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FOR THE CITY HALL APRIL 25, 2023, MEETING AGENDA

**Re: Proposed Temporary Housing at Benton Street at Lawrence Expressway
Notice to Cure or Correct; Potential Legal Issues**

Dear Mayor Gilmore, City Councilmembers, and Boardmembers:

Our law firm represents neighbors in the Benton community who are committed to identifying meaningful ways to assist the homeless while still preserving the safety of their community. The purpose of this letter is twofold:

- (1) to provide notice to the City of the need to cure or correct current legal violations regarding the proposed Homekey project to construct interim housing at the Lawrence and Benton intersection ("Benton Project"); and
- (2) to notify the City of some of the potential legal risks it faces should it vote "yes" on the proposed Benton Project at the April 25, 2023, City Council meeting based on currently available public information.

Notice to Cure and Correct

1. The Benton Project Is Subject to CEQA Review Despite the Homekey CEQA Exemption Statute.

The County of Santa Clara incorrectly claims California Health and Safety Code Section 50675.1.4 (i.e., "AB 140" or the "Homekey CEQA Exemption") exempts the Benton Project

from CEQA review because the Benton Project would be funded by Homekey.¹ The Homekey CEQA Exemption only exempts housing projects that meet **all** nine requirements delineated in the statute, including the requirement that the housing project “does not result in an increase **in the existing** onsite development footprint of structure, structures, or improvements by more than 10 percent.” Cal. Health & Safety § 50675.1.4(a)(9). If all nine requirements are **not** met, then the housing project remains subject to CEQA. In other words, the Homekey CEQA Exemption is only intended to apply to Homekey projects that entail remodeling / converting **pre-existing** structures; not projects that involve erecting a new structure on a vacant lot.

Here, the Benton Project is not remodeling a pre-existing building and thus is not exempt from CEQA under Health and Safety Code Section 50675.1.4. The Benton Project entails constructing a completely new four-story building, consisting of up to 120 units on the vacant lot, which will result in a 100% increase of structures on the lot since the lot currently has zero buildings on it. Thus, the Benton Project does not qualify for CEQA exemption under this statute.

Furthermore, the Benton Project does not qualify for other exemptions under CEQA such as the “commonsense exemption.” “[I]f a reasonable argument is made to suggest a **possibility** that a project will cause a significant environmental impact, the agency **must refute** that claim **to a certainty** before finding the exemption applies.” (*Davidon Homes v. City of San Jose* (1997) 54 Cal. App. 4th 106, 118 [bold emphasis added; italics in the original].) As the California Supreme Court recently held, a reasonable argument of environmental impact exists if new construction could theoretically change patterns of foot and automobile traffic around the area. (*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, 1198.)

Here, the Benton Project poses a high possibility of causing a significant environmental impact and thus the City must refute the claim to a certainty before finding that an exemption applies or undergo CEQA review. For instance, the Benton Project anticipates constructing 80 additional parking spaces, which demonstrates that the County itself already anticipates a substantial change to patterns of automobile traffic around the once vacant lot. Moreover, the are less than the 120 units that are anticipated to be built. Other foreseeable environmental impacts also include possible contamination of the Calabazas Creek, which currently flows into the Bay. Given these foreseeable impacts on the environment, the City should comply with its statutory obligations before rushing to approve a project, especially one that is based on false information.

Potential Legal Issues

2. Violation of Due Process Clause

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees property owners due process of law when the government interferes with their

¹ See “Frequently Asked Questions, Is the Benton and Lawrence site already zoned for the proposed shelter and does the General Plan allow for this use?” <https://osh.sccgov.org/project-homekey-scc/benton#3925188384-2245695837> (last visited April 17, 2023)

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property interests. U.S. Const. Amend. XIV. A substantive due process claim exists when a deprivation of one's property interest transpired in such a way that it "shocks the conscience" or "interferes with the rights implicit in the concept of ordered liberty." (*Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (citations omitted)).

Indeed, acts that "shock the conscience" include instances where the government acts in a manner that creates a dangerous situation for citizens, such as putting citizens at an increased risk of harm by moving forward with a rushed proposal based on false information. (*See Hernandez v. City of San Jose* (9th Cir. 2018), 897 F.3d 1125, 1138 [recognizing the state-created danger doctrine]; *Wood v. Ostrander* (9th Cir. 1988) 851 F.2d 1212, 1214 [holding an intentional assertion of government power that tended to show a disregard of the plaintiff's physical safety may amount to gross negligence, recklessness or deliberate indifference sufficient for a substantive due process claim].)

Here, the City risks violating the neighbors in the Benton community's substantive due process rights by approving a proposal that relies on false and incorrect information from the County and LifeMoves. For instance, the proposal contains key omissions of fact, such as the fact that the Benton Project would be built in the middle of the highest concentration of daycare facilities and K-12 schools compared to all other Santa Clara communities.²

Similarly, the proposal also fails to address or rectify several publicly known deficiencies with Santa Clara's Care of Continuum, of which the Benton Project is a part, which have not yet been addressed and essentially guarantee the failure of the Benton Project at the risk of the safety, health, and constitutional rights of the neighbors in the Benton community. For instance, per the California State Auditor Report 2020-112 dated February 2021, Santa Clara's Care of Continuum was **critically deficient** in adequately assessing whether the types of service providers and number of service providers that exist in the CoC area are sufficient to effectively combat homelessness in an area.

This deficiency identified by the State Auditor—i.e., Santa Clara's inadequacy of assessing the types of service providers needed and quantity of providers needed for a housing project—has a direct impact on the amount of crime, violence, drug use, and continued homelessness in an area around a Project Homekey development as noted by a study in 2022 conducted and published by the Pacific Research Institute. Specifically, the study found that the lack of such service providers was a critical component to failed Project Homekey efforts implemented in Los Angeles, San Francisco, and San Jose. Indeed, the study concluded that such deficiencies were tied to the failure of Project Homekey housing developments in those cities, whereby those cities continued to experience increases in homelessness, continued crime, drug use, and overdose deaths around the project areas.

Such deficiencies are also presumably the reason why similar housing projects in Mountain View, Milpitas, and Kifer have failed. Milpitas observed a 3x increase in crime around the homeless housing facility as there was insufficient staff and support to effectively operate the

² See Slide 8 of powerpoint presentation presented at the April 4, 2023, meeting.

facility. Similar spikes of crime were witnessed in other areas. The Benton Proposal only copies these already tried-and-failed projects. By rushing forward with the proposal—despite objective evidence indicating the inevitable failure of such a proposal that risks an increase of crime, health, and safety to existing residents—would undoubtably demonstrate a reckless or deliberate indifference to Santa Clara residents physical safety in violation of their substantive due process rights.

3. Public Nuisance (Cal. Civ. Code §§ 3490, *et seq.*)

California has defined nuisance as “[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property” (Cal. Civ. Code § 3479.) In addition to health and safety hazards, “[a] reduction in property values caused by activities on a neighboring piece of land, and an assault on the senses by noise, dust, and odors, are just the kinds of harm that common law suits to abate a nuisance are designed to redress.” (*Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs* (7th Cir. 1996) 101 F.3d 503, 505.)

The adoption of the Benton Project proposal in this rushed manner and based on false information without adequate correction of the negative effects such a proposal will have on the community will undoubtably result in a public nuisance. As already communicated to the City in prior meetings, the Benton Project mirrors already tried-and-failed homeless shelter projects around the area including Mountain View, Milpitas, Kifer, and Bella Vista (Santa Clara) that have faced significant increases in crime due to financial unsustainability, poor management, low staffing, and under prioritized handling of addiction and mental health problems. Project Benton does not address any solutions to these issues. As a result, there is a high likelihood that the Santa Clara community will imminently experience a substantial and unreasonable interference with the enjoyment of their property and will be threatened with respect to his or her or their health and welfare by reason of the increased threat of disease, human waste, trash, and drug use on the sidewalks and streets.

4. Possible Violation of Cal. Gov. Code § 54952.2 (Brown Act prohibition against serial meetings).³

California Government Code Section 54952.2 prohibits a majority of members of a legislative body to engage in a series of private communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the City’s jurisdiction. This prohibition applies to situations where the majority of members directs one specific individual to engage in such private communications on their behalf, or uses such

³ The neighbors in the Benton community also reserve any legal issues related to the deficiencies in the City Council’s Notice of Public Hearing detailing the City’s potential sponsorship of the Santa Clara County’s Project Homekey application, which include an error regarding the address of the Benton Project and the fact that the notice was distributed only within 1000 feet of the construction site.

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privately obtained information to collectively take action on an item of business without sharing such information with the public. (*See Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171 Cal. App. 3d 95, 103.)

Here, neighbors in the Benton community are aware that councilmember Suds Jain has been privately meeting with LifeMoves repeatedly and exchanging information that is never published, released, or noticed to the public. It is currently unclear whether Suds Jain has acted pursuant to the instruction of the majority of City Council members, or exchanged information with the majority of City Council members gained from these private meetings. Neighbors in the Benton community are aware that they may need to request records pursuant to the California Public Records Act to more fully investigate the issue. But in the meantime, if the City Council has been persuaded by privately gathered information, the City Council should not approve the measure until the public has a meaningful opportunity to review the private information and communications exchanged between Suds Jain and LifeMoves.

Conclusion

In conclusion, the neighbors in the Benton community emphasize that that they are not opposed to the ultimate goal of housing the homeless to help them transition to a more stable living. But the residents know that mimicking tried-and-failed methods will not meaningfully effectuate any noble goal and instead only dramatically endangers current residents.

In light of the above concerns, my client respectfully encourages the City to vote “no” on the Benton Project or postpone the decision until the City can undergo CEQA review and provide its residents with the opportunity to review the information discussed privately with LifeMoves.

Sincerely,

Dorothy C. Yamamoto, Esq.