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ATTORNEYS AT LAW



2007 DEC 20 e-mail: rbattles@mullenlaw.com

COUNTY OF SANTA BARBARA
CIRK OF THE
BOARD OF SUPERVISORS

December 20, 2007

HAND DELIVERED

Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara, CA 93101

Re: Santa Barbara Botanic Garden - Revised Terrace Project Appeal of December 10, 2007 Action by HLAC

Dear Honorable Supervisors:

We are writing on behalf of our client, the Santa Barbara Botanic Garden, to appeal the actions taken by the Historic Landmarks Advisory Commission ("HLAC") on December 10, 2007 relating to the Garden's revised Meadow Terrace project. This appeal is made pursuant to Section 18A-7 of Chapter 18A of the Santa Barbara County Code.

BACKGROUND

The Original Project

In the summer of 2007, the Garden received a Substantial Conformity Determination ("SCD") from the Santa Barbara County Planning & Development Department for its proposed Meadow Terrace Exhibit project (the "Original Project"). The issuance of the SCD reflected the County's finding that the Original Project was in substantial conformity with the Garden's 1972 Conditional Use Permit. Because of the small scope of the Original Project and the fact it would involve less than 50 cubic yards of cut and fill, no grading permit or other County approvals were required.

The Garden also determined that the Original Project was exempt from HLAC's review and approval jurisdiction under Resolution No. 2003-059, which designated certain structures and features and certain portions of the Garden's property as historic landmarks. The Garden's determination in this regard was based on (i) the clear terms of the Resolution which exempted projects of this nature, and (ii) a 2005



opinion from County Counsel which found that a far larger trail paving project undertaken by the Garden earlier was exempt from HLAC review and approval under the Resolution.

On that basis, the Garden proceeded with the construction of the Original Project. However, a few weeks after construction had begun, at a point where the Garden had spent approximately \$90,000 and had completed approximately half of the work, HLAC asserted that the Original Project required its approval. County Planning & Development then asserted that, because of the controversy associated with the Original Project, the SCD should not have been granted without Planning Commission approval. On that basis, the County revoked the SCD and issued a stop work order.

On September 10, 2007, HLAC held a public hearing at which it reviewed the Original Project. At the hearing, the Garden asserted that HLAC lacked jurisdiction and that, in any event, the Original Project was consistent with the terms of the Resolution. HLAC asserted jurisdiction and denied the Original Project.

The Garden filed a timely appeal of HLAC's September 10 actions. The Board of Supervisors is scheduled to hear that appeal on January 22, 2008.

The Revised Project

Notwithstanding the Garden's strong belief that the Original Project was exempt from HLAC jurisdiction and was consistent with the terms of the Resolution, the Garden was nevertheless interested in addressing the concerns raised by HLAC at its September 10 hearing and in achieving a mutually acceptable compromise.

Accordingly, subsequent to HLAC's September 10 action, Garden representatives met on several occasions with a subcommittee of HLAC members in an effort to develop revisions that would make the Original Project acceptable to HLAC. Through these meetings, a revised Meadow Terrace project was designed (the "Revised Project"). The Revised Project (i) eliminated almost 70% of the paving associated with the Original Project, (ii) replaced preexisting concrete pavers with natural flagstone, and (iii) redesigned and reduced in scale the three low walls closest to the meadow area. As redesigned, the Revised Project represents nothing more than (a) a modest improvement to an existing public area, and (b) the creation of additional flagstone pathways through and around native plant communities, displays, exhibits and structures, consistent with Resolution No. 2003-059.



The members of the HLAC subcommittee all indicated that the Revised Project represented an acceptable compromise and that it addressed their concerns regarding the Original Project.

The Revised Project was reviewed by HLAC at a public hearing on November 15, 2007, at which only five HLAC members were present. At that hearing the Garden's representative advised HLAC of its position that the Revised Project was exempt from HLAC jurisdiction but was being submitted as a compromise and as an alternative to the Original Project which had been appealed to the Board of Supervisors. After receiving testimony from the Garden and members of the public, and after discussing the Revised Project among themselves, HLAC asked the Garden to submit additional details relating to the Revised Project and continued further consideration of the matter to its December 10 hearing.

As requested by HLAC, the Garden submitted additional details relating to the Revised Project on December 5, 2007. At its December 10 hearing, HLAC took action to "adjourn" the November 15 hearing and to treat the December 10 public hearing as if it were HLAC's first and only consideration of the Revised Project. This action was apparently taken so that the HLAC members who were not present at the November 15 hearing could participate in the discussion and vote on the Revised Project.

After receiving testimony from Garden representatives and members of the public, and after discussing the Revised Project among themselves, HLAC denied the Revised Project by a 5-4 vote.

BASIS FOR APPEAL

It is the Botanic Garden's position that, under the clear terms of Resolution No. 2003-059, the Revised Project is exempt from the HLAC's review and approval jurisdiction. The facts and analysis that provide the basis for this position are set forth in detail in the appeal letter filed on behalf of the Garden on September 20, 2007 relating to the Original Project, which appeal is incorporated by this reference.

The Garden's position as set forth in its September 20 appeal is even stronger as it relates to the Revised Project because, as discussed above, the Revised Project significantly reduces the scope and scale of the Original Project. The Revised Project clearly represents nothing more than (i) a "change" to an existing "public



area", and (ii) the creation of additional flagstone pathways through and around native plant communities, displays, exhibits and structures.

PROCEDURAL VIOLATIONS

We also want to call to your attention certain serious procedural violations that occurred at the December 10 HLAC hearing. As indicated above, on December 10 HLAC took action to "adjourn" the November 15 hearing and to treat the December 10 public hearing as if it were a "new" consideration of the Revised Project. The effect of this action was to allow HLAC members who were not present at the November 15 hearing to participate in the discussion and vote on the Revised Project.

As also indicated above, at the November 15 HLAC hearing, only five members were present. Three of those five members served on the HLAC subcommittee which developed the changes to the Original Project and supported the Revised Project. Those same three members voted against the motion to deny the Revised Project on December 10. It is therefore clear that if only the members who were present on November 15 were allowed to vote on December 10, the Revised Project would have been approved by a 3-2 vote.

Violation of HLAC Bylaws

Purporting to "adjourn" the November 15 hearing and allowing additional HLAC members to vote on the Revised Project was a clear violation of Section I.4 of HLAC's Bylaws, which provides as follows:

"4. PARTICIPATION IN AGENDA ITEM DISCUSSION: A member must be present for the duration of an agenda item discussion to vote on such item. If a Commissioner joins a meeting late, or must excuse himself/herself and leave the meeting, that Commissioner must abstain from voting on the item being discussed."

The plain and obvious purpose and intent of Section I.4 of HLAC's Bylaws is to ensure that HLAC members are not permitted to vote on an item unless they were present for the entire time that an item was discussed. In the present case, the Revised Project was discussed at length at HLAC's November 15 hearing. At that hearing the Garden's representative provided a detailed presentation of the Revised



Project and answered numerous questions from HLAC. In addition, dozens of members of the public provided testimony and the HLAC members discussed the Revised Project at length. The hearing lasted a period of hours.

Four of the HLAC members who voted on December 10 were not present on November 15 and therefore did not participate in that exchange of information. By voting to “adjourn” the November 15 hearing on December 10, HLAC wrongfully circumvented the clear directive of its Bylaws and allowed voting by members who had not been present for the entirety of the discussion on the Revised Project.

Clearly the December 10 hearing was a continuation of the hearing which began on November 15. This conclusion is supported by the agenda for the December 10 HLAC hearing, which states that the November 15 hearing was “continued” and not “adjourned.” More specifically, the December 10 agenda states as follows:

“At a Special Meeting on November 15, 2007 HLAC’s ad hoc subcommittee reported its activities to the full Commission and the Garden presented a new modified Meadow Terrace project for consideration and decision by HLAC. HLAC received public comment and continued its discussion and decision-making to its December 10, 2007 agenda.”

There is simply no legitimate basis on which the December 10 HLAC hearing can be characterized as anything other than a continuation of the November 15 hearing. As such, it was improper for the four HLAC members who were not present on November 15, one of whom had not yet even been appointed to HLAC on November 15, to vote on the Revised Project on December 10.

Brown Act Violations

The action by HLAC to “adjourn” the November 15 hearing and commence a new hearing on December 10 was also a violation of the Brown Act (Government Code Section 54950 et seq.). This is true for two reasons. First, HLAC did not follow the procedures for adjourning the November 15 hearing as set forth in Section 54955 of the Brown Act, which requires, among other things, (i) that the meeting be adjourned to a stated time and place, and (ii) that a notice or order of adjournment be posted. HLAC did neither. When one considers the requirement for adjourning a meeting to a stated time and place, it becomes clear that HLAC did not adjourn the November



15 hearing at all. Instead it simply "terminated" the November 15 hearing and purported to start a "new" hearing on December 10. There is no provision under the law that allows HLAC to do this.

Second, HLAC violated the Brown Act because neither the adjournment of the November 15 hearing nor the commencement of a new hearing on December 10 were noticed on HLAC's agenda. Section 54954.2(b) of the Brown Act clearly states that no action or discussion shall be undertaken on any item not appearing on the posted agenda. Accordingly, HLAC's actions with respect to the adjournment/termination of the November 15 hearing, and its action to hold a "new" hearing on December 10, both violated the Brown Act.

CONCLUSION

The actions by HLAC on December 10 demonstrate a complete disregard for the clear language of Resolution No. 2003-059 as well as the requirements of its own Bylaws and the Brown Act. As such, HLAC's actions with respect to the Revised Project cannot be permitted to stand.

Thank you for your favorable consideration of this appeal.

Respectfully Submitted,

A handwritten signature in black ink that reads "Richard G. Battles".

Richard G. Battles of
Mullen & Henzell L.L.P.
Attorneys for Santa Barbara
Botanic Garden

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The Honorable Fife Symington, Botanic Garden Board Chairman
Edward Schneider, Botanic Garden President and CEO

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Nancy Johnson, Botanic Garden VP of Development and Marketing
Michael Brown, County Administrator
John Baker, Director of Planning and Development
Diane Black, Director of Development Services
David Ward, Deputy Director of Planning and Development
Anne Almy, Supervising Planner
Alex Tuttle, Planner
Mary Pat Barry, Deputy County Counsel
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