

March 6, 2018

VIA E-MAIL

Mayor Liccardo and Members of the City Council
City of San Jose
200 E. Santa Clara St.
San José, CA 95113

Re: *Agenda Item 3.7: Proposed Resolution of the City Council Regarding the Ballot Measure Proposal to Amend the San Jose City Charter To Enact “An Act to Limit Urban Sprawl and the Fiscal and Environmental Effects of Specified Development in Outlying Areas”*

Dear Mayor Liccardo and Members of the City Council:

We are writing on behalf of San Jose Residents for Evergreen Senior Homes to object to the Council’s rushed consideration of the proposed charter amendment (Agenda Item 3.7) (the “Charter Amendment”). The Charter Amendment is expressly intended to counteract the pending Evergreen Senior Homes Initiative currently qualified for the June 5, 2018 ballot. The Charter Amendment is a substantive land use measure to be adopted by charter amendment. The Council is being asked to consider the Charter Amendment without the benefit of any analysis of the potential environmental impacts, which violates the California Environmental Quality Act (CEQA).

The CEQA determination that accompanies the proposed Charter Amendment as Exhibit B asserts variously that the Charter Amendment is a not a “project” as defined by CEQA, and even if it is a project, it is exempt from CEQA review under the common sense exemption, and finally, even if it is a project and not exempt, its impacts were previously analyzed under the City’s EIR for its most recent general plan. None of these hurried defenses has merit. As the co-author of the leading legal treatise on CEQA, I believe that if the City proceeds as proposed, without complying with CEQA, its proposed Charter Amendment will violate state law.

I. THE CHARTER AMENDMENT IS A PROJECT SUBJECT TO CEQA.

The Charter Amendment is a discretionary act by the City Council and is a “project” subject to CEQA. CEQA Guidelines Section 15378(b)(3) excludes from the definition

of a “project” only those initiatives that are not public agency-sponsored. Thus, the California Supreme Court in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, made clear that public-agency generated initiatives, such as the City’s proposed Charter Amendment, are projects requiring compliance with CEQA even though the initiative would later require voter approval to pass it. “[T]he decision to place the measure on the ballot [was] discretionary, not ministerial. Therefore, placing the council-generated initiative measure on the ballot was not the type of ministerial act contemplated by the guideline [section 15378(b)].” (*Id.* at 187–88; cf. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1036–37 [voter-initiated measure not a “project” subject to CEQA].) The Charter Amendment is a City Council-generated initiative and, thus, a discretionary action that is subject to CEQA review. The argument that the Charter Amendment is not a “project” subject to CEQA is wholly without merit.

In addition, for the reasons set forth in Part II, below, the City cannot establish that the Charter Amendment does not have the potential for causing a significant effect on the environment.

II. THE COUNCIL CANNOT MEET ITS HEAVY BURDEN TO RELY ON THE COMMON SENSE EXEMPTION UNDER CEQA GUIDELINES 15061 (b)(3).

The common sense exemption places the burden on the City to show “with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (CEQA Guidelines, § 15061, subd. (b)(3); *Muzzy Ranch Co. v. Solano County Airport Land Use Comm’n* (2007) 41 Cal.4th 372, 386 [“whether a particular activity qualifies for the common sense exemption presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies”]; see *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 510–12 [City determination that revegetation project fit within common sense exemption was supported by biological report and preliminary environmental review report that showed “with certainty” that no impacts would occur].) Unlike in *CREED-21*, no such showing is possible here because the proposal itself has been sprung on the Council with no time or opportunity to evaluate its potential effects, including indirect effects. The City has made no effort to satisfy its burden to demonstrate with certainty that the Charter Amendment would not have any significant effect on the environment. Indeed, the environmental analysis prepared by the Evergreen Senior Homes Initiative sponsor demonstrates that the Charter Amendment would increase VMTs as well as have other potentially significant environmental impacts.

III. THE CITY CANNOT RELY ON THE EIR PREPARED FOR ITS EARLIER ADOPTED GENERAL PLAN TO COVER THIS CHARTER AMENDMENT

The City’s final defense of its action to slip a new substantive land use regulation on the June ballot asserts that the City need not examine the impacts of the Charter Amendment because its environmental impact report (EIR) for Envision San José General Plan 2040 (the 2011 General Plan EIR, the 2015 Supplemental EIR and the subsequent addenda thereto are

referred to herein as the General Plan EIR) already evaluated the impacts. That is simply not true. The General Plan EIR did not evaluate the implications of the Charter Amendment on the newly required “vehicle miles traveled” metric, nor did it anticipate that the new charter amendment would be targeted to prevent the Evergreen Senior Homes Initiative. These circumstances constitute new information about potentially new significant impacts and in addition, may give rise to mitigation measures and new alternatives analysis that the City has not previously considered.

Evergreen Senior Homes submitted data showing that the location of housing outside the urban core, which would allow the City to direct jobs downtown, near transit, would reduce VMT and air quality impacts. That data constitutes new information that post-dates the City’s General Plan EIR and also demonstrates that the Charter Amendment, seeking to prevent the very project that would reduce the City’s VMT impacts, would cause potentially significant impacts itself. And those potentially significant impacts have not previously been analyzed because both the issue of VMT and the existence of the Evergreen Senior Homes Initiative post-date the City’s General Plan EIR.

Less than one week ago, on February 27, 2017, the City Council adopted Resolution Nos. 78520 and 78519, approving a new City Council Policy 5-1 entitled “Transportation Analysis Policy” using VMT, rather than LOS, as the metric for transportation analysis under CEQA, and amending City Council Policy 5-3 entitled “Transportation Impact Policy” providing a transition from LOS to VMT, and making General Plan 2040 text amendments to reflect the new City Council Transportation Analysis Policy 5-1. Prior to adoption of these Resolutions, the Envision San José 2040 General Plan utilized LOS to measure automobile delay at intersections will degrade below the LOS D standard representing a significant impact under CEQA. Here, the Charter Amendment was not evaluated in light of the City’s shift to the VMT metric.

Moreover, the City failed to evaluate the Charter Amendment in light of new information available regarding the impacts of employment uses in areas proximate to the urban growth boundary. The 2011 EIR prepared for the Envision San José 2040 General Plan evaluated an alternative land use scenario (the “More Housing/Fewer Jobs Alternative”) in which 40 dwelling units would be developed in the Evergreen Area (specifically, the Evergreen Specific Plan Area), which was ultimately rejected. However, in 2017, the City was presented with new information by Evergreen Senior Homes establishing that the development of housing within the proposed Evergreen Senior Homes Specific Plan area (also in Evergreen) and closer to the urban growth boundary would result in decreased VMT by relocating employment uses closer to public transit. Therefore, the City’s determination that the Charter Amendment is consistent with General Plan 2040 EIR is not supported with substantial evidence. New information has become available, which was not known at the time of certification of the EIR demonstrating that there are new potentially significant impacts that must be evaluated. (Public Res. Code, § 21166(c).)

Mayor Liccardo and Members of the City Council
March 6, 2018
Page 4

Whether evaluated as a failure to consider reasonably foreseeable impacts, failure to consider mitigation measures or a failure to consider alternatives, this Charter Amendment is not adequately evaluated in the General Plan EIR.

Sincerely,

A solid black rectangular redaction box covering the signature of Michael H. Zischke.

Michael H. Zischke

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