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December 14, 2021

SENT VIA EMAIL & REGULAR MAIL

Mayor Rico E. Medina
& City Council
City of San Bruno
567 El Camino Real
San Bruno, CA 94066

Re: Crestmoor High School Development, San Bruno City Council Meeting (December 14, 2021) Agenda Item 6(n): Adopt Resolution Regarding Open Space and Recreation Policy OSR-8

Dear Mr. Mayor and City Council:

This firm serves as counsel to the San Mateo Union High School District ("District"). This letter concerns the District's ownership and ability to reasonably develop the former Crestmoor High School site ("Crestmoor" or "Site") and the City of San Bruno's ("City") requirements for redevelopment of Crestmoor. Specifically, the City Manager has repeatedly asserted that 12 acres (50% of the approximately 24 developable acres on the Site) cannot be redeveloped due to an erroneous interpretation of the City's General Plan.[1] Tonight, the City Council will consider a resolution that embraces that erroneous interpretation. (Consent Calendar Item "n".) This interpretation stretches the General Plan beyond its limits and may be viewed as an attempt at an illegal plan amendment. The City should reject this faulty interpretation of Policy OSR-8.

Procedural Due Process

Initially, the District requests that the above-referenced agenda item be removed from the agenda and either dropped or properly noticed as a regular agenda item for a future public hearing. This significant matter is far from "routine" and was placed on the agenda without notice to the District. The District is also concerned that the City's agenda, both by how the item was placed on the agenda and the failure to reference Crestmoor, is insufficient, as it fails to give notice of the essential nature of the action to be considered. The proposed interpretation threatens to deprive the District of a constitutionally protected property right. Without due process, the District, as the only property owner affected by the proposed action, is entitled to adequate notice and a meaningful opportunity to prepare and be heard.

[1] See, for example, Letter from City Manager Grogan to Superintendent Skelly, dated February 8, 2021.

The Lease

The District has always cooperated with the City in good faith to provide recreational/open space opportunities for the City's residents and remains open to good faith cooperation. In fact, for over 34 years, the District leased a portion of the Crestmoor playing fields to the City for public use (The lease has since terminated). The City's maintenance of the fields was part of the consideration due under the lease. Any suggestion that the City gained a property interest in the playing fields by virtue of such expressly permitted use or lease consideration, however, is wholly without merit.

The Proposed Resolution, Agenda Item n

General Plan Policy OSR-8 states as follows:

> **OSR-8:** During reuse of the former Crestmoor site (designated for single-family residential development), preserve the existing playing fields for recreational use per the direction of the General Plan Update Committee.

Notably, Policy OSR-4 states:

> **OSR-4:** Seize all opportunities to develop and/or maintain parks and recreation facilities within existing residential neighborhoods through acquisition or preservation of former school facilities.

A plain reading of these provisions suggests that the City would pursue opportunities to maintain the playing fields through acquisition of a fee, leasehold, or other interest. Notably, however, when the District offered the Site for sale to the City and other public agencies pursuant to the Naylor Act (Ed. Code §§17485, *et seq.*), the City did not respond.

In contrast to this plain reading of Policy OSR-8, the proposed Resolution asserts that "Policy OSR-8 of the City's General Plan requires that the approximately **12-acre area** occupied by the playing fields **shall be made available for public use through dedication to the City** of San Bruno and shall be kept intact in their present condition." (Resolution, *emphasis added*.) On its face, this so-called "confirmation" in fact substantially expands Policy OSR-8 in several important respects. For example, nothing in the General Plan states that "12 acres" of recreation space are required at Crestmoor, and in fact the "playing fields" occupy substantially less acreage. More importantly, Policy OSR-8 does not require "dedication" of the playing fields. Rather than a confirmation, the Resolution would significantly change the meaning of Policy OSR-8, without compliance with procedural and substantive requirements for a General Plan amendment. A General Plan amendment requires noticed public hearings before the Planning Commission and City Council. Further, because the action would effectively reduce the feasible housing density on the Site, the action would trigger Senate Bill 330's "no net loss provisions," requiring the City to concurrently redesignate other property to ensure no net loss of residential density. CEQA

review would be required for these actions. Based on the foregoing, the proposed Resolution is neither a "confirmation" of existing General Plan policy nor an effective General Plan amendment.

State Housing Policy

The proposed Resolution flies in the face of both State and local policy in favor of increasing the housing supply during an acknowledged housing crisis, and unnecessarily opens the City to a risk of successful legal challenge. State housing laws, specifically the Housing Accountability Act (Gov. Code § 65589.5), are designed to prevent a city from unreasonably denying a housing development project that is consistent with the objective standards of the General Plan and zoning designations. Objective standards must be "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need," and "applied to facilitate and accommodate development at the density permitted on the site and proposed by the development." (Gov. Code § 65589.5, subd. (f)(1).) Moreover, a development project is consistent with an objective standard if there is substantial evidence that would allow a reasonable person to conclude that the housing development project is consistent. (Gov. Code § 65589.5, subd. (f)(4).) Violations of these laws subject the City to attorney's fees and may result in civil penalties of at least $10,000 per unit. (Gov. Code § 65589.5, subd. (k)(1)(B).)

As contained in the General Plan, OSR-8 is not an objective standard. OSR-8 only comments that the existing playing fields be preserved. OSR-8 is therefore ambiguous because it does not express a clear standard, namely, how much land, specifically, must be set aside for recreation space, or where such land must be located. The recent case of *California Renters Legal Advocacy and Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820 found that a requirement for a "transition or step in height" without specifying the amount of the transition was not an objective standard because it was open to interpretation as to how much any transition or step must be. OSR-8 is likewise open to subjective interpretation and does not constitute an objective standard. The language of the General Plan does not mandate a 12-acre requirement for recreational facilities, and an after-the-fact policy interpretation at this time will not change that fact.

Several internal inconsistencies within the General Plan, the Housing Element, and the Land Use designation support the development of Crestmoor without the unreasonable condition that half of the usable acres remain as recreational space. The City's Housing Element identifies Crestmoor as an opportunity site with a "realistic unit capacity" of 241 units, based on 6 units per acre across the 40 acre site. (HE, p. 4-13, 4-17, Table 4.4-1.) There is no deduction of 12 acres for recreational facilities. The General Plan's Land Use Diagram (Figure 2-1) designates the entire Site as low density residential and the Site is zoned the same. Any reasonable person would conclude that the entire Site could be developed for single family homes based on the Land Use Diagram and zoning. These clear standards cut against the City's interpretation of OSR-8 that 12 acres of playing fields are required at Crestmoor. No amount of informal policy

interpretation can evade the specific standards expressed in the Housing Element and Land Use designation.

Taking, Due Process, Equal Protection, Mitigation Fee Act

The proposed interpretation of GP OSR-8 would effect a taking of property without just compensation, a denial of due process and equal protection, and a violation of the Mitigation Fee Act.

We stress that the City's own Housing Element states that only two (2) acres of parkland per 50 acres of residential subdivision is required. (HE, p. 3-16.) While the City replaced that standard in its 2019 Impact Fee Ordinance, the February 6, 2019 San Bruno Development Impact Fee Nexus Study by EPS is based on an even lower 1.79 acre/1,000 service population existing service standard. A greater exaction here is not justified. We also note that the former lease dated December 17, 1987, that had been in place between the District and the City relating to the fields at Crestmoor, provided for City use of an area substantially less than 12 acres.

Perhaps even more troubling is the statement in the proposed resolution that the fields "shall be made available for public use through ***dedication*** to the City of San Bruno. . . ." (Emphasis added.) According to Black's Law Dictionary (11th ed. 2019), "dedication," in the property context, is "the donation of land or creation of an easement for public use." As you are aware, the California and United States Constitutions protect a property owner's right to use and develop its own property, and unreasonable conditions, excessive exactions, and regulatory prohibitions on productive use of property constitute a taking for which just compensation must be paid. As noted above, when offered the opportunity to purchase the Site pursuant to the Naylor Act (Ed. Code §§17485, *et seq.*), the City did not respond. Having so declined, the City could now seek to acquire the Site through its powers of eminent domain, but it would have to pay just compensation and, given that the District also is a public agency, demonstrate the higher and better public use. Instead, the City is attempting to avoid these constitutional requirements by attempting to impose excessive regulatory burdens that prevent making productive use of the Crestmoor site. In addition to requiring recreational facilities on a substantial portion of the Site and ignoring the General Plan Land Use designation, requiring a full 12 acres of recreational open space at Crestmoor be "dedicated" to the City makes redevelopment of the Site infeasible and constitutes a taking of District property. The City's actions have already damaged the District, as one reputable residential developer backed out of a contracted purchase of the Crestmoor site due to the excessive demands of City staff. The City's position risks future purchasers backing out as well and the Site remaining idle and unproductive at a time when additional housing is sorely needed by the residents of San Bruno.

We also note that keeping the playing fields "intact in their present condition," as the Resolution proposes, would not be in the best interests of the City and the users of the fields because the fields are in poor condition, due in part due to years of substandard City maintenance in breach of its previous lease obligations. There is no public policy that supports retaining substandard

fields when possibilities are available for state of the art facilities as part of a new residential development. The District still desires to redevelop this Site with a well-planned single family home development with sufficient and updated recreational amenities, for the benefit of San Bruno residents. It is not now, nor has it ever been, the District's intent to deprive the community of recreational facilities. To the contrary, the District remains cooperative towards developing adequate recreational amenities. However, insisting that 50% of the developable Site cannot be redeveloped and must be dedicated to the City is based on an unlawful standard and constitutes an illegal exaction and taking, will inevitably limit the development both of Crestmoor and of new recreational facilities, and will lead to legal entanglements, all to the detriment of San Bruno residents. The District urges the City Council not adopt the proposed resolution.

Respectfully,

LOZANO SMITH LLP

James C. Sanchez

JCS/ng

cc: Kevin Skelly, Superintendent
Jovan D. Grogan, City Manager
Marc Zafferano, City Attorney

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December 22, 2021

Via U.S. Mail & E-Mail: MThurman@sanbruno.ca.gov

Melissa Thurman, MMC
City Clerk
City of San Bruno
567 El Camino Real
San Bruno, CA 94066

Re: Violations of Ralph M. Brown Act (Gov. Code, § 54950, et seq.) at San Bruno City Council Meeting (December 14, 2021) on Agenda Item 6(n): Adopt Resolution Regarding Open Space and Recreation Policy OSR-8; Cease and Desist (Gov. Code, § 54960.2(a)(1)); Demand to Cure and Correct (Gov. Code, § 54960(a))

Dear Ms. Thurman:

This letter is a demand to cease and desist and to cure and correct violations of the Ralph M. Brown Act (Government Code section 54950 et seq.) that occurred at the City of San Bruno ("City") City Council Meeting on December 14, 2021. The Brown Act violations pertain to Consent Calendar Item "n". Item "n" was agendized to "Adopt Resolution Regarding Open Space and Recreation Policy OSR-8"; what it does not clarify is that Item "n" , if it were an effective "interpretation" of the General Plan, could materially impacts the development of housing at the former Crestmoor High School site to the detriment of its owner, as well as impairing necessary housing development that would benefit the residents of the City at a time of critical housing need.

The following violations of the Brown Act occurred with respect to this item:

1. Failure adequately to describe the agenda item. (Gov. Code, § 54954.2(a)(1).)
2. Failure to allow public comment on consent calendar items. (Gov. Code, § 54954.3(a).)

Specifically, the meeting agenda description for Consent Calendar Item "n" did not provide the public with enough information to reasonably understand the subject matter or action being taken without reference to other items not contained on the face of the agenda. The Brown Act requires agenda descriptions to "give the public a fair chance to participate in matters of particular or general concern by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local

agency." (*Olson v. Hornbrook Cmty. Servs. Dist.* (2019) 33 Cal.App.5th 502, 519 (quoting *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 643).)

Here, the City's agenda stated simply, "Adopt Resolution Regarding Open Space and Recreation Policy OSR-8." This description is inadequate because it only provides "mere clues" of what business will be transacted. (*Ibid*.) It says nothing about interpretating the General Plan. It doesn't even say in the most general terms what the subject of the policy is. The agenda description requires one to hunt for Policy OSR-8 in the City's General Plan to know the subject matter. Only then would a member of the public understand that this policy affects the Crestmoor site – and only the Crestmoor site – and the impact the "interpretation" could have on development of Crestmoor. Aside from the clear violation of planning law, this also is inadequate under the Brown Act. It appears that the agenda description was intentionally vague in order to keep members of the public in the dark as to what public business was actually being conducted. A key purpose of the Brown Act is to "ensur[e] that the public is adequately notified of what will be addressed at a meeting in order to facilitate public participation and avoid secret legislation or decisionmaking." (*San Joaquin Raptor Rescue Ctr. v. Cty. of Merced* (2013) 216 Cal.App.4th 1167, 1178.) The agenda description for Item "n" did not provide the required notification.

The City further violated the Brown Act by not holding public comment on the Consent Calendar (Item 6). Item 4 allows for public comment, but specifies that it is for matters not on the agenda. Consent Calendar Item "n" was on the agenda, so comment during general public comment was not the proper place to comment on the Consent Calendar. A motion to approve the Consent Calendar was made and adopted by the City Council without allowing the public a reasonable opportunity to understand the true general nature of the resolution or the opportunity to comment on Item 6 (Consent Calendar). The Brown Act is intended "to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies." (*San Joaquin Raptor*, 216 Cal.App.4th, at 1176 (quoting *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1321–1322).) The City's actions here cut out public participation on Item "n".

In addition to the foregoing, the City failed to follow its own policies for conducting a City Council meeting. First and foremost, the Consent Calendar is for "routine" items, but a resolution interpreting a General Plan policy, and impacting the property rights of a public school district, is not routine. Second, the Consent Calendar states that the Consent Calendar "may be enacted by one motion; there will be no separate discussion, unless requested." In fact, members of the public did request that Item "n" be pulled from the Consent Calendar and discussed separately. The request was ignored in violation of the instructions included in the agenda. The City Clerk's statement in an email to me of December 14, 2021, that members of the public are not permitted to pull items from the consent calendar is inconsistent with those published instructions. It is also inconsistent with the only City policy or regulation regarding consent calendar that we have been able to locate, which states in relation to consent items that "there will be no separate discussion unless requested by councilmember, citizen or staff. . . ."

For these reasons, the San Mateo Union High School District ("District") demands that the City cease and desist with the aforementioned Brown Act violations and take steps to cure and correct these violations by: 1) re-agendizing Item "n" with a complete description of the subject matter and action to be taken, 2) agendizing the item as a regular business item, not a consent calendar item, 3) allowing public comment on the item, and 4) separately discussing the item prior to a vote.

The District also reiterates that there are other significant problems with Item "n" outlined in the letter sent to the City dated December 14, 2021. Similar to the Brown Act violations described herein, the City failed to hold a noticed public hearing for this land use action, which deprived the public of meaningful opportunity to participate in this land use decision, and violated the District's due process rights by failing to give the District notice of the essential nature of the action that directly affected the District's property rights.

The District demands that the City immediately correct the noted Brown Act violations and deficiencies with respect to Item "n".

Respectfully,

LOZANO SMITH

Harold M. Freiman

HMF/vb

cc: Kevin Skelly, Superintendent (*via e-mail*)
Jovan D. Grogan, City Manager (*via e-mail*)
Marc Zafferano, City Attorney (*via e-mail*)

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