Downtown Design Review 20-019 and Vesting Tentative Parcel Map 11186 – Subdivision 21- 003, subject to conditions of approval (the "Approvals").

On May 26, 2021, the City and Eden entered into a First Amendment to the DDLA to define the development and financial obligations for the proposed Veterans Park, allow for reimbursement by City to Eden for certain emergency vehicle access road improvements adjacent to the Project, and to update the entitlement, financing, and development timeline in the Schedule of Performance included with the DDLA.

On June 24, 2021, a Petition for Writ of Mandate was filed in Alameda County Superior Court by Save Livermore Downtown against the City and Eden, challenging the Approvals and the City's compliance with the California Environmental Quality Act. On February 14, 2022, the Superior Court entered judgment denying the Petition for Writ of Mandate. On April 13, 2022, Save Livermore Downtown appealed the judgment to the California Court of Appeal, and the appeal is still pending (the "Litigation")."

As adopted on May 24, 2022, the Resolution states that "the City and Eden desire to enter into an Amended and Restated DDLA and make several modifications and additions that will facilitate the development process, enumerate specific financial contributions and agreements that would be under the authority of the City Manager to execute, and modify the Schedule of Performance to extend the time period for Eden to complete development of the project in light of the pending Litigation." The stated purpose of the Amended and Restated DDLA in the document is to "provide the terms and conditions under which Eden shall prepare or cause to be prepared all required documents necessary to receive development approvals for the Project, to obtain title to the Property, and to develop the Project. The Amended and Restated DDLA also provides terms and conditions under which the City shall convey the Property to Eden for the purpose of developing, building, and operating the Project and contribute certain funds for the acquisition and predevelopment of the Property."

According to the staff report for the May 24, 2022 City Council consideration of the Resolution, dated May 23, 2022, the DDLA implements a number of business point changes and clarifications to the original contract between the City and Eden, as previously amended[1]. The Resolution implements and does not change the policy decisions already made for the project. The site has been designated for the development of affordable housing in multiple City policy documents since at least 2009, and approved for that purpose by the California Department of Finance as part of the dissolution of the City's Redevelopment Agency in 2018. The Resolution does not change the Downtown Plan designation of 130 units of affordable workforce housing units to be developed on the subject property; nor does it change in any material way the identity of the overall developer chosen for the project in 2018. The Resolution does not change the land use entitlements approved in 2021. The new terms in the amended and restated DDLA approved in the Resolution, broadly summarized, relate to the financing of the previously-approved project, the business terms under which the property would be transferred to Eden, and back to the City if Eden defaults, and the mechanics of parking and the construction of the previously-approved park.

[1] Based on a review of the DDLA, the staff report description is accurate.

Analysis

The power of referendum over acts taken by a legislative body is reserved to the people of California in Article IV, Section 1 of the California Constitution. There is no question that the power of referendum applies only to legislative acts, and not to administrative acts. *See, generally, Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516 fn. 6 ("The powers of referendum and initiative apply only to legislative acts by a local governing body.") While many reported cases note the important point that the reserved powers of initiative and referendum are to be liberally construed, the power of referendum simply does not extend to administrative or executive acts. The reason for this distinction, explained by a number of courts, is that to allow a referendum on administrative acts would interfere with the efficient business operation of a city. *See, e.g. City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399 (and cases cited therein).

The question in this instance, then, is whether the Resolution is a legislative act, subject to referendum, or an administrative act which is not.

The test used to determine whether a local action is administrative or executive in character is set out in several cases. The court in *Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954 described the distinction as follows:

> "The acts, ordinances and resolutions of a municipal governing body may, of course, be legislative in nature or they may be of an administrative or executive character. [Citation omitted] Also well settled is the distinction between the exercise of local legislative power, and acts of an administrative nature. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. [Citation omitted] Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, *are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body*, or such as are devolved upon it by the organic law of its existence. [Citations.]" (*Id.* at 957-958) (italics added)."

The reported decision of the court of appeal in *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524 is closely analogous to the facts of the proposed

referendum in Livermore. In *San Bruno*, the City Clerk, on the advice of the City Attorney, declined to process a referendum petition that challenged the City Council's approval by resolution of the sale of property to a hotel developer on the ground that the challenged resolution was not a legislative act. The San Bruno City Council adopted a Specific Plan designating a property for hotel development in 2001. The City purchased the property in 2012, issued a request for proposals from hotel developers in 2012, selected a developer in 2013, entered into an exclusive negotiating agreement in 2015, and adopted the challenged resolution approving the purchase and sales agreement in 2016. The referendum proponents collected signatures and timely filed petitions with over 3,000 signatures to the City Clerk. The San Bruno City Clerk rejected the petitions, and both the trial court and the court of appeal supported that rejection.

The court held, at pages 533 and 534, that if prior acts by a City Council establish a specific policy, subsequent acts to implement that policy are deemed to be administrative. The court noted an "overall history of actions" that led to the administrative step of approving a purchase and sale agreement for the property. That "overall history of actions" included the adoption of a Specific Plan that designated the property for hotel development, an amendment to the Specific Plan, and approval of the developer. The land sale, at an established fair market price, simply implemented the prior policy decisions and was not a legislative action, the court held. *Id.* at 536.

The court in *San Bruno* distinguished the decision in *Hopping v. City Council of Richmond* (1915) 170 Cal. 605, which is a case the proponents' attorney cited to support the referendum at a recent City Council meeting, according to a news account. In *Hopping* the action subject to referendum was a group of decisions leading to the construction of a new city hall. Within that group of decisions, the City Council made the policy decisions that 1) there would be a city hall; 2) where it would be located; 3) that it would be located on land donated by a local company; 4) that the City Council would appropriate funds to be spent on the construction, and 5) that the City would occupy the building as city hall once completed. The court held that those decisions about the policy of whether to build a city hall, where, and how, were legislative decisions subject to referendum. The City Council decisions in *Hopping* were all made at one time, not in a series of decisions over years we have seen in the process leading to the DDLA. Thus, *Hopping* is not a case that supports the concept that the Resolution is subject to referendum because the Resolution was an administrative step following an "overall history of actions" setting the policy that led to the implementing Resolution.

Indeed, the court's analysis in *Hopping*, although over 100 years old, actually supports the conclusions the *San Bruno* court reached, and supports the conclusion that the Resolution is an administrative decision not subject to referendum. At pages 614 and 615, the California Supreme Court lists the reasons it determined the Richmond City Council's decisions were legislative acts.

Comparing those listed legislative acts to the decisions the Livermore City Council made illustrates the difference between the two cases:

1. *A decision by the city council that the public interest required that it should have a city hall.* The subject property was deed restricted for affordable housing in 2009, designated for affordable housing in the housing agency's approved long term plan in 2015, and designated for 130 units of affordable housing in the Downtown Plan in 2018. The Resolution does not include any new decision on these issues.

2. *A decision by the city council where the city hall would be located.* The subject property was deed restricted for affordable housing in 2009, designated for affordable housing in the housing agency's approved long term plan in 2015, and designated for 130 units of affordable housing in the Downtown Plan in 2018. The Resolution does not include any new decision on these issues.

3. *That the City would accept the offer of dedication for the city hall.* There is no comparable decision involved here, but note that the property has been owned by the City for more than a decade. The decision to acquire the property was thus made many years before the City Council adopted the Resolution.

4. *That the City would appropriate its funds for the construction and operation of the city hall.* The construction of the project will be funded by Eden and other sources. The City is not obligated to operate the project. The City Council previously approved the first DDLA in 2018. That approval committed the City to make the $500,000 pre-development loan to Eden and to make the "seller take back" loan for the land purchase price at fair market value when the sale is to take place. So, to the extent a secured loan for the purchase price is similar to a policy decision to appropriate city funds to build a city hall, the City Council made that decision in 2018. The Resolution implements a decision the City Council already made.

5. *That, when completed, the building would be occupied by city officers as a city hall.* Again, the City's decision about who would occupy and use this building was made in 2009, 2015, and 2018, when it was repeatedly designated as a site for affordable housing as detailed above.

Thus, *Hopping* does not remotely support, and actually undermines, counsel for the proponents' assertion that the City Council's adoption of the Resolution was a legislative act subject to referendum. Although the facts of *San Bruno* much more closely resemble the facts in the Livermore situation, we believe that the California Supreme Court's factors described in *Hopping* actually supports the advice that the Resolution is not subject to referendum.

Another separate, but similar, line of authority shows that the City Council's decision to dispose of real property housing assets for the approved purpose of developing affordable housing, as required by California's redevelopment dissolution laws, is administrative and not subject to referendum because the City acted as an "administrative agent of the State." *See, Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 586 fn. 14 (distinguishing as administrative those acts where cities are an "administrative agent of the state.") In 2015, as part of the dissolution of the City's Redevelopment Agency, the subject property was approved as a housing asset for the City of Livermore and approved by the California Department of Finance for inclusion on the City's Long Range Property Management Plan as property to be disposed of for housing development. Thus, the City is required, as an agent of the state as a part of redevelopment dissolution, to dispose of the property for the development of housing within certain time periods. *See,* Health and Safety Code §§ 34176.1 and 33334.16. The City Council adopted the Resolution to implement that plan in compliance with the policy decisions the State Legislature made in 2011.

In an almost identical situation, the California Attorney General issued an opinion that said the City of Hollister's sale of real property pursuant to its Long Range Property Management Plan was not subject to referendum. 101 Ops.Cal.Atty.Gen'l 34 (Caballero, 2018)[2]. In that opinion, the Attorney General opined that the Hollister City Council's resolution "occurred at the tail end of the statutorily prescribed process for disposing of a dissolved redevelopment agency's property. The successor agency's plan is the product of that process, and the City's resolution follows a string of decisions to implement that plan, further illustrating that the resolution is an administrative act implementing an established legislative policy and therefore not subject to referendum." (citation omitted). Additionally, the Attorney General noted that redevelopment agencies' implementation of redevelopment plans were never subject to referendum and, by analogy, the successor agencies' implementation of dissolution plans would not be either. *Id.* at 37. The Attorney General Opinion closed by articulating the policy reason behind deeming this type of contract approval to be administrative and not subject to referendum:

> "That the referendum power cannot apply here is perhaps best demonstrated by its potential consequences. If Hollister's resolution were subject to referendum, the disposition and development of the property pursuant to the approved long-range plan could potentially never happen. The electorate could indefinitely prevent the sale of the property for development (as set forth in the approved long-range plan) by rejecting every attempt by Hollister to implement the plan. That would completely thwart the redevelopment

[2] An Attorney General Opinion is not binding precedent a court must follow. But this opinion is authority that can help guide the City's action, in the absence of binding case authority. Courts tend to give deference to the opinion of the Attorney General's office.

> dissolution law's purposes to dispose of redevelopment agencies' property expeditiously in order to fund core government services. It would also conflict with the statutory requirement that the dissolved agencies' property be disposed of as provided in a long-range property management plan approved by a successor agency's oversight board and the Department of Finance. In short, referendum would frustrate the essential goals of the redevelopment dissolution law. *Id."*

The only substantive difference between the Livermore transaction that is the subject of a referendum and the Hollister transaction the Attorney General opined was not subject to referendum is that Hollister sold its property for commercial development and Livermore sold its property for affordable housing. In Livermore's case, selling a housing asset that was a part of the redevelopment dissolution process is even more regulated by the State, since housing assets are subject to additional statutory control and processes. The policy questions articulated by the Attorney General are even more applicable to the adoption of the Resolution. If the opponents of building affordable housing on the Livermore site were repeatedly permitted to challenge every administrative decision they could indefinitely frustrate the City's and State's policy goals of building affordable housing. That factor is particularly relevant here since the proponent submitted a proposed summary for the petition that proposed to use a website hosted by Save Livermore Downtown. That relationship is important because a Court has already determined that Save Livermore Downtown's lawsuit against the project was for purpose of delaying the provision of affordable housing. (*Save Livermore Downtown v. City of Livermore, Alameda County Superior Court Case No. RG21102761.*) In that case, the Court upheld the project after determining at trial that *"this is not a close case. The CEQA arguments are almost utterly without merit. I just don't see any way that any of the CEQA arguments have any possible merit in the face of the 2009 EIR ..."*

The dissolution factors in Livermore are strikingly similar. Those factors are summarized in City Council Resolution No. 2022-084 to implement the development of the property for affordable housing consistent with the State's approval of the dissolution plan for the former Redevelopment Agency of the City of Livermore. That resolution was adopted concurrent with Resolution 2022-085. The State Department of Housing and Community Development has agreed with the findings in that resolution and issued a letter determining that the DDLA implements the original disposition agreement on November 27, 2018, to provide terms and conditions under which the City would convey the property to Eden Housing for the purpose of developing, building, and operating affordable workforce housing.

In other scenarios, courts have held that city actions to approve contracts that implement the policy of state agencies are administrative acts and not subject to referendum. *See, Kleiber v. City and County of San Francisco* (1941) 18 Cal.2d 718 (housing authority contracts with a city

and county to execute State housing laws are administrative acts); *Worthington v. City of Rohnert Park* (2005) 130 Cal.App.4th 1132 (city council resolution approving a Memorandum of Understanding with a tribe to mitigate impacts of a casino project on tribe land under the Indian Gaming Regulatory Act was an administrative act that implemented federal policy). Under this line of authority, Livermore's action to approve the Resolution, as an agent of the State, disposing of property for housing purposes following the process and requirements of the State's dissolution and housing laws, was an administrative act.

Because the Resolution was an administrative act and not subject to referendum, the remaining question is whether the City Clerk should process the petition as a referendum and proceed to verify signatures, if a petition is presented, or decline to process the petition as was upheld by the court in *San Bruno*. Pre-election review of proposed ballot measures is appropriate where the validity of a proposal is in serious question. This allows the city to resolve the issue as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign. *Dunkl, supra,* 86 Cal.App.4th at 389. Unfortunately, there is no specific section of the Elections Code or regulation that instructs city clerks what they should do with a petition that is an improper use of the referendum power or is not eligible for referendum. One option is that the City Clerk can receive the petition for *prima facie* review and, if the raw number of signatures submitted equals or exceeds the required number, decline to process it as a referendum, which was the City Clerk's decision that was upheld by the court in *San Bruno*. Obviously, if there are not sufficient signatures in the *prima facie* review, the City Clerk would take no further action. Alternately, you may receive the petition, conduct the *prima facie* review and, if sufficient, process the signatures for verification. If the referendum qualifies, the City Council could simply refuse to take action on the petition, or the City Attorney could file an action to have it removed from the ballot. Either of the latter two actions are more problematic from the perspective of the project, because they will unnecessarily delay implementation of the project while the signatures are verified and further action is taken. Once a petition is filed, if it is processed as a referendum then the effectiveness of the action challenged is delayed until the referendum is resolved. If you accept this petition as filed, the agreement and the project cannot move forward until the referendum is disqualified or fails at the election.

Note also that the petition purports to challenge only those aspects of the Resolution that are legislative acts. It does not identify any legislative act and, as we have described above, that is because the Resolution is an administrative act not subject to referendum.

With a reported decision of the court of appeal on point and an Attorney General's Opinion on the same issue both strongly showing that the Resolution was an administrative act, there is authority for simply receiving the petition when it is filed, conducting the *prima facie* review and, if sufficient, declining to process it as a referendum since the Resolution at issue is not a legislative act and therefore the petition has no legal effect. That is what the City Clerk did in *San Bruno*,

upon the advice of the City Attorney. As noted above, the City Attorney Alcala concurs with the advice in this memorandum.

Please do not hesitate to contact me with any questions.

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I, Jason R. Alcala, City Attorney for the City of Livermore, hereby concur with the analysis and advice in this memorandum. In consultation with City Clerk Marie Weber and Craig Steele, and without waiving the attorney-client privilege and the attorney work-product privilege, I also note that this memorandum is available for public review.

Dated: 7-11-22

Jason R. Alcala
City Attorney
City of Livermore

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