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September 12, 2017

Inder Khalsa
Assistant City Attorney
City of Mill Valley
C/O RWG Law
44 Montgomery Street, Suite 3800,
San Francisco, California 94104-4811
By email: ikhalsa@rwglaw.com

Dear Ms. Khalsa,

I am writing on behalf of Bob Silvestri and Community Ventures Partners and responding to your letter of August 24, 2017 regarding the "Pilot Program in the Miller Avenue Parkway" (Miller Avenue Parkway Project.) The Miller Avenue Parkway Project is a major structural realignment of Miller Avenue, which reduces capacity from four lanes to two lanes.

In general, we strongly disagree that CEQA's "common sense" exemption (CEQA Guidelines, Section 15061(b)(3)) can be used by the City of Mill Valley to avoid environmental review for the Miller Avenue Parkway Project. We remain unconvinced that the state legislature or case law allow for this narrow exemption to be used for infrastructure realignment projects. Your letter provides no legal authority for the use of this exemption where indirect impacts are reasonably foreseeable and instead cites a court of appeals case that essentially prohibits the City from using this exemption.

Even if the common sense exemption could be used for such infrastructure projects, the City has not provided the substantial evidence required to conclude "with **certainty**" that there is "**no possibility** of significant impacts." Instead, our review of the City's records demonstrates that the City has absolutely no scientific evidence or technical data to support its conclusions that such a major infrastructure realignment will have no potential impacts to circulation, air quality, public safety and water quality.

1. There is No Legal Authority for Use of the Common Sense Exemption for Infrastructure Projects

CEQA Guidelines, Section 15061(b)(3)'s exempts projects "where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." The City, while citing Section 15061(b)(3) in its staff report, used a different criteria and did not support its use of the common sense exemption with either the required evidence or relevant analysis.

In my letter of August 12, 2017 I stated that:

Section 15061(b)(3) has been affirmed by courts to be applicable to certain legislative actions that do not authorize projects. I am not aware of any legal authority for the use of Section 15061(b)(3) for projects with construction, or infrastructure realignments or reconfigurations.

Your response was that you agree that the "common sense" exemption does not apply to projects involving significant construction, citing the holding in *Rominger v. County of Colusa*, 229 Cal. App. 4th 690 (2014). First, I never stated that. My question - as clearly stated in my letter – is whether the common sense exemption can be applied to *infrastructure realignment* projects, not “construction” projects.

Second, *Rominger* does not contain a holding that the common sense exemption cannot be used for construction projects; instead, its holding is that the common sense exemption cannot be used where there are indirect impacts. *Rominger* holds:

For the commonsense exemption to apply, the county would have to show as a factual matter, based on the evidence in the record, that there is no possibility that the approval of the Adams subdivision may result in a significant effect on the environment, i.e., that despite the subdivision of the property into smaller parcels to facilitate lease or sale, there is no possibility that purpose will be achieved and the creation of the smaller parcels will not lead to the development of those parcels and to resulting significant environmental effects.

Thus, you have misstated the basic holding in *Rominger*. Further, there is additional substantial case law that further demonstrates the City's use of this narrow exemption is contrary to law. See *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 658 [“Since the staff likewise was unable to produce evidence of no adverse impact, the District cannot say with certainty "there is no possibility that the activity in question may have a significant effect on the environment." (Guidelines, § 15061, subd. (b)(3).)"]; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 113–118.

The examples of Miller Avenue Parkway impacts we have provided to the City of Mill Valley are both direct, such as air quality impacts due to idling and indirect impacts, such as congested side streets due to cut-through traffic caused by reducing four lanes to two. *Rominger* holds that such potential indirect impacts prohibit an agency from using the common sense

exemption and therefore, provides no coverage for the City's obvious attempts to avoid environmental analysis and public review of the Miller Avenue Parkway Project.

Thus, *Rominger* is not supportive of the City's liberal use of the common sense exemption.

2. The City Does Not Have or Cite Required Evidence Related to the Miller Avenue Parkway's Environmental Impacts

My August 12 letter requests that the City "provide any records, including email correspondence, that cite Section 15061(b)(3) language and any analysis regarding the Miller Avenue Parkway Project related to complying or falling under Section 15061(b)(3) or its language. "

The reason for this request is that there was no required substantial evidence in the Staff Report to conclude that reducing traffic capacity by 50 percent will not cause impacts. The documents provided by City Staff don't fill this evidentiary gap. No data, modeling, studies, or evidence has been provided to support the off-the-cuff opinions in Council meetings by Mr. Parisi and the Chief of Police that there will be no circulation or safety impacts. Neither of these two refers to evidence and both appear to be simply providing justification for the Council's desire to eliminate a traffic lane on Miller Avenue.

Regarding traffic, Mr. Parisi never cites to any evidence regarding the primary or secondary congestion impacts from the major reduction in Miller Avenue capacity ... because apparently, there is no evidence. There is not one reference to any previous traffic studies, traffic counts, the Mobility Element or previous CEQA documents that actually contains any technical quantification, studies or modeling of the Miller Avenue Parkway Project's major infrastructure realignment.

Thus, we are left with the Staff Reports' baseless conclusion that "While the capacity of the roadway is modified, the proposed single lane can accommodate existing and projected traffic volumes, with excess capacity, identified in the Mill Valley General Plan. No impacts to adjacent intersections have been observed since the temporary restriping of the area and there is no evidence that the reduction to one travel lane will significantly impact existing or projected peak hour traffic volumes or adjacent intersection Levels of Service."

This conclusion not only has no support, it makes absolutely no sense. "Common sense in the CEQA domain is not restricted to the exemption provided by the [Guidelines]. It is an important consideration at all levels of CEQA review." *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2009) 52 Cal.4th at p. 175. It is only *common sense* that a 50% reduction of capacity in the main arterial, truck route and emergency evacuation route of a City will have potential impacts related to slowed traffic. Yet, Mr. Parisi brushes them off without referencing any data or studies to support his nonsensical conclusion.

Similarly, there was no evidence presented regarding impacts to safety, due to delay time for fire department vehicles being able to access Blithedale Canyon, Cascade Canyon and Upper Homestead Valley. Instead, the City Chief of Police appeared to present an unsupported opinion that told the Council what the Council wanted to hear.

Your letter states that the Police Chief claims that eliminating a lane won't cause any difficulties to fire department and EMT responders. However, what the Police Chief and Fire Chief were actually asked at the council hearing was if they had seen any difficulties since the Parkway had been narrowed to one lane *during the construction* period. They were not asked their opinion about future circumstances once traffic had returned to normal levels. This is significant because residents have generally avoided driving on Miller Avenue since construction began and have been warned about doing so, almost daily, by the City. Highlighting the lack of evidence is the fact that emergency preparedness professionals, County EMT and Search and Rescue responders, who have great experience in this matter, should have been consulted but were not.

Another potential issue regarding public safety impacts that has not been addressed, as stated in public comment, is that situating a bicycle lane between curbside parking and a through lane of traffic increases the potential for safety hazards from "dooring" and other rapid movements by vehicles cutting across the bicycle lane, in and out of parking spaces.

Therefore, we disagree with the City's argument that it presented "evidence" even regarding temporary impacts for construction or realignment because there was no evidence presented supporting the Police or Fire Chiefs' opinions regarding safety response times, except for anecdotal opinions. What seems beyond argument is that the City has not referenced or presented any evidence at all regarding operational impacts to public safety.

Regarding impacts to air quality, the Staff Report concludes that: "Once completed, the proposed project would not generate significant vehicle or other emissions." Again, this conclusion is not supported by any evidence – whether through air quality modeling or even a qualitative discussion by an air quality specialist. Instead, despite the projected increase in wait times and idling, the City again defies common sense by rejecting out of hand what is logically predictable. Slower traffic, curbside parking delays, stopped delivery trucks and single stalled vehicles and accidents all have the potential to create increased wait times and additional idling which could all increase vehicle emissions.

Your letter doubles down on those baseless opinions by concluding: "Furthermore, there is no evidence that the number of cars traveling on Miller Avenue will increase due to the reconfiguration or that increased delays at adjacent intersections would increase idling of cars at intersections. Therefore, the evidence supports a finding that the Pilot Program will have no impact on air quality." What evidence does the City have for such a conclusion? There is no air quality study regarding an increase of emissions due to additional idling and thus, the conclusion, again, provides no evidence while defying common sense.

None of these baseless conclusions made to justify the Council's predetermined, political preferences is evidence of "**certainty**" that there is "**no possibility**" of congestion, air quality or safety impacts. And the unsupported, illogical claims by acquiescent City Staff do not qualify as substantial evidence as is required by CEQA. *Save the Plastic Bag Coalition* essentially holds that where justifications for a project are so transparently self-serving that they defy common sense, then the agency has violated CEQA.

3. The City Improperly Invokes Tiering Concepts for the Miller Avenue Parkway Project

Your letter also makes the strange claim that impacts were "already analyzed in terms of fugitive dust, hazardous materials, or vehicle emissions" thus claiming that the Miller Avenue Parkway Project is covered by previous CEQA documents.

First, the Miller Avenue Parkway Project is not remotely similar to the previous CEQA covered projects relating to Miller Avenue, which all **assumed four lanes**. This Project is significantly different than those previous CEQA project descriptions and as such previous CEQA analysis is grossly different than that required for Miller Avenue Parkway Project. Indeed, the Miller Avenue Parkway Project is strikingly inconsistent with the Mobility Element EIR and Miller Avenue Streetscape Mitigated Negative Declaration, which assumed four full lanes on Miller Avenue. The MND does not even have a project description but simply figures showing four lanes.

Second, the Staff Report does not identify the Miller Avenue Parkway Project as being tiered from any other project. As we have explained to the City Staff previously, agencies don't simply get to claim tiered review and get a blank check to do whatever they wish. CEQA requires that second tier CEQA documents describe any environmental impacts that were not described in a first tier CEQA document. The Initial Study must include reference the first tier EIR and evidence and analysis that the later project does not cause significant effects that were not examined in the EIR. (Pub. Res. Code § 21094(c); CEQA Guidelines §§15063(b), 15152(f). The Staff Report does not do so and your letter provides no evidence that the City can rely on this as a tiered project.

4. Required CEQA Environmental Review Has Not Taken Place

In my conversation on August 16, 2017 with City Attorney Greg Stepanicich and Inder Khalsa, it was understood by me that when the City Council makes a final decision at the end of the Miller Avenue Parkway pilot program, that the data gathered would be presented and incorporated into a CEQA impact assessment document. While we did not specifically discuss the exact form of such a CEQA document, the understanding was that a CEQA exemption would not be used for City Council decision to finalize the Miller Parkway Program's realignment. This admission by the City confirms that, to date, no CEQA environmental review has taken place. Since there is no exemption for "pilot" projects under 15061(b)(3) or elsewhere under CEQA

and there was no relevant evidence provided regarding potential impacts, it can be concluded that in undertaking the Miller Avenue Parkway pilot project, the City is currently acting in violation of CEQA.

Conclusion

CEQA's Section 15061(b)(3) exemption is governed by its court originated name – common sense. Common sense says that eliminating two lanes in a congested main thoroughfare in a California city will cause more congestion, wait times, and idle times and it is logical that direct and indirect impacts would follow. Thus, it is *common sense* that more congestion and idling will lead to more side street cut-throughs, more emissions, more runoff and more delays for fire, police and ambulance vehicles. Unfortunately, the Staff Report and your letter sidestep these reasonably foreseeable impacts by reference to non-existent studies and specious reasoning in order to avoid public scrutiny of the CEQA process and to justify the pre-determined political result desired by the City Council.

The exemption is termed the “common sense” exemption, not the “politically convenient” exemption.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward Yates", with a long horizontal flourish extending to the right.

Edward Yates