From: Borre Winckel [mailto:Borre@biasandiego.org]
Sent: Monday, September 16, 2013 3:50 PM
To: John Coates; Manager Internet Email
Cc: Council Internet Email; Matt Adams; Mike McSweeney
Subject: BIA Request to pull Housing Commission Agenda Item No. 2
Importance: High

City of Carlsbad Housing Commission
c/o John Coates, City Manager
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008

Re: BIA PROTEST: Res. No. 2013-003; Affordable Housing Impact Fee – September 19, 2013 Hearing by the Carlsbad Housing Commission

Dear Mr. Coates,

The Building Industry Association of San Diego County (hereafter "BIA") received notice from your Housing Commission on September 10, 2013. The notice informs us that the Commission intends to adopt an unprecedented and extraordinary high affordable housing "In-lieu" fee (hereafter the "fee") when it convenes on September 19, 2013. We ask that you please use the powers of your office to pull the item. The nature of the fee and its level are both highly controversial and perpetuates the myth that market rate housing causes affordable housing constraints. No parallel to any other industry exists which would give this bizarre "cause and effect" supposition its intellectually sound underpinning. If anything, this very fee which would make housing further unaffordable fully exposes why affordable housing challenges persist and why the entire causal premise is flawed. And, ironically, because it uniquely targets new apartment units, it diminishes the very housing option most people chose to fit their wallet! Please note this protest does not challenge the City's existing Inclusionary Zoning Ordinance.

BIA is the industry's formal representative and qualified to comment on the proposal. However, with nine days separating us from receipt of first notice to the adoption date it does not give us anywhere near sufficient time to respond, much less to the fee study which we received last Thursday. We anticipate that the Commission's action shall amount to a recommendation to the City Council, which shall or shall not take up the item on its own time table. However, the Commission's mere discussion of this fee – which we believe shall amount an illegal tax - will have damaging consequences for our members who do business in your city. The Commission's short timetable and unimaginative approach to fixing the world "Post-RDA's collapse" forces us to communicate aggressively, which we regret. We are a solutions oriented organization but were not invited to provide input.

Consequently, the BIA opposes and shall vigorously challenge the proposed adoption of Resolution No. 2013-003, intended to establish an affordable housing fee on market-rate housing. The Resolution forces the market rate housing industry to fully bear the financial

consequences stemming from the collapse of the Redevelopment Agencies in California. The cost to build housing affordable to the citizens of Carlsbad will be increased dramatically by the new fees proposed by City staff, exacerbating the housing shortage which already exists. Excessive regulation, such as that now proposed by Carlsbad explains why California has major affordable housing challenges. The real solution to the Redevelopment aftermath is the creation of a task force made up of experts which can advise the Commission on any number of programs and market-based incentives which make quality affordable housing a reality. The proposed fee-based approach is punitive and it will not yield meaningful results. A $20 per s.f. fee on rental housing would, in fact, simply drive new multi-family construction to adjacent jurisdictions, and further drive up the cost of living in the existing Carlsbad rental market housing stock. As a result, new affordable housing challenges shall arise. Rather than a fee-based solution to affordable housing, the BIA asks, instead, for the opportunity to discuss with the City comprehensive affordable housing policy reform policies such as those now under review by the City of San Diego, San Marcos, Vista and Oceanside.

The proposed fee on new rental housing is illegal. Among other reasons, it violates the Costa-Hawkins Rental Housing Act. In-lieu fees were squarely addressed by the court of appeal in Palmer/Sixth Street v. City of Los Angeles (2009) 175 Cal.App.4th 1396. There, the court struck down fees intended to mitigate the impacts of market rate rental housing on the need for new affordable housing stock, just as Carlsbad now proposes:

> Because the affordable housing requirements conflict with and are inimical to the Costa-Hawkins Act, it necessarily follows that the in lieu fee provision, which exists only within the context of the preempted affordable housing requirements, is also preempted by the Act.

City staff may be anticipating AB 1229 becoming law if signed by the Governor. As of the date of the City public notice and staff report, AB 1229 is not law in California, and thus the proposed fee structure is unquestionably illegal. Simply imposing the fee through a provision of the Municipal Code other than the Inclusionary Housing Ordinance, as staff suggests, does not change the nature of the fee imposition, or avoid the preemption of the Costa Hawkins Act.

BIA does not limit its opposition to the Costa Hawkins Act. We vigorously oppose the Fee Study by the Commission's consultant Keyser Marston of September, 2013, which purports to justify the proposed Fee. The BIA has great familiarity with Keyser Marston and its body of work across the State. We find it of great interest that at the same time that Carlsbad is considering a $20 per s.f. fee for rental units, San Marcos was provided with a Study that limited this Fee to approx. $10,700 per unit held for sale, while the City of San Diego is apparently at $8.25 per s.f. and Oceanside at $1.75 per s.f. In other words, Keyser Marston provides its clients with the fee the client wants and deems "right sized" for the market. While it can be argued that some of the aforesaid cities have a different housing market, such differences are not that great to yield such wildly different study outcomes.

More to the point, BIA rejects the argument that a new house or apartment unit built causes the need for a new (affordable) housing. There simply is no "essential nexus" between the construction of new housing and the need for affordable housing. Keyser Marston must have

prepared the Carlsbad Nexus Study prior to the recent US Supreme Court ruling in Koontz v. St. Johns River Water Management District, as it makes no attempt to satisfy the basic constitutional requirements set forth in that decision. The US Supreme Court confirmed that a heightened nexus (cause and effect) standard must exist between the "project" and the alleged impact it causes. Furthermore, a measure of proportionality must be established between the project's impact and the remedy imposed to address the impact. For years, the courts required a mere associational relationship between the project, the impact and the fee. The Keyser Marston study, while elaborate in its findings, fails to satisfy the essential nexus/rough proportionality requirement which is now the law of the land. At a minimum, the study must be revised to address the requirements enunciated by the Supreme Court.

Passage of California Proposition 26 in 2011 shall also constitute a major challenge for the City to adopt this new tax on housing. The City has not obtained a 2/3 voter majority from its citizenry for what amounts to nothing more than a regulatory fee. The proposed fee is not and cannot be couched as a Development Impact Fee under the Mitigation Fee Act (Gov. Code Section 66000 et seq.). Under Prop 26 this Fee is a tax unless the City can prove – as it is required - that it is not a tax by showing that it fits within one of seven specific exceptions that would allow certain defined types of fees / charges. We already know that this proposal shall fail each of these seven required exceptions.

We believe that the City can adopt any number of creative reforms which actually lowers housing cost production. Many of our members are affordable housing builders as well as contractors, trades, suppliers and vendors to this specific market. We have much expertise to offer to solve the issue at hand. However, rushing the adoption of a huge fee increase absent the honest opportunity for constructive dialogue intended to result in a "win win" scenario for all parties involved will be counterproductive to the goal of producing affordable housing, and shall meet with stiff opposition.

We look forward to the invitation.

Sincerely,

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