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Via Via Email and U.S. Mail

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Re: September 18, 2012 Calistoga City Council Meeting
Second Readings of Zoning Ordinance and Development Agreement
Ordinance for the Enchanted Resorts Project

Dear Michelle and Karen:

I am following up on the my September 12, 2012 telephone conversation with Karen Murphy regarding the second readings of the Zoning Ordinance and Development Agreement Ordinance for the Enchanted Resorts Project (“Project”), which I understand are scheduled to take place at the Council’s September 18, 2012 meeting.

As you know, my clients are currently circulating a referendum petition requesting that the City Council repeal Resolution No. 2012-062 (“GPA resolution”), adopted on August 21, 2012, or submit it to a vote of the people to determine whether it should take effect. The GPA Resolution would amend the City’s General Plan to add a new Planned Development Overlay to the Enchanted Resorts property to allow, among other things, “destination resorts,” where currently no such uses are permissible. The referendum proponents anticipate submitting well above the roughly 213 signatures required to stay the effectiveness of the GPA resolution.

As we discussed on the telephone, pursuant to *Midway Orchards v. County of Butte*, 220 Cal.App.3d 765, 781 (1990), the City may not adopt the Zoning Ordinance or Development Agreement Ordinance unless and until Resolution No. 2012-062 becomes effective. The Council should delay any action on the second reading of these Ordinances until the General Plan Amendment takes effect. As an alternate approach and pursuant to your request, this letter proposes language that could be inserted into the Zoning Ordinance and Development Agreement Ordinance prior to the second reading to ensure compliance with *Midway Orchards* and state law, and to avoid purporting to vest rights with the developer prior to the General Plan Amendment taking effect.

A city resolution subject to referendum does not go into effect until the time permitted for the filing of a referendum petition has expired. *Midway Orchards v. County of Butte*, 220 Cal.App.3d at 781. Referendum proponents are permitted 30 days from the date the resolution is attested by the city clerk to file a referendum petition. Elec. Code § 9237. If a referendum petition signed by 10 percent of the voters of the city is submitted within this timeframe, the resolution's effective date is suspended. *Id.* If the referendum petition is certified by the elections official, the effective date will remain suspended until a majority of voters vote in favor of the resolution. *Id.* §§ 9237, 9241. Because the filing period has not yet expired, the GPA resolution is not currently effective.

State law requires that development agreements and zoning ordinances be consistent with the general plan before they may be approved. Gov't Code §§ 65867.5(b); 65860(a). The Zoning Ordinance and the Development Agreement Ordinance both rely on the General Plan Amendment to be consistent with the City of Calistoga General Plan. *See e.g.*, General Plan Consistency Findings, Exh. A to Zoning Ordinance. Accordingly, the City Council may not approve the Zoning Ordinance or Development Agreement Ordinance because the GPA Resolution is not yet effective.

The court's holding in *Midway Orchards*, is directly on point. In *Midway Orchards*, the County approved a general plan amendment to create consistency with a proposed development project. 220 Cal.App.3d at 770. The County next approved a development agreement before the period for filing a referendum petition expired, finding it to be consistent with the amended general plan. *Id.* at 771. Opponents to the development project timely submitted a referendum petition for the general plan amendment that was certified by the County clerk. *Id.*

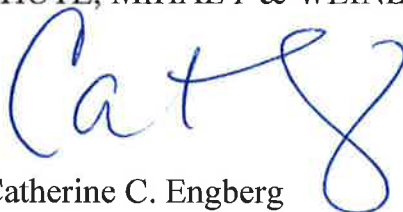
The court held that the development agreement had been “unlawfully approved and executed.” *Id.* at 783. It reasoned that the general plan amendment was not effective during the referendum filing period when the development agreement had been approved. *Id.* at 781-82. Moreover, the general plan amendment failed to go into effect because of the timely filing of the referendum petition. *Id.* at 782-83. Consequently, the court held that the development agreement was void because it was never consistent with the general plan as required by law. *Id.* at 783.

Because the General Plan Amendment is not yet effective, and because the Zoning Ordinance and Development Agreement Ordinance rely on the General Plan Amendment to be consistent with the City’s General Plan, the City Council may not legally adopt these Ordinances at its September 18, 2012 meeting. I have attached an alternate proposal as Exhibit A that would allow the Council to go forward on September 18 with the second reading, but would ensure that the Ordinances do not take effect until permissible by law.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in blue ink that reads "Cathy". The signature is written in a cursive, flowing style.

Catherine C. Engberg

Exhibit A: Proposed edits to Zoning Ordinance and Development Agreement Ordinance

433697.1

EXHIBIT A

ZONING ORDINANCE DEVELOPMENT AGREEMENT ORDINANCE

SECTION ONE:

[Insert new recitals in each ordinance, after the recital regarding the EIR]

WHEREAS, on August 21, 2012, the City Council approved the General Plan Amendment pursuant to Resolution No. 2012-062; and

ZONING ORDINANCE SECTION FIVE:

DEVELOPMENT AGREEMENT ORDINANCE SECTION FOUR:

THIS ORDINANCE shall take effect thirty (30) days after its passage, provided that Resolution No. 2012-062 has become effective by that time. If Resolution 2012-062 has not become effective by that time, then this Ordinance shall not become effective unless and until Resolution 2012-062 becomes effective. ~~and b~~Before expiration of fifteen (15) days after its passage, **THIS ORDINANCE** shall be published in accordance with law in a newspaper of general circulation published and circulated in the City of Calistoga.

THIS ORDINANCE was introduced with the first reading waived at the Calistoga City Council meeting on the ___th day of ____ 2012, and was passed and adopted contingent on the effectiveness of Resolution 2012-062 at a regular meeting of the Calistoga City Council on the ___ day of 2012, by the following vote:

AYES:

NOES:

ABSENT/ABSTAIN: