



## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** PROPOSED CITY BALLOT  
MEASURE – RESPONSE TO  
CEQA COMMENT LETTER

**DATE:** 3/8/2018

### SUPPLEMENTAL

#### BACKGROUND

On March 6, 2018, the law firm of Cox, Castle & Nicholson LLP submitted a letter (the "Cox Castle letter") on behalf of "San Jose Residents for Evergreen Senior Homes" arguing that the proposed Council-initiated charter amendment entitled "An Act to Limit Urban Sprawl and the Fiscal and Environmental Effects of Specified Development in Outlying Areas" requires review pursuant to the California Environmental Quality Act ("CEQA") before it can be placed on the ballot for the June 5, 2018 election.

The City of San José ("City") has already determined that CEQA review is not required, pursuant to the Department of Planning, Building, and Code Enforcement's CEQA Determination for the proposed Charter Amendment dated March 5, 2018 ("CEQA Determination"). As discussed below, and for the reasons articulated in the CEQA Determination, the Cox Castle letter does not provide any additional factual or legal basis for requiring further CEQA review before the City Council may place the Charter Amendment on the ballot.

#### ANALYSIS

##### **I. The Charter Amendment is Not a "Project."**

The Cox Castle letter contends that the Charter Amendment is a "project" pursuant to CEQA Guidelines section 15378 because the City Council's decision to put a measure on the ballot is discretionary. (Cox Castle letter at 1-2 [citing *Friends of Sierra Madre v. City of Sierra Madre* (2011) 25 Cal.4th 165].) The letter is correct that placing the Charter Amendment on the ballot would be a discretionary act on the part of the City Council.

March 8, 2018

Subject: City Proposed Charter Amendment – Response to CEQA Comments

Page 2

Yet the Cox Castle letter neglects to mention the other essential element of CEQA's definition of a "project." CEQA does not apply to all discretionary actions of public agencies, but rather only to discretionary actions that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code ("PRC") § 21065; see also CEQA Guidelines § 15378(a).) As the CEQA Determination stated, the Charter Amendment "merely supports existing land use designations and does not change any land use designations or densities." (CEQA Determination at 2.) The Charter Amendment does not propose or authorize any development or use of land. Accordingly, the Charter Amendment does not have the potential to cause any direct or reasonably foreseeable indirect physical changes to the environment. In addition, as explained in detail below, future development projects subject to the Charter Amendment will require discretionary City approvals and CEQA review, and will be analyzed at the appropriate time in accordance with CEQA. Requiring CEQA review of such unknown and unknowable projects at this time, as the Cox Castle letter appears to urge, would be premature and would necessitate pure speculation.

As a result, the Charter Amendment is not a "project" pursuant to PRC section 21065 and CEQA Guidelines section 15378. The Cox Castle letter does not identify, and the City is not aware of, any substantial evidence that any physical change to the environment, direct or indirect, may result from adoption of the Charter Amendment.

## **II. CEQA's "Common Sense" Exemption Applies to the Charter Amendment.**

Even if the Charter Amendment were a "project" under CEQA, it would be exempt from environmental review because "it can be seen with certainty that there is no possibility" that the Charter Amendment "may have a significant effect on the environment." (CEQA Guidelines § 15061(b)(3).) Again, because the Charter Amendment preserves and supports existing land use designations, and does not propose or authorize any development or use of land, it will not cause any physical effect on the environment, much less a significant effect. Nothing in the Cox Castle letter identifies, and the City is unaware of, any substantial evidence to the contrary.

## **III. The Cox Castle Letter Relies Entirely on a Hypothetical Comparison Prohibited by CEQA.**

The Cox Castle letter does not contend that the Charter Amendment will have any impact on the existing physical environment, and identifies no evidence showing that any such impact may occur. Rather, the letter contends only that development under the existing land use designations preserved and supported in the Charter Amendment might have greater environmental effects than a *hypothetical* development that might be allowed under the different land use designations and standards in the proposed Evergreen Senior Homes Initiative. (Cox Castle letter at 2.) Based on this comparison, the letter claims that an "environmental analysis" prepared by the initiative's proponents

March 8, 2018

Subject: City Proposed Charter Amendment – Response to CEQA Comments

Page 3

“raises a fair argument that the Charter Amendment could increase VMTs [vehicle miles traveled] as well as have other potentially significant environmental effects.”<sup>1</sup> (*Ibid.*; see also *id.* at 3.)

The Cox Castle letter's proposed comparison between the Charter Amendment and the Evergreen Senior Homes Initiative is legally erroneous for at least three reasons.

First, as discussed below, development under the land use designations preserved and supported by the Charter Amendment has already been reviewed under CEQA, and further environmental review is not required.

Second, the potential environmental effects of the Charter Amendment must be analyzed in comparison to existing physical conditions rather than in comparison to hypothetical development that might occur under some other land use designation. (See, e.g., *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707-10; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 246; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354-58.) Here, the effects of the Charter Amendment must be considered not in relation to hypothetical development that might occur under the Evergreen Senior Homes Initiative, but rather in relation to existing physical conditions, including conditions on the currently undeveloped parcel that is the primary subject of the Evergreen Senior Homes Initiative.

The Charter Amendment does not change any existing land use designation or otherwise approve or authorize any particular use of land. The Charter Amendment thus will not have any physical impact, much less a significant physical impact, on existing environmental conditions in the City. Indeed, the Cox Castle letter proposes a doubly hypothetical comparison insofar as the Evergreen Senior Homes Initiative has not been, and may never be, approved by the voters. CEQA does not permit analysis of environmental effects on the basis of such hypothetical comparisons.

Third, to the extent the Charter Amendment has any relationship to or effect on the Evergreen Senior Homes Initiative, it operates as a project denial. (Charter Amendment § 1903.) As the Supreme Court has explained, rejection or disapproval of a project is not itself a “project” under CEQA. (PRC § 21080(b)(5); see *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902.)

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<sup>1</sup> Taken together or separately, the letter's general, unelaborated reference to “other potentially significant environmental impacts,” and its broad reference to the “environmental analysis” prepared for the Evergreen Senior Homes Initiative, are insufficient to exhaust or preserve any basis for objection to the City Council's action. (PRC § 21177; see *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527-28.)

March 8, 2018

Subject: City Proposed Charter Amendment – Response to CEQA Comments

Page 4

#### IV. Supplemental Review Is Not Required Under PRC 21166.

The City's CEQA Determination also concluded that the Charter Amendment supports, and does not enact any changes to, existing land use policies and designations that were fully analyzed in the environmental review documents prepared for the Envision San José 2040 General Plan. (CEQA Determination at 2-3 [citing the 2040 General Plan Final Program Environmental Impact Report, certified on November 1, 2011 by Resolution No. 76041 ("FEIR"), a Supplemental Environmental Impact Report, certified on December 15, 2015 by Resolution No. 77617 ("SEIR"), and addenda thereto].) Because no changes to these policies and designations are proposed in the Charter Amendment, the environmental effects of any potential development that might occur under these policies and designations have already been subject to CEQA review.

CEQA provides that when an Environmental Impact Report ("EIR") has been prepared for a project—such as the FEIR and SEIR prepared for the General Plan—no subsequent or supplemental EIR shall be required unless one of three triggering "events" occurs. (PRC § 21166.) One of those "events" is that "[n]ew information, which was not known or could not have been known at the time the environmental impact report was certified as complete, becomes available."<sup>2</sup> (PRC § 21166(c).)

However, "new information" does not mean just any information. Rather, to trigger additional environmental review under CEQA, the "new information" must be of "substantial importance," and must show "that the project will have a significant effect not discussed in the EIR, significant effects discussed in the EIR will be substantially more severe, mitigation measures or alternatives found to be infeasible will be feasible and would substantially reduce a significant effect, or mitigation measures or alternatives considerably different from those discussed in the EIR would substantially reduce a significant effect." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1200; CEQA Guidelines § 15162(a)(3).)

The Cox Castle letter asserts that two pieces of "new information" require supplemental review here: (1) a private "environmental analysis" prepared by the proponent of the Evergreen Senior Homes Initiative, and (2) a recently adopted change in City policy related to analysis of transportation impacts under CEQA. Neither the "environmental analysis" nor the change in City policy are sufficient to trigger supplemental review or to call into question the CEQA Determination's reliance on the prior environmental review documents for the General Plan.

The "environmental analysis" prepared by the Evergreen Senior Homes Initiative proponent is not "[n]ew information of substantial importance" under CEQA Guidelines section 15162(a)(3) or PRC 21166. Contrary to the Cox Castle letter's suggestion, the "environmental analysis" is not an environmental review document prepared pursuant to

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<sup>2</sup> The Cox Castle letter does not contend that either of the triggering "events" described in PRC section 21166(a) or (b) has occurred here.

March 8, 2018

Subject: City Proposed Charter Amendment – Response to CEQA Comments

Page 5

CEQA. Nor was the “environmental analysis” prepared subject to any of CEQA’s provisions for public notice, involvement, or review (see, e.g., PRC §§ 21091, 21092, 21092.2, 21092.3), and does not reflect the City’s independent judgment. (See CEQA Guidelines § 15090.) Indeed, as shown in the report on the Evergreen Senior Homes Initiative prepared pursuant to Elections Code section 9212, many of the assertions in the “environmental analysis” are incorrect. Finally, the “environmental analysis” was prepared before the Charter Amendment was proposed, and thus does not constitute evidence that the Charter Amendment may have any particular effect on the environment.

Nor do the City’s recently adopted policies regarding analysis of transportation impacts constitute “new information” within the meaning of PRC section 21166 and CEQA Guidelines section 15162(a)(3). This is so for three reasons.

First, assessment of transportation impacts in light of vehicle miles traveled (“VMT”) rather than level of service (“LOS”) is not “new information” that was not known, and could not reasonably have been known with the exercise of reasonable diligence, at the time the FEIR and SEIR for the General Plan were certified. (See CEQA Guidelines § 15162(a)(3).) Indeed, the environmental review documents for the General Plan specifically addressed VMT at the programmatic level appropriate for a general plan. Reduction of VMT and green-house gas emissions are major policies of the General Plan. General Plan Policies TR9.1 – 11.4 set forth goals and policies to reduce VMT in the City by 10% in the near term and 40% in the long term. The General Plan FEIR and SEIR specifically analyzed VMT and green-house gas emissions at the programmatic level. (See CEQA Guidelines § 15168(a).) The Cox Castle letter is therefore incorrect in asserting that the environmental review for the General Plan designations preserved and supported in the Charter Amendment did not evaluate transportation impacts using the VMT metric.

Second, the City resolutions adopting the new VMT policies have not yet taken effect. Because these resolutions amend the General Plan, they are subject to referendum, and by law will not take effect until 30 days after adoption. (See *Midway Orchards v. County of Butte* (1990) 220 Cal. App. 3d 765, 781-82.) Amendments to the CEQA Guidelines implementing state law requiring changes to transportation analysis have been proposed by the California Resources Agency, but are not yet final. (See <http://resources.ca.gov/ceqa/>.) It would be improper for the City to treat either the newly adopted resolutions or any proposed Guidelines amendments as “new information” prior to their becoming legally effective.

March 8, 2018

Subject: City Proposed Charter Amendment – Response to CEQA Comments

Page 6

Third, the analysis requested in the Cox Castle letter is premature and requires pure speculation. The proper time for evaluating whether supplemental environmental review is required due to changes in the City's transportation analysis policies would be when a specific development is proposed on threatened employment lands as defined in the Charter Amendment. The nature and character of any such development, and its possible effect on VMT, are entirely speculative at this point. Under the Charter Amendment, proposals may be made for industrial or residential development, or for preservation of currently undeveloped lands as open space, as the Charter Amendment expressly provides and as some stakeholders have already suggested. The precise character of any such development proposal is unknown, and unknowable, at this time. CEQA does not require the City to speculate as to the effects on VMT of development projects that have not been, and may never be, proposed under the existing land use designations preserved and supported by the Charter Amendment. (See, e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395 [where future development is unspecified and uncertain, agency need not engage in "sheer speculation as to future environmental consequences"].)

The Charter Amendment does not propose any specific development, but rather preserves and supports existing land use designations in the General Plan. The Charter Amendment also specifically provides that future proposals to convert threatened employment lands to other uses will be subject to CEQA at the time any such proposals are made. In sum, therefore, the Cox Castle letter provides no basis for revisiting the CEQA Determination or otherwise requiring further review under CEQA before the City Council votes to put the Charter Amendment on the ballot.

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