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May 5, 2015

VIA E-MAIL AND HAND-DELIVERY

Hon. Joe Buscaino, Chair
Councilmember Curren D. Price, Jr.
Councilmember Gilbert Cedillo
Public Works and Gang Reduction Committee
Attn: Michael Espinosa
Los Angeles City Council
200 North Spring Street - Rm. 395
Los Angeles, California 90012

Re: Council File No. 14-1297
Class "B" Permit for Voluntary Non-Standard Improvements on Bulwer
Drive From Woodstock Drive To 750 Feet West of Woodstock Drive
Hearing Date: May 6, 2015

Dear Chair Buscaino and Members of the Committee:

This office represents Bulwer Drive, LLC ("Bulwer"), the Applicant for the above-referenced Project, which is categorically exempt from the California Environmental Quality Act ("CEQA"). Bulwer seeks voluntarily to provide limited, specific improvements to provide safe and sustainable access to two existing single-family homes, as requested by the City's District Engineer in 2008. These improvements cannot, by the terms of the approval requested and under the City's Baseline Hillside Ordinance (the "BHO"), facilitate development of any other parcels. We respond to the untimely and therefore invalid Appeal by the Santa Monica Mountains Conservancy (the "Conservancy"), which contains a number of significant omissions regarding the proceedings before the Board of Public Works (the "Board") and implementation of the BHO. As described more fully below, the Conservancy's Appeal advances absurd arguments that are unsupported by any evidence, let alone substantial evidence, and therefore fails to raise a fair argument that a significant impact would occur. The City Council should deny the Conservancy's appeal in its entirety and uphold the decision of the Board.

1. THE APPEAL IS UNTIMELY AND THEREFORE INVALID, AND THE CITY COUNCIL SHOULD NOT HEAR IT.

As described in detail in our February 17, 2015 letter to Deputy City Attorney Michael Kaplan, no appeal of the Board's determination under the CEQA is available to the Conservancy. The Notice of Exemption (the "NOE") for the Project was filed on September 18, 2014. Section 21167(d) of the Public Resources Code provides that an action alleging that a public agency has improperly determined that a project is not subject to CEQA or is exempt must be filed within 35 days of the filing of a NOE. Accordingly, the time period in which to challenge the issuance of the subject exemption by the Bureau of Engineering ("BOE") expired on October 23, 2014.

Although the City Council attempted to exercise discretion under Section 245 of the City Charter, that attempt suffered from procedural flaws—most notably a violation of the Ralph M. Brown Act (Govt. Code § 54950, *et seq.*)—detailed among other places in our letter dated October 21, 2014. As that action by the City Council was invalid and void *ab initio*—and later rescinded by the City Council—it could not and did not extinguish the Board's prior determination, the filing of the NOE, or the run of the associated limitations period under CEQA. Although the April 23, 2015 Staff Report (p. 5) states the prior NOE became "inoperative" this conflicts with the invalidity and rescission of the whole City Council's action, which included rescission of the NOE. Consequently, nothing changed the Conservancy's requirement to appeal the NOE by October 23, 2014, and the Conservancy's failure to file by that time extinguished any right to an administrative appeal. As a result, the Categorical Exemption is no longer subject to challenge in court or in further administrative proceedings. *See* Kosta & Zischke, Practice Under the California Environmental Quality Act § 23.31 (2014) (lead agency may only reconsider exemption determination if new discretionary action is taken). Consequently, the City Council should not have accepted—and should not now hear—the Conservancy's appeal.

2. THE PROPOSED IMPROVEMENTS ARE LIMITED AND WERE PROPOSED AT THE ORIGINAL REQUEST OF THE CITY.

The proposed improvements concern life safety, not facilitating development. As described in detail in the Board Report, the Project includes construction of 750 feet of roadway, associated drainage improvements, and a guardrail along an existing, failing roadway. The improvements are necessary to restore safe access to two existing residences for which the City previously granted Certificates of Occupancy but for which access remains treacherous and unsafe.

A separate development project originally proposed by Bulwer and considered by the City in or around 2005 proposed a full-width roadway to serve the two existing residences and up to 10 then-proposed additional residences. However, Bulwer ultimately abandoned that proposal. It has no applicability here and no further plans currently exist to develop any additional residences.

However, since abandonment of the 2005 project, the conditions of the affected portion of Bulwer Drive severely deteriorated. Several lots owned by Bulwer experienced slope failure during prolonged rainstorms in 2004-2005.

Bulwer consulted with the Bureau of Engineering regarding the proper course of action to maintain safe access to 8041 and 8045 Bulwer Drive. The improvements ultimately proposed came *at the request of District Engineer Lemuel Paco*, P.E. Inspections after a severe rain event by BOE staff in 2008 led to observations that Bulwer's safety concerns "are valid and merit consideration by the City." As stated in the same letter,

"these improvements *would not* constitute a suitable paved roadway that meets the requirements of LAMC 12.21 A.17(e) – Hillside Access [i.e., a Standard or Substandard Hillside Limited Street] for future development." Letter from Lemuel Paco to Duckworth Consulting, dated April 16, 2008 (emphasis added).

Ultimately, Bulwer obtained grading permits to repair the slope. Remedial grading occurred in late 2010, with additional remedial grading in 2011 and placement of some non-structural fill in August 2011.

As described in the City's approval letter and further below, these improvements are neither intended nor designed to support any additional residential structures. Thus, no future building permits could rely upon the completed or proposed improvements to obtain a Certificate of Occupancy. Instead, issuance of building permits for any new residences that propose to take access from the proposed roadway would require discretionary review and the provision of roadway improvements that satisfy the Municipal Code.

3. THE 2005 PLANNING CASE WAS AND REMAINS INAPPLICABLE TO THE PROJECT.

The Conservancy bases its opposition to the Categorical Exemption on an inapplicable, nine-year-old statement by the Department of City Planning ("DCP"). As the Conservancy conceded, the 2005 Planning Case (Case DIR-2005-8437-DRB-SPP) proposed a full-width roadway, consistent with the road classification in the City's Master Plan of Streets precisely to provide access to two existing lots and up to ten additional lots then proposed for development by the Applicant. None of those conditions occurs here, because the proposed improvements would not provide a 20-foot-wide, continuously paved roadway to satisfy BHO requirements and no further lots are proposed for development.

Moreover, the Conservancy's assertions of future approvals are not evidence and prove too much. If the Conservancy's statement that issuance of building permits and Certificates of Occupancy for buildings fronting on non-compliant roads is "a common outcome" is correct, the City could still issue new Certificates of Occupancy even without the roadway

improvements, and these improvements therefore could not eliminate a constraint on development.

Despite the Conservancy's unsupported assertion, such approvals would not occur and are not foreseeable. The existing residences were approved prior to the DCP and Department of Building and Safety ("DBS") requirement for a fully improved and continuously paved roadway to obtain a building permit and a Certificate of Occupancy. At the time of approval of the existing residences, both departments only required improvement of the portion of the roadway immediately fronting a residence. But that has not been the case for some time. Prior to the 2011 amendments to the BHO (Ord. 181,624; eff. May 9, 2011), both departments require a full-width, continuous roadway improvement from the point of driveway access to the boundary of the Hillside Area. *See also* LAMC §12.21 C.10(i)(3).

The proposed voluntary improvements do not constitute a "fully improved" road, as they do not provide sufficient width to qualify as a Standard or Substandard Hillside Limited Street. Aside from providing basic, safe access to the existing two residences for which the City long ago granted Certificates of Occupancy, the improvements would not provide a sufficient basis for approving building permits or granting a Certificate of Occupancy. The Board of Public Works continued its hearing regarding the Project *expressly* to address the argument the Conservancy advances. Associate Zoning Administrator Charles Rausch confirmed the requirements and application of the BHO and testified that provision of the voluntary improvements proposed here would not suffice to permit construction of any new residences, even on properties that front the proposed improvements. Absent a future commitment to construct a fully improved, continuous roadway (as defined above), any subsequent construction of new residences would require further discretionary review, including a public hearing and environmental review, by the Office of Zoning Administration.

Moreover, and contrary to the Conservancy's position, CEQA presumes agency and applicant compliance with applicable regulations. *See, e.g., Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 416 (1988) (agency compliance with the law "can be reasonably presumed"). The scenario posited by the Conservancy is speculative because any support the Conservancy's claim may have found within the history of the City's Municipal Code and administrative process does not exist and has not existed for some time. Changes that are "speculative or unlikely to occur" are "not reasonably foreseeable." CEQA Guidelines §15064(d)(3). As the Board determined through specific testimony on this issue, the construction of additional residences along or adjacent to the proposed improvements are not supportable by the Project and are not reasonably foreseeable, despite the Conservancy's unsupported assertion to the contrary. Therefore, the City need not attempt to analyze the effects of such construction.

4. NO EVIDENCE SUBSTANTIATES ANY CLAIM OF A WILDLIFE CORRIDOR.

As described by the Board, all work would occur within existing paths of travel and recently graded surfaces, and any risk of effects on a plant or animal species of special concern is negligible. Despite this determination, the Conservancy includes a desperate and unsubstantiated claim that the existing road constitutes a “critical element” of a “wildlife linkage” between Nichols Canyon and Laurel Canyon Boulevard. Section 15384(b) of the CEQA Guidelines defines “substantial evidence” as “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” Here, the vague and unverifiable claims of “regular” photography of some animals in a particular area, even when coupled with the unexceptional observation that a public roadway cannot be fenced by private parties, provide no evidence of any value to a decision maker. If the roadway, which had been used for years as a road and leads only to another improved road (Woodstock Road), were “critical” or “irreplaceable,” one would expect some citation to an expert, as well as some support by systematic and verifiable observations. Yet, none of that is present here. Moreover, the Conservancy’s argument appears at least partially premised on the notion that Bulwer could fence the proposed public roadway, which it, of course, cannot—either as a dirt or paved roadway.

However, even granting some factual basis (though there is none) for the Conservancy’s claimed wildlife observations, the City is replete with hillside streets, such as Beverly Glen and Roscomare Road, that regularly convey deer and other animals within and among canyon areas. Unlike those areas, however, aerial photographs of the vicinity of 8041 and 8045 Bulwer Drive reveal that paving a portion of Bulwer Drive would not obstruct any wildlife movement, as a substantial area of scrub and other vegetation occurs both north and south of the existing residences. Further, as stated on page 8 of the Department of Public Works Bureau of Engineering Report No. 1, dated August 13, 2014 (the “Board Report”), the easements used for construction of the improvements would conform the right-of-way with the existing and historical path of travel on the roadway. No evidence—let alone substantial evidence—supports an argument that the Project would impede wildlife movement.

5. CONSTRUCTION OF DRAINAGE IMPROVEMENTS IS REMEDIAL AND WOULD NOT INDUCE GROWTH.

In addition to the fact that the roadway would not, as described above, induce growth because no future residences could rely upon it, the proposed drainage improvements also would not induce growth, as their very purpose is to improve existing drainage and control erosion. In arguing the contrary, the Conservancy ignores the clear statement on page 8 of the Board Report that the soils report prepared for the affected property “clearly indicates that no surface drainage or control or erosion protection devices” currently exist, and the proposed improvements “will help to control this situation” and are therefore remedial in nature. Board Report, p. 10. The record is replete with descriptions of the erosion and mud deposits that occur as a result of rain and, more recently, a ruptured water main. *See, e.g.*, Board Report pp. 5-7.

The proposed improvements would address these and other existing drainage and erosion issues. Board Report, p. 7.

The proposed drainage improvements do not remove any existing barrier to development. Rather, they merely ensure continued and safer access to two existing residences and minimize the potential for stormwater-related damage to the roadway itself, as well as to existing upslope and downslope structures. The DBS letter to Bulwer, dated August 2, 2011 and approving remedial grading, specified, "[t]he compacted fill is approved only as a non-structural fill and *shall not be used for the support of structures*" (emphasis added). That is, the slope repair only addresses restoration of the slope to its prior topography, and is neither designed nor approved to support any structures. Any proposal to develop upslope lots with building structures, including single-family homes, would require separate engineering studies and (likely) extensive earthwork and additional slope reinforcement prior to approval for construction.

The April 23, 2015 Staff Report further clarifies the remedial nature of the proposed drainage improvements. As discussed on page 4, the improvements are meant to relieve existing impoundments and convey the flows to an existing storm drain, and to "provide an alternate path of travel for the water" in the event of a slough or debris flow from slope failure. *Id.* These improvements "will not satisfy the requirements for development of the vacant lots" and "will not in itself allow any further development or be growth-inducing." *Id.*

6. THE CONSERVANCY PROVIDES NO EVIDENCE THAT CONDEMNATION WOULD RESULT IN ANY ENVIRONMENTAL EFFECTS.

The Conservancy wrongly argues that in considering the Project, the City must consider the effects of the potential refusal of two other landowners to grant the City permission to grade and pave the proposed (partial) roadway. However, the Conservancy ignores the long-established prescriptive easement held by the City over the relevant portions of those other properties. As described above, the Board recognized the historic path of travel along that roadway, and no specific "permission" is required from any party. Further, for this argument to have any relevance to environmental review, the Conservancy must articulate how permission or condemnation to allow construction of the same improvements changes any determination regarding the applicability of a Categorical Exemption or of the environmental effects of the Project. No such difference exists, and the Conservancy cannot articulate one.

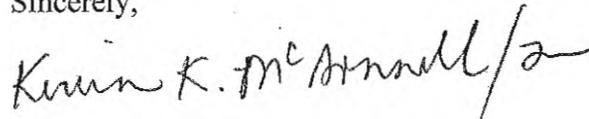
7. THE CATEGORICAL EXEMPTION IS APPROPRIATE.

As stated in the Board Report, "a Categorical Exemption pursuant to City CEQA Guidelines Article III, Section 1, Class 1 (existing facilities), Class 3 (new construction of small structures) and Class 4 (minor alteration to land) is appropriate." This determination is consistent with the inapplicability of the 2006 Planning Case, abandonment the project associated with that case, and the inability of future buildings to rely on the improvements

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proposed here. For all of the reasons stated above and any additional reasons presented at hearings before the Public Works and Gang Reduction Committee and the full City Council, the Board's grant of a Class "B" Permit for voluntary non-standard improvements on Bulwer Drive from Woodstock Drive to 750 feet west of Woodstock Drive, and adoption of the associated Notice of Exemption, should be upheld.

Sincerely,



KEVIN K. MCDONNELL of
Jeffer Mangels Butler & Mitchell LLP

KKM:neb

cc: Gary Lee Moore (via e-mail)
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