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May 15, 2020

Via Email & U.S. Mail
Mayor Hobart and Honorable Members of the City Council
City of Rancho Mirage
69-825 California Highway 111
Rancho Mirage, CA 92270

RE: In-N-Out Burger Restaurant – 42-560 Bob Hope Drive
(Rancho Las Palmas Shopping Center) /City Council Meeting April 16, 2020

Dear Mayor Hobart and Honorable Members of the City Council:

As you know our office represents Save Rancho Mirage, an association of City of Rancho Mirage residents ("SRM.")

This letter is intended to call your attention to what we believe are substantial violations of law taken by the City of Rancho Mirage in connection with the proposed In-N-Out Burger Restaurant – 42-560 Bob Hope Drive (Rancho Las Palmas Shopping Center)(the "Project"). That Project was terminated as a result of In-N-Out Burger Restaurants' ("In-N-Out") termination and rescission of the Development Agreement that underlies that Project (which the City acknowledged.) Unfortunately, the residents of the City were forced to sue the City to stop the Project. Ultimately, the City and In-N-Out agreed to terminate the Project in January 2020. Rather, than abide by the fact that the Project was then terminated by operation of the law, the City and In-N-Out have, instead, engaged in backroom dealings that have attempted to "resurrect" the Project from the dead during a national pandemic. Those actions are not only wrongful to the residents of the City but are also actionable as detailed below.

It seems plain that the City is engaged in a misuse of democratic process in its consideration of the Project. The City has not only violated the Brown Act, the Public Records Act but also, most significantly from a legal position, the provisions of Government Code § 65000, et. seq. (the Planning and Zoning Law), and its own municipal code While the City, and its electeds, are required to be objective in the process of its consideration off the Project, it is evident that the City has demonstrated bias in proceeding with the Project.

1. VIOLATIONS OF THE BROWN ACT

We write first to all parties with respect to the actions of the City Council on April 16, 2020, taken as they were *during the current Covid19 pandemic*. Those actions were taken without proper notice to the public and attempted to "undo" actions it had previously voted upon at its February 3, 2020, special City Council meeting and its rescission of the below defined In-N-Out Burgers' project. The City Council believed it made a mistake previously and believed it could take advantage of that same mistake. (We previously corresponded with the City in our letter of May 1, 2020, regarding this matter but the City, like it has done so repeatedly, does not respond to any of our correspondence.) The City's actions of April 16, 2020 were in clear violation of the Brown Act. Before we discuss those violations, a little background is in order.

A. The Background.

As you know, our office has represented certain homeowners, SRM, in connection with the Project. That Project was approved by the City at the City Council meeting held on October 3, 2019, despite numerous concerns that we had raised in connection with the City's consideration thereof (including the fact that the City had failed to require an EIR for the Project), and a packed City Council chamber of residents hotly opposed to the Project. We will note, that then the Mayor Pro Tem, Dana Hobart (now Mayor Hobart), took great pains to recuse himself from voting on the Project because a physician, who had treated him, was a member of our group, SRM. The City Council unanimously (with Councilmember Hobart abstaining) voted to approve the Project. Thereafter, SRM sued the City for its failure to require an EIR for the Project on October 29, 2019, in a case captioned *Save Rancho Mirage v. City of Rancho Mirage (In-N-Out Burgers),* Riv. Ct. Case No. RIC1905468 (the "Lawsuit"). Thereafter, on January 29, 2020, as a result of the Lawsuit, both the City and In-N-Out Burgers publicly stated that neither it, nor In-N-Out Burgers, would move forward with the Project. See, the City's letter of January 29, 2020, attached hereto as Exhibit "1." Rather, both had agreed to halt the Project. In a letter dated January 29, 2020 (the City has refused to produce that letter – more about that below.)

Thus, the City took the position – until very recently - that since In-N-Out Burgers had terminated the Development Agreement that the Project, and all associated zoning text amendments passed in connection with the Project, were dead by operation of law. If there was going to be an In-N-Out project in the City, then In-N-Out Burgers would refile for such project and agreed that any such project would include a focused Environmental Impact Report. The City then conducted a *special* meeting on February 3, 2020, at which it passed a *unanimous resolution* rescinding the approvals for the Project (again Mayor Pro Tem Hobart recused himself.) See, the City's Resolution of February 3, 2020, attached hereto as Exhibit "2." The Project was really dead. In-N-Out Burgers and the City made that pronouncement in the January 29, 2020 letter, and then punctuated that fact with the

resolution of February 3, 2020. Further, any project, the both agreed, connected to a possible project would include an EIR.

B. April 16, 2020 Meeting and the Brown Act Violation During a National Pandemic.

Fast forward to the meeting of April 16, 2020. The City made a unilateral decision that it could somehow magically resurrect the Project at this meeting. However, no *member of SRM was aware of this meeting beforehand because was no mention of the Project in the agenda for the meeting.* Here is the description of the agenda item (Item No. 8), for the action taken on April 16, 2020:

> 8. Resolution No. 2020-(Next in Order), Repealing Resolution No. 2020-01 and Declaring it Null and Void Ab Initio Pursuant to The Equal Dignities Rule and Other Procedural Defects.

See, the Agenda for the April 16, 2020 meeting attached hereto as Exhibit "3." Item No. 8 made *no mention whatsoever of In-N-Out* and was buried at the end of the agenda right before updates on the Covid19 virus.

The notice the City provided in the agenda was defective because it did not provide notice to third parties that that it impacted the Project (provided as it was during a calamitous period of time that should have required a heightened concern that the residents of the City were notified of such a significant act.) According to the California Attorney General's guide to the Brown Act, "the purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." The Brown Act, Open Meetings For Local Legislative Bodies, Office of the Attorney General, 2003, at pp. 16-17.

The City did not provide proper notice of its purported action. What the City was attempting to do at the April 16th meeting was to surreptitiously "resurrect" the Project from the dead. *That was not an insignificant action*, and the City knew it. The City had purposely obfuscated the agenda for the April 16, 2020, so as not to draw attention to this fact. The only reason that SRM was notified of the City's action, after the fact, was that a City resident, *by chance*, watched a rebroadcast of the meeting and heard mention of In-N-Out. This is not the way residents of a hotly contested project should learn of an action affecting the Project. Nor was anyone especially attuned to the actions of the City Council vis-à-vis the Project since it had publicly declared the Project terminated and dead. The residents opposed to the Project had relied upon the representations of the City and its elected officials. No one could have seen this coming – and certainly not in the midst of a national pandemic!

As it turned out, the City asserted (as we learned in hindsight), at the April 16, 2020 meeting, that the approval of the prior termination of the Project, and In-N-Out's termination of the Development Agreement was not done properly and was a violation of

the "Equal Dignities Rule." The City asserted that since it had passed the Project with an "ordinance" then only an "ordinance," and not a resolution could be utilized to terminate the Project. Thus, the City believed it could "rescind" its prior resolution and the Project sprung anew![1]. Naturally, the City must have known that taking a 180 degree turn from its prior position (the Project was dead, then alive!), should have more than a passing interest on the part of SRM. The agenda for the April 16, 2020, meeting did not apprize the public that this was a possibility.

The agenda for a public meeting must describe the legislative body's business in enough detail to enable the general public to ascertain the nature of the business to be transacted. A misleading or inadequate description would violate this provision. *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal. App. 3d 196, 200. For example, an agenda description that stated only "Continuation school site change" was inadequate to provide notice that the board would consider discontinuing elementary education at the named school. *Id.* Here, the City only provided notice that it was rescinding a prior resolution. It made no mention of the Project or In-N-Out whatsoever.

The agenda for the April 16, 2020, was meant to repeal the resolution that the City enacted at its February 3, 2020 meeting. A comparison of the agenda description of that item, on

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[1] That argument is wrong for several reasons.

First, if the City made an error, which it now claims it did at the February 3, 2020, Council meeting when it passed a resolution, instead of an ordinance, *the remedy to repair that error is to fix that error*! Therefore, if the City was forthright, to rectify the problem the City need only adopt an ordinance in line with its public pronouncements. Rather than correct its admitted error, the City apparently believed it could take advantage of that same error and vote so that Project could "resurrect" it from the dead by revoking its It is axiomatic that one cannot take advantage of their own wrong. See, *Civil Code* § 3517. The actions of the City Council squarely violated this edict and the trust of the City's residents. When the public places power in the hands of its public officials, the public relies on officials to exercise that power prudently. Indeed, the definition of "trust" is to rely on the integrity, strength and ability of a person or thing. The City Council not only breach that trust, but it breached it prior public pronouncements.

The Residents of the City were rightly entitled to rely upon the representations of its elected that the Project was dead and that all zoning amendments and Project had been repealed by its actions on February 3, 2020.

Second, and perhaps more importantly, nothing the City Council has done thus far can spring the Development Agreement back to life. See the discussion below regarding violations of the Planning Law.

the February 3, 2020, agenda is provided for comparison and contract purposes and highlights how the City attempted to "hide" its actions on April 16th:

> 1. Termination of Development Agreement by and between the City of Rancho Mirage and In-N-Out Burgers and Rescission and Repeal of the Approvals of Ordinance No. 1157 amending the text of Table 2-4 of Section 17.10.012 of the Rancho Mirage Municipal Code ("RMMC") and amending Section 17.90.020 of the RMMC; Conditional Use Permit No. CUP19007; Preliminary Development Plan Permit No. PDP19002; and Environmental Assessment Case No. EA 190004 ("Project") and Directing Staff to Process the Same Project Entitlement Applications/Requests, at In-N-Out's Request, Subject to the Preparation of an Environmental Impact Report Pursuant to CEQA and the CEQA Guidelines.
>
> A. Adopt Resolution No. 2020-(Next in Order), Acknowledging and Accepting Developer's Election to Terminate Development Agreement Case No. DA 190001 and Rescinding and Repealing the Approvals of Related Entitlements; and
>
> B. Direct staff to process the same Project entitlement applications/requests, at the Developer's request, subject to the preparation of an Environmental Impact Report ("EIR") pursuant the CEQA Statute and CEQA Guidelines.

Thus, when the City noticed the above item for consideration at it February 3, 2020, meeting, it provided very specific and detailed information and references to In-N-Out and the Project. However, when they attempted to "undo" the same actions at their April 16, 2020 meeting, they provided *no references* to the Project nor In-N-Out[2] whatsoever.

Finally, the City can make no showing as to how it could possibly justify taking this sort of action during a national pandemic. Naturally, given the nature of the pandemic, no one in the public of City of Rancho Mirage is attending these meetings and there is lessened oversight of the actions of the City Council. However, the City took advantage of this fact and noticed an agenda item impacting the Project without any mention of the Project itself or In-N-Out. It is plain that the City Council attempt to "pull a fast one" on its residents and attempt to bring the Project back to life.

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[2] The City ultimately passed a resolution on Agenda No. 8 (the April 16th Resolution) and passed a resolution that rescinded the City Council's resolution of February 3, 2020. This resolution was passed unanimously. *This time, however, there was an additional participant in the vote.* While Mayor ProTem Hobart had previously recused himself both the deliberations on the Project, as well as a vote on the Project, itself, he felts unfettered this time to vote in favor of the April 16th Resolution. Essentially, then, Mayor ProTem Hobart voted in favor of the Project despite his prior recusal.

Unless for proper security reasons, the public has the right to be present and to be heard during all phases of legislative enactment by any governmental agency. This right is a source of strength to our Country and must be protected at all costs. This is why the Brown Act was enacted in the first place. *Sacramento Newspaper Guild v. Sacramento Cty. Bd.*, (1968) 263 Cal.App.2d 41, 50. Contrary to Brown Act, *Government Code* § 54954.2(g), the City did not provide adequate notice to the public on the posted agenda that the Project would be discussed and that the City would attempt to "resurrect" the Project.

C. Demand for Brown Action Cure.

The Brown Act creates specific obligations for notifying the public and creates remedies, including the judicial invalidation of illegal actions. Pursuant to *Government Code* § 54960.1, SRM demands that the City cure and correct the illegal action taken by a formal and explicit withdrawal of its April 16, 2020 Resolution. As provided by Section 54960.1, the City has 30 days from the receipt of this demand letter to cure or correct the challenged action or to inform me of your decision not to do so. If you fail to cure or correct as demanded, such inaction may have no recourse but to seek judicial invalidation of the April 16th Resolution, and related illegal actions in which case the City may be liable for reasonable fees and costs pursuant to *Government Code* § 54060.5. Please contact me if you would like to discuss these concerns regarding this specific matter.

2. VIOLATIONS OF THE STATE PLANNING AND ZONING LAW.

Most importantly the City cannot proceed with the Project in a "resurrected" manner. There is no legal basis for doing so and any *ad hoc* attempt by City, and In-N-Out, in doing so, would violate planning and zoning laws under State and local laws. *Gov. Code* § 65000 et seq.

The Project cannot proceed with the Project since it died on January 29, 2020. The City cannot breathe life into an otherwise dead corpse. That is because there presently is no Development Agreement between the City and In-N-Out Burgers since the City acknowledged, on January 2020, that (1) In-N-Out Burgers had communicated its termination of the Development Agreement; and (2) the City had accepted that termination. The Development Agreement, at p. 7, itself addresses the issues of termination:

> Section 9. Termination
> This Agreement shall be terminated and of no further effect upon the occurrence of any of the following events:
> . . .
> (d) The effective date of Developer's election to terminate this Agreement for any reason.
>
> In-N-Out Burgers' right to terminate the Development Agreement was unfettered. Once it terminated the Development Agreement, there were no

> more rights between the parties regarding the Project. The termination section goes onto provide, as follows:
>
> In the event of a termination of this Agreement with respect to any portion of the Project or Project Site, any then-existing rights and obligations of the parties with respect to such portion of the Project or Project Site shall automatically terminate and be of no further force, effect or operation.

Thus, as of the date of communication of its termination of the Development Agreement, there was no rights between the parties. There was NOTHING to "resurrect" on April 16, 2020. First, developments agreements are merely a matter of contact between parties. As the Court in *Citizens for Amending Proposition L v. City of Pomona*, stated in reviewing a development agreement to determine whether or not it had been terminated:

> "Of equal importance is the rule that ' "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." *Civ. Code*, § 1643; see also *id.*, § 3541. Pursuant to this rule, we will not construe a contract in a manner that will render it unlawful if it reasonably can be construed in a manner which will uphold its validity.' [Citation.]" *Quantification Settlement Agreement Cases*, *supra*, 201 Cal.App.4th at p. 798, 134 Cal.Rptr.3d 274.) A contract is unlawful if it is "[c]ontrary to an express provision of law." Civ. Code, § 1667. Unlawful contracts are considered void. *Civ. Code*, §§ 1598, 1599.

Citizens for Amending Proposition L v. City of Pomona (2018) 28 Cal.App.5th 1159, 1188-89.

> A contract that is terminated ceases to bind the parties. A terminated contract cannot be extended or modified; both extension and modification as those terms are commonly understood presuppose the existence of a valid contract to extend or modify. An "extension" is "[t]he continuation of the same contract for a specified period." (Black's Law Dict. (10th ed. 2014) p. 703, col. 1.) *Id.*

Here the undisputed facts here can support only one reasonable conclusion: that the City and In-N-Out had terminated the Development Agreement. If the City wants a new development agreement, then the must comply with (1) public notice requirements, (2) publication, and (2) city council procedures. As the trial court recognized, in *Citizens for Amending Proposition L,* those procedures include a requirement that ordinances adopting contracts be introduced on a first read and then "not be passed within five days of their introduction, nor at other than a regular meeting or at an adjourned regular meeting." *Gov. Code*, § 36934.

Also, the City's own Municipal Code requires that use of land or structures shall not be allowed, and on if they are in accordance with an approved development agreement:

> 17.04.020 Requirements for development and new land use activities. Use of land or structures shall not be allowed, altered, constructed, established, expanded, reconstructed, or replaced unless the use of land or structures complies with the following.
>
> . . . .
>
> E. Development Agreements. Uses and/or structures shall comply with requirements referenced in an applicable development agreement approved by the city in compliance with Chapter 17.56 (Development Agreements) or by Riverside County before city incorporation, even if in conflict with this title.

Thus, the Project was approved on the basis of the Development Agreement. It is axiomatic: there is no valid Development Agreement, so there can be no development. Since there is no Development Agreement, there is no Project.

3. PATTERN OF OBFUSCATION / PUBLIC REQUEST ACT.

Unfortunately, the above has not taken place in isolation. There has been a long-standing pattern of obfuscation on the part of the City vis-à-vis the Project. The City has determined that it wants the Project in any form and is determined that the Project will proceed no matter what obstacles are place in the path of it.

The most recent example of the City's action was set forth above on April 16, 2020. However, the City is engaged in a pattern of such conduct. For example, we served a Public Act Request on the City on Feb. 13, 2020 (the "Request.") In that Request, we asked that the City produce the following documents:

> • We would like copies of all of the following documents pertaining to the project described as follows: In-N-Out Burger Restaurant – 42-560 Bob Hope Drive / In-N-Out Burger Restaurant – 42-560 Bob Hope Drive (the "Project")
> • Any and all documents pertaining to In-N-Out Burger's decision to terminate the Development Agreement for the Project including all written communications regarding that decision.
> • In addition to the above, we would like any and all documents pertaining to In-N-Out Burger's plans, including any inquiries, investigations, correspondence, documents submitted, applications therefore, to develop a restaurant at the site of the Project after it terminated the Development Agreement.

Thus, we were seeking (1) documents pertaining to the termination of the Development Agreement; and (2) any documents pertaining to plans at the site of the project after it was terminated. These were two simple requests.

The City was required to respond to the Request by Feb. 20, 2020, but nonetheless requested additional time to respond to the Request (even though it was aware of the lawsuit between SRM and the City), and the importance of this matter to that lawsuit. The City did

not formally respond to the Request until Mar 4, 2020. In City's response, that had been routed through the City's Attorney, the City asserted that it could not produce such document based on (1) Cal Gov't Code § 6255 ("Deliberative Process Privilege") and (2) Cal. Gov't Code § 6254 (attorney-client privilege). However, upon recent review of the above Resolution of February 3, 2020 (above), the City makes clear reference to a letter that it received from In-N-Out Burgers as follows:

> WHEREAS, *the City received a letter from the Developer terminating the Development Agreement and requesting that the approvals of Project' s entitlements be rescinded and that the same entitlement applications/ requests be processed again , at the Developer' s request*, subject to the preparation of an Environmental Impact Report pursuant to CEQA and the CEQA Guidelines; (Emphasis added.)

Thus, In-N-Out Burgers sent a letter to the City terminating the Development Agreement and the City failed to produce it. It, and any other documents that SRM had requested. These documents do not fall within any of the privileges the City cited, including the deliberative process privilege since such communications came from a third party, i.e. In-N-Out and it was after both parties agreed that the Project had been terminated! See, above.

Therefore, the common interest doctrine may be applicable to communication between a developer ad a city because of a "common interest" there was no "common interest" when In-N-Out *terminated* the Project.

In evaluating whether the deliberative process privilege applies, the court will still perform the balancing test prescribed by the public interest exemption. *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172. In doing so, courts focus "less on the nature of the records sought and more on the effect of the records' release." *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at pp. 1338, 1342. Therefore, the key question in every deliberative process privilege case is "whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Times Mirror Company v. Superior Court*, *supra*, 53 Cal.3d at p. 1342, citing *Dudman Communications v. Dept. of Air Force* (D.C.Cir.1987) 815 F.2d 1565, 568 "Accordingly, the ... courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not." *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151–152. Thus, this privilege may have attached during the time that the City was deliberating on the Project. However, the documents we are seeking are with respect to the termination of the Project (no deliberation there), and the application or consideration (in the form of an application or otherwise) of a new project by In-N-Out.

Also, although not explicitly asserted (but perhaps by extension the City by reason of the attorney-client privilege), the common interest doctrine does not apply here either. For the common Interest doctrine to attach, the parties to the shared communication must have a reasonable expectation that the Information disclosed will remain confidential. Further, the

parties must have a common interest In a matter of joint concern. In other words, they must have a common Interest In securing legal advice related to the same matter and the communication must be made to advance their shared Interest in securing legal advice on that common matter. *Citizens for Ceres v. Superior Court* (2012) 217 Cal.App.4th 889, 914-922 (common interest doctrine inapplicable to communications between developer and city prior to approval of application because, pre-project approval, parties lacked a common interest. The same holds true for a communication of the termination of the Project. There is/was no "common interest" with In-N-Out at that point since they had terminated the Development Agreement.

Therefore, the City is required to produce the requested document forthwith. Since you have refused our prior demands for their production (contained in our email of April 30, 2020 (Exhibit "4" hereto), and letter of May 1, 2020), we currently have a right to civil action for injunctive or declaratory relief, or writ of mandate, to enforce our right to inspect or receive a copy of these records. We will be doing so forthwith. Please be forewarned that Attorneys' fees may be awarded to a prevailing party in an action under the Public Request Act.

4. BIAS ON THE PART OF THE CITY.

It has become all too clear the City is not exercising independent judgment in this matter.

It is commonly understood that elected function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges. *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021 (*Woody's*).) Hearing and deciding an appeal of a conditional use permit is one of the times that a city council acts in a quasi-adjudicatory capacity. (Ibid.) "[W]hen functioning in such an adjudicatory capacity, the city council must be 'neutral and unbiased.'" *Woody's*, *supra*, 233 Cal.App.4th at p. 1021, quoting *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234 (BreakZone); see also Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2019) ¶ 3:426, at p. 3-70 ["A decisionmaker must be unbiased (meaning that the decisionmaker has no conflict of interest, has not prejudged the specific facts of the case, and is free of prejudice against or in favor of any party)"].) "[A]llowing a biased decision maker to participate in the decision is enough to invalidate the decision." *Woody's*, supra, at p. 1022; *Nasha*, *supra*, 125 Cal.App.4th at p. 484; Clark, supra, 48 Cal.App.4th at p. 1171.)

"A party must show either actual bias or show a situation in which '"experience teaches that the probability of actual bias on the part of the . . . decisionmaker is too high to be constitutionally tolerable." ' " *Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 580 (Hauser), quoting *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.)

"The law does not require the disappointed applicant to prove actual bias. Rather, there must not be '"'an unacceptable probability of actual bias'"' on the part of a municipal decision maker." [Citations omitted.] See, *Petrovich Development Co., LLC v. City of Sacramento* (2020) Cal. App. LEXIS 406, *16. When functioning in an adjudicatory capacity, a city council

must be neutral and unbiased. Allowing a biased decision maker to participate in the decision is enough to invalidate the decision. Id. Lexis 406, *1.

Here there is ample bias that the City has demonstrated in this matter in favor of In-N-Out and the Project and against SRM. First, we have its unreasonable refusal to abide by the dictates of CEQA that required the filing of the Lawsuit.

Second, we have the termination of the Development Agreement, and the Project, by In-N-Out and agreed to by the City. Rather, the City pretended to act in accordance with those pronouncements at the February 3, 2020, only to act duplicitously at the April 16, 2020, meeting, as detailed above. This City's machinations were all in violation of the Brown Act.

Third, we have the refusal of the City to abide by SRM's reasonably Public Records Act request.

Finally, we have the actions of the City's Mayor Pro Tem Hobart that underscore the bias that is present with the City vis-à-vis the Project. As explained above, the Mayor Pro Tem had consistently took great pains to recuse himself from voting on the Project. However, he revealed his bias, and that of the City, in voting at the April 16, 2020, meeting, and in a speech that he had delivered before that vote (at the at the February 20, 2020, City Council meeting.) At the February 20, 2020 meeting, Mayor Pro Tem Hobart made a speech on the City's dais that was aimed at a former member of SRM (Stephen Jaffe, Esq.), who the Mayor Pro Tem believed "had been hired by the residents of the group that are opposing the restaurant" (i.e., SRM.) The attack came as it did on the eve of a City election for City Councilmembers, April 14, 2020. Mr. Jaffe, strongly opposed to the Project, was an opponent of the Mayor Pro Tem's allies and incumbents on the City Council, Ted Weill and Richard Kite.

The Mayor Pro Tem's *ad hominin* attacks[3] against Mr. Jaffe (wholly inappropriate on their face), were clearly directed toward him as a support of SRM and an opponent of the Project: The Mayor Pro Tem Hobart stated that Mr. Jaffe "had been hired by the residents of the group that are opposing the restaurant". He also stated that Mr. Jaffe was "selected by the home group." He further stated "[h]e ended up being the attorney representing the residents for the group." All these references were to SRM. The Mayor Pro Tem Hobart repeated claims that Mr. Jaffe (therefore, by extension SRM), said that "a staff member was some part of a conspiracy to get this restaurant situated in Rancho Mirage."

While The Mayor Pro Tem Hobart attempted to couch his long-winded diatribe against Mr. Jaffe, and SRM, as "him speaking personally" it was clearly emanated from the person who was the City's Mayor Pro Tem. As pointed out above, the participation of Mayor Pro Tem

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[3] Mayor Pro Tem Hobart statements were not protected by *Civil Code* § 47(b), since his statements had no "connection to the work of the legislative body" as required to enjoy the protection of that privilege. *Thornton v. Rhoden* (2018) 245 Cal.App.2d 80.

Hobart in the vote of April 16, 2020, invalidated the vote. *Petrovich Dev. Co. v. City of Sacramento*, 2020 Cal. App. LEXIS 406.

Conclusion

The actions that the City Council took on April 16, 2020, will not withstand judicial scrutiny for the reasons set forth above. It is regrettable that the City Council felt unbridled by its own pronouncements, the law and the underlying Development Agreement, to assert, during a pandemic, that the Project has been resurrected and that it could proceed anew. On this basis, SRM will seek extraordinary judicial redress in the form of a petition for writ of mandate. Our demands are as such:

- The City must agree that the Project, pursuant to April 16, 2020, meeting will not be allowed to proceed and will take any all measure necessary to deem that so including formal repeal of the Project and zoning text amendments that were previously adopted; and,
- In response to the document request pursuant to the PRA, the City must produce the documents as previously demanded.
- Comply with the Brown Act, as set forth and within the deadlines outlined above.

The City and In-N-Out chose to ignore our last communication. We were hoping, because of the current environment that we might evade litigation in this matter but it appears that will not be possible given the posture of the City. If we are required to move forward, then we will likewise seek immediate relief in the form of provisional remedies. **By copy of this letter to counsel for In-N-Out, it is put on notice of the inherent defects in the nature of the Project and that, in fact, *that no such Project currently exists* (and has not existed as a result of its rescission of January 29, 2020).**

Sincerely,

Bruce T. Bauer, Esq.

Enclosures
/BTB

CC: Dana Hobart, Mayor ProTem (danah@ranchomirageca.gov)
Iris Smotrich. Council Member (iriss@ranchomirageca.gov)
Richard W. Kite, Council Member (richardk@ranchomirageca.gov)
Charles Townsend, Council Member (charlest@ranchomirageca.gov)
Ted Weill, Council Member (tedw@ranchomirageca.gov)
Steve Quintanilla, City Attorney (steveq@qalawyers.com)
Kristie Ramos, City Clerk (kristier@ranchomirageca.gov)
Art Coon, Counsel for In-N-Out Burgers (arthur.coon@msrlegal.com)

EXHIBIT "1"

LAW OFFICES OF
QUINTANILLA & ASSOCIATES

City of Rancho Mirage
Office of the City Attorney

Via Electronic Mail Only

January 29, 2020

Bruce T. Bauer, of Counsel
Slovak Baron Empey, Murphy & Pinkney, LLP
1800 E. Tahquitz Canyon Way
Palm Springs, CA 92262
Email: bauer@sbemp.com

Re: Save Rancho Mirage v. City of Rancho Mirage (In-N-Out Burgers)
Riverside Superior Court Case No. RIC1905468)

Dear Mr. Bauer:

I am writing to inform you that Real Party in Interest In-N-Out Burgers has informed the City that it does not intend to defend the above-referenced litigation your clients filed against the City of Rancho Mirage on October 29, 2019. Instead, in light of your clients' continuing opposition to the project under CEQA despite the City's and developer's best efforts and proposals to address their concerns, In-N-Out has opted to terminate the Development Agreement, which by operation of law rescinds and repeals the City's approvals related to the project's land use entitlements.

In-N-Out has also informed the City that it is considering potential next steps in connection with developing a restaurant on the site, including the preparation of a focused Environmental Impact Report that will provide for the highest level of CEQA review of and public participation regarding the proposed project's potential environmental impacts.

Notwithstanding that no formal action of the City Council is necessary regarding termination of the Development Agreement, the City Manager, Development Services Director and my office, in the interest of public transparency, will present this matter to the City Council at a noticed public meeting for its consideration and for confirmation that the approvals associated with the project's land use entitlements are hereby rescinded and repealed.

P.O. Box 176
Rancho Mirage, CA 92270
Tel. 760.993.3702

Please be advised that this letter shall serve as notice that the pending litigation filed against the City of Rancho Mirage is now moot and obviates the need for any further work in connection with the subject matter and the legal issues raised in the context of the litigation. *See, e.g., Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa*, 198 Cal.App.4th 939 (2011)

Please let me know if you have any questions.

Regards,

The Law Offices of Quintanilla & Associates

Steven B. Quintanilla

Steven B. Quintanilla, City Attorney
City of Rancho Mirage

N:\RNCH\0013-70 In-N-Out\LTR\001 - Letter To Bruce Bauer (01.29.20).Docx

EXHIBIT "2"

RESOLUTION NO. 2020-01

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RANCHO MIRAGE, CALIFORNIA, ACKNOWLEDGING AND ACCEPTING DEVELOPER'S ELECTION TO TERMINATE DEVELOPMENT AGREEMENT CASE NO. DA190001 AND RESCINDING AND REPEALING THE APPROVALS OF RELATED ENTITLEMENTS

WHEREAS, City of Rancho Mirage ("City") is a Charter City and a Municipal Corporation of the State of California; and

WHEREAS, In-N-Out Burgers, a California corporation ("Developer") has a leasehold interest in a 1.52 acre parcel of land, identified as Assessor Parcel No. 682-320-033 ("Project Site"), located within an existing shopping center known as Rancho Las Palmas Shopping Center, which consists of approximately 15 acres of land located at the southeast corner of Highway 1111 and Bob Hope Drive at 42560 Bob Hope Drive, bordered on the eastside by Magnesia Falls Drive in the City of Rancho Mirage; and

WHEREAS, the City and Developer entered into a statutory Development Agreement ("Development Agreement") pursuant to the authority of Sections 65864 et seq. of the California Government Code and Chapter 17.56, "Development Agreements," of the Rancho Mirage Municipal Code to construct a 3,885 square foot fast food restaurant, known as In-N-Out Burger, with associated drive-through, site improvements and landscaping at the Project Site; and

WHEREAS, pursuant to the Development Agreement, which the City Council approved by adopting Ordinance No. 1158 approving Development Agreement Case No. DA190001, the City Council approved various land use entitlements for the Project that included: Environmental Assessment Case No. EA190004, Ordinance No. 1157 approving Zoning Text Amendment Case No. ZTA19002, Conditional Use Permit Case No. CUP19007 and Preliminary Development Case No. PDP19002; and

WHEREAS, after approval of the Project's entitlements, a lawsuit was filed against the City by a group of citizens, known as Save Rancho Mirage, challenging the City Council's determination, as "Lead Agency" under the California Environmental Quality Act ("CEQA") and the CEQA Guidelines, that the Project was categorically exempt per CEQA Guidelines Section 15332 (Class 32) – Infill Development; and

WHEREAS, in light of the continuing opposition to the Project under CEQA despite the City's and Developer's best efforts and proposals to address the concerns of Save Rancho Mirage, Developer has elected to terminate the Development Agreement pursuant to section 9(d) therein, Rancho Mirage Municipal Code section 17.56.010(B), and Government Code section 65868 and requested that the City formally rescind and repeal the approvals of each of the above-referenced project entitlements; and

WHEREAS, the City received a letter from the Developer terminating the Development Agreement and requesting that the approvals of Project's entitlements be rescinded and that the same entitlement applications/requests be processed again, at the Developer's request, subject to the preparation of an Environmental Impact Report pursuant to CEQA and the CEQA Guidelines; and

WHEREAS, pursuant to the "Termination" provisions of the Development Agreement, upon termination of the Development Agreement by the Developer, the Development Agreement shall be deemed immediately terminated and of no further effect, which does not require the City's consent, acceptance nor approval; and

WHEREAS, since the termination of the Development Agreement is for the entire Project, any existing rights and obligations of the parties with respect to the entire Project or Project Site automatically terminates and is also of no further force, effect or operation, which means that the approvals of each of the entitlements specifically approved for the Project or Project Site, by operation of law, are rescinded and repealed; and

WHEREAS, notwithstanding the above, in the interest of public transparency, the City Manager and City Attorney recommended that the City Council consider this matter in an open session at a noticed public meeting and take official action acknowledging and accepting the Developer's termination of the Development Agreement and rescinding and repealing the City Council's approvals of the Project's entitlements; and

WHEREAS, the City Manager, City Attorney and Development Services Director all concur with the Developer's request that the same Project Entitlement applications/requests be processed again, at the Developer's request, subject to the preparation of an Environmental Impact Report pursuant to CEQA and the CEQA Guidelines.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF RANCHO MIRAGE, CALIFORNIA, HEREBY RESOLVES, DECLARES, DETERMINES, AND ORDERS AS FOLLOWS:

SECTION 1. RECITALS

That the above Recitals are true and correct and are incorporated as though fully set forth herein.

SECTION 2. TERMINATION OF DEVELOPMENT AGREEMENT AND RESCISSION OF PROJECT ENTITLEMENTS

That the City Council hereby acknowledges and accepts the Developer's election to terminate Development Agreement Case No. DA190001 by and between the City of Rancho Mirage and In-N-Out Burgers and rescinds and repeals the approvals of Environmental Assessment Case No. EA190004, Ordinance No. 1157 approving Zoning Text Amendment Case No. ZTA19002, Ordinance No. 1158 approving Development

Agreement Case No. DA190001, Conditional Use Permit Case No. CUP19007; and Preliminary Development Case No. PDP19002.

SECTION 3. ENVIRONMENTAL IMPACT REPORT

That staff shall process the same entitlement applications/requests submitted for the Project, at the Developer's request, subject to the preparation of an Environmental Impact Report ("EIR") pursuant the CEQA Statute and CEQA Guidelines.

SECTION 4. EFFECTIVE DATE OF RESOLUTION

That this Resolution shall take effect immediately upon adoption by the City Council.

SECTION 5. REPEAL OF CONFLICTING PROVISIONS

That all prior actions and approvals related to the entitlements for the Project or Project Site taken by the City Council, as may be reflected by any ordinances, resolutions or minute orders, that are in conflict with the provisions of this Resolution are hereby rescinded and repealed.

SECTION 6. SEVERABILITY

That the City Council declares that, should any provision, section, paragraph, sentence or word of this Resolution be rendered or declared invalid by any final court action in a court of competent jurisdiction or by reason of any preemptive legislation, the remaining provisions, sections, paragraphs, sentences or words of this Resolution as hereby adopted shall remain in full force and effect.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

PASSED, APPROVED and ADOPTED on this 3rd day of February, 2020.

CITY OF RANCHO MIRAGE:

Iris Smotrich, Mayor

ATTEST:

Kristie Ramos, City Clerk

APPROVED AS TO FORM:

Steven B. Quintanilla, City Attorney

EXHIBIT "3"

CITY OF RANCHO MIRAGE

CITY COUNCIL,
LIBRARY AND OBSERVATORY BOARD,
HOUSING AUTHORITY BOARD,
AND THE CITY COUNCIL REPRESENTING
THE REDEVELOPMENT SUCCESSOR AGENCY

REGULAR MEETING
THURSDAY, APRIL 16, 2020
1:00 P.M.[I,II,III]

AGENDA

City of Rancho Mirage
City Hall - Council Chamber
69-825 Highway 111
Rancho Mirage, CA 92270

CALL TO ORDER

a) Flag Salute
b) Roll Call: Kite, Townsend, Weill, Hobart, Smotrich.

NON-AGENDA PUBLIC COMMENTS – An opportunity for the public to speak on issues that are not on the agenda for a maximum of three minutes per speaker.

COUNCIL/BOARD MEMBER COMMENTS/REPORTS

CITY MANAGER COMMENTS

MINUTES March 19, 2020 Regular Meeting.

Click Here For Late Submissions or Additions

CONSENT CALENDAR

1. Waive Full Reading of All Ordinances Introduced or Adopted Pursuant to this Agenda.

2. Final Acceptance of Carpet Installation in the Library Children's Room and Story Time Room at Rancho Mirage Library and Observatory.

3. Contracts.

4. Demands.

PUBLIC HEARINGS

5. Resolution No. 2020-(Next in Order), Adjusting Electric Generation Rate Schedule for Rancho Mirage Energy Authority (RMEA) Community Aggregation Program.

6. Environmental Assessment Case No. EA190009, Tentative Tract Map Case No. TTM37856 – Section 31 Phase 1:

   A) Filing of a Notice of Determination based on Environmental Assessment Case No. EA190009 and pursuant to the California Environmental Quality Act Section 15168; and

   B) Approval of Tentative Tract Map Case No. TTM37856, subject to the Conditions of Approval and based on the content and Findings in the staff report.

ACTION CALENDAR

7. Ordinance No. (Next in Order), 1st Reading, Adding Chapter 15.86 (Expedited Electric Vehicle Charging Station Permitting) to Title 15 (Buildings and Construction) of the Rancho Mirage Municipal Code to establish procedures for expedited permit processing for electric vehicle charging systems.

8. Resolution No. 2020-(Next in Order), Repealing Resolution No. 2020-01 and Declaring it Null and Void Ab Initio Pursuant to The Equal Dignities Rule and Other Procedural Defects.

9. Update on COVID-19 State of Emergency.

CLOSED SESSION

1. CONFERENCE WITH LEGAL COUNSEL - POTENTIAL INITIATION OF LITIGATION Pursuant to Government Code Section 54956.9(d) (4). (Three Potential Cases)

2. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
Pursuant to Government Code Section 54956.9(d)(1)
Case Name: Save Rancho Mirage v. City of Rancho Mirage.
Case No.: RIC1905468

3. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
Pursuant to Government Code Section 54956.9(d)(1)
Case Name Unspecified: Disclosure of case name will jeopardize existing settlement negotiations

ADJOURNMENT

[i] People with disabilities are encouraged to attend. If you have special communication or access needs, please contact the City Clerk's office at (760) 324-4511 in advance of the meeting.

[ii] Staff reports for all agenda items considered in open session, and any writings or documents provided to a majority of the legislative bodies regarding any item on this agenda, are available for public inspection at City Hall, at the Rancho Mirage Library & Observatory, and on the City's website at www.RanchoMirageCa.gov.

[iii] For information on how to participate in a City Council meeting remotely, please contact the City Clerk at (760) 324-4511, Ext. 488, or via email to KristieR@RanchoMirageCA.gov, by 10:00am on the day of the meeting (requests received after 10:00am on meeting day may not be processed). Written comments may be submitted to the City Clerk via email to KristieR@RanchoMirageCA.gov, or mailed to 69-825 Highway 111, Rancho Mirage, CA 92270 (written comments received after the meeting starts will be provided to the City Council following the meeting and be made part of the public record).

Declaration of Posting:

I, Kristie Ramos, City Clerk of the City of Rancho Mirage, do hereby declare that a copy of the foregoing Meeting Notice/Agenda was personally delivered to the legislative bodies, posted in the City Hall posting box, at the Rancho Mirage Library & Observatory, and on the City website at least 72 hours in advance of the meeting.

K. Ramos — 04/13/2020

Signature — Date

EXHIBIT "4"

Bruce T. Bauer

From:	Bruce T. Bauer
Sent:	Thursday, April 30, 2020 10:46 AM
To:	Steve Quintanilla
Cc:	Ron Hall; kristier@ranchomirageca.gov
Subject:	Save Rancho Mirage v. City of Rancho Mirage (In-n-Out Burgers, RPI) / Public Records Act Request Dated Feb. 13, 2020
Attachments:	Re: Response to February 13, 2020 California Public Records Act Request for In-N-Out Burger Restaurant Records; Feb 3 2020 Res 2020-01.pdf
Importance:	High

Mr. Quintanilla –

We are following up on a Public Act Request that was served by our office on Feb. 13, 2020 (the "Request.") In that Request, we asked that the City produce the following documents:

- *We would like copies of all of the following documents pertaining to the project described as follows: In-N-Out Burger Restaurant – 42-560 Bob Hope Drive / In-N-Out Burger Restaurant – 42-560 Bob Hope Drive (the "Project")*

- *Any and all documents pertaining to In-N-Out Burger's decision to terminate the Development Agreement for the Project including all written communications regarding that decision.*

- *In addition to the above, we would like any and all documents pertaining to In-N-Out Burger's plans, including any inquiries, investigations, correspondence, documents submitted, applications therefore, to develop a restaurant at the site of the Project <u>after</u> it terminated the Development Agreement.*

The City was required to respond to the Request by Feb. 20, 2020, but nonetheless requested additional time to respond to the Request (even though it was aware of the lawsuit between our client, Save Rancho Mirage, and the City), and the importance of this matter to that lawsuit. The City did not formally respond to the Request until Mar 4, 2020, See the enclosed response dated March 4, 2020, from Ron Hall with the City. In its response, the City assserted that it could not produce such document based on (1) Cal Gov't Code § 6255 ("Deliberative Process Privilege") and Cal. Gov't Code § 6254 (attorney-client privilege). However, upon review of the Resolution that the City passed on February 3, 2020, the City makes clear reference to a letter that it received from a third party, In-N-Out Burgers as follows:

WHEREAS, the City received a letter from the Developer terminating the Developmen t Agreement and requesting that the approvals of Project' s entitlements be
rescinded and that the same entitlement applications/ requests be processed again , at the Developer' s request, subject to the preparation of an Environmental Impact Report
pursuant to CEQA and the CEQA Guidelines; and

We fail to understand how this referenced letter falls within any of the privileges you have cited (and even if it did, then it was waived by this reference.) Moreover, this letter has been, and has become increasingly germane to, the issues raised in the lawsuit that we filed against the City. It is bad faith for the City to assert these privileges with respect to the communications of a third party. This letter, and any and all such letters sent by In-N-Out Burgers that involve these issues, must be produced immediatedly. If not, then we will file lawsuit to compel their production.

Given the recent machinations that the City undertook on April 16, 2020, to surreptitiously (and without notice to our office) attempt to "resurrect" the Project that both the City and In-N-Out Burgers all agreed was "dead," we are forced to

act immediately with this demand. (Incredulously, the City now claims that all of its pronouncements on February 3, 2020, were not true.) Therefore, you have until the closed of business on Friday, May 1, 2020, to produce the requested communications or we will file suit therefor.

You immeidate attention in this matter is required.

SBEMP
ATTORNEYS
PALM SPRINGS COSTA MESA SAN DIEGO PRINCETON NEW YORK

Bruce T. Bauer
Of Counsel
SLOVAK BARON EMPEY MURPHY & PINKNEY LLP
1800 E. Tahquitz Canyon Way, Palm Springs, California 92262
Phone (760) 322-2275 / Fax (760) 322-2107
https://sbemp.com/