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August 3, 2017

VIA EMAIL AND U.S. MAIL

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**Re: Ongoing Failure to Comply with Public Records Act - Oak
Knoll Mixed Use Community Plan Project**

Dear Ms. Klein, Ms. Flores-Medina, Ms. Simmons, Ms. Lee:

We are writing on behalf of **Oakland Residents for Responsible Development** ("Oakland Residents"). This follows our July 27, 2017 letter to the City of Oakland ("City"), which advised the City of its failure to provide a timely and legally sufficient response to this office's June 29, 2017 Public Records Act ("CPRA") request ("PRA Request").¹ The PRA Request sought access to all documents related to "the Development Agreement for the Oak Knoll Project, including any and all

¹ See July 27, 2017 letter from C. Caro to City re *Response to June 29, 2017 Request for Immediate Access to Public Records - Oak Knoll Mixed Use Community Plan Project*, attached hereto as Exhibit 1.

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drafts of the Agreement, outlines and summaries of the Agreement, and all correspondence related to the Agreement and its proposed terms.”² Our July 27 letter requested an immediate response that complied with the CPRA. To date, the City has failed to provide the response required by law, and has failed to provide access to all requested documents.

Under the CPRA, the City’s response must either provide all outstanding requested documents (including a copy of the draft Development Agreement and all correspondence and summaries related to it), a written response stating that the requested documents do not exist, or a written response explaining the City’s basis for withholding the documents from disclosure.³

A. The City Has Provided Only A Partial Response to the PRA Request and Has Failed to Disclose Whether It Possesses a Draft Development Agreement.

On July 5, 2017, the City produced a set of documents in response to two CPRA requests by Oakland Residents. The CPRA requests included the instant PRA Request (filed on June 29, 2017), which sought two limited categories of documents related to the Development Agreement and the Economic Benefit Report, and a prior request, filed on June 14, 2017, which sought “all public records related to the Project...since the date of our last request on March 28, 2017.”⁴

The responsive documents included over 5000 pages of documents related to the Project, including the EIR, the Project application, public comments received by the City, and various documents and emails related to the Project. The responsive documents *did not* include the documents requested in the June 29 PRA Request related to the Development Agreement. In particular, the City did not provide a

² As explained in the July 27, 2017 letter, Oakland Residents only disputes the City’s response as to Item #1 of the documents requested in the PRA Request (documents related to the Project’s Development Agreement). We do not dispute the City’s response to Item #2 (documents related to the Project’s Economic Benefit Report), which clearly stated that the City has no documents responsive to that portion of the request.

³ Gov. Code §§ 6253(a), 6254, 6255; *Citizens for a Better Env’t v. Dep’t of Food & Agric.* (1985) 171 Cal. App. 3d 704, 716

⁴ The June 14, 2017 and June 29, 2017 CPRA requests are attached hereto as Exhibit 2.

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copy of the Development Agreement or any drafts of it, any summaries, outlines, or correspondence discussing the Development Agreement, except for a few emails from the official City email account of planner Heather Klein. Among those emails is a June 5, 2017 email from City employee Claudia Cappio to City employee Darin Ranelletti (in which Ms. Klein was cc'd), which responds to questions regarding the terms of the Development Agreement. Ms. Cappio's email explains that "the DA [Development Agreement] presently does not contain any provision for a PLA or other local/small business hiring."⁵ No other emails from Ms. Cappio, Mr. Ranelletti, or any other City staff were included in the City's response.

Ms. Cappio's email demonstrates that other City staff, besides Ms. Klein, have sent and received emails regarding the Project's Development Agreement, and have knowledge of its terms. Ms. Cappio's June 5, 2017 email also indicates that a draft Development Agreement is in the City's possession. Because the Development Agreement is a contract between the City and the developer, there is no question that one or more City employees must be engaged in negotiating its terms. The City has a duty to provide all correspondence and documents from all such City employees in response to the PRA Request, including but not limited all emails and email attachments from the official and personal email accounts of Ms. Cappio and Mr. Ranelletti which refer or relate to the Development Agreement.⁶ To date, the City has not provided these documents.

1. The City Has an Ongoing Duty to Assist Oakland Residents in Identifying and Locating Documents Responsive to Its PRA Request.

The City has failed to fully respond to Oakland Residents' follow up questions related to the City's July 5 document production. In particular, the City has failed to answer our questions regarding whether there are any drafts of the Project's proposed Development Agreement in the City's possession, and if so, whether they are being withheld from disclosure to Oakland Residents.

⁵ See June 5, 2017 email correspondence between Ms. Cappio and Mr. Ranelletti re *East Bay Times – Oak Knoll*, attached hereto as Exhibit 3.

⁶ *City of San Jose*, 2 Cal.5th 608, 621, 622 ("although employees are not specifically mentioned in the local agency definition, nothing in the statutory language indicates the Legislature meant to exclude these individuals from CPRA obligations").

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On July 20, 2017, we advised Ms. Klein by email that the Development Agreement was not included in the City's July 5 CPRA response, and asked for clarification regarding its status.⁷ On July 25, we again asked Ms. Klein by email to clarify "whether there is currently a draft Development Agreement under consideration by the City," and if so, who at the City is the custodian of the draft.⁸ Finally, on July 25, we asked Ms. Klein by email "[i]s there a draft Development Agreement, or documents related to it, that are being withheld from disclosure in response to our Public Records Act requests?"⁹

Ms. Klein failed to provide a clear response to any of these questions. Ms. Klein's responses simply state that "[a]ll public documents responsive to your request have been provided."¹⁰ These responses are inadequate because they fail to explain the absence of the Development Agreement and related documents from the documents provided by the City in response to the PRA Request.

The CPRA requires not only that the City timely respond to a CPRA request, but that the City assist requestors in identifying responsive documents.¹¹ Specifically, the CPRA requires that the City "do all of the following":

1. Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request.
2. Describe the information technology and physical location in which the records exist.
3. Provide suggestions for overcoming any practical basis for denying access to the records sought.¹²

⁷ See July 20-25, 2017 email correspondence between C. Caro and H. Klein re *Public Records Request 21605: A response has been added to the request*, attached hereto as Exhibit 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ See July 27, 2017 email from H. Klein to C. Caro re *Public Records Request 21605: A response has been added to the request*, attached hereto as Exhibit 5.

¹¹ Gov. Code § 6253.1.

¹² *Id.*

These requirements may only be dispensed in three situations:

1. When the agency makes the requested records available;
2. When the agency determines that the request should be denied, in which case it must base its determination on an enumerated exemption to the CPRA, and disclose the basis of its determination to the requesting member of the public; or
3. When the public agency makes available an index of its records.¹³

None of those situations have occurred here. Accordingly, the City remains obligated to assist Oakland Residents in identifying and locating all documents related to the Development Agreement that are responsive to its PRA Request until the City either produces the requested documents for inspection, issues a written denial of the PRA Request based on a specific CPRA exemption, or determines that there no documents exist which have not already been provided.

**B. The Development Agreement is a Public Record Related to the
“Conduct of the People’s Business.”**

Development agreements are contracts authorized and controlled by statute. Development agreements authorize municipalities like the City to lock into place all planning, zoning and development requirements that exist at the time of project approval for the duration of a project’s build out.¹⁴ In exchange for these regulatory concessions, the City has the authority to negotiate terms for the development agreement that require a project developer to convey specific economic or other benefits to the municipality.¹⁵ Development agreements therefore have an important public purpose, and constitute “information concerning the conduct of the people’s business.”¹⁶

¹³ Gov. Code §§ 6255(b)6253.1.

¹⁴ Gov. Code §§ 65864-65869.5.

¹⁵ *Id.*

¹⁶ Gov. Code § 6250.

The CPRA provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."¹⁷ Article I, Section 3 of the California Constitution similarly provides that "the people have the right of access to information concerning the conduct of the people's business, and, therefore, the writings of public officials and agencies shall be open to public scrutiny. The California Supreme Court has explained that, in order to verify accountability, individuals must have access to government files so that there is a "check against the arbitrary exercise of official power and secrecy in the public process."¹⁸

The CPRA California Public Records Act defines a public record as any writing containing information related to the conduct of the public's business, prepared, owned, used, or retained by a local agency, regardless of physical form or characteristics.¹⁹ Therefore, documents related to the Development Agreement constitute public records which must be disclosed under the CPRA.²⁰ Our July 29 letter explained that the Development Agreement is not subject to any privilege withholdings. Therefore, if a draft Agreement exists in the City's files, the City has a duty to produce it in response to our PRA Request, along with all other related documents, including summaries, outlines, memoranda, emails, notes, text messages and other correspondence related to the Development Agreement and its terms.

¹⁷ *Id.*; *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323.

¹⁸ *Int'l Federation of Professional and Technical Engineers Local 21, AFL-CIO v. Super. Ct* (2007) 42 Cal.4th 319, 328-29; *Comm'n on Peace Officer Standards and Training v. Super. Ct.* (2007) 42 Cal.4th 277, 288.

¹⁹ Gov. Code § 6252(e).

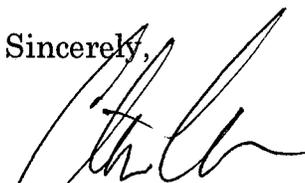
²⁰ *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 619; *Coronado Police Officers Ass'n v. Carroll* (2003) 106 Cal.App.4th 1001, 1009.

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C. Conclusion.

The City has failed to fully and meaningfully respond to its PRA Request. The City has a duty to disclose to Oakland Residents whether the City is in possession of a draft Development Agreement for the Project. If so, the City must disclose the Agreement. We request an immediate response to this letter.

Sincerely,



Christina Caro

CMC:acp

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