Attachment G

MILLER STARR REGALIA

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

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

Arthur F. Coon
Direct Dial: 925 941 3233
arthur.coon@msrlegal.com

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VIA E-MAIL AND U.S. MAIL

Claudia Quintana, Esq.
City Attorney
City of Vallejo
City Attorney's Office
555 Santa Clara Street
Vallejo, CA 94590
E-Mail: claudia.quintana@cityofvallejo.net

Re: VMT/Orcem's Appeal of Staff Determination Refusing to Finalize And Allow Planning Commission To Act on FEIR Prior to Considering VMT/Orcem Projects

Dear Ms. Quintana:

I have received and reviewed your February 14, 2017 letter directed to me, Steve Bryan (Orcem), and Matt Fettig (VMT) in response to VMT/Orcem's above-referenced administrative appeal. This letter will respond to yours.

Preliminarily, you refer to the duly filed VMT/Orcem "appeal" (in quotes), and claim "that request is premature, and will not be treated as a standalone appeal." Regrettably, this appears to be yet another arbitrary denial of due process to my clients. The City's Code *expressly* provides "[t]he applicant or any party adversely affected by an administrative decision of the planning manager rendered under authority conferred by this title" with the *right* to appeal that decision in writing to the Planning Commission. (Vallejo Municipal Code, § 16.102.030A, underscored emph. added.) Accordingly, unless you are conceding staff's decision exceeded its lawful authority and represent it will therefore be rescinded forthwith, the appeal is proper and is authorized by right, not merely a "request."

My clients – the "applicant," VMT/Orcem – have clearly been "adversely affected" by the staff's decision to refuse to timely complete a satisfactory FEIR and agendize it for discretionary action by the Planning Commission prior to or concurrently with its consideration of their project. As I have previously pointed out, unless this decision is reversed there will be *no legal option* for the Commission to exercise its discretion to approve the VMT/Orcem project when it comes before that body on February 27. Absent prior certification of the FEIR, which cannot possibly occur if it is not completed and agendized to be heard with the project as CEQA requires, the

Planning Commission will be precluded from exercising either full or informed discretion.

The fact that an appeal will lie from a decision by the Planning Commission to *deny* the project, or that the Planning Commission or City Council can – likely after further administrative appeals and delay – order the staff to do what the law already requires it to do does not vitiate staff's unlawful decision, nor does it mean VMT/Orcem are not aggrieved by staff's decision. In fact, the additional delays associated with the alternate procedures you suggest only further staff's malicious objectives and make the VMC § 16.102.030A's appeal remedy (which you intend to deny) all the more critical.

At the heart of your correspondence is your mistaken reading of the decision in *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837 as broadly holding "that it is perfectly legal for an agency to deny a project, and to use a CEQA exemption for denial, without considering or approving an EIR." Contrary to your position, however, neither that case nor CEQA Guidelines § 15270 apply here. As explained further below, staff's actions here are patently illegal, beyond their authority and discretion, and will subject both staff and the City to liability for substantial damages if they are not corrected administratively.

Crucially, your position ignores that: (1) staff is *not* a public agency; (2) the relevant public agency (City's decisionmaking body) has *not* acted to deny the project here, notwithstanding staff's "recommendation"; (3) Guidelines § 15270's categorical exemption on its face does not apply under these circumstances; and (4) the duty to prepare, complete and certify an EIR in compliance with CEQA is *ministerial*, not discretionary, which is precisely why courts have recognized that it is enforceable by writ of mandate. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222 ["By both state law and its own guidelines, Redlands has ***no discretion to refuse to complete an EIR when a project requires one***. Therefore, mandamus lies to compel Redlands to complete the process of preparing and certifying the EIR for this project."]; *see id.* at 225 ["although an agency does not have a duty to approve *any particular* proposed draft EIR, ***it is obligated to complete a satisfactory EIR when a project requires it.***"], emph. added.)

I explained to staff long ago, in my detailed October 3, 2016 letter to Andrea Ouse and Dan Keen, copied to you, that the *Sunset Drive* decision, not *Las Lomas*, governed the instant matter. It still does, and the basic reason is simple: in *Las Lomas*, the ultimate decision making body – the city council – had already exercised its discretion and disapproved the project, prior to even a draft EIR being prepared, thereby rendering preparing, finalizing and certifying a final EIR a futile process. By contrast, in *Sunset Drive*, the developer sought mandamus to enforce what the court clearly recognized to be a *ministerial* duty – timely completion and certification of a satisfactory EIR – so that there *could be* an exercise of discretion by the decision-making body on the project. Here, unlike in *Las Lomas*, VMT/Orcem are not seeking to overturn a discretionary decision that has been made by the decision-

making body or to compel approval of their project after such a decision, but simply to enforce the City's *ministerial duty* to finalize the EIR and certify it so that the decision-making body *can* make a discretionary decision on the project.

Staff's actions in refusing to complete the FEIR and present it to the City's decision-making body are in clear violation of the City's *ministerial* duty to do so as described in *Sunset Drive* and a long line of subsequent case law. (*Sunset Drive, supra,* 73 Cal.App.4th at 221-225 [recognizing both City's ministerial duty to timely complete and certify satisfactory EIR where project requires one, and developer's monetary damages remedy under 42 U.S.C. § 1983 for violation of its federal constitutional due process and equal protection rights where city maliciously or arbitrarily refuses to perform its duty]; *California Water Impact Network v. Newhall Water Dist.* (2008) 161 Cal.App.4th 1464, 1483-1484 [citing *Sunset Drive* in support of proposition that mandate "does lie to command the exercise of discretion to compel some action upon the subject involved"]; *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63 [citing *Sunset Drive* for proposition that mandate lies "to compel some action upon the subject involved under a proper interpretation of the applicable law"]; *Vedanta Soc. of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 535 [stating *Sunset Drive* "makes it clear that a petition for writ of mandate and a complaint for damages under 42 United States Code section 1983 are available for an agency's refusal to act in failing to complete and certify an EIR."].)

The decisionmaking body of the City has not yet exercised its discretion to act on the VMT/Orcem project and that project is still pending consideration by City's decision-making body. Staff's and your continued misplaced reliance on *Las Lomas* to try to excuse City's refusal to comply with its clear and present *ministerial duty* to timely complete and certify an EIR for the VMT/Orcem project is nothing short of malicious, irrational and arbitrary – as is your refusal to recognize VMT/Orcem's exercise of its clear right to administratively appeal staff's unlawful decision in this regard under the City's Code. In fact, your letter concedes the complete lack of merit in your legal position when it states: "If an *agency* at any time decides not to proceed with a project CEQA is inapplicable *from that point forward*." (Emph. added.) While that may or may not be true under the present circumstances, what is undisputable is that "that point" has not been reached, and (as in *Sunset Drive*) CEQA is therefore clearly still applicable here. The VMT/Orcem project is still very much under consideration by the agency; the decision making body has not denied it, nor has any member of the decision-making body made or scheduled any motion not to proceed with it; yet staff has unilaterally and intentionally violated the law and City's ministerial duty under CEQA (as well as its contract with VMT/Orcem) by ceasing work on the FEIR, refusing to complete it, and refusing to allow the Planning Commission to consider a sufficient, complete and accurate EIR so that it can *properly exercise its discretion* on the project.

Aside from its mischaracterization of CEQA's ministerial requirements under these circumstances, your letter wholly fails to address City's contract obligations to complete the EIR, and is inaccurate in other respects. You state "staff's

recommendation of denial is only a recommendation and therefore, far from 'final', [but] it does constitute the agency's less-than-final decision for purposes of determining what to do next." This is presumably asserted to justify your assertion that VMT/Orcem's administrative appeal is "premature" and your resulting arbitrary denial of their appeal right. Yet your argument is plainly thrice wrong since: (1) the staff's decision *is* a final decision *of staff* that aggrieves VMT/Orcem and is appealable as such under VMC § 16-102.030A; (2) the *staff* is *not* the *agency*, and *only* the *agency's decisionmaking body* can lawfully make a decision to approve or deny the project, or to certify or not certify the EIR; and (3) therefore, staff's determination *cannot* constitute the "*agency's less-than-final decision*" for *any* purpose.

As I also previously explained, the decisionmaking body cannot lawfully delegate its CEQA review obligations, nor can CEQA review authority lawfully be split off and separated from project approval authority as staff has endeavored to do, quite obviously for the sole purpose of attempting to assure that this project cannot lawfully be considered for approval but can only be denied if acted upon at all.

Your assertion that staff has taken its unlawful actions to save the applicants' money is ludicrous, and belied by the clear facts and history of this project, as disclosed by the contract modifications, change orders, and payments made as well as other record evidence.

Moreover, in preparing their position statement in recommending denial of both projects, staff has specifically relied on and included references to the as-yet uncertified Draft FEIR. As will be addressed separately in a letter from Mr. Loewke, many of these EIR-based assertions in the staff report are simply inaccurate, and grossly misrepresent the actual nature and environmental effects of the VMT/Orcem projects. This is precisely why CEQA requires the preparation *and certification* of a complete and accurate EIR prior to commencement of decision making on such projects.

I should add that neither City nor the individual staff members involved in perpetrating this unlawful conduct will be immune from judicial damages remedies should resort to the courts become necessary. Under Government Code § 820.2, of which I know you are well aware, immunity for public entities and employees only extends to *discretionary* acts. (Gov. Code, § 820.2 ["public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him"].) Intentional, knowing or even negligent violation of the City's clear and present *ministerial* duty to complete and certify a final EIR under CEQA for a project that requires one (*Sunset Drive*, *supra*, 73 Cal.App.4th at 222-225) is far beyond any "discretion" vested by any law in any City staff member. Not finalizing and presenting an EIR for certification to the decision making body when a project is still pending consideration and has not been acted on by that body is not a "policy" decision entrusted to staff, but a ministerial, operational level duty imposed by law, as established by another long line of

authorities. (*See*, e.g., *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 48 [processing of application for disability retirement was within operational, not policymaking, category of decisionmaking; therefore, administrator of county employees retirement association had no discretionary immunity for her decisions about how to handle paperwork, including medical evidence, in processing application and was not immune from county employee's claim that she caused certain medical reports to be withheld from retirement board's medical advisor, leading to denial of employee's application]; *Connelly v. California* (1970) 3 Cal.App.3d 744, 751 [while "determination to issue flood forecasts is a policy-making function, a discretionary activity within the scope of governmental immunity, ... gathering, evaluating and disseminating flood forecast information are administrative or ministerial activities outside the scope of governmental immunity"]; *Ma v. San Francisco* (2002) 95 Cal.App.4th 488, 517 [design and content of 911 emergency medical service were discretionary, although manner in which that program is administered by 911 dispatchers was ministerial]; *Cuff v. Grossmont Union High School Dist.* (2013) 221 Cal.App.4th 582, 594 [decision to disclose report to recipients other than those statutorily designated was a lower-level decision implementing a basic policy that had already been formulated, and was not immune]; *Sanborn v. Chronicle Publishing Co.* (1976) 18 Cal.3d 406, 415 [governmental officer's discussions with public or press regarding functioning of office fall within category of routine, ministerial duties incident to normal operations of that office]; *Johnson v. State* (1968) 69 Cal.2d 782, 795-796 [held that if parole officer failed to warn plaintiff of foreseeable, latent danger in accepting youth in her home and that failure led to plaintiff's injury, plaintiff should be entitled to recover from state and state would not be immune on basis that parole officer's decision not to warn plaintiff had been exercise of a discretionary function]; *Toney v. California* (1976) 54 Cal.App.3d 779, 792 [press release by officials of state college defaming plaintiff professor; decision to issue press releases concerning college events was discretionary act, but timing of a particular release, its content, and manner of making were operational and not protected by immunity]; *Elton v. Orange* (1970) 3 Cal.App.3d 1053,1058 [although it was policy decision to declare plaintiff a dependent child, negligent implementing acts of placement and supervision of home were ministerial]; *Scott v. Los Angeles* (1994) 27 Cal.App.4th 125,140 [social worker's noncompliance with Department of Social Services regulation requiring monthly visits to foster children and foster parents was ministerial]; *Ogborn v. Lancaster* (2002) 101 Cal.App.4th 448, 460 [public school counselor's alleged act of providing copy of mandatory report of suspected child abuse by mother to victims' father was not entitled to immunity; counselor's act was "lower level decision" as opposed to creation of policy].)

Conclusion: Both City and its staff have a ministerial duty under CEQA to complete and certify an EIR for the project under these circumstances, and they may not rely on and hide behind an inapplicable categorical exemption and inapposite case law to justify or excuse their non-compliance with this duty. Staff must comply with the law, including properly scheduling a meaningful hearing before

the Planning Commission on VMT/Orcem's properly pending administrative appeal of staff's unlawful decision to refuse to comply with its ministerial duty.

Very truly yours,

MILLER STARR REGALIA

Arthur F. Coon

AFC:klw
cc: Hon. 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)
Andrea Ouse, Community and Economic Development Director
(andrea.ouse@cityofvallejo.net)
Daniel Keen, City Manager (city.manager@cityofvallejo.net)
Clients
Richard T. Loewke, AICP (dick@loewke.com)