



The Law Office of
Julie M. Hamilton

January 16, 2020

Mayor Catherine Blakespear
City of Encinitas
505 S. Vulcan Ave.
Encinitas, CA 92024

VIA EMAIL

RE: Safe Parking Program on Leichtag Foundation Property.

Honorable Mayor Blakespear:

I represent NC3, LLC in opposition to the safe parking program proposed on the Leichtag Foundation Property. This letter is to call your attention to substantial violations of the Ralph M. Brown Act, one which may jeopardize any actions taken by the Encinitas City Council in relation to the safe parking program proposed on the Leichtag Foundation Property. In addition, the City Council has falsely claimed a Shelter Crisis and is wrongly relying on exemptions from the Encinitas Municipal Code, California Environmental Quality Act (CEQA) and the California Coastal Act.

The nature of the violation of Brown Act is as follows: The City Council held two closed sessions to discuss issues and solutions related to the safe parking program under the auspices of the real estate negotiations exception to the Brown Act. The closed session agenda for October 30, 2019 and November 13, 2019 identified the discussion as “Real Estate Negotiations” and did not describe a discussion of the legal real property issues and solutions associated with the safe parking program.

Any actions taken related to the safe parking program are a result of, or products of these closed sessions and were not in compliance with the Brown Act. In the first place, the agenda described the closed session items as “Conference with real property negotiator.” However, the report out from closed session and your testimony at the hearing on November 20, 2019 describe the actions taken in closed session as discussion related to the legal real property issues and solutions related to the safe parking program. Under the plain language of the Brown Act, the City may only consider those matters in closed session that were covered in its statement at an open meeting of the item or items to be discussed in closed session.¹ No action *or discussion* shall be undertaken in closed session on any item not appearing on the posted closed session agenda, except that members of the City Council may ask questions for clarifications or report on related activities.²

¹ *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917.

² Government Code section 54954.2, subd. (a).

Under the Brown Act, the purpose of a closed session for real estate negotiations is limited to directing the City's negotiator prior to "the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the ***price and terms of payment for the purchase, sale, exchange, or lease.***"³

Government Code section 54956.8 allows for a closed session to discuss the price and terms of payment in real estate negotiations. Given the negotiation for a rental price of \$1 per year, the issue of price and terms of payment were not properly discussed in closed session as there was no negotiation. The open meeting requirements of the Brown Act should be liberally construed and the statutory exceptions to open meetings should be narrowly construed.⁴ It is clear the City Council here used the Brown Act as a shield against public disclosure of its consideration of important policy issues related to the safe parking program rather than to direct the City's negotiator to negotiate a price of \$1 for the lease or the terms of payment of that \$1.

This violation of the Brown Act was further demonstrated by City Attorney, Leslie Devaney's report out from closed session on November 13, 2019 wherein she reported the City Council had discussed the legal real property issues and solutions to the safe parking program. This evidence was further reinforced by your discussion of the closed session at the November 20, 2019 hearing wherein you justified considering the safe parking program by stating "we had to go into closed session to deal with the basic issue of is this allowed, the land use issue that's allowed." This is a violation of the Brown Act, in fact your premise the City Council has to go into closed session for the type of challenging debate that would have occurred in open session is in complete conflict with the Brown Act.

Pursuant to Government Code section 54960.1, NC3 demands that the Encinitas City Council cure and correct the illegally taken actions related to the safe parking program by a formal and explicit withdrawal of any commitment made towards the safe parking program, including direction to staff. In addition, NC3 demands complete disclosure of any and all documents in the possession of the City of Encinitas and the City Council related to the safe parking program that were considered in close session. This includes any material provided to the City by the Leichtag Foundation initiating discussions with any representative of the City of Encinitas; including but not limited to the City staff, elected officials, and the City Attorney. These materials include but are not limited to notes of any telephone calls, emails and calendars that are used in any way to conduct business on behalf of the City.

As provided by Government Code section 54960.1, you have 30 days from the receipt of this demand to either cure or correct the challenged action or inform me of your decision not to do so. If you fail to cure or correct as demanded, such inaction may leave NC3 no recourse but to seek a judicial invalidation of any actions related to the safe parking program and the Leightag Foundation. Should NC3 be required to seek judicial invalidation of the City Council action, NC3 will seek court costs and reasonable attorneys' fees in this matter, pursuant to Section 54960.5.

In addition to violations of the Brown Act, the City has falsely declared a shelter crisis and failed to comply with the Municipal Code, CEQA and the Coastal Act. The City has falsely

³ Government Code section 54956.8, *Shapiro v. San Diego City Council, supra*, 96 Cal.App.4th at 922.

⁴ *Bell v Vista Unified School Dist.*, (2000) 82 Cal.App.4th 672, 682.

declared a significant number of persons are without the ability to obtain shelter. The point in time count relied on by the City showed 84 homeless individuals in Encinitas, a City with a population of 63,000 people – 84 homeless individuals compared to the population size is not a “significant number of persons without the ability to obtain shelter, resulting in a threat to their health and safety. Regardless, the City misinterprets the provisions of the Shelter Crisis Law.

Pursuant to California Government Code section 8698.1:

“The provisions of any state or local regulatory statute, regulation or ordinance prescribing standards of housing, health, or safety shall be suspended to the extent that strict compliance would in any way prevent, hinder, or delay the mitigation of the effects of the shelter crisis.”

This section is specific, only those regulations related to the standards of housing, health or safety shall be suspended. This section does not allow the City to suspend the requirements of zoning, CEQA or the Coastal Act. In fact, Government Code section 8698.3 and 8698.4 are specific as to which jurisdictions are allowed to suspend the provisions of zoning, CEQA and the Coastal Act. The City of Encinitas is not included in the list of jurisdictions allowed to suspend these regulations. Therefore, the City must comply with the zoning requirements of the zoning, CEQA and the Coastal Act.

The safe parking program is not an allowed use in the Agricultural Zone of the Encinitas Ranch Specific Plan. The City has enacted a homeless shelter ordinance that specifies where the safe parking program might be allowed, but the use is not allowed in this zone.

The City failed to comply with CEQA. The safe parking program requires the installation of bathrooms and showers, resulting in a direct physical change to the environment. There is a fair argument the project may have a significant impact on land use by introducing a use that is not allowed in this zone. Approval of this safe parking program sets a precedent to allow other such uses in zones where the use is not allowed. A categorical exemption is not appropriate for the safe parking program because the project may have a significant impact due to unusual circumstances.

The safe parking program is an intensification of use on the Leichtag Foundation property and requires a coastal development permit. The safe parking program will allow 25 individuals or families to live on the property each night, in addition to the living quarters shown on the site in the Leichtag Foundations’s 2013 application for a coastal development permit. In the alternative, the Leichtag Foundation is proposing to allow 25 individuals or families to live in an area that was greenhouses in its 2013 application. Either scenario is an intensification of use requiring a coastal development permit. The City cannot enter into a lease or an operating agreement for the safe parking program without first receiving a coastal development permit for the project.

In its rush to approve the safe parking program to comply with the HEAP grant, the City of Encinitas has violated the Brown Act, the Municipal Code, CEQA and the Coastal Act. It is time for the City to take a step back and fully examine the safe parking program on the Leichtag Foundation Property in a public forum. The City Council must set aside all previous actions and

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must not act on the operating agreement until it has taken the actions discussed above to cure its violation of the Brown Act.

The City cannot approve the safe parking program on the Leichtag Foundation Property because it is not an allowed use. The City must look for a different location as allowed by the Municipal Code and must comply with CEQA and the Coastal Act prior to approving a safe parking lot in the City of Encinitas.

I look forward to working with you and the City Council to resolve these issues. Please let me know if you have any questions or need additional information.

Regards,



Julie M. Hamilton

Attorney for NC3

CC: Interim City Attorney, Leslie E. Devaney
Assistant City Attorney Barry Schultz
City Clerk
Client