



**MILLER STARR
REGALIA**

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrlgal.com

Wilson F. Wendt
wilson.wendt@msrlgal.com

Sean Marciniak
sean.marciniak@msrlgal.com

January 17, 2017

Via Email and U.S. Mail

Andrea Ouse
Community and Economic Development Director
City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590
Email: andrea.ouse@cityofvallejo.net

Dan Keen
City Manager
City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590
Email: citymanager@cityofvallejo.net

**Re: Response to City Staff Determination on Process for Review of FEIR
and Hearings on Vallejo Marine Terminal and Orcem Applications**

Dear Ms. Ouse and Mr. Keen:

This letter responds to the email sent on January 10, 2017 by Lisa Plowman on behalf of the City of Vallejo, modifying the terms of the agreement reached on October 11, 2016 between Dan Keen, Andrea Ouse and Steve Bryan as to the hearing process for consideration of the Final EIR, the Revised Environmental Justice Analysis, and the Applications filed on behalf of Vallejo Marine Terminal, LLC ("VMT") and Orcem California Inc. ("Orcem") for their respective Projects.

We and our clients are alarmed that City staff apparently is refusing to honor the process agreed to on October 11, 2016. We have concerns that this breach will lead to legal and practical complications that affect the City of Vallejo's compliance with the terms of Orcem and VMT's Reimbursement Agreements with the City (collectively, the "Reimbursement Agreement"), as well as violate our clients' due process rights. The City has a legal obligation to undertake a good faith review of both our clients' Projects and the Final EIR prepared for the Projects, as set forth in the California Environmental Quality Act ("CEQA") and other applicable law.

It is certainly a strange day in California when an applicant is asking for more scrutiny of a development project. But we are concerned City staff's decision to abbreviate the Projects' hearing schedule short-changes the Planning Commission, the public, and our clients. Our clients' Projects, as you well know, are extremely complicated, and the truncation of the review process increases the likelihood that decisionmakers will simply deny the Projects, or approve the Projects based on an administrative record requiring clarification. In other words, it appears that City staff's proposed review process might sabotage the City's consideration of the Projects. And while some elements in the City believe the Projects benefit only our clients, the proposed developments will in fact bring

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significant benefits to the greater community, including 192 living wage jobs, \$60 million in capital improvements, a \$21.7 million contribution to the local gross domestic product on an *annual* basis, and tens of millions of dollars in tax revenues.

Accordingly, we respectfully request that you reinstate the more robust review process that the City and our clients agreed to on October 11, 2016.

1. **The Procedural Agreement of October 11, 2016.**

At the conclusion of the meeting held at City offices on October 11, 2016, it was proposed by Dan Keen, and agreed by all participants, that the City would complete preparation of, and post, the Final EIR and Revised Environmental Justice Analysis for the VMT and Orcem Projects (the "Environmental Documents") at the earliest possible date. At that time, all parties expected the Environmental Documents to be available by mid-December 2016.

The parties also agreed to provide advance notice to the community and all interested parties of three sequential meetings to be held by the Planning Commission for consideration of the Environmental Documents and the Projects. The first such meeting, subsequently scheduled by City staff for February 27, 2017, was to be reserved exclusively for informational presentations to the Commission by City staff and our clients, and for Commissioners to have the opportunity to ask questions. The second meeting was to be scheduled as a formal public hearing for purposes of allowing all interested parties to make comments on the completed Environmental Documents and the Projects. This second, separate meeting was set aside for this purpose exclusively, given the level of public interest anticipated.

Finally, the third meeting was to be scheduled for purposes of Commission review of the Final EIR and deliberation of the Project Applications. So that Planning Commissioners would be prepared to the maximum extent possible, it was contemplated that, in advance of this third meeting, answers to questions asked by Commissioners at the first meeting would be prepared in writing by City staff and our clients' professional consultants, and submitted to the Commission.

As agreed on October 11, 2016, the foregoing three-meeting process would constitute a well-organized process through which the public would be afforded ample time for comments, and Commissioners would be afforded the best opportunity to understand the numerous complex environmental issues addressed in the Environmental Documents. In order to ensure that all interested parties were prepared for the process, City staff agreed to prepare and publish an early informative notice outlining the full three-meeting process.

Following the October 11, 2016 meeting, our clients, their consultants, and Miller Starr Regalia placed numerous phone calls, and submitted numerous emails, to Mr. Keen, Ms. Ouse, Ms. Plowman, and the City Attorney's office, requesting a follow-up meeting with City staff to address a number of procedural questions pertaining to the Planning Commission's three meetings. However, there was no response until receipt of

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Ms. Plowman's email of January 10, 2017. In her email, Ms. Plowman suggests that the agreement reached with Mr. Keen and Ms. Ouse on October 11, 2016 has been breached, specifically by stating that a single, combined public meeting would now be scheduled on February 27, 2017. Meanwhile, the City has not, to date, released the Environmental Documents for public review, though a month has elapsed since the mid-December release date contemplated last autumn.

2. **Potential for Conflicts with Terms of Reimbursement Agreement and CEQA.**

We question the logic of, and worry as to the legal complications arising from, Ms. Plowman's changes to the three-meeting process agreed to on October 11, 2016. This office submitted a detailed letter to you on October 3, 2016, reminding the City of its obligations pursuant to the contractual Reimbursement Agreement entered into between the City and the our clients. In that letter, we reminded Staff of the City's legal obligation to complete and publish the final Environmental Documents, including a complete and accurate Final EIR, and to submit that document to the Planning Commission for consideration and certification prior to any deliberations on the Project entitlements.

As you know, the Projects, largely at the request of City staff, have undergone significant changes in order to minimize environmental impacts and address other concerns, which has required significant changes in the Projects' environmental review. We are concerned, based on the City's substantial delay in issuing the Final EIR and the Revised Environmental Justice Analysis, that there may not be adequate time for this office and our clients' environmental experts to review and identify any needed explanations or clarifications about the scope and meaning of the substantially revised analysis of environmental effects, and for the City Staff and their consultants to address such needs in a timely manner. In this vein, we note that City staff still have not committed to a date by which the Environmental Documents will be released for public review, and that staff have not clearly and unequivocally foreclosed the possibility that the Environmental Document will be unavailable to the Planning Commission on February 27, 2017. Based on each of the foregoing concerns, we hereby renew and incorporate by reference each of the legal claims asserted in our letter of October 3, 2016.

We also wish to point out the following:

- As required by CEQA Guidelines Section 15088 and Public Resources Code section 21092.5, it is legally necessary that the Final EIR, including its responses to comments, edits to the Draft EIR, and supplemental information, be made available at least 10 days prior to the Planning Commission's certification of the document.
- The City owes a good faith duty to both the public and our clients to produce an accurate and legally compliant Final EIR. (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 269; *In re Bay-Delta*

Programmatic Evt'l Impact Report Coordinated Proceedings (2008) 54 Cal.4th 1143, 1175 [sufficient information should be provided to the decisionmakers and the public]; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428; CEQA Guidelines sections 15088(c), 15144, 15151.) While we agree that a Final EIR is not deficient if it results in environmental conclusions with which an applicant disagrees, it is an entirely different case where a City knowingly produces a Final EIR with legal defect, or adopts a hearing process that is likely to result in legal defect or otherwise provide project opponents with fodder for a successful project challenge. We are not suggesting at this time that the Final EIR will have legal defect, as we have not seen it; however, City staff's abbreviation of the hearing process will have the effect of frustrating our clients ability to clarify or supplement the administrative record to address any legal defects that might appear.

- CEQA requires that a city's decision to certify an EIR reflects its independent judgment and analysis. (CEQA Guidelines section 15090(a)(3); Public Resources Code section 21082.1(c)(3).) Given the complexity of the Projects and their subsequent revisions, it appears necessary that the Planning Commissioners have more time to consider the Projects, their Environmental Documents, and any public comments, so as to avoid relying too heavily on summaries and reports provided by City staff, and thereby avoid an improper delegation of duties. (See CEQA Guidelines section 15025(b)(1); see our October 3, 2016 letter.)
- As discussed above and in our letter of October 3, 2016, the City is obligated pursuant to the Reimbursement Agreement to ensure that the Final EIR is complete and adequate at the time of its certification, and that the Projects' "environmental review process" be "comprehensive." (Reimbursement Agreement, Recital B, p. 2.). As a separate contractual matter, the City is also obligated to ensure that the original Draft Environmental Justice Analysis (paid for entirely by our clients) is properly revised and issued as a "Revised" document.

3. Summary and recommended Solution.

Again, we are deeply concerned that, by failing to adhere to the agreement reached on October 11, 2016, and by failing to issue the Environmental Documents within the time frame originally committed to by City Staff, the City might ultimately be asking the Planning Commission to make a flawed or uninformed decision.

Our clients have paid the City in excess of \$1 million to prepare and certify a complete and accurate set of Environmental Documents. In addition, they have spent many times this amount in good faith, pursuant to the Reimbursement Agreements, preparing and processing applications and the various technical environmental studies reviewed and incorporated into the Environmental Documents. Given the elevated potential for procedural errors to occur with a "truncated," single combined public hearing, and based

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on the delays in issuance of the Environmental Documents, we strongly urge the City to adhere to the three-meeting process first agreed to on October 11, 2016.

We ask that you provide a written response to this letter as quickly as possible, and offer again to sit down with Staff to discuss these issues in greater detail.

Very truly yours,

MILLER STARR REGALIA

Wilson Wendt

Wilson F. Wendt

Sean Marciniak

Sean Marciniak

WFW:srm

cc: Honorable Chairperson Graden and members of the Vallejo Planning Commission,
c/o Dina Tasini, Planning Manager (Dina.Tasini@cityofvallejo.net)
Honorable Mayor Sampayan and Members of the Vallejo City Council
(Mayor@cityofvallejo.net, Bob.Sampayan@cityofvallejo.net,
Rozzana.Verder-Aliga@cityofvallejo.net, Pippin.Dew-Costa@cityofvallejo.net,
Robert.McConnell@cityofvallejo.net, Katy.Miessner@cityofvallejo.net,
Hermie.Sunga@cityofvallejo.net, Jesus.Malgapo@cityofvallejo.net)
Claudia Quintana, City Attorney (claudia.quintana@cityofvallejo.net)
Leslie Trybull, Executive Secretary (Leslie.Trybull@cityofvallejo.net)
Lisa Plowman, RMM Design Group (maplowman@rrmdesign.com)
Richard T. Loewke, AICP (dick@loewke.com)
Arthur F. Coon, Esq., Miller Starr Regalia