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Members, City Council
City of Benicia
250 East L Street
Benicia, CA 94510

November 16, 2008

Dear Council Members:

This letter addresses the item on the November 18, 2008 City Council agenda for the review of the Benicia Business Park project. I have reviewed the agenda material. This letter has comments on the idea of a proposed workshop that would be held to identify remaining project issues and determine whether they can be resolved with the project as currently designed.

My view is that resolution of the remaining project issues can only occur if the City ends its current process for review of this project. The City's current review process has failed its residents. The current application needs to be denied and the applicant should be invited to submit a new application for the City's consideration.

The following is a chronology of events describing how this review process has failed to adequately protect the health, safety and welfare of Benicians. Text in *italics* is text taken directly from the minutes of meetings or the environmental document, unless otherwise specified. It's a long, twisted process, so a summary is provided at the end of this letter.

July 6, 2005: CITY ISSUES NOTICE OF PREPARATION (NOP) FOR AN ENVIRONMENTAL IMPACT REPORT (EIR)

When the Draft EIR was released it indicated this EIR would be used for all required permits and approvals, including design review, approval of improvement plans, grading plans and building permits (Draft EIR, p. 1). After the Draft EIR was released, the following statement appeared in numerous responses to comments.

"The project as currently proposed is a conceptual development plan that does not contain many of the site-specific development details that would typically accompany a development project.... The environmental analysis in the Draft EIR, including the identification of impacts and mitigation measures, was undertaken based on the level of detail on the proposed project that was provided by the project sponsor."

These statements clearly indicate that the City did not have enough information in the development application to provide a complete and adequate review of the project for all project approvals. The EIR was handicapped from its inception.

May 1, 2007: COUNCIL HEARING ON THE ADEQUACY OF THE DRAFT EIR

Initially, the City received 115 comments. Responses to these comments were not available prior to the hearing, but an opportunity was available at the hearing to comment on what the Draft EIR disclosed about the proposed project. Many of the project issues that are currently unresolved were not disclosed in the Draft EIR but were raised through comments from the public. Some commenter advocated for completion of the EIR, others advocated for stopping further work on the EIR and denying the project.

All Council Members discussed their views. *Council Member Patterson stated that....*

- *Every time the applicant is allowed to move forward, the advantage is on their side. They would be less responsive, and that has already been demonstrated.*
- *It was a considerable major mistake to accept the application. She does not want to compound that mistake which was done by beginning the environmental document when we did not have all the information needed. Why would Council want to make a third mistake by finishing the document?*
- *It puts the City in a very poor bargaining position. It would be ill advised to say to finish the document.*

Mr. Erickson stated that proceeding would not put the City at a disadvantage. The City still has the discretionary decision of certifying the EIR, accepting or not accepting a project. The City has the leverage.

Council Member Patterson stated that:

- *The City would not have all the leverage...*
- *She referenced Seeno's project 'Crystal Ranch [in Concord].' The project did not meet what the city wanted, but they finally got worn down, which is what the strategy was, and the project was developed with some modest changes.*
- *This is not what the community wants.*
- *The City would be weakened if it takes that route of moving forward. History would show that was a mistake.*

All Council members, except Mayor Messina, asked the developer to come back with a new project because the Draft EIR showed their proposal was poorly planned. *Mr. Erickson stated that the applicant has indicated that they would like Council to proceed with the [EIR] process. The applicant is saying that they were willing to work with the City on some sort of alternative plan. He suggested working with the applicant until it is determined that an alternative project couldn't be done. His concern was that the opportunity would be jeopardized.* The hearing was continued.

Be aware that the City's review process played out in a manner similar to that stated by then Council Member Patterson. No "alternative plan" was submitted by the developer until March 20, 2008, and only after the City certified the EIR and declared that the proposed project in the EIR could not be approved due to numerous conflicts with general plan policies.

August 7, 2007: COUNCIL HEARING ON THE ADEQUACY OF THE DRAFT EIR

The developer gave a 30-minute presentation that provided more detail on the project that was evaluated in the Draft EIR. Contrary to what was proposed by City staff on May 1st, no changes or alternative plan was proposed by the developer.

Staff recommended that the Council find the Draft EIR in compliance with the City's guidelines and find that the project evaluated in the EIR could not be approved due to numerous conflicts with the General Plan.

Mayor Messina said the finding that the project could not be approved as proposed was not necessary. He removed that finding from the resolution and called for a vote. On a 3-2 vote the Council found the Draft EIR complied with the City's guidelines.

Be aware that eventually (as described below) the City Council had to force the developer to submit an alternative plan by finding that the project evaluated in the EIR could not be approved due to numerous conflicts with the General Plan.

January 15, 2008: CITY COUNCIL MEETING – CLOSED SESSION FOR POTENTIAL LITIGATION

Under Public Comment, Kristina Lawson of Miller, Starr, Regalia Law Firm – On behalf of her client, Discovery Builders, Ms. Lawson requested Council schedule a hearing for certification of the EIR that was prepared for the Benicia Business Park project. Discovery Builders' presence tonight to request a hearing was not a waiver of their right to challenge the closed session that Council was holding.

Ms. McLaughlin [City Attorney] reminded Council that the City had at least two threats of litigation by the attorneys for Discovery Builders if the City does not schedule a hearing for the certification of the EIR soon.

Even though the City later certified the EIR, concerns still exist that the developer would sue the City if the project is denied.

February 19, 2008: COUNCIL HEARING TO CERTIFY THE EIR

Mr. Evola stated that City Staff requested the bifurcation of the EIR. If the EIR were approved, Discovery Builders would submit a project within the framework of LSA's EIR. It would be the start that could send Discovery Builders back to the drawing board and make modifications to fit within the framework of the EIR, and then bring it back for approval with 100% complete discretion of the Planning Commission and Council.

Staff could not recall if the City has ever considered a project's environmental document, separate from its review of the project.

Council Member Schwartzman made a motion to add the following amendments to the Resolution certifying the Benicia Business Park and further resolving that the proposed project considered by the EIR cannot be approved without significant modification due to numerous conflicts with general plan policies:

- *directing the applicant and Staff to move forward on a CEQA Initial Study for the Hillside Upland Preservation Alternative,*
- *directing the applicant and Staff to incorporate Leadership in Energy and Environmental Design(LEED) and AB 32 into the review of the Hillside Upland Preservation Alternative, the need for a new mitigation measure for the I-780 impacts, and lastly adding language regarding urban decay and sustainability.*

The above motion was approved by a 4-1 vote.

March 20, 2008: DEVELOPER SUBMITS NEW PROJECT TO CITY

The developer submits a new project and an addendum to the certified EIR. There is No CEQA Initial Study pursuant to the Council's February 19 direction, because staff argued an Addendum was adequate. The Addendum avoids the need for an Initial Study and maintains state-mandated time limits for action by the Planning Commission and Council on the project. The Council received many comments in subsequent hearings that an Initial Study should be prepared as directed by the Council. The Initial Study would likely find that a Supplemental EIR should be prepared. If a Supplemental EIR was required, the City would have leverage to obtain from the developer a waiver of the state-mandated time limits in order to complete the Supplemental EIR.

April 10, 2008: PLANNING COMMISSION HEARING ON THE PROJECT

The staff report was received by the Commission six days prior to the meeting. No peer review was available on the Addendum prepared by the developer. This is the first opportunity for the Commission to review the project. The developer declined a request of the Commission for additional time to consider the project.

On a 6-1 vote, the Commission recommended the City Council deny the project because of numerous conflicts with the general plan; and there was inadequate information regarding geological studies, the commercial impact on the downtown, the impact on the public health, and the impact on bicyclists and pedestrians.

Further, the Commission unanimously recommended the City and developer move forward with the best possible project, the City invite the developer to contact staff to establish a comprehensive schedule designed to both address the shortcomings of the plan and get this community fully on board with a project that everyone can get behind and to that use of a development agreement would be advantageous.

May 6, 2008: COUNCIL HEARING ON THE PROJECT

Jim Erickson, City Manager, set parameters for this portion of the meeting.... Staff continues to work with the developer to discuss the 216 proposed conditions.... This could be a big part of the City's economic well-being...with a potential of 5,000+ jobs, approximately \$500,000 of annual net revenue for the City at full build out, and substantial changes to the environmental conditions in the area.

At the meeting, the developer requested a revenue sharing agreement.

May 20, 2008: CONTINUED HEARING FROM MAY 6

June 3, 2008: CONTINUED HEARING FROM MAY 20

A revenue sharing agreement was added as a condition of approval to allow the "property owners" to be reimbursed for any construction and maintenance costs for public services that are above their fair share.

Comments were received from the public. Comments on the revenue sharing condition included how the fair share of each property owner would be determined? To what degree will this condition offset the overriding economic reasons for approving the project?

Council and staff discussed the following concerns:

- *condition relating to the \$1 million for the Mills Community Center,*
- *the conditions of the project being legally binding,*
- *what would happen if the developer were to appeal some of the conditions after the project was approved,*
- *what would happen if the courts were to overturn some of the conditions,*
- *amending conditions,*
- *the legal possibility of having the applicant waive its right to appeal the conditions as a condition of approval,*
- *economic analysis,*
- *how the park and ride would work,*
- *economic analysis vs. specific plan,*
- *24-hour onsite security personnel for the proposed project,*
- *greenhouse gas reduction,*
- *western commercial area,*
- *conformance of site plan with LEED Neighborhood Development (ND) standards,*
- *campus design,*
- *application for vesting tentative map,*
- *advantage of a development agreement,*
- *what staff would do more of if it had more time – such as getting more detail, making more of nexus, more research on the addendum to beef it up more,*
- *having a draft revenue sharing agreement,*

- *having a citizen committee,*
- *establishing a grading limit, how much of the site could be developed if there was a 20% slope limit, contour grading,*
- *why there is no ability to do a form-based code with the project, and*
- *how Council should handle the comments the City has received as it relates to the addendum and conditions of approval and the desire for a supplemental EIR.*

Mr. Evola offered a 60-day extension for more time to deliberate with staff and do a traffic study.... Council Member Ioakimedes discussed his displeasure with the developer's offer of an extension. Why didn't they offer the extension earlier?

On motion of Council Member Hughes, the Council voted 4-1 to accept the developer's extension until the October 7, 2008 Council meeting, have a comprehensive traffic study submitted to Council, limit the public hearing to the traffic study, and opening Council's deliberations to the entire project.

October 7, 2008: HEARING ON THE SUPPLEMENTAL TRAFFIC STUDY AND COUNCIL REVIEW OF THE PROJECT

Ms. Kristina Lawson, Miller Starr Regalia, stated...her client agreed to all conditions of approval brought forward by the City. The EIR was certified in February 2008.... The impacts identified in the supplemental traffic analysis are outside of the CEQA process.

Be aware that the City received comments to evaluate potential traffic impacts of the project on East 2nd south of the freeway on 3/10/07 (Draft EIR, Comment C2-20). The City's response then was the transportation modeling showed no project trips would go south of the freeway.

The supplemental traffic study identified impacts at four intersections along East 2nd Street (both north and south of the freeway) not previously identified in the EIR. Mitigations were proposed at some of these locations.

Be aware that on 3/10/07 the City received comments on the Draft EIR regarding potential traffic impacts at Seaview/East 2nd and at East Tennys/East 2nd (Comment C2-9) and again on 2/13/08 during review of the proposed Final EIR (Supplemental Response to Comments E7-3). The Final EIR made largely unsubstantiated claims that there was no impact from the project at this intersection – a conclusion that the supplemental traffic study refutes.

The supplemental traffic study, even though it substantiated impacts to nine intersections along East 2nd Street, from Military to Seaview, continues to ignore comments made on 3/17/07 on the Draft EIR to evaluate storage capacity for the approach lanes at intersections along East 2nd Street (Comment C2-16), or comments to evaluate the East Tennys intersection (Comment C2-9).

On a motion by Council Member Campbell, the Council votes 2-3 on approval of the Addendum for the project and related actions, resulting in denial of the approval. Be aware, however, that Council Members Hughes and Schwartzman believed that review of the project's environmental impact was complete and adequate.

To help understand the next step in the process, it is important to review the transcript of the Council meeting following this vote:

McLaughlin: Alright, so since you didn't approve ...

Patterson: So we give direction to staff to prepare a Resolution of Denial for the, APPROVING A VESTING TENTATIVE MAP, MASTER PLAN OVERLAY, AND REZONING FOR THE BENICIA BUSINESS PARK PROJECT, WITH CONDITIONS

McLaughlin: Yes, that works.

Patterson: Thank you. Anything else on our agenda?

Schwartzman: I don't think so.

Patterson: Without objection, we are adjourned.

October 20, 2008: COUNCIL CONSIDERS STAFF RECOMMENDATION ON THE PROJECT

City staff report includes alternative recommendations, ranging from denying the project to continuing the matter for reconsideration.

Staff recommendations include reconsideration of a project decision which is a breach of the City's rules and procedures. Adopted Council procedures stipulate for "reconsideration" that, *"Providing that no intervening rights shall be prejudiced, any Council Member who voted with the majority on a question may move the reconsideration of that question at the same meeting in which the original decision was made or at the next following meeting."*

"After a motion for reconsideration has been acted upon, no other similar motion shall be made without unanimous consent." (Rules of Procedure, V(C)(3).)

The transcript of the October 7 Council meeting shows no Council Member who voted with the majority moving for reconsideration.

When, if ever, is it appropriate for staff to seek reconsideration of a Council vote that may be contrary to its recommendation? The Benicia Herald quotes staff on this point: *"What they voted on October 7th was a motion to approve the final environmental documentation," he said. "Technically, no action has been taken. There's really no opportunity for staff to presume what they want to do."*

On a motion by Council Member Schwartzman, with a 4-0 vote the Council agreed to continue the matter to November 18, 2008 following staff recommendation for a

facilitated discussion with the developer to reach a final conclusion that will make the bulk of the community comfortable.

November 18 2008: CONTINUATION OF THE ITEM FROM OCTOBER 21, 2008.

The staff report includes a six page Health Risk Assessment for students and staff at Robert Semple Elementary School that was prepared by LSA Associates for discussion at a facilitated workshop. Please be aware that there is no request in the record by Council to staff to prepare such an assessment. There is no discussion in the Draft EIR, the Addendum, or the CEQA findings of the potential need for a health risk assessment for students and staff at Semple School.

In March 2007, the City received at least 3 comments on the Draft EIR requesting an evaluation of localized air pollution generated by the project on the risk to sensitive populations for cancer, asthma, and heart disease (Comments A7-1, A7-4, C2-29). LSA responded at that time that the future traffic volumes in the area are below the thresholds set by the state for locating schools near busy roadways, therefore the project would not be expected to expose sensitive populations to hazardous levels of vehicle emissions (DEIR Comment A7-1). Why then, is staff addressing this issue now after completion of their environmental disclosure documents?

The Health Risk Assessment serves only to confuse issues, not to clarify them. No technical supporting data or peer review is provided. The potential conflict of interest in having the author of the EIR (which found no potential for health impacts), also prepare the subsequent Health Risk Assessment is obvious. No explanation is provided on why the projected freeway traffic volumes used in the assessment conflict with similar data the City received on 2/13/08 during review of the Final EIR. The assessment ignores the unique setting of the school site, ignores air emissions of the neighboring use (e.g. refinery) and ignores stated concerns about the project's potential to increase exposure of sensitive populations to respiratory disease. The Health Risk Assessment as presented further damages the credibility of the City's review process for this project.

HOW CAN A WORKSHOP HELP THE CITY?

It has been over 1,300 days since the City initiated the process for review of the developer's application for the Benicia Business Park. With this passage of time, the following substantive issues remain unresolved:

- Enabling the Planning Commission to review the project;
- Creating jobs that meet the needs of Benicia residents;
- Avoiding conditions of blight for the neighborhoods along East 2nd Street and for downtown;
- Protecting the health and safety of school children at Semple School;
- Avoiding congestion and unsafe conditions for motorists, bicyclists and pedestrians along the East 2nd Street corridor between Military and East Tennys;

- Enabling significant reductions in greenhouse gas emissions for future generations;
- Ensuring the project will develop as intended by the City; and
- Ensuring the project will pay its way and provide additional long-term City revenue for discretionary projects and services.

How can these issues be resolved by continuing this failed review process? The failings of this process can be summarized as follows:

- The City did not have enough information in the project application to provide a complete and adequate review of the project;
- 32 months after the NOP was issued, the developer conceded that the proposed project could not be approved under the existing general plan;
- The developer ignored the Council's request for a new project for 10 months, until after the Council detached certification of the EIR from review of the project application;
- The Council detached review of the EIR from review of the project application, an unprecedented action in Benicia;
- The developer refused to grant the Planning Commission's request for additional time to review the EIR and project;
- Staff undercut credibility in the review process by: a) failing to prepare an Initial Study on the revised project as directed by Council on 2/19/08; b) preparing an Addendum on the new project rather than an Initial Study, thereby maintaining the state-mandated time limits for Commission and Council action on the revised project; c) evaluating new traffic and air quality impacts without reconsidering the certified EIR or Addendum, and d) breaching Council procedures by recommending reconsideration of the Council's 10/7/08 rejection of the Addendum and related actions; and
- The developer conceded that the Council has *100 percent discretion* over review of the application, yet there is concern the developer will sue the City if the project is denied.

Benicia resident Marilyn Bardet has described this process as a TRAIN WRECK. *The train has gone completely off the tracks and staff is acting as though it's time to serve dinner, when they should be hauling out the bodies.* What is needed is to end this process. Only then would a workshop be appropriate for the purpose of agreeing on a new process that would resolve these outstanding issues. This new process, by definition, would involve a new application and a Supplemental EIR. We would then be on our way to achieving the clean-tech/green tech research and development campus that most of the community wants and the general plan calls for.

Sincerely,



Steven L. Goetz

Cc: C. Knox, City of Benicia