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VIA ELECTRONIC MAIL

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Re: Plot Plan Review 23-001 / Applicant – Michael Harris

Dear Mr. Rosen:

This Firm has been retained by applicant Michael Harris with respect to the City's recent approval of a permit to install a well on his property. As explained below, a number of the City's permit conditions are unlawful and should be struck. Given the short time within which to file a court action challenging those conditions, we respectfully request that the City promptly advise Mr. Harris whether it will remove the offending conditions.

I. Legal Background

A. City Code

The City has the authority to require and approve a permit for water wells pursuant to Chapter 13.08 of the City Code. "The council may approve the application if, in its discretion, the drilling and the operation of the well will not deplete nor contaminate the city water supply and service from the city water system is neither practical nor feasible." City Code § 13.08.040(A). Significantly, if the City approves a well permit, the sort of condition it can impose on said approval is strictly limited:

> "If the council approves the granting of a permit, it may be issued subject to such reasonable conditions as the council imposes *to prevent the depletion and contamination of the city water supply* . . . ."[1]

Id. (emphasis added).

[1] A well permit is also issued "subject to compliance with the standards provided by the county of San Luis Obispo." But there is no dispute here that the subject permit is consistent with County standards. Nor do the challenged conditions discussed below implicate any County standard or requirement.

Notably, section 13.08.040(A) identifies only one kind of permissible condition. It thereby excludes any other kind of condition on a well permit. *People v. Salas* (2017) 9 Cal.App.5th 736, 742 ("[T]he principle [of] *expressio unius est exclusio alterius*, . . . the enumeration of things to which a statute applies is presumed to exclude things not mentioned.").

"To be valid, an administrative action must be within the scope of authority conferred by the enabling statutes." *Terhune v. Superior Court*, 65 Cal.App.4th 864, 872-73 (1998). A "governmental agency that acts outside of the scope of its statutory authority acts ultra vires and the act is void." *California DUI Lawyers Assn. v. Dept. of Motor Vehicle*, 20 Cal.App.5th 1247, 1264 (2018). The City Code does not authorize any condition imposed on a well permit that is not for the specific purpose of preventing the depletion or contamination of the city water supply. Attempts to invent conditions outside the scope given to the City by the Code are ultra vires and void.

B. The Federal Unconstitutional Conditions Doctrine

The Federal Constitution imposes significant limitations on the ability of land-use agencies, like the City, to exact property interests from owners as the condition of exercising their right to use and develop their properties. Under a trio of United States Supreme Court decisions, a land-use agency must prove—as a matter of federal constitutional law—that an "essential nexus" and "rough proportionality" exists between the exaction of a property interest and a project's public impacts. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Koontz v. St. Johns River Water Management District* (2013) 570 U.S. 595, 612. If the requisite nexus and proportionality are absent, then the exaction effects an unconstitutional taking of private property—or, as the Supreme Court aptly has put it, "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

C. Equal Protection

The City has the constitutional obligation to treat similarly situated citizens equally. "Both the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution guarantee to all persons the equal protection of the laws. The right to equal protection of the laws is violated when 'the government … treat[s] a s[similarly situated] group of people unequally without some justification.'" *People v. Jackson*, 61 Cal.App.4th 189, 195 (2021).

If the City treats some similarly situated well applicants different from others, without any rational basis, the City violates the disfavored applicants' equal protection rights.

D. Due Process

The City has a constitutional obligation to write and enforce permit conditions that are clear and unambiguous; if such conditions are unclear, they are void for vagueness. This obligation arises from the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. As the Court of Appeal has explained, "The concern underlying the void for vagueness doctrine is the due process requirement of adequate notice. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)" *In re R.P.*, 176 Cal.App.4th 562, 566 (2009). The standard is whether "terms are so vague [that] people of common intelligence must guess at its meaning." *Id.* (cleaned up). "To survive a challenge on the ground of vagueness," a permit condition "must be sufficiently precise for the [permittee] to know what is required of him, and for the court to determine whether the condition has been violated." *Id.*

II.
Several of the Well Permit's Conditions Are Unlawful

A. Conditions 6, 7, 8, 9, and 13 Are Ultra Vires and Void

Conditions 6, 7, and 13 purport to anticipatorily alter his well rights based on speculative development that may or may not occur in the future. Condition 6 would arbitrarily eliminate Mr. Harris's well rights if "[a]ny additional development of the property" beyond a single-family home, one accessory dwelling unit, and one junior accessory dwelling unit is built. It would force Mr. Harris "to connect to the City's water infrastructure at the sole cost of the property owner at the time of the proposed development." Similarly, Condition 7 would require Mr. Harris to "abandon the well" upon the property's subdivision. Condition 13 would require Mr. Harris to return to the City Council "for a new hearing and approval to use the well"—in light of the then-current City Code requirements—if he intensifies use of his property through additional development or subdivision.

Condition 8 requires Mr. Harris to install a meter on the well head to monitor all water drawn from the well and annually report the amounts to the City. Condition 9 requires him to install an approved backflow device.

Section 13.08.040(A) authorizes none of these conditions. None of the conditions "prevent[s] the depletion and contamination of the city water supply." The reason is simple. As the City's own findings for Mr. Harris's well permit state: "The drilling and operation of the well will neither deplete nor contaminate the City water supply," precisely because *"[t]he proposed well does not access the same aquifer utilized by the City's wells*." Resolution No. 5366, ¶ 3(a) (emphasis added). Mr. Harris's well is a private well will not draw from the City's water supply. Thus, even if the speculated intensification of Mr. Harris's property occurred in the future, the permitted well would not affect the City's water supply, let alone deplete or contaminate it. And, with respect to Conditions 8-9, the City to our knowledge does not supervise private domestic well use that does not affect the City water supply. Thus, there is no reason or authorization to require the improvements mandated in Conditions 8-9.

Conditions 6, 7, and 13 also violate the unconstitutional conditions doctrine. The conditions seek to destroy, in the future, a vested right in the well—which Mr. Harris will commit significant resources to install. Any permit condition purporting to take a property interest must bear an essential nexus and be roughly proportional to the adverse public impacts caused by the project. Here, the City cannot make such a showing. The project as proposed creates no public impacts that

would justify the well's abandonment in the future. The conditions therefore violate *Nollan* and *Dolan* and threaten the uncompensated taking of Mr. Harris's property.

Next, Conditions 6, 7, and 13 appear to be unique to Mr. Harris. No other well permit we have identified contains such conditions, even though other well applicants have proposed the same or similar project as Mr. Harris. *See, e.g.,* Resolution No. 5054 (well permit for Louis Moscardi, dated January 12, 2021). There being no rational basis for such discrimination against Mr. Harris, the conditions violate his equal-protection rights.

Finally, Conditions 6, 7, and 13 create barriers to further residential development that state law affirmatively encourages. For example, Senate Bill 9 streamlines the process for a homeowner to create a duplex or subdivide an existing lot. The City's conditions are in strong tension with Senate Bill 9, as they discourage Mr. Harris from subdividing and building additional residential units in the future. This is particularly true given the prohibitive cost of connecting to the City's water infrastructure—about $300,000—which Condition 6 would *require* upon further development of Mr. Harris' 27 acres. Indeed, the City specifically found that "[s]ervice from the city water system is neither practical nor feasible," including because it would require "construction of a service line that would have potential impacts to sensitive resources such as native oak woodland and existing rock outcroppings." Resolution No. 5366, ¶ 3(b). The impracticality and infeasibility of connecting to the city water system will remain in the future.

Conditions 6, 7, and 13 in particular are based on speculative impacts associated with hypothetical scenarios in the future. Permit conditions should be based on *current* impacts associated with the project actually before the City—in this case, a private domestic well. In the future, if there is additional development proposed, the City can consider impacts associated with the actual proposal before it.

For all these reasons, Conditions 6, 7, 8, 9, and 13 are ultra vires and void, and they should be struck from the permit approval.

B. <u>Conditions 14 and 15 Are Void for Vagueness</u>

Condition 15 states that "[d]uring any period of noncompliance with these conditions, the well will constitute an unapproved use of land subject to the penalties and remedies of the Arroyo Grande Municipal Code." This is a bizarre condition that is unintelligible. The permit has been approved. It cannot be unilaterally rescinded, *ipso facto*, without due process—including a hearing and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (cleaned up)).

Condition 15 does not specify what constitutes noncompliance with the conditions, and generalized references to the Code are insufficient to cure the condition's vagueness. If there is a permit violation, the Code provides for clear procedures that allow the City to address the alleged noncompliance. This condition does not adequately put Mr. Harris on notice about what is prohibited or what it means for a permitted use to suddenly become "unapproved."

Condition 14 states that "[t]he well must comply with all general legal requirements imposed by the California Department of Water Resources, State Water Resources Control Board, and any other applicable state or federal law." This is exceedingly broad and, like Condition 15, fails to put Mr. Harris on notice of the requirements he must abide by in order to comply with the well permit. Because it is vague, Condition 14, like Condition 15, is void for vagueness.

III.
Conclusion

Our hope is to resolve this dispute over the above-described conditions amicably without court intervention. Accordingly, we request that the aforementioned conditions be struck so that Mr. Harris can proceed with installation of his well. Time is of the essence, so please let us know, no later than June 28, whether the City will do so.

Very truly yours,

PIERSON FERDINAND

Paul Beard II

Cc: Brian Pedrotti, Community Development Director (Email: bpedrotti@arroyogrande.org)