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June 24, 2024

City Council
City of Eureka
531 K Street
Eureka, CA 95501

Re: City Council June 24, 2024 Regular Meeting Agenda Item A.1
Housing For All and Downtown Vitality Initiative

Dear Councilmembers:

This letter is submitted on behalf of the proponents of the Housing For All and Downtown Vitality Initiative ("**Initiative**"). The comments below follow on, and incorporate, the comments that we submitted concerning the City Council's June 18, 2024 consideration of Item H.1. from that meeting's agenda.

We appreciate the City's decision to revise its prior proposed ballot statement. As we explained in our comment letter for the June 18 meeting, the prior ballot statement was clearly untrue and biased, and lacked required verbiage, in violation of the state Elections Code. The revised ballot statement is a marked improvement, but still contains problematic elements, as discussed below.

We understand that the City now proposes to adopt a revised ballot statement, which reads as follows:

Shall the measure amending Eureka's General Plan, creating an overlay designation for downtown that limits 21 City-owned lots, with exceptions, to parking at or above the current capacity and above-ground-level high-density housing, and creating an overlay designation for the former Jacobs Middle School site, allowing housing, public, quasi-public, and commercial uses, with at least 40% of non-public use area dedicated to high-density housing, subject to review for consistency with state law, be adopted?	**YES** **NO**

This revised ballot statement still contains elements that are untrue and argumentative, and therefore still violates state law. For this reason, we again recommend the following ballot statement in the alternative:

Shall the measure amending Eureka's General Plan creating an overlay designation for 21 City lots that, with exceptions, limits those lots to public parking, housing where the number of public parking spaces is preserved, and bike parking, and creating a designation for the former Jacobs Middle School Site allowing housing, public, and commercial uses, with at least 40% dedicated to high-density housing exclusive of public facility uses be adopted?	**YES** **NO**

A detailed explanation of why the proposed Ballot Statement is incorrect, untrue and prejudicial follows below.

1. Election Code Requirements

We outlined the applicable Elections Code requirements in our prior letter, which we incorporate by reference here. Relevant to our comments on the revised ballot statement, we again refer to Elections Code section 13119(c), which states as follows:

> (c) The statement of the measure shall be a true and impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure.

As discussed below, the revised ballot statement still contains elements that are untrue and argumentative, in violation of Elections Code section 13119(c).

2. Legal Analysis

A. The Proposed Ballot Statement Contains Two Untrue Statements.

Statement 1: The first untrue statement in the revised ballot statement is the assertion that the new overlay designation applicable to the 21 City-owned lots would limit use of those to, besides parking, "above-ground-level high-density housing". This statement is not supported by the text of the Initiative.

As noted in our prior letter, the Initiative would allow the parking lots subject to the Off-Street Public Parking Overlay Designation ("**OSPP Overlay**") to be used for, among other things, "High-density residential above ground-floor public parking or garaged public parking". The OSPP Overlay thus presents two acceptable development scenarios: (1) a traditional "podium-style" development where the housing structure is elevated above ground-level parking, or (2) a development where the housing units are placed above, on, or around garage parking. Garage parking, of course, could be subterranean. For this reason, the proposed ballot statement language presenting the allowed uses of lots subject to the OSPP Overlay as being limited to "above-ground-level high-density housing" is untrue. Under the text of the Initiative, high-density housing could be above-ground-level, at ground level or any combination of the two. The "above-ground-level" verbiage is untrue and must be removed.

Statement 2: The second untrue statement in the proposed ballot statement is the clause suggesting that some or all of the Initiative is "subject to review for consistency with state law". Not only is the effect of this clause unclear (i.e., what exactly is subject to review for consistency with state law, with what state law, and who is conducting the review?) but the statement itself is wholly without basis in the text of the Initiative. Nothing in the Initiative states or suggests that its enactments are subject to review for consistency with state law. For this reason, the statement is untrue and must be removed.

B. The Proposed Ballot Statement Is Argumentative.

Referring again to the second untrue statement discussed above, the assertion that some or all of the Initiative is "subject to review with consistency with state law", the City again is attempting to incorporate an argumentative element into the ballot statement. As best as we can make sense of this clause, it seems to be based on the City's position that some portion of the Initiative, or its perceived effect, may be inconsistent with state housing element law. The City's position, and thus the clause at issue, is erroneous for at least the following two reasons.

First, as we discussed at length in our prior letter, nothing in the Initiative text or in its effect is at odds with the City's adopted General Plan Housing Element. We explained that nothing in the Initiative prohibits affordable housing development on any of the 21 City-owned lots, including the six lots that are included in

the Housing Element, and, further, two of those lots are expressly carved out from the Initiative altogether so long as they are developed by the Wiyot. In this regard, we have attached as Attachment A to this letter a more detailed explanation of the state Housing and Community Development Department's enforcement process relating to housing elements. We prepared Attachment A so that the City has no excuse to continue asserting that mere adoption of the Initiative by voters could result in a loss of local land use control. That statement is fundamentally wrong, as Attachment A shows.

Second, nothing in the text of the Initiative or in its effect directly conflicts with state law relating to housing elements or otherwise. The City has certainly never made any specific argument in this regard. Thus, without a direct conflict with state law, the Initiative would become the law of the City immediately upon enactment by the voters – there would be no period of "review for consistency with state law" prior to becoming effective.

In any event, because the Initiative text does not require any "review for consistency with state law", the statement is necessarily based on an interpretive argument by the City. The correct time and place for the City to make that argument is in the ballot arguments that the City allows each City Councilmember to file. The City can also make arguments directly to the public regarding its position on the Initiative at any other time. The law is very clear, however, that the City is not permitted or entitled to make an argument on the ballot statement. (Elec. Code § 13119(c).)

3. Conclusion

We urge the City to adopt the proposed alternative ballot statement provided above and in our prior letter. Whatever the City's philosophical, policy, or other differences may be with the Initiative or its proponents, the alternative ballot statement is factually correct, unbiased, nonargumentative, and nonprejudicial for or against the Initiative. The statement has also been carefully written to comply with the 75-word limit, and, if adopted by the City, would avoid the potential for litigation by the proponents.

Sincerely,

Bradley B. Johnson, Esq.
Everview Ltd.

Encl.: Attachment A

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ATTACHMENT A

HCD and Housing Element Compliance and Enforcement

State housing law[1] requires all cities and counties to prepare and implement general plan housing elements meeting specific requirements. (See Gov. Code §§ 65581; 65583.) The state Housing and Community Development Department ("HCD") is the state agency empowered to review, comment on, and ultimately determine compliance of local jurisdiction housing elements. In order to execute these functions, HCD follows a specific process, as summarized below.

To begin, HCD primarily functions in an advisory capacity. When a jurisdiction prepares a housing element or a revision to its housing element, within 60 days prior to adoption, the jurisdiction must provide the draft to HCD. (Gov. Code § 65585(b)(1).) The jurisdiction is also required to provide a draft to the public for comment. (*Ibid.*)

HCD will not review a draft housing element until the public has had 30 days to review, and if the public has provided comments, 10 days to review and incorporate the comments. (Gov. Code § 65585(b)(3).) HCD then will provide comments within 60 days of receiving the draft once the public comments are considered and potentially incorporated. (*Ibid.*)

After the initial comments and review, HCD will determine whether the submitted draft housing element complies with state housing law. HCD ultimately provides written findings and a determination to the jurisdiction indicating whether the proposed housing element complies with state housing law. (Gov. Code. § 65585(b); (c); (d).)

If HCD determines that a local jurisdiction's housing element is not compliant with state law, the jurisdiction has two options: change the housing element to correct the deficiencies identified by HCD, or adopt the housing element, but include a statement about why the legislative body believes the draft housing element complies with state law despite the findings of HCD. (Gov. Code. § 65585 (f)(1-2).) The jurisdiction then must submit a final adopted version of the housing element to HCD and HCD will review the adopted housing element and report its findings back to the local jurisdiction. (*Id.* subds. (g);(h).)

If HCD determines that the adopted housing element does not comply with state law, HCD may issue a notice of non-compliance identifying the deficiency and providing the local jurisdiction 30 days to correct deficiency. (Gov. Code. § 65585(i)(1)(A).) If the local jurisdiction timely corrects the deficiency, HCD will provide a written concurrence. If the local agency fails to correct the deficiency, HCD will notify the local jurisdiction that HCD has "decertified" its housing element. (*Id.* subd. (i)(1)(B).)

[1] Gov. Code § 65580 *et seq.*

If the local jurisdiction subsequently corrects the deficiency, HCD will provide written concurrence and a statement that the housing element has been "recertified".

If the local jurisdiction fails to correct the deficiency, HCD may refer the matter to the state Attorney General. (Gov. Code. § 65585(j).)

The Attorney General may then bring suit to require compliance of the housing element with state housing law. (Gov. Code. § 65585(l).) A court will then determine if the housing element is in substantial compliance with state housing law and, if the court finds that a housing element is not in substantial compliance, the court will then order the local jurisdiction to bring its housing element into compliance, in which event the jurisdiction will have 12 months to do so before a mandated status conference with the court. (*Id.* subd. (l)(1).) If the jurisdiction is not in compliance at this point, the court may issue fines. (*Ibid*; see also subd., (i)(3)(A).) Only if the fines are not paid within six months following the status conference that the court *may* (but is not required to) order an agent to take over land use authority for the jurisdiction and make all changes needed to bring the housing element into compliance with state housing law. (*Id.* subd. (l)(3)(B).)

As is evident, HCD's enforcement procedures relating to housing elements are a long and iterative process during which a local jurisdiction has multiple opportunities to correct deficiencies. HCD does not have the statutory authority to summarily determine a housing element to be out of compliance or to initiate the enforcement actions described above.

* * *