Attachment B

MILLER STARR REGALIA

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrlegal.com

Arthur F. Coon
Direct Dial: 925 941 3233
arthur.coon@msrlegal.com

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Via Email and U.S. Mail

Andrea Ouse
Community and Economic Development Director
City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590
Email: andrea.ouse@cityofvallejo.net

Dan Keene
City Manager
City of Vallejo
555 Santa Clara Street
Vallejo, CA 94590
Email: citymanager@cityofvallejo.net

Re: Vallejo Marine Terminal/Orcem Application for Major Use Permit and Site Development Permit

Dear Ms. Ouse and Mr. Keene:

Our office represents Vallejo Marine Terminal ("VMT") and Orcem California Inc. ("Orcem"), the applicants for the above-referenced Project approvals, the processing of which has been underway since 2012. On August 29, 2016 – in direct conflict with the provisions of existing contracts between the applicants and the City of Vallejo, as well as applicable law – the City Manager advised our clients' representatives that the nearly complete Final EIR for the Project would not be completed, and that staff would recommend to the Planning Commission denial of the entitlements sought. Later, City staff modified their enunciated position and stated the Final EIR would be completed and posted on line, but that the CEQA review process would not be completed in that the Final EIR would not be presented to the Planning Commission for its review, consideration and action at the scheduled public hearing on the Project in December. These actions of City's staff are shocking, in bad faith, and, as explained below, in blatant violation of applicable law – including CEQA, the City's contractual obligations to applicants, and the applicants' constitutionally-protected property and due process rights. Staff must reverse its illegal and inequitable course, or City will be held liable for its legal violations.

1. **Both CEQA And The Parties' Existing Contracts Require That The CEQA Review Process Be Completed Through Presentation Of The Final EIR To The Planning Commission.**

Our clients have expended literally millions of dollars in the planning and entitlement processing for this Project and are parties to separate but identical reimbursement agreements (collectively, the "Reimbursement Agreement") under which the City is

obligated to complete the preparation and processing of the Final EIR and present it to the decisionmaking body at the scheduled public hearing for consideration and certification. Each of the Reimbursement Agreements contains and is expressly "predicated upon" a Recital and Finding B that states substantially as follows:

> The proposed [Orcem/VMT] Project will be subject to a comprehensive planning and environmental review process, which will include completion of a single combined Initial Study and Environmental Impact Report (collectively, the "EIR") which will be prepared to concurrently evaluate both the [Orcem/VMT] Project and the adjoining [VMT/Orcem] Project.

(Reimbursement Agreement, Recital B, p. 2.)

Recitals in a written instrument are conclusively presumed true between the parties and their successors (Cal. Evid. Code, § 622), and there can be no doubt that the parties' agreement here was predicated on the common factual assumption and understanding that the Project would undergo CEQA's "comprehensive ... environmental review process" whereby the combined Orcem/VMT Project would be "concurrently evaluate[d]" through the completed EIR being presented to the City's decisionmaking body for its review and consideration. Underscoring this binding contractual understanding among the parties, attached as an exhibit to the Reimbursement Agreement is a copy of the consultant's agreement between Dudek and the City under which the consultant is obligated to prepare, complete and submit to the City's decisionmaking body a Final EIR to guide the decisionmakers in considering the Project and evaluating its environmental effects.

In addition to our clients' contractual rights, CEQA itself precludes staff's proposal to withhold the Final EIR from the Planning Commission under the circumstances present here. As a matter of both State and local law, "[a]ll projects must comply with the California Environmental Quality Act (CEQA), as appropriate." (City of Vallejo Mun. Code, § 16.71.058.) It is well established that a principal purpose of CEQA's comprehensive environmental review process is to "***inform the government*** ... about a proposed activity's potential environmental impacts" and that an EIR prepared pursuant to the CEQA process "advances not only the goal of environmental protection but of ***informed self-government***." (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382-383, emph. added.) Here, in violation not only of the parties' contracts but of CEQA itself, City's staff proposes to usurp the decisionmaking authority of the Planning Commission (and potentially the City Council), by withholding the Final EIR from consideration of the only decisionmaking body with power to approve or disapprove the Project. In essence, City staff proposes to arrogate the authority to *conclusively determine* that the Final EIR *cannot be certified,* and then – in a classic "offer that can't be refused" – "*recommend*" denial of the Project to the actually *authorized* decisionmaking body – here, the Planning Commission, subject to an

administrative appeal of its actions to the City Council. Such an effort by staff is wholly unauthorized and unlawful, as explained further below.

At this late point in the project processing timeline, with the Final EIR fully completed or virtually so, essentially nothing remains to complete the required CEQA review process except for the City's *authorized* decisionmaking body's determinations (1) as to the Final EIR's adequacy under CEQA, and (2) whether to approve the Project in light of it. ***CEQA does not allow these functions to be split apart from one another, and does not allow the delegation of the City's EIR certification decision to a nondecisionmaking body, such as the City Manager or City staff.*** It is fundamental "that an environmental review document 'cannot serve its informational function unless it is reviewed and considered by the governmental body which takes action having an effect on the environment.'" (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 727, quoting *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779.) Here, of course, that authorized body is the Planning Commission, not the City Manager or staff.

As further explained by the Court of Appeal:

> [T]he principle that prohibits the delegation of authority to a person or entity that is not a decisionmaking body includes a corollary proposition that CEQA is violated when the authority to approve or disapprove the project is separated from the responsibility to complete the environmental review. [Citations] This conclusion is based on a fundamental policy of CEQA. For an environmental review document to serve CEQA's basic purpose of informing governmental decisionmakers about environmental issues, that document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove the project at issue. In other words, the separation of the approval function from the review and consideration of the environmental assessment is inconsistent with the purpose served by an environmental assessment as it insulates the person or group approving the project "from public awareness and the possible reaction to the individual members' environmental and economic values."

(*Id.*, at 731, fn. omitted, quoting *Kleist v. City of Glendale*, *supra*, 56 Cal.App.3d at 779 [holding California Air Resources Board violated CEQA "when it gave the responsibility for completing the environmental review process to the Executive Officer because he did not have the authority to approve or disapprove the project."]; *see also California Clear Energy Committee v. City of San Jose* (2013)

220 Cal.App.4th 1325, 1339 ["CEQA Guidelines make it clear that there are certain duties that cannot be delegated to nondecisionmaking bodies. A decisionmaking body, for instance, cannot delegate its duty under the Guidelines to "review[ ] and consider[ ]" the Final EIR."], citing CEQA Guidelines, § 15090(a)(2); *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 583-584 [reviewing and considering final EIR and making findings are nondelegable tasks "reserved exclusively for the agency's decisionmaking body"], quoting *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 289.)

Reinforcing these basic rules prohibiting bifurcation of environmental review and project approval authority, and delegation of the responsibility to review and consider the EIR, CEQA's Guidelines also expressly provide that the processes are to occur concurrently: "The environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval process being used by each public agency. *These procedures, to the maximum extent feasible, are to run concurrently, not consecutively.*" (14 Cal. Code Regs., § 15004(c), emph. added.)

Simply put, City staff is completely unauthorized to make the decision not to certify the Final EIR, and it is unauthorized to withhold the Final EIR from the decisionmaking body that *is* authorized and obligated under CEQA to make both the certification decision and the decision whether to approve the Project.

In addition to its being clearly unlawful under fundamental policies of CEQA, staff's proposed action is also shockingly inequitable. Pursuant to the Reimbursement Agreement, our clients have reimbursed, or will reimburse, the City ***over $1,000,000 just to cover the cost of EIR preparation and processing***. They have consented to multiple amendments to the City's consulting agreement with Dudek allowing the scope to be broadened to include a number of studies not required under CEQA, and services that were not initially anticipated in Dudek's contract. It is a breathtaking breach of the public trust for staff to inform our clients at the eleventh hour that they were recommending denial of the Project and, ***based solely and exclusively on that staff recommendation***, staff had determined not to allow the decisionmaking body – the City's Planning Commission – to receive, review and consider the completed Final EIR. Staff is well aware that CEQA precludes approval of the Project unless the decisionmaking body first considers and certifies the EIR, and its actions are a transparent attempt to torpedo the Project by precluding this necessary prerequisite step in the process from occurring. You are hereby advised that unless staff takes all necessary steps to present the Final EIR to the Planning Commission for its consideration before it makes any determination on approval of the Project, you and the City will be in violation of California law, and the parties' agreements, and potentially subject to significant damages.

Ms. Ouse's September 6, 2016 letter to our clients' representative stated that the City proposes to instruct the consultant to complete the Final EIR but not deliver that finished document to the Planning Commission for consideration at the scheduled public hearing; rather, the finished document will be put on the City's website for public review. This is clearly not sufficient under CEQA, and unless the completed document is presented to the Planning Commission for its consideration at a duly-noticed public hearing, staff will put the City in breach of the Recitals and contractual provisions set out in the Reimbursement Agreement, which incorporate the provisions of the consultant's agreement. It would also be a surprising act of bad faith, in violation of implied contractual duties of good faith and fair dealing, to prevent the decisionmakers from considering the enormous amounts of environmental information provided in the Final EIR – a document whose preparation costs have been paid by our clients – which information is essential to making any reasoned determination on the Project.

We have been informed by our clients' representative that the City staff believes its proposed approach is supported by the holding of *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837. If true, this belief is woefully misguided. That case is simply inapplicable to the current situation. There, the ***decisionmaking body*** that was authorized to approve the development project – the Los Angeles City Council – determined on its own motion at some point following the commencement of the environmental review process, but prior to completion of a final EIR, to reject, disapprove and not proceed with the project for which applications had been submitted. This decision was made by the decisionmaking body itself following competing motions made at a public hearing by City Council members who opposed and supported the project, respectively. (*Las Lomas Land Co., LLC, supra*, 177 Cal.App.4th at 843-844.) Because the decisionmaking body there acted on its own motion to reject the Project before it – which would have required annexation and various legislative approvals and entitlements – prior to completion of any final (or even draft) EIR, it had clearly no legal duty to thereafter complete, review and consider a final EIR on the already-rejected project prior to acting. (*Id.* at 848-852.) Simply put, where a project has been definitely rejected by a decision-making body prior to completion of any EIR and thus no longer under consideration for approval, a lead agency need not undertake the pointless task of preparing and considering a useless EIR analyzing the environmental impacts of the rejected project. The *Las Lomas* Court thus distinguished *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, which held "that a public agency has a ministerial duty to complete an EIR in a timely manner," as "not address[ing] the question whether [the City] still proposed to consider and possibly approve the project or whether it had rejected or disapproved the proposal sometime after its initial study." (*Las Lomas Land Co., LLC, supra,* at 852 ["Despite lengthy delay, the parties and the court apparently regarded the proposed project as still under consideration."].)

Here, like in *Sunset Drive*, but unlike in *Las Lomas*, the Project is still under consideration by the City, and has not been rejected and disapproved by the City's authorized decisionmaking body by vote at a duly noticed public hearing prior to the preparation of an EIR. Here, also unlike in *Las Lomas*, a Final EIR has been prepared – yet City staff proposes to prevent the decisionmaking body from considering it when it takes its scheduled final action on the Project. As noted above, staff's proposal violates CEQA's prohibition on separating the EIR certification and project approval functions of the decisionmaking body, which here is still considering and has not rejected the Project. This case thus involves entirely different facts and issues than did *Las Lomas.* In short, *Las Lomas* is simply not on point, and in no way justifies the proposed unlawful and ultra vires actions of City staff here.

2. **The City Is Equitably Estopped To Refuse To Process The Project Through A Planning Commission Decision In Compliance With CEQA And The Parties' Agreements, Or To Eliminate Our Clients' Ability To Pursue The Industrial Uses Permitted By Their Lease With The City.**

Staff's proposed course of action is so inequitable, detrimental to applicants, and inconsistent with the City's prior course of conduct that the doctrine of equitable estoppel applies.

VMT originally met with representatives of the City prior to their purchase of the Project site to discuss their plans to rehabilitate the site for a marine terminal and an appropriate maritime industrial use consisting of an environmentally superior cement mill. Reuse of the old General Mills site was considered extremely desirable to the City, and staff strongly encouraged this Project to go forward. VMT then finalized negotiations with Ocrem to maximize its chances for a successful project.

The City owns in trust for the benefit of the people of the State approximately 431,000 square feet of property adjacent to the VMT-owned property (the "Tidelands Property"). The Tidelands Property had been leased to General Mills (the "Tidelands Lease") and is an essential element of industrial use of the VMT property. In order to go forward with the Project, the existing lease from the City to General Mills of the Tidelands Property had to be assigned to VMT and also modified in various respects. The original Tidelands Lease was expiring in 2014 and its term thus had to be extended. The use provisions set out in section 5 of the Tidelands Lease limit the use of the Tidelands Property to "purposes of manufacturing, receiving, storing, warehousing, preparing, and otherwise handling goods and raw materials, for shipping the same, [and] for other industrial uses which shall promote commerce and navigation ...." Crucially, these limitations have not been revised and continue to define the extent of VMT's leasehold property interest and rights to this day. On July 24, 2012, the City Council approved the execution of the First Amendment to the Tidelands Lease between the City and VMT which approved assignment of the Tidelands Lease to VMT, contained the same industrial use limitations quoted above, and extended the term for a period of 33 years, with

an additional option to extend for another 33 years; thus, the effective term of the Tidelands Lease with VMT is now 66 years. The rent required under the lease is $95,520 per year subject to a cost of living adjustment. The Staff Report presented to the City Council prior to their approval of the lease amendment stated as follows:

> "The Lessee has plans to reuse the General Mills site for industrial operations including integrating rail, truck and ship/barge transportation so that the site serves as a trans-shipment center for commodity products with cargos coming into the facility and being shipped abroad. Staff recommends entering into the lease amendment so that the General Mills site can be put back into productive reuse which will generate jobs and revenue for the City."

The City Council approved the execution of the First Amendment. VMT then immediately negotiated their arrangement with Orcem and the two jointly filed their applications for entitlements for the Project. It should be noted that no legislative approvals, such as a General Plan amendment or rezoning, are required to entitle the intended use of the Project site. The Project proposes to entitle uses which are fully consistent with the current General Plan and zoning designations for the Project site, as well as the existing use limitations in the Tidelands Lease.

As recently as July 28, 2015, the City Council revisited and reaffirmed the viability of the Tidelands Lease and, by resolution, approved the execution of a Third Amendment which extended the abatement period for rental under the Tidelands Lease. This abatement period had originally been established in the Second Amendment and was meant to reflect the additional entitlement processing time needed for the Project. Thus, as recently as a year ago, the City considered and reaffirmed the validity and desirability of the Tidelands Lease, and accordingly, the appropriateness of the uses allowed under that lease on the Project Site.

In connection with their entitlement applications filed in 2012, our clients have expended ***over $10 million dollars*** in acquisition, planning, design and processing expenses, and have reimbursed the City ***over a million dollars*** to cover the cost of the preparation of the EIR by Dudek. Our clients' planning consultant, Richard T. Loewke, AICP, has worked closely with City staff and any requests or requirements for information have been promptly met. Processing has moved forward steadily with the release of the Draft EIR and the receipt of comments on that document. ***The next and final step in the CEQA process is to present the completed Final EIR to the Planning Commission for consideration in conjunction with its consideration of approval of the proposed Project at a public hearing.*** As noted above, that step is required by the Reimbursement Agreement, and by CEQA, and is the process which municipalities acting lawfully and in good faith under these circumstances invariably follow in order to provide adequate environmental information for decisionmaking bodies to consider when they decide whether to

approve or deny a project. Based on its entry into the Tidelands Lease with VMT, the City stands to receive – and VMT is obligated to pay – a substantial rent annually for the Tidelands Property for a term extending well over half a century. The Tidelands Property is essential to the economic operation of the marine terminal facility and the industrial sites located upon the VMT property. The City has acknowledged through the approval and execution of the First Amendment that the Tidelands Lease, which restricts the use of the Tidelands Property to industrial uses, is in force for a period of 66 years and ***requires*** the property to be used for maritime industrial purposes.

Despite all this, our clients have now learned that the City has undertaken study and possible pursuit of a General Plan "update" in which it is considering the redesignation of the VMT property, including the Tidelands Property, to no longer allow water-related industrial uses. Nothing could be more devastating to the Project or to the property rights that our clients currently possess under the Tidelands Lease. The City has already determined the only permissible uses of the Tidelands for the next 66 years by approving and executing the First Amendment, and our clients have detrimentally relied on that and the parties' other agreements in moving forward at great expense with the planning and environmental review of a Project fully consistent with those uses. Under these circumstances, the City is equitably estopped to deny the Project or to pursue changed land use regulations precluding maritime industrial uses on the Tidelands Property, except upon payment of just compensation for the resulting taking of the applicants' leasehold and property rights. The City is equitably estopped from taking action in derogation of our clients' rights under the Tidelands Lease.

More specifically, our clients' rights to make beneficial economic use of the Project property as now allowed under the Tidelands Lease implicates a "fundamental vested right" for purposes of determining the degree of judicial scrutiny – independent judgment review – in any legal proceeding that may be required challenging the City's actions because such rights are "preexisting rights" that were "legitimately acquired" and are "of sufficient significance to preclude [their] extinction or abridgment by a body lacking *judicial* power." (*HPT IHG-2 Properties Trust v. City Anaheim* (2015) 243 Cal.App.4th 188, 199.) The doctrine of equitable estoppel has four elements: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Id.* at 201, citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Additionally, the injustice to be avoided by applying estoppel must outweigh any adverse impact on public policy or the public interest. (*Id.*, at 201, 205, citing *Shafer v. City of Los Angeles* (2015) 217 Cal.App.4th 1250, 1263.)

All elements of estoppel are clearly met here since: (1) City has at all times been aware of its CEQA, contract, and Tidelands Lease obligations, as well as its actions inconsistent with the same; (2) City intended that Orcem and VMT rely on the

Reimbursement Agreement and the Tidelands Lease and amendments thereto in proposing and funding at great expense the processing and CEQA review of a Project contemplated by those agreements which would, if approved, benefit the City economically; (3) Orcem/VMT were ignorant of the facts that City would disavow its CEQA, Reimbursement Agreement, and Tidelands Lease obligations, unlawfully seek to truncate environmental review and consideration of the Project at the eleventh hour, and begin pursuit of rezoning and General Plan amendments wholly inconsistent with City's legal obligations and their legal rights; and (4) Orcem/VMT have injuriously relied on City's conduct, and the grave injustice avoided by holding the City to its legal and lease obligations far outweighs any supposed adverse "public policy" impacts of so doing.

3. **If The City Thwarts The Project And Eliminates Our Clients' Rights To Use The Property For Maritime Industrial Use As Allowed By The Lease, It Will Be Liable For Inverse Condemnation.**

Even if a court determined City were not equitably estopped to proceed as staff proposes, that would not relieve the City from its liability for the enormous economic damages it would inflict on our clients by so proceeding. As mentioned above, in August, City staff dropped a bombshell on our clients when they informed them that they were not going to present the Final EIR to the Planning Commission because they intended to recommend denial. Also as mentioned above, that determination was modified somewhat, as evidenced by Ms. Ouse's September 6, 2016 letter to Richard T. Loewke, to announce that while the Final EIR would be completed, it would not be presented to the Planning Commission but would be posted on-line. To treat any applicant this way is unconscionable, but to afford such treatment to an applicant who has been unhesitatingly responsive in the entitlement process and who has paid over a million dollars in fees in reliance on settled law and binding legal agreements is beyond astonishing: it is actionable. If the City staff refuses to comply with City's legal obligations to present the Final EIR to the Planning Commission for that body's review and consideration, and if staff is successful in its apparent goal of thwarting our clients' Project and depriving them of their rights to beneficially use the property under their Lease, the City will be liable for substantial damages for a regulatory taking.

The Federal and State Constitutions require the government to pay just compensation when it takes private property for public use. (U.S. Const., Amend. V; Cal. Const., Art. 1, § 9.) While the government has the power to take property for public use directly through eminent domain, a property owner may also have its property "taken" by "inverse condemnation," i.e., acts or conduct of a public agency which, without the formal exercise of eminent domain authority, invade or appropriate a valuable property right to the owner's direct and special injury. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119-120; *City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 220-222.) Our clients' rights under the existing Tidelands Lease clearly qualify as private property subject to

these constitutional protections. (E.g., *City of Vista v. Fielder* (1996) 13 Cal.4th 612, 616-617 [taking of leasehold interest is compensable under Eminent Domain Law].)

A "regulatory taking" occurs when a government action restricts the property owner's use and enjoyment of its property to such a degree that it amounts to a "taking" even absent a physical invasion, property damage, or formal exercise of eminent domain. Where a regulation denies the property owner all economically viable use of his or her property, this is considered to be a "per se" or "categorical" taking - akin to a physical occupation of the property - for which compensation is absolutely required. *(Kavanaugh v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774; *Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1193-1196 [discussing regulatory takings generally and rules and procedures for challenging same]; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270; *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal.App.4th 1428,1435-1436; *Charles A. Pratt Constr. Co., Inc. v. California Coastal Com'n* (2008) 162 Cal.App.4th 1068, 1080; *see Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 303-305 [City's moratorium on home construction deprived landowners of all economically beneficial use of property, without City proving justification under State principles of nuisance or property law, and therefore constituted taking]; *Twain Harte Associates, Ltd. v. County of Tuolumne* (1990) 217 Cal.App.3d 71, 81-83, 85 [county's rezoning of 1.7 acre parcel to open space, with limited available uses by CUP which owner alleged were not feasible, resulted in placement of burden on county to prove that owner had an economic use of his land].) Where a denial of all economic use results from regulatory action, such that a "per se" or "categorical" taking has occurred, compensation is required and the owner's "reasonable investment backed expectations" are not relevant to the analysis. *(Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1027 [where regulation deprives land of all economically beneficial use, payment of compensation may be avoided "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."].)

It should also be noted that a *regulatory* taking claim is not precluded where the deprivation of economically viable use is "one step short of complete" *(Kavanaugh, supra,* 16 Cal.4th at 774, citing *Lucas, supra,* 505 U.S. at 1019, Fn. 8); the taking in such a case is "non-categorical" and the relevant analysis would depend on a court's consideration of numerous factors to evaluate the regulation and its impact on the owner. *(Palazzolo v. Rhode Island, supra,* 533 U.S. at 618; *Kavanaugh, supra,* 16 Cal.4th at 775-776; *Allegretti & Co. v. County of Imperial, supra,* 138 Cal.App.4th at 1270-1271.) Appropriate factors thus considered by the courts include:

(a) "[t]he economic impact of the regulation on the claimant" (*Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 265; *Allegretti & Co. v. County of Imperial, supra*, 138 Cal.App.4th at 1279; *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124);

(b) "the extent to which the regulation has interfered with distinct investment-backed expectations" (*ibid.*);

(c) "the character of the governmental action" (*Penn Cent. Transp. Co. v. City of New York, supra,* 438 U.S. at 124);

(d) whether the regulation "interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes" (*id.* at 125);

(e) whether the regulation affects the property's existing or traditional use so as to interfere with the property owner's "primary expectation" (*id.* at 136);

(f) whether the owner's holding is limited to the specific interest the regulation abrogates or is broader (*id.* at 127-130);

(g) whether the government is acquiring "resources to permit or facilitate uniquely public functions, "such as its entrepreneurial operations" (*id.* at 128, 135).

(h) whether the regulation "permit[s the property owner]... to profit [and]... obtain a 'reasonable return' on ... investment" (*id.* at 136);

(i) whether the regulation provides the owner offsetting benefits or rights that "mitigate whatever financial burdens the law has imposed" (*id.* at 137; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470);

(j) whether the regulation "prevent[s] the best use of land" (*Agins v. City of Tiburon* (1980) 447 U.S. 255, 262, abrogated on other grounds by *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528); and

(k) whether the regulation "extinguish[es] a fundamental attribute of ownership" (*ibid.*).

California courts have applied the foregoing factors to find regulatory takings have occurred due to the application of land use regulations, without the formal exercise of eminent domain, in various contexts. (E.g., *Jefferson Street Ventures, LLC v. City of Indio*, *supra*, 236 Cal.App.4th at 1201-1202 [city's "no build" condition of development approval used to "bank" portion of developer's land for lower cost acquisition in future for public project held uncompensated taking]; *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 167-173, 189-191 [County's application of voter-adopted general plan amendments in Measure D to prohibit construction of self-storage facility that had received all discretionary approvals before Measure D became effective constituted non-categorical taking for which County was liable]; *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1272-1273 [spot zoning that reduced property's number of permitted homes from 4 per acre to one per 20 acres constituted compensable taking due to its "dramatic" economic impact on property's value,

undermining of owners' investment-backed expectations, and true motivation of preserving property as open space].)

While application of each and every one of the relevant factors set forth above would clearly weigh entirely in favor of our clients and against the City under the circumstances here, analysis of those factors is also wholly unnecessary to establish a taking here. That is because if the City thwarts the Project and the applicant's ability to use the property for economically beneficial maritime industrial use – which is the only type of use allowed under the Tidelands Lease – it will be liable for a *categorical* or *per se* taking. The economic impact of precluding any beneficial water-related industrial use of the Project property would take ***all*** of applicants' property rights under the Tidelands Lease because applicants currently have only the limited right to undertake such industrial uses, and, in fact, no other uses are allowed under the Tidelands Lease.

4. **The City's Shocking Arbitrary And Irrational Actions Further Expose It To Damages Liability For Violations Of Substantive and Procedural Due Process And Equal Protection Of The Law.**

Deprivation of property rights by government without due process of law is also prohibited by the Federal and State Constitutions. (U.S. Const., Art. V; Cal. Const., Art. I, § 7(a).) Substantive due process protects against "arbitrary and capricious government action" that interferes with protected property interests. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845, *Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1407; see *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528.) Procedural due process protects against deprivations of a fair hearing, such as would result from staff's proposed withholding of the Final EIR from the Planning Commission here. (E.g., *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 561 [cumulative effect of City's procedural errors and "blatant disregard of [real estate developer's] due process rights" were actionable when city council, *inter alia*, "simply submitted to the roar of the crowd"].) Equal protection protects persons against discrimination and unfair treatment (U.S. Const., Amend. 14; Cal. Const., art. I, § 7(a)), and monetary damages are available for violations of federal constitutional rights. (42 U.S.C. § 1983; *Gonzaga Univ. v. Doe* 92002) 536 U.S. 273, 283.) Prevailing parties in such actions may also recover attorneys' fees. (42 U.S.C. § 1988(b)-(c).) It is pellucid that City staff's actions, described in detail above, place the City in violation of our clients' constitutional rights and on a collision course with liability for massive monetary damages resulting from such violations.

Conclusion: We urge the City staff to ensure that City complies with its contract obligations, CEQA and due process, respects the applicants' property rights, and takes actions enjoined on it by law, in order to avoid extreme damages to our clients and ensuing lengthy and costly litigation over this matter. Simply put, the completed Final EIR must be presented to the Planning Commission for its consideration as required by CEQA at the duly noticed December public hearing, so that that body

can exercise the full measure of its discretionary decisionmaking authority over the Final EIR and Project that the law confers on it, and so that it will also have the benefit of all of the environmental information required by CEQA (and for which our clients have paid at great expense) when that body considers the merits of the proposed Project.

Should you have any questions, please do not hesitate to contact the undersigned. Thank you in advance for your anticipated prompt attention to these critically important matters and issues.

Very truly yours,

MILLER STARR REGALIA

Arthur F. Coon

AFC:klw
cc: Claudia Quintana, City Attorney (claudia.quintana@cityofvallejo.net)
Clients
Richard T. Loewke, AICP (dick@loewke.com)