

From: Zdeba, Benjamin
Sent: Wednesday, December 05, 2018 3:15 PM
To: Lippman, Tiffany
Cc: Ramirez, Brittany
Subject: FW: Harbor Pointe response to Baycrest HOA President (b)
Attachments: 2018-11-09 Response to Kirk Snyder_.docx



Follow Up Flag: Follow up
Flag Status: Flagged

Hi Tiffany,

Please see below and attached received in reference to the Harbor Pointe Senior Living project (PA2015-210) on the Commission's agenda tomorrow.

Thanks,

Ben Z.

BENJAMIN M. ZDEBA, AICP
Community Development Department
Associate Planner
bzdeba@newportbeachca.gov
949-644-3253

From: Carol McDermott <carol@entitlementadvisors.com>
Sent: Wednesday, December 05, 2018 10:14 AM
To: Zak, Peter <pzak@newportbeachca.gov>; Weigand, Erik <eweigand@newportbeachca.gov>; Koetting, Peter <pkoetting@newportbeachca.gov>; Kleiman, Lauren <kleiman@newportbeachca.gov>; Kramer, Kory <kkramer@newportbeachca.gov>; Lowrey, Lee <llowrey@newportbeachca.gov>
Cc: Zdeba, Benjamin <bzdeba@newportbeachca.gov>; Campbell, Jim <JCampbell@newportbeachca.gov>; Jurjis, Seimone <sjurjis@newportbeachca.gov>
Subject: Harbor Pointe response to Baycrest HOA President (b)

Mr. Chairman and Members of the Commission: it has always been my hope as a planner, as a community outreach specialist and as an advocate of quality development to achieve community support for my projects. I have almost always been able to achieve common ground. In this case, we have tremendous community support but the leadership of our immediate neighbors in the Baycrest condo community has been resistant to dialogue. We have undertaken numerous methods to communicate but have not found a receptive audience. There have been no responses to our multiple requests give us a chance to answer questions from the community. In a brief meeting with the HOA this past week there was no notice to the community of our non-agendized visit and there was little dialogue with the few residents present permitted under the 30-minute limit.

As a result, we wish to resend to you a letter we sent to the President of the Baycrest HOA in response to his letter to us. It is indicative of our efforts to communicate and to

discuss possible benefits to their community but were never give a chance. We continue to remain open to discussions with the community but respectfully request Commission action at the hearing this Thursday to forward your recommendation to the City Council of this worthy project.

Sincerely, Carol McDermott

November 9, 2018

Dear Kirk: Paul Habeeb asked me to respond on his behalf to your letter and we hope the following answers to your questions are helpful. Please feel free to forward this and contact me again with any further comments or questions. I have labeled the answers according to the subjects in your letter as shown below.

Request that we send every resident our notice by registered mail

We specifically sent your copy of our letter to the community via certified mail because we wanted verification that you, as President of the Baycrest HOA, did receive our mailing. As you know, I have reached out to you on several occasions to set up meetings, and hear the community's concerns directly – all to no avail. Although we did not send our letter to everyone in this same manner, please rest assured the we did send our communication to over 300 neighbors. To date, I have heard from only three residents including yourself. As the HOA President, I would again ask and would be very appreciative if you could provide a forum during one of your Association meetings or at a separate time that would allow us to present and hear the community concerns directly. Please reconsider allowing us to do that.

Availability of Responses to Comments on the DEIR

The State CEQA guidelines provide a 45-day review period for comments on the Draft EIR due to the size of most environmental documents. For our project, the City actually provided a 50-day period of time for the public review and comment. State law dictates the minimum ten-day notice prior to any public hearings. All project documents, including the Response To Comments (RTC) document are made available prior to the certification of the Final EIR by the City. The RTC document is prepared for the City's Planning Commission and City Council to be able to review the public's comments/questions on environmental issues outlined in the Draft EIR, and the responses or explanations addressing them before they take any action on the project. The RTC document is not subject to another round of a public review and comment time period. Most agencies determine that since there are multiple ways for the public to participate in the review of a project through the public hearings at both the Planning Commission and City Council, they follow the State guidelines. However, it is in the City's purview to decide on this issue, not the applicant.

Clarification of the Zoning and General Plan categories being requested

In response to the community concerns regarding the possibility of drug rehab uses being allowed on the site, we proposed to the City that we narrow the zone change request in the Planned Community (PC-32) regulations to only allow one type of use – Residential Care Facility for the Elderly (RCFE). When the public hearing is scheduled, and the City prepares the staff reports, you will see that the text of the PC-32 document will be edited to remove all other types of uses, precluding a drug rehab use from occupying the site/building. Also, even though the proposed Land Use designation in the General Plan is still proposed to change from CO-G to PI (Private Institution), we

have asked the City to again narrow the allowable uses by changing the Anomaly Table in the General Plan, removing both the uses (restaurant or office) and the allowed square footage for each. Instead this Table, which governs what is allowed under a General Plan Land Use designation, will allow only for an 85,000 square feet RCFE. Because these proposed changes are more restrictive than originally described at the Study Session, they do not result in any additional environmental impacts that need to be analyzed.

Regarding your concern about an arbitrary zone change by the City, in my experience and observation, the City is never arbitrary in their decisions or deliberations on such matters. Requests for rezoning are responded to and the same extensive review as for this project is conducted, including the appropriate environmental review and public hearings allowing for adequate public input.

Licensing of an RCFE by the State

The reason we mentioned that the State licenses RCFE's is because we wanted the community to know that once the City approves an RCFE, the applicant must also apply to the State for an RCFE license which is an additional level of approval. The operator of the facility cannot prepare the RCFE application for either Section A or Section B, nor will the State review the application until the City approval is granted. The State will then review the building plans and the proposed staffing levels based on the plan, the intended acuity of the residents, the security plan and the proposed levels of service. Given the surplus of required parking and the anticipated number of employees as shown in the EIR, as well as the security measures for the Memory Care residents, neither traffic impacts nor tragic events are anticipated. The RCFE application will be provided to the City at the appropriate time and can be shared with interested parties as well.

Deleting certain uses allowed in the CO-G designation

I appreciate your comments regarding the deletion of certain uses currently allowed by both the PC-32 zoning document, and under the CO-G Land Use designation. It was not intended to be perceived as a "scare tactic" by anyone on our project team. We heard from many residents and members of the Planning Commission that were surprised to learn that some of the uses, particularly the one's in bold in our letter, were allowable at the site. I believe that it is because the PC-32 document is very dated, and we had hoped to demonstrate the positive results of our Zone Change and General Plan Amendment to the community at large by removing many of the allowable, but likely incompatible to neighboring residential types of uses. The other uses may be unlikely, but at this time remain as possible and should be deleted.

How the City can limit the use of the subject site to only an RCFE

In response to the community concerns we have offered to limit the zoning to only an RCFE. Should the City Council approve the rezoning of the site to allow only an RCFE, they do so by adopting an ordinance, which then becomes the "law" governing the use

on the site. This type of approval runs with the land, and we or any future owners would have to comply with all the limitations of this Zoning and General Plan action, as well the conditions of the Conditional Use Permit. There are no circumstances we are familiar with that would cause the City to reverse the Zoning or General Plan approval once the City Council takes its action.

Increase in Open space for the project

The increase in project open space is in response to an issue raised by both the community and comments by the Planning Commission. The additional open space is an additional trellised and gated patio area with small seating arrangements and gardens. This area is accessible as an extension of the interior library amenity and is only for the assisted living (AL) residents. This area is anticipated to provide a quiet, outdoor space related to AL residents use of the library, and will not be used for organized gatherings that might be perceived to be noisy. The memory care (MC) residents are limited to use of a separate internal courtyard space specifically designed for their needs and would not have direct access to this new patio area. We believe the repurposing of a portion of the landscaped area is a benefit to both our residents and the neighboring residential communities because it provides an additional outdoor space opportunity on site, reducing any perceived increase in use by our residents of existing City open space/parks,

Development Agreement

Development Agreements are now being used for many of the new projects in the City as a way to protect not only our right to develop the site as proposed, but to also provide benefits to the larger community that might not otherwise occur. Our proposed agreement is intended to cover the mitigation for fire and paramedic services and the other allocations outlined in our letter are just suggestions. Oasis seemed like a natural connection for our senior resident population and the proposed animal shelter in Santa Ana Heights was a suggestion from a Santa Ana Heights resident who has been willing to meet with us. However, we are most open to suggestions from you as to what might be a meaningful contribution to your community. I look forward to hearing from you on the possibility to help address community priorities.

In closing, we will note that we are happy to have you share this response with your neighbors just as we are happy to hear from any of them with additional questions. Thank you for taking the time to make us aware of your thoughts. Please contact me to set up a meeting with you and/or your neighbors at your convenience.

Sincerely,

Carol McDermott

From: Zdeba, Benjamin
Sent: Wednesday, December 05, 2018 5:03 PM
To: Lippman, Tiffany
Cc: Ramirez, Brittany
Subject: FW: Agenda Item #4: Harbor Pointe (PA2015-210)
Attachments: Applicant Response to HOA Attorney Letter - December 5 2018.pdf



Hi Tiffany,

Please see below and attached received in reference to the Harbor Pointe Senior Living project (PA2015-210) on the Commission's agenda tomorrow.

Thanks,

Ben Z.

BENJAMIN M. ZDEBA, AICP
Community Development Department
Associate Planner
bzdeba@newportbeachca.gov
949-644-3253

From: Matsler, Sean <SMatsler@coxcastle.com>
Sent: Wednesday, December 05, 2018 4:59 PM
To: Planning Commissioners <PlanningCommissioners@newportbeachca.gov>
Cc: Paul Habeeb <paul@cpsldev.com>; Jurjis, Seimone <sjurjis@newportbeachca.gov>; Zdeba, Benjamin <bzdeba@newportbeachca.gov>; Harp, Aaron <aharp@newportbeachca.gov>; Komeili, Armeen <AKomeili@newportbeachca.gov>; 'Carol McDermott' <carol@entitlementadvisors.com>
Subject: Agenda Item #4: Harbor Pointe (PA2015-210)

The attached letter relates to Agenda Item #4 (Harbor Pointe PA2015-210) on the Planning Commission's December 6, 2018 agenda.

Sean Matsler



Cox, Castle & Nicholson LLP
3121 Michelson Drive | Ste 200 | Irvine, CA 92612
direct: 949.260.4652
main: 949.260.4600 | *fax:* 949.260.4699
smatsler@coxcastle.com | [vcard](#) | [bio](#) | [website](#)

This communication is intended only for the exclusive use of the addressee and may contain information that is privileged or confidential. If you are not the addressee, or someone responsible for delivering this document to the addressee, you may not read, copy or distribute it. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please call us promptly and securely dispose of it. Thank you.



Cox, Castle & Nicholson LLP
3121 Michelson Drive, Suite 200
Irvine, California 92612-5678
P: 949.260.4600 F: 949.260.4699

Sean Matsler
949.260.4652
smatsler@coxcastle.com

File No. 081382

December 5, 2018

VIA E-MAIL: PLANNINGCOMMISSIONERS@NEWPORTBEACHCA.GOV

Chairman Zak and Honorable Planning Commissioners
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Re: Agenda Item #4: Harbor Pointe (PA2015-210)

Chairman Zak and Honorable Commissioners:

This Firm represents Harbor Pointe Senior Living LLC (“HPSL”), the applicant for the proposed residential care facility for the elderly facility (“Project”) before this Commission as Agenda Item #4. Earlier this week, City staff received a letter from an insurance defense and civil/business litigation attorney representing the Bayview Court Homeowners Association (“HOA”). That letter requests a continuance of the Planning Commission’s action on the Project for several years until the City’s General Plan has undergone an update. For the reasons set forth in this letter, HPSL respectfully disagrees. The Project has been thoughtfully designed (and redesigned to respond to community concerns, including those expressed by HOA) over a three year timespan and deserves this Commission’s consideration.

Each of the HOA attorney’s substantive points is copied and responded to below. None motivate HPSL to request a delay of the City’s public hearing process.

1. **HOA letter:** *“You are hereby put on notice of the intent of the HOA to pursue all legal action available by law to protect the homeowners’ rights and maintain the value of their property, their personal safety, and continue to enjoy the lifestyle that currently exists in the Master Planned Community of Bayview. Should such legal action prove necessary, this office would intend to join with other HOAs, area businesses, and other currently unnamed entities with an interest in protecting the Bayview community in a joint effort to stop this project.”* (Emphasis in original.)
 - a. **HPSL response:** Over the course of the past three years, HPSL and its representatives have reached out to the HOA, its Board members and directly to the residents no less than four times to engage in a dialogue regarding the Project. Those efforts only received written objections. Nonetheless, in an effort to address the HOA’s concerns, HPSL reduced the Project’s scale from 144-beds and approximately 110,000-square-foot in five-stories to the current Project

December 5, 2018
Page 2

configuration of 120-beds and approximately 85,000-square-foot in four-stories. HPSL has also narrowly tailored the proposed General Plan and zoning redesignations such that only RCFEs will be allowed

In light of its past overtures and concessions, HPSL was disappointed to see that the HOA hired an attorney who, rather than offering to facilitate a dialogue, begins his letter by threatening litigation against the City. The HPSL team remains open to conversation with the HOA and hopes that its saber rattling will give way to more a reasoned dialogue. If litigation is unavoidable, the HOA should understand that it could be financially liable for (1) payment of the prevailing party's attorneys' fees (Code Civ. Proc., § 1021.5); (2) payment for the cost of preparing the administrative record (See, e.g., *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1055); and (3) other recoverable costs as are generally awarded to a prevailing party (Code Civ. Proc., § 1032(b); *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1151-1154; see also *Wagner Farms, Inc. v. Modesto Irrigation Dist.* (2006) 145 Cal.App.4th 765.)

2. **HOA letter:** *"The project is highly unpopular among the constituency, poorly conceived, and is inappropriate for the property in question. It confers no benefit on the local community, constitutes a nuisance to local residents, will result in unnecessary parking and traffic issues, violates certain representations and agreements made by the City to the HOA, and is not supported by the City's General Plan."*

- a. **HPSL response:** There is a lot to unpack here.

First, it is simply not true that the "project is highly unpopular among the constituency." The HOA may not support the project, but many Newport residents see it as an important public benefit allowing aging seniors to reside in their community. The Planning Commission has already received supportive written comments and will hear from other Project supporters on December 6th.

Second, with respect to local benefits, HPSL has agreed to a \$1,000,000 community benefit payment to the City as part of its Development Agreement, with the potential for an *additional* \$150,000 in direct benefit to entities such as the Newport Bay Conservancy, Bayview Court HOA, and the Bayview Terrace HOA. If the HOA had a specific local benefit in mind, it should have accepted HPSL's invitation to engage in a productive dialogue.

Third, with respect to "parking and traffic issues," the Project's Environmental Impact Report ("EIR") concludes that the Project will not have significant circulation impacts. In fact, as demonstrated in the EIR, the Project would result in 312 daily trips compared to 738 daily trips for the existing restaurant for a net *reduction* of over 400 daily trips.

December 5, 2018
Page 3

Finally, the Project will be consistent with the General Plan as amended. This conclusion is supported at length in the EIR, particularly in its Table 4.8-1 (*Project Comparison To Applicable City Of Newport Beach General Plan Elements*) which concludes that the Project would not conflict with any of the General Plan objectives or policies that the City considers to be applicable to the Project.

3. **HOA letter:** *“Further, this project violates the representations the City made to the homeowners through the Bayview Planned Community Development Plan including, and not limited to, zoning designations. Any development agreement between the Harbor Pointe project's developer and the City wrongfully circumvents the legal planning process and violates the representations and assurances the City made to homeowners through the Bayview Planned Community Development Plan that was in place when homeowners purchased their properties.”*

- a. **HPSL response:** The HOA incorrectly asserts that it has some vested right in the existing Bayview Planned Community Development Plan. It does not. (See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 796 [“It is beyond question that a landowner has no vested right in existing or anticipated zoning.”].)

It is unclear exactly what “representations and assurances” were made by the City. One interpretation of that phrase is that oral or written statements were made by City staff or even public officials to the HOA. I highly doubt this. Nevertheless, assuming that to be true, case law tells us that such statements cannot and should not be relied upon by property owners (See, e.g., *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 221 [estoppel did not apply where county planning had advised that a project complied with applicable local codes, but then turned around and brought an implied dedication claim].)

It is possible that the reference to “representations and assurances” is meant to suggest that the Bayview Planned Community Development Plan cannot be amended. Wrong again. Not only does Chapter 20.66 of the City’s Municipal Code allow for such amendments, but three such amendments to the Bayview Planned Community Development Plan have occurred over the years in 1987 (Resolution No. 87-24), 1995 (Resolution No. 95-115) and most recently in 2010 (Ordinance No. 2010-12). The two most recent amendments added new land use categories not previously included within the Bayview Planned Community Development Plan, as the Project proposes to do.

The final assertion by the HOA’s attorney in this passage is most troubling. He writes that the proposed Development Agreement “wrongfully circumvents the legal planning process.” In other words, the attorney is alleging that the Development Agreement is illegal and that the City and HPSL are engaged in

December 5, 2018
Page 4

unlawful activities. That statement is as inaccurate as it is irresponsible. The Development Agreement before this Commission has been vetted by the City Attorney, City staff and myself. It fully complies with California Government Code Sections 65864-65869.5 and Newport Beach Municipal Code Chapter 15.45. The HOA's attorney crossed a line with this statement and should be asked to retract it.

4. **HOA letter:** *“Additionally, the Draft EIR dated August 2018, and known as Harbor Pointe Senior Living Project Draft Environmental Impact Report (PA2015-210) SCH No. 2016071062, contains grossly misrepresented facts and inaccurate information as well as violates CEQA guidelines and NBMC requirements. The HOA has brought this to the attention of the Planning Commission in a timely manner and is prepared to further discuss them at the Commission's invitation.”*
 - a. **HPSL response:** City staff and the City's environmental consultant (PSOMAS) have prepared responses to 82 written comments and 23 verbal comments as part of the EIR's *Responses to Comments* document, consistent with Section 15088 of the CEQA Guidelines. Most of the written and verbal comments were from HOA members. None of the comments result in a substantial change to the Project, create new environmental impacts, or result in an intensification of an impact already identified in the Draft EIR.
5. **HOA letter:** *“A second, independent Draft EIR should be conducted by another firm to address the misrepresented and inaccurate findings before any further public discussions on this project. A Firm should be mutually agreed on by both the City of Newport Beach and the HOA to prepare a new Draft EIR.”*
 - a. **HPSL response:** The EIR was prepared by PSOMAS under the direction and supervision of City staff, as allowed by CEQA (Pub Res C §21082.1(a)). As the lead agency, the City is required by CEQA to independently review and analyze the EIR and certify that the EIR reflects its independent judgment (See *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 723, overruled on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 [finding that “the final responsibility and final authority as to the quality and the content of the EIR lies in the sole discretion of the [lead agency]”]; see also Pub. Resources C § 21082.1(c) [providing that final CEQA document must reflect the lead agency's independent judgment].) For obvious reasons, the City does not allow third parties (e.g., HOAs or applicants) to direct the selection of the City's EIR consultants.

December 5, 2018
Page 5

HPSL remains open to productive dialogue with the HOA and other community members. In the interim, we respectfully request this Commission's positive recommendation on the Project at Thursday's hearing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sm', is centered below the word 'Sincerely,'.

Sean Matsler
of COX, CASTLE & NICHOLSON LLP

cc: Paul Habeeb (via e-mail: paul@cpsldev.com)
Carol McDermott (via e-mail: carol@entitlementadvisors.com)
Seimone Jurjis (via e-mail: sjurjis@newportbeachca.gov)
Ben Zbeda (via e-mail: bzdeba@newportbeachca.gov)
Aaron Harp, Esq. (via e-mail: aharp@newportbeachca.gov)
Armeen Komeili, Esq. (via e-mail: akomeili@newportbeachca.gov)

081382\10250703v1