SOLURI MESERVE
a law corporation

tel: 916.455.7300 · fax: 916.244.7300
510 8th Street · Sacramento, CA 95814

February 2, 2022

SENT VIA EMAIL (cityclerk@cityofmillvalley.org)

Kelsey Rogers, City Clerk
City of Mill Valley
Mill Valley City Hall
26 Corte Madera Avenue
Mill Valley, CA 94941

RE: Public Comments to February 7, 2022 City Council Meeting, Agenda Item 6 re: 1 Hamilton Drive

Dear Ms. Rogers:

On behalf of Friends of Hauke Park ("FOHP"), this letter provides comments regarding Agenda Item 6, a proposed Exclusive Negotiating Agreement ("ENA") with a developer for residential development at 1 Hamilton Drive ("Project").

The City's approval of the ENA, viewed in light of all the surrounding circumstances, commits the City as a practical matter to the Project without first conducting CEQA review. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132 (*Save Tara*).) This violates CEQA.

In September 2021, we previously raised a concern about the City's commitment to the Project in the context of its action to declare 1 Hamilton Drive "surplus." Rather than take these concerns seriously, the City instead doubles down on its commitment to the Project through approval of the ENA that now creates significant financial incentives to approving the Project at the 1 Hamilton Drive location.

Specifically, City "agrees to loan the Housing Team up to $150,000, to be used towards certain predevelopment costs." (Staff report, p. 4.) This "loan" would not need to be repaid by the developer if the City ultimately declines to approve the Project. (Draft ENA, p. 4 ["the City's sole recourse shall be limited to the Work Product"].)[1] Further, the ENA also provides that the City would assume financial responsibility for performing CEQA review for the Project. (Draft ENA, p. 5 ["City shall, at the City's

[1] It is unclear why this "loan" provision is set forth in section 5.1.5 of the draft ENA as a "possible DDA provision" since it is clearly a provision of the ENA itself.

cost and expense, undertake an Initial Study of the proposed Project pursuant to Section 15063 of CEQA or other appropriate documentation in order to determine the appropriate environmental documents and procedures that may be necessary to comply with CEQA"].)

In *Save Tara*, the California Supreme Court provided important guidance on this issue in the context of another affordable housing project including similar facts:

> City agreed to initially lend the developer nearly half a million dollars, a promise not conditioned on CEQA compliance. This predevelopment portion was to be advanced in the first phase of the agreement's performance, before EIR approval and issuance of other final approvals, and was to be repaid from project receipts over a period of up to 55 years. If City did not give final approval to the project, therefore, it would not be repaid. For a relatively small government like City's, this was not a trivial outlay, and it would be wasted unless City gave final approval to the project in some form.

(*Id*. at 140.)

The relevant facts in *Save Tara* are strikingly similar to those presented here, and the superficial differences are simply window dressing. In *Save Tara*, the agreement with the developer plainly stated that the loan did not need to be repaid. Here, the ENA provides that the loan must somehow be "repaid," but the City's "sole recourse shall be limited to the Work Product." Thus, as a practical matter, the loan does not need to be repaid as in *Save Tara*.[2] Further, while a $150,000 loan appears far less than *Save Tara*'s loan of "nearly half a million dollars," this loan amount does not include the unspecific additional amount that the City is assuming for CEQA analysis of the Project. This additional cost must be added to the $150,000 for purposes of comparing the City's financial commitment to that in *Save Tara*.

Further, surrounding circumstances reinforce the City's practical commitment. As *Save Tara* explains:

---

[2] A later court found *Save Tara* distinguishable because "in contrast to *Save Tara*, the Center must repay the loan whether or not the project is approved." (*Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, 553.) The ENA's failure to require repayment is therefore a critical factor in determining that an agency has committed to a project even if the loan is otherwise limited to otherwise appropriate predevelopment purposes.

> [C]ourts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project. (See Cal.Code Regs., tit. 14, § 15126.6, subd. (e).) In this analysis, the contract's conditioning of final approval on CEQA compliance is relevant but not determinative.

(*Id*. at 139.)

Here, the surrounding circumstances further support that the City is committing as a practical matter to the Project at 1 Hamilton Drive "so as to effectively preclude any alternatives," such as off-site alternatives.[3] We previously raised a concern that the City's action to designate the 1 Hamilton Drive site 'exempt surplus' land could be used as the basis to improperly exclude otherwise feasible project alternatives. (See letter dated September 17, 2021 from Soluri Meserve on behalf of FOHP.) We explained:

> We note that only one site – 1 Hamilton Drive – is being proposed for this "exempt surplus" designation despite the existence of other possible sites. FOHP is reasonably concerned that the City is excluding from consideration other feasible sites based on political and other concerns that are unrelated to site suitability as articulated in the City's staff report dated October 5, 2020. Limiting the City's "exempt surplus" designation to only 1 Hamilton Drive reinforces this concern, as the City could attempt to rely on that designation as substantial evidence supporting the decision to exclude consideration of off-site project alternatives. (CEQA Guidelines, § 15126.6.) This is untenable.

(*Ibid*.)

---

[3] Confirming the legitimacy of our concern that the City intends to impermissibly rely on its "surplus land" designation to avoid the required consideration of feasible alternative locations, the staff report asserts, "the City is not committing itself to any final project now and may still decide not to move forward with a project ***on the site***." (Staff report, p. 6, emphasis added.) This tellingly omits any mention of approving an affordable housing project on an alternative site. Similar circumscribed CEQA review over the proposed project was another factor leading the court in *Save Tara* to conclude that the agency had committed to the project. (*Save Tara, supra*, 45 Cal.4th at 141.)

The City's prior commitment to the 1 Hamilton Drive site, coupled with the now-proposed significant financial commitment[4] to the Project in the draft ENA, creates precisely the "bureaucratic and financial momentum . . . providing a strong incentive to ignore environmental concerns." (*Save Tara*, *supra*, 45 Cal.4th at 135.) This is both unlawful and unacceptable.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: 

Patrick M. Soluri

PMS/mre

cc: John McCauley, Mayor (jmccauley@cityofmillvalley.org)
Jim Wickham, Vice Mayor (jwickham@cityofmillvalley.org)
Urban Carmel, Councilmember (ucarmel@cityofmillvalley.org)
Sashi McEntee, Councilmember (smcentee@cityofmillvalley.org)
Stephen Burke, Councilmember (c/o cityclerk@cityofmillvalley.org)
G. Inder Khalsa, City Attorney (gkhalsa@rwglaw.com)

[4] It is unclear why the City is providing this financial subsidy since the staff report asserts, "The EAH Team is . . . well-capitalized not-for-profit corporation." (Staff report, p. 3.) The staff report fails to explain why a "well capitalized" developer requires a subsidy of several hundred thousand dollars.