

July 12, 2013

Hal Bohner, Esq.  
115 Angelita Avenue  
Pacifica, CA 94044

Re: Loeb v. City of Pacifica, San Mateo Superior Court Case No. CIV522741

Dear Mr. Bohner:

This letter addresses issues raised in your correspondence (dated June 4, 11 and 29, 2013) and Complaint for Declaratory and Injunctive Relief regarding Caltrans' plans to widen 1.3 miles of Highway 1 (the Calera Parkway Widening Project).

### INTRODUCTION/SUMMARY

The City has reviewed your correspondence and Complaint. We appreciate the interests and concerns you express on behalf of Plaintiff Peter Loeb. The City is studiously evaluating these and other issues as it considers its options relative to making determinations regarding the Project's consistency with the City's General Plan and Local Coastal Land Use Plan.

However, your Complaint does not state any viable claim, and your demand that the City immediately cease all actions concerning the Project is unreasonable. First, you cannot present any justiciable dispute because the City has not taken any action which could be subject to judicial review. Your allegations are not ripe, and you cannot present an actual controversy to support a claim for declaratory relief.

Second, your claims lacks substantive merit. When the City makes a determination regarding the Project's consistency with the General Plan and Local Coastal Land Use Plan, the City will have substantial and legitimate grounds upon which the make consistency determinations.

Thus, your allegations are improper and unsubstantiated, as further explained below. Accordingly, we request that dismiss your suit, saving our respective clients the expenses of a demur, and seek to work cooperatively and productively with the City with respect to the subject issues.

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## **FACTUAL BACKGROUND**

Caltrans is currently preparing the Environmental Impact Report (EIR) for its Project to improve a substandard, 1.3 mile segment of Highway 1. The Draft EIR analyzes the Project's consistency with the City's General Plan and Local Coastal Land Use Plan, including without limitation with respect to policies to improve the safety to Highway 1, intermodal access to Highway 1 (e.g., pedestrians and bicycle access), and landscaping.

We anticipate that Caltrans may issue Responses to Comments and approve the Final EIR later this summer. Thereafter, the City Council will consider whether to request the San Mateo County Transportation Authority to release funds for the design phase of the Project. After substantial completion of the design, Caltrans may seek a Coastal Development Permit. During this process, the City will have an opportunity to determine whether the Project is consistent with the General Plan and Local Coastal Land Use Plan in light of all the available information (including without limitation the Final EIR, the design documents, and staff reports and analysis).

Thus, no application is pending before the City, and the City has yet to make a determination regarding the Project's consistency with the General Plan and the Local Coastal Land Use Plan. However, the information compiled and analyzed to date demonstrates that substantial evidence will support a determination that the Project is consistent with the General Plan and Local Coastal Land Use Plan.

Nonetheless, you have sued the City, alleging that the Project is inconsistent with policies set forth in the General Plan and Local Coastal Land Use Plan. As discussed in detail below, your contentions fail.

## **ANALYSIS**

### **I. You Do Not Allege a Justiciable Controversy**

First, you cannot present a justiciable controversy and thus may not obtain any judicial relief. Your claims are not ripe, and you cannot present an actual controversy to support a claim for declaratory relief, as explained below.

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### **A. The Allegations Are Not Ripe**

To be ripe, a controversy “must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” (*Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170-171 (citations omitted).) “[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decision making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.” (*Id.* at 170 (citations omitted).) A difference of opinion regarding the proper interpretation and validity of any agency’s regulations is insufficient to satisfy the ripeness requirement. (See *id.* at 173.)

The courts use a two-pronged test to determine ripeness: (1) whether the dispute is sufficiently concrete; and (2) whether the parties will suffer hardship if judicial consideration is withheld. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 64.)

As to the first prong: the City of Santa Monica could not state a concrete dispute regarding the legality of a recently adopted ballot measure because the city had not taken action in contravention of its duties under the law. (*City of Santa Monica*, 126 Cal.App.4th at 64-65.) Similarly, Pacific Legal Foundation failed to present an actual dispute based upon concrete facts regarding legality of administrative guidelines because the Coastal Commission had yet to apply the guidelines to a development application. (*Pacific Legal Foundation*, 33 Cal.3d at 172.)

As to the second prong: the courts require the plaintiff to complete the administrative process before seeking judicial review, and the courts presume that the agency will properly apply the law during the administrative process. (*Pacific Legal Foundation*, 33 Cal.3d at 172.) Thus, in *Pacific Legal Foundation*, the Supreme Court held that the plaintiff would not be harmed by completing the administrative process before filing suit. (*Ibid.*)

You could not satisfy either prong of the ripeness test. First, the dispute is not sufficiently concrete. The Draft EIR, General Plan, Local Coastal Land Use Plan and other materials include substantial evidence to support consistency findings (as discussed below). However, the City has yet to make any consistency determination and to set forth the reasons therefor. Thus, you cannot allege a sufficiently concrete dispute warranting judicial review. (See, e.g., *City of Santa Monica*, 126 Cal.App.4th at

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64-65; *Pacific Legal Foundation*, 33 Cal.3d at 172.)

Second, you could not satisfy the hardship prong. Your clients will not be harmed by continued administrative review and processing of the Project, including the not-yet-completed analysis by the City of the Project's consistency with the General Plan and Local Coastal Plan. (*Pacific Legal Foundation*, 33 Cal.3d at 172.)

Accordingly, you do not present a ripe controversy warranting judicial review.

**B. No Claim for Declaratory or Injunctive Relief Can Be Stated**

Similarly, you do not state a claim for declaratory or injunctive relief.<sup>1</sup>

Declaratory relief is only available for an "actual controversy." (Code Civ. Proc. § 1060.) "The court may refuse to exercise the power granted by this chapter [Code Civ. Proc. §§ 1060 et seq.] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc. § 1061.) Declaratory relief is not available if the plaintiff is seeking "an advisory opinion on a particular or hypothetical state of facts." (*Selby Realty Co. v. City of Buenaventura* (1973) 10 Cal.3d 110, 117.) For example, in *Selby*, the plaintiff sought a declaratory judgment that a city's determination, via the adoption of a general plan, that a street could be located across his land would violate his property rights. Even though the adoption of the general plan was a legislative act, "[w]hether eventually any part of plaintiff's land will be taken for a street depends upon unpredictable future events." (*Id.* at 118.) Thus, the trial court had properly sustained the demurrer. (*Ibid.*)

Similarly, even if the underlying facts are not in dispute, a party cannot state a justiciable controversy for equitable relief unless the plaintiff completed an available administrative process regarding the agency's application of its regulations to those facts. A court will sustain a demurrer in such a situation. (See, e.g., *DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 544 (even though the facts were fixed with respect to a landlord-tenant dispute, landlord could not state a claim for declaratory relief regarding the parties' respective rights because the parties had yet to complete an administrative

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<sup>1</sup> Injunctive relief is a remedy, not a cause of action. Thus, any purported claim for injunctive relief only states facts sufficient to constitute a cause of action if it incorporates a cognizable claim for declaratory or other relief. (See 5 Witkin, Cal. Procedure (2008), Pleading, § 825, p. 241; see also *City of Tiburon v. Northwestern Pac. R.R. Co.* (1970) 4 Cal.App.3d 160, 178.)

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process regarding the applicability of local regulations).)

Here, the City Council has not yet made any determination that the project is consistent with the General Plan and Local Coastal Land Use Plan. Nor has it taken an action, e.g., to request the Transportation Authority to fund Project design or to approve any permit, that presents an actual controversy regarding the application of law to a set of facts. Thus, your allegations do not support a cognizable claim for declaratory or injunctive relief.

**II. The City Has Ample Bases to Find the Project Consistent with the General Plan and Local Coastal Land Use Plan**

Second, you will not obtain any judicial relief because the City has ample grounds upon which to determine that the Project is consistent with the General Plan and Local Coastal Land Use Plan.

**A. The Courts Defer to Local Agencies' Consistency Determinations, and Challengers Bear an Extraordinarily High Burden of Proof**

We concur that the General Plan and Local Coastal Land Use Plan are overarching planning documents that guide the City's land use and planning decisions.<sup>2</sup> Thus, review of projects for consistency with the City's General Plan is a regular part of its planning process. (See *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531; see also *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142.) Similarly, the City regularly reviews projects for consistency with its Local Coastal Land Use Plan. (See *McAllister*, 147 Cal.App.4th at 273.)

However, the courts recognize that these comprehensive planning documents reflect a range of competing interests, and that city councils are in the best position to make determinations regarding consistency. (See *Friends of Lagoon Valley v. City of*

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<sup>2</sup> The City's General Plan is its supreme planning document, providing an underlying framework to guide land use and planning decisions. (Gov. Code §§ 65300 et seq.; see also *DeVita v. County of Napa* (1995) 9 Cal.4th 763.) The City's Local Coastal Land Use Plan, adopted pursuant to the California Coastal Act of 1976, provides additional framework for land use and planning decisions. (Pub. Resources Code §§ 30600, 30108.5, 30108.6; see also *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 271-72.)



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*Vacaville* (2007) 154 Cal.App.4th 807, 816.) Accordingly, the courts accord great deference to an agency's determination concerning consistency with its own general plan. (*Save Our Peninsula*, 87 Cal.App.4th at 142.)<sup>3</sup>

A challenger to a consistency determination has an extraordinarily high burden. The courts apply a "strong presumption of regularity" to general plan consistency determinations. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677 fn. 9 (citation and internal quotation marks omitted).) The challenger must establish that the local agency "acted arbitrarily, capriciously, or without evidentiary basis," and a court will only reverse a consistency determination if "no reasonable person could have reached the same conclusion." (*Id.* at 677 (citations and internal quotation marks omitted).)

Moreover, in applying this deferential standard, courts have held that consistency does not require an "exact match" with a general plan. (*Id.* at 678.) A project should be "in agreement or harmony with" the terms of the applicable plan, not in rigid conformity with every detail thereof." (*Ibid.* (citations omitted); see also *Friends of Lagoon Valley*, 154 Cal.App.4th at 816.) This principle complements the fact that "[g]eneral plans ordinarily do not state specific mandates or prohibitions. Rather, they state 'policies,' and set forth 'goals.'" (*Friends of Lagoon Valley*, 154 Cal.App.4th at 817.)

As the First District explained, "it is beyond cavil that no project could completely satisfy every policy stated in [a general plan], and that state law does not impose such a requirement." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719.) In sum, "[i]t is, emphatically, not the role of the courts to micromanage these development decisions." (*Ibid.*)

## **B. Substantial Evidence Supports a Consistency Determination**

Here, the City Council may readily find the Project to be consistent with the General Plan and Local Coastal Land Use Plan.

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<sup>3</sup> As the Court further explained in *Save Our Peninsula*: "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Ibid.*) Thus, the courts must afford the agency's governing body freedom to weigh and balance the plan's policies and to exercise broad discretion in construing its policies in light of the purposes of the general plan. (*Ibid.*)

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For example, the Circulation Element of the General Plan includes the following policies: (1) to provide safe access consistent with the level of development, (2) to improve pedestrian and bicycle access, (3) to improve safety of the local circulation system, and (4) to promote orderly growth in land use and circulation. (General Plan, Circulation Element, Policy nos. 4, 9, 11 and 15.) In addition, the Scenic Highways Element includes a policy to encourage multiple recreational uses along scenic highways and routes other than auto. (General Plan, Scenic Highway Policy no. 4.)

These General Plan policies provide ample substantial evidence to support a determination that the Project is consistent with the General Plan. For example, the Project will improve the safety of this segment of Highway 1, provide for improved alternative modes of transportation, e.g., bicycle and pedestrian travel, and increase the capacity of this segment for current and projected traffic volumes without increasing the overall capacity of the highway.

Examples of relevant Local Coastal Land Use Plan policies regarding Highway 1 include (1) to improve the operation of the highway to ensure erosion control, to protect views and to improve “the visual edge” of the highway, (2) to improve intermodal travel along the highway, e.g., pedestrian, bicycle and emergency access, and (3) to improve landscaping to ensure erosion control, to protect views and to improve “the visual edge” of the highway. (Local Coastal Land Use Plan, pp. C-112, 113.)

These policies provide ample substantial evidence to support a determination that the Project is consistent with the Local Coastal Land Use Plan. As the Draft EIR explains at page 54:

The project would be consistent with these policies since either Build Alternative would provide improved bicycle and pedestrian access, as well as vehicular access, within the project segment (refer to Section 2.6 Traffic & Transportation/Pedestrian & Bicycle Facilities). The project would also include erosion control and storm water detention measures (refer to Section 2.9 Hydrology and Floodplain and 2.10 Water Quality and Storm Water Runoff). While the two Build Alternatives would require the removal of mature landscaping and trees along the highway, particularly the mature trees west of SR 1 north of San Marlo Way, the project would include new landscape planting and would protect and/or improve coastal views (refer to Section 2.7 Visual/Aesthetics).

Accordingly, the City has multiple grounds upon which to find that the Project is

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consistent with the General Plan and Local Coastal Land Use Plan, and the court will affirm such a determination. (See, e.g., *Sequoyah Hills*, 23 Cal.App.4th at 720 (development project was consistent with general plan because project approval sought to minimize impacts to views and hillsides pursuant to preservation and conservation policies); *San Franciscans*, 102 Cal.App.4th at 675-80 (development project was consistent with general plan because it advanced policies related to economic development despite loss of historical architecture, which the general plan also sought to preserve); *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509-11 (approval of winery project that would destroy wetland was consistent with general plan because it furthered policy to promote wineries even though general plan also sought to preserve wetlands).)

### **C. Your Allegations of Inconsistency Lack Merit**

As explained above, the court will defer to the City's consistency determination based upon the substantial evidence that the Project is consistent with the General Plan and Local Coastal Land Use Plan. Nonetheless, it is worth noting that your allegations of inconsistency lack merit.

Your Complaint purports to identify policies that conflict with the Project. For example, you refer to a Local Coastal Land Use Plan discussion of a three decade-old proposal and study regarding improvements to Highway 1 which did not contemplate increasing the capacity of the highway. (Complaint, ¶ 27.) In addition, you refer to discussion in the General Plan and Local Coastal Land Use Plan to a potential frontage road. (Complaint, ¶ 31.) However, you cannot rely upon these or any other policies to establish any inconsistency.

First, you fail to acknowledge that the policies upon which you rely do not set forth specific mandates. For example, you cannot establish that the discussion in the planning documents of three-decade-old proposal for Highway 1 compels the City to oppose any project that varies therefrom. Similarly, with respect to the previously contemplated frontage road, you cannot establish that the City adopted any policy mandating the construction of a frontage road.

Second, you cannot establish that the Project is inconsistent with any policy. The current Project is not intended to increase the overall capacity of Highway 1, but to improve the current, substandard segment. The Project is designed to alleviate a localized bottleneck only within the project reach, not to change circulation or traffic volumes beyond this limited 1.3 mile segment of highway. (See Draft EIR, pp. 46, 69, 191.) Thus, the Project does not conflict with any policy upon which you rely, including



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the three-decade-old proposal and the frontage road concept.

Accordingly, you cannot establish the Project is inconsistent with the General Plan and Local Coastal Land Use Plan. Indeed, a long line of cases demonstrates the courts' rejection of general plan inconsistency claims. (See, e.g., *Sequoyah Hills*, 23 Cal.App.4th at 720 (court rejected claim that development project that would remove knoll was inconsistent with general plan policy to discourage significant alternation of land forms); *San Franciscans*, 102 Cal.App.4th at 675-80 (court rejected claim that project was inconsistent with general plan policy to preserve historic architecture); *Sierra Club*, 121 Cal.App.4th at 1509-11 (court rejected claim that approval of wetland-destroying winery was inconsistent with wetland preservation policy); *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 239 (court rejected claim that roadway encroachment into creek buffer zone was inconsistent with general plan policy to preserve the buffer zone as open space).)

### CONCLUSION

In sum, you cannot establish a basis for judicial review, and even if you did, your claims lack substantive merit. Therefore, the City requests that you dismiss your Complaint and seek to work productively with the City.

Sincerely,

BURKE, WILLIAMS & SORENSEN, LLP

  
MICHELLE MARCHETTA KENYON

MMK:KDS

cc: City Council  
City Manager  
City Planner  
Public Works Director