Attachment E

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February 7, 2017

VIA E-MAIL AND U.S. MAIL

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Re: Staff's Unlawful Refusal To Schedule Vallejo Marine Terminal and Orcem Project FEIR For Consideration At February 27, 2017 Planning Commission Hearing

Dear Mr. Keen and Ms. Ouse:

I have received and reviewed Mr. Keen's February 2, 2017 email to Richard Loewke and others disavowing City staff's agreement to a three-hearing procedure on the above project, and otherwise stating in pertinent part as follows:

> The VMT/Orcem project is scheduled to be heard at a special Planning Commission meeting on February 27, 2017 at 6:00 p.m. in the City Hall Council Chambers.... It will be up to the majority of the Planning Commission in attendance at that time to determine if they have enough information and adequate time to hear public testimony, deliberate and make a well-informed decision that night, or to vote to continue the public hearing to a future meeting date. (Underscored emph. in orig.)

I am also in receipt of City EIR consultant Lisa Plowman's February 2, 2017 email to Mr. Loewke and Ms. Ouse stating in pertinent part regarding the Planning Commission hearing:

> The staff report, Draft Final EIR (with the Response to Comments), and the EJA will be made available to the public on Monday, February 6th. Please be advised that the Draft Final EIR is being shared with the Planning Commission for informational purposes only.

> They are not being asked to consider and certify the document in this hearing. Staff is relying on the CEQA exemption 15270 – Projects Which are Disapproved, which states that projects which are denied are not subject to CEQA.

The City staff's apparent refusal to schedule the VMT/Orcem Project FEIR for consideration for certification at the scheduled February 27, 2017 Planning Commission hearing on the Project is outrageous, patently unlawful and in bad faith. Moreover, the proposed action is wholly beyond staff's lawful discretion and authority under CEQA or the City's Municipal Code and local law. I urge you to rethink your position while there is still time to comply with the law and avoid embroiling the City in the litigation that your actions will force my clients to bring if these matters are not rectified.

I explained in great detail in my (apparently unread) letter to both of you, dated October 3, 2016, why staff's proposed course of action (as again set forth in Mr. Keen's and Ms. Plowman's above-quoted emails) would violate CEQA, the City's contractual obligations to my clients, and my clients' constitutionally protected property and due process rights. A copy of that letter is enclosed herein and incorporated by reference as Exhibit A. You were again apprised of the legal requirements of CEQA and the parties' contractual obligations in a detailed January 17, 2017 letter from my partners, Wilson Wendt and Sean Marciniak, a copy of which letter is also enclosed herein and incorporated by reference as Exhibit B.

You have not only ignored the legal requirements and obligations brought to your attention by this firm's enclosed letters, but also have arbitrarily and capriciously disregarded the City's own local CEQA implementation procedures, which are quite simply and accurately summarized in its September 27, 2005 "Environmental Review, Planning Handout No. PH-13," a true and correct copy of which is enclosed herein and incorporated by reference as Exhibit C. That City document states in relevant part:

> Following the [DEIR] review period a Final EIR is prepared consisting of amendments to the draft and written responses to the comments received. . . . . ***A certification hearing is then scheduled before the Planning Commission and/or City Council. Action on the project can follow certification if all other City requirements have been satisfied.***

(Ex. C, PH-13 at p. 2, emph. added.)

The City's own document thus confirms the legally required CEQA procedures and relevant principles that apply here. Most notably, and as pertinent here, these include: (1) after FEIR preparation, an EIR certification hearing must be scheduled

before the Planning Commission; and (2) the Planning Commission can only take action on the Project after EIR certification has occurred.

The supposed February 27, 2017 Planning Commission hearing on the Project mentioned in Mr. Keen's email can thus, as you both well know, be nothing but a sham "hearing" if the FEIR is not considered and certified since the Commission will then have no legal option, authority or power to act on the Project except to deny it and its decision in that regard would be anything but well informed without consideration of the FEIR and its compliance with CEQA. That the City staff has deliberately proceeded in bad faith and in an unlawful manner – such that Planning Commission denial will be a preordained outcome and forgone conclusion – is further underscored by Ms. Plowman's statement that staff intends to rely on the CEQA Guidelines § 15270 exemption for projects which are disapproved. Apart from the fact that staff has absolutely no legal authority to approve or disapprove the Project, and cannot predict or predetermine how the City's authorized decisionmaking bodies will vote on it if given the opportunity, staff also ignores the full text of the exemption which shows it was never intended to apply to circumstances like those existing here:

> (a) CEQA does not apply to projects which a ***public agency*** rejects or disapproves.
>
> (b) ***This section is intended to allow an initial screening of projects for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved.***
>
> (c) This section shall not relieve an applicant from paying the costs for an EIR or negative declaration prepared for his project prior to the lead agency's disapproval of the project ***after normal evaluation and processing***.

(CEQA Guidelines, § 15270(a)-(c), emph. added.)

Staff is not a "public agency" as defined by CEQA. (CEQA Guidelines, § 15379.) The context presented by this project's processing is a completed FEIR following years of analysis and millions of dollars expended by my clients for project planning, processing and environmental review – a far cry from the quick initial screening and disapproval prior to initiation of CEQA review to which the exemption is intended to apply. And, as has been repeatedly demonstrated to both of you and other City staff in excruciating detail, the unlawful and bad faith procedure that staff continues to propose is a far cry from "normal evaluation and processing" of a project under

CEQA or the City's own rules.

Quite frankly, in my approximately 30 years of practicing law, I have never seen such a shocking, unlawful and breathtaking attempted usurpation of legal authority on the part of a local public agency's staff.

Having been fully advised, it is hoped and anticipated that you will conform your actions and conduct to what the law requires and cease your unlawful efforts to discriminate against and force the denial of my clients' Project without a lawful, fair and unbiased hearing before the City's authorized decisionmaking body or bodies.

Very truly yours,

MILLER STARR REGALIA

Arthur F. Coon

AFC:gaw:klw
Enclosures: (Exhibits A, B & C)
cc: Claudia Quintana, City Attorney (w/encls.)
Clients
Richard T. Loewke