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September 17, 2021

VIA EMAIL to: cityclerk@cityofmillvalley.org

Kelsey Rogers, City Clerk
City of Mill Valley
Mill Valley City Hall
26 Corte Madera Avenue
Mill Valley, CA 94941

RE: Public Comments to Item 4, 1 Hamilton Drive
City Council meeting September 20, 2021

Dear Ms. Rogers:

On behalf of Friends of Hauke Park ("FOHP"), this letter provides comments regarding Agenda Item 4, identified as "1 Hamilton Drive," to the City Council meeting on September 20, 2021. As explained more fully below, the "project" at issue for purposes of the California Environmental Quality Act ("CEQA") necessarily includes the underlying proposed affordable housing project, and we are unaware of any CEQA exemption for that underlying project. While there is some confusion regarding whether the proposed designation of the 1 Hamilton Drive site as "exempt surplus" land is a commitment to that underlying housing project, this uncertainty can be avoided by simply not making the proposed designation at the present time. This is further justified because (i) the staff report fails to explain why the designation must be made before entering discussions with proposed developers; (ii) the proposed designation appears intended to impermissibly manufacture a justification to avoid considering alternative sites as required by CEQA; and (iii) the City cannot presently support requisite findings with substantial evidence in the record.

I. The "Project" includes the underlying affordable housing project.

The staff report states that the proposed actions are not subject to CEQA "because they are excluded from the definition of a project by section 21065 of the Public Resources Code and section 15378(b) of the State CEQA Guidelines." This is incorrect. CEQA Guidelines section 15378, subdivision (a) clarifies, " 'Project' means the whole of an action," and subdivision (c) further clarifies, "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by

government agencies. The term 'project' does not mean each separate approval." The staff report makes clear that the proposed actions are being taken to implement an affordable housing project. The affordable housing project is therefore the "project" for purposes of CEQA. The City has not identified any statutory or categorical exemption applicable for that project.

CEQA case law further clarifies that an agency must perform CEQA review for the first, not last, discretionary approval for a project. (CEQA Guidelines, § 15352; *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91 (*Megaplex*).) The relevant question presented here is therefore not whether the proposed approvals are a "project" under CEQA, but whether the actions commit the City to the affordable housing project and thereby constitute an "approval" of that project and resulting duty to comply with CEQA. Unfortunately, it is not always clear when this occurs. The CEQA Guidelines explain, "EIRs and negative declaration should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment," and also "CEQA compliance should be completed prior to acquisition of a site for a public project." (CEQA Guidelines, § 15004, subd. (b), (b)(1).)

By limiting its declaration of "exempt surplus" property to the 1 Hamilton Drive – to the exclusion of up to 75 other sites (many of which are actually zoned for residential use) – in order to secure its availability for the project, the City appears to be committing to the 1 Hamilton Drive site for the project. This suggests that the proposed designation is the first City "approval" of the project, which may force FOHP to file an action in an abundance of caution. (*Megaplex*, *supra*, 149 Cal.App.4th 91.) *Megaplex*, which involved serial discretionary approvals, provides a cautionary tale. The petitioners in that case waited until the later discretionary approvals to file their lawsuit. The appeal court upheld the trial court's determination that petitioners were required to file their action following the agency's first discretional approval of the project, not the last one. (*Megaplex*, *supra*, 49 Cal.App.4th at 110 ["Here, the fact that the City has filed notices of determination relating to subsequent approvals does not extend the limitations period for challenging the MND that was the subject of the May 4, 2005 notice of determination"].) This can be avoided by simply not making the proposed designation at this time.

II. The proposed designation is premature, unnecessary and contrary to law.

As explained above, the proposed designation of the 1 Hamilton Drive site as "exempt surplus" land may arguably constitute the City's first "approval" of the proposed affordable housing project. This leads to the obvious question whether that designation is even necessary at the present time.

The staff report provides inadequate information. It merely asserts, "This declaration is necessary in order to proceed with negotiations with the housing partner and explore options for the Property." (Staff report, p. 4.) The staff report provides no further explanation, much less legal authority, supporting this conclusion. We are aware of no such authority. Thus, the staff report fails to explain why the "exempt surplus" designation must be made now.

In the absence of factual or legal support for the City's stated purpose in making the declaration at this time, it is reasonable to question whether the action is advancing other purposes. We note that only one site – 1 Hamilton Drive – is being proposed for this "exempt surplus" designation despite the existence of other possible sites. FOHP is reasonably concerned that the City is excluding from consideration other feasible sites based on political and other concerns that are unrelated to site suitability as articulated in the City's staff report dated October 5, 2020. Limiting the City's "exempt surplus" designation to only 1 Hamilton Drive reinforces this concern, as the City could attempt to rely on that designation as substantial evidence supporting the decision to exclude consideration of off-site project alternatives. (CEQA Guidelines, § 15126.6.) This is untenable.

As a final matter, and reinforcing all of the issues described above, the "exempt surplus" land designation is limited to "whenever the legislative body of a city determines that any real property or interest therein owned or to be purchased by the city ***can be used to provide housing*** affordable to persons and families of low or moderate income." (Gov. Code, § 37364 (emphasis added).) Accordingly, the city must affirmatively "determine" that the site "can be used to provide housing." Any such determination must be "supported by written findings." (Gov. Code, § 54221, subd. (b)(1).) Here, the 1 Hamilton Drive site's land use and zoning designations prohibit all residential uses, and so it is difficult to understand how such findings can be made. While it is possible that the City may address this with a General Plan amendment or rezone, such actions have not yet occurred. Indeed, it would be unlawful for the City to commit to take any such actions in the future without performing CEQA review.

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It appears that the proposed action to designate the 1 Hamilton Drive site as "exempt surplus" land at the present time is unnecessary and even improper and unlawful. Thank you for the opportunity to comment.

Very truly yours,

SOLURI MESERVE
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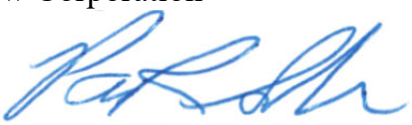
By: 
Patrick M. Soluri

PMS/wra

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