From:	Michelle Pase
To:	REstanislau@surfcity-hb.org; supplementalcomm@surfcity-hb.org; CITY COUNCIL (INCL. CMO STAFF)
Cc:	Michael Leifer; Erin Naderi; Michelle Pase; Briant@thieneseng.com
Subject:	10/15/2024 City Council Agenda Item No. 18 - Bolsa Chica Senior Living Community - Objection Letter
Date:	Tuesday, October 15, 2024 12:21:19 PM
Attachments:	Letter to City Council 2024 10 15 - Thienes Objection Letter.pdf

Good afternoon.

At the request of Mr. Leifer, attached in PDF format is a correspondence of today's date regarding Agenda Item No. 18 for tonight's City Council meeting.

Please review.

Thanks.

Michelle Pase, Secretary to Michael H. Leifer, Erin B. Naderi and Aaron M. Rothrock

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File No.: -

October 15, 2024

VIA E-MAIL

Mayor and City Councilmembers of the City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
c/o Robin Estanislau, City Clerk
REstanislau@surfcity-hb.org
SupplementalComm@surfcity-hb.org
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Re: 10/15/2024 City Council Agenda Item No. 18 - Bolsa Chica Senior Living Community
Objection Letter

Dear Hon. Mayor and City Council Members:

This letter is submitted on behalf of appellant Brian Thienes and is a supplement to the prior letters submitted by and/or on behalf of Mr. Thienes. As discussed herein, the City should not approve what the applicant refers to as the Bolsa Chica Senior Living Community Project ("Project") at this time as submitted. The City should not approve a host of material amendments to its municipal operating requirements: amend its General Plan, amend its Zoning Map and Zoning Text, adopt a Specific Plan to alter the zoning requirements for this property for this project. The City should grant Mr. Thienes' appeal reversing the Planning Commission's approval of the Conditional Use Permit which was an abuse of discretion by failing to adopt conditions to enforce the claimed nature of the project. Additionally, the City should not approve and certify the revised Environmental Impact Report ("EIR") as it does not comply with CEQA.

To be clear, as Mr. Thienes previously advised, including to this City Council nearly a year ago when the prior iteration of this project was before it, Mr. Thienes is not opposed to the development of a senior living facility. But this proposed Project is improper as it is a giant building/complex, close to the street, looming over the surrounding neighborhood and uses, that over-intensifies the use and is completely out of character with the surrounding area of Huntington Beach.

There is a total lack of transparency in the processing of this proposed Project and the approvals sought. Mr. Thienes objects to the fundamentally unfair process that the City is undertaking. (See *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 720-723.) To attempt to obtain approval of the requested host of amendments

to the City's land use requirements, the applicant claims that the proposed Project will be a "convalescent facility." Without basis and without proposing enforcement conditions, City staff echoes the applicant's unsupported claim.

The existing CG zone already allows a convalescent facility subject to a conditional use permit. The purported reasons for all of the sought for land use changes for this Project are not explained by City staff or the applicant. Applicant's attempt to pull a fast one on the City to obtain approval is not appropriate but is somewhat to be expected. City staff's failure to shine a bright light on the host of requested land use amendments is totally unjustified.

The applicant and City staff claim that the proposed Project complies with the current CG zoning other than some of the biggest issues that apply to proper real estate development—floor area ratio (FAR), setback of building mass distance to the street and parking area and parking number requirements. In short, applicant and staff claim that the Project complies, except that it seeks excuses and special dispensation because of its massiveness and density. Another way of putting it, the Project does not comply with the most fundamental requirements relating to size and density.

While claiming the Project "complies" with existing zoning, applicant and staff claim that a host of major amendments are required leading off with a General Plan Amendment, Zoning Map and Zoning text amendment and Specific Plan. Are these major changes sought in a large area of the City of Huntington Beach? No. The host of changes requested just happen to the target applicant's site. Why? If the applicant's Project is supposedly consistent with existing zoning except for FAR, setback and parking, as claimed by the applicant and staff, why is the City Council being asked to take all of these major actions to permit this use? Something is not adding up. The applicants attempt to drastically change the General Plan, Zoning Code and adopt a Specific Plan to allow this Project and avoid seeking a variance is a red flag. This Project is not entitled to a variance from the City standards. The City's Zoning Code and established case-law establish that a variance cannot be provided to grant special privilege but is limited to special circumstances such as where the size, shape or topography of a property justify a variance from the strict application of the zoning code. Here, the Project applicant seeks special privilege. The applicant's end-around attempt to obtain a special privilege variance is improper. The City staff and applicant's lack of transparency to try an end-around the City's own law is unacceptable and must be rejected.

The applicant's strategy is a camouflaged attempt, unfortunately with the support of staff, to evade the residential zoning restrictions already applicable to senior housing and residential care facilities as identified in the City's General Plan and Zoning Code. The proposed Project is a senior housing project that must fall within the residential zoning standards. The proposed Project looks like a **high-density residential** project, it operates like a **high-**

density residential project. The units are residential units as is evident by the Clearwater documents, submitted separately by Mr. Thienes, which confirm the Project is for age-limited apartment homes. If it walks like a duck, talks like a duck—it is a duck. Here, the Project is a **high-density residential project** in contravention of the General Plan and Zoning Code.

A conditional use permit typically imposes conditions on the approved use. It includes conditions for the ongoing operation of the permitted use. The conditional use permit can be enforced by the City or third-parties. Here, however, **there is nothing in the proposed Specific Plan or the Conditions of Approval that limit the use of the proposed Project-site in any way. There is no mechanism to enforce.** The representation is made of certain unit types—memory care and assisted living units. However, there is no condition in the Conditions of Approval limiting the use of the units for the ongoing operation of the permitted use. There is no deed restriction to be recorded on the property as a covenant to limit the use. The proposed Specific Plan does not include any limitation of use of the property. There is no definition as to what constitutes "memory care" versus "assisted living" units. To define is to limit. Without definition, there is no limitation.

The proposed Specific Plan does not limit the use or specify the permitted or conditionally permitted uses of the property covered by the Specific Plan (which is limited to the specific site proposed for the Project). Instead, Section 2.2 of the proposed Specific Plan states "The proposed General Plan Land Use designation for the Specific Plan Area is Mixed-Use, which shall allow for the proposed Senior Care Community, to include senior care **residential units** *accommodating* assisted living and memory care…" (Attachment 6, Draft Specific Plan, p. 14 [emphasis added].) "Accommodating" what might be is no limit. There is no enforcement mechanism. If approved, the City Council would be abandoning its role and obligations. That staff has recommended unconditional approval for a conditional use permit is astounding—astoundingly bad.

Not only is there no limitation of use in the Specific Plan, but the Specific Plan also does not identify any specified uses. The proposed amendments include a General Plan Amendment to designate the proposed Project site as Mixed Use. However, in contravention to the General Plan and the City's Zoning Code, the proposed Specific Plan does not identify uses that are permitted or conditionally permitted uses. (See Zoning Code Chapter 21-215.) Indeed, the Development Standards provided in Section 3.2 of the proposed Specific Plan do not provide any use limitations. This deficiency is recognized in the Attachment 1 Suggested Findings of Approval which states that the Proposed Specific Plan should be modified including "Section 3.2 Development Standards shall identify that a convalescent land use requires approval of a Conditional Use Permit by the Planning Commission, and include a discussion of any other on-site permitted uses." (Attachment 1, p. Attachment No. 1.8 [¶ 3.d.].) **The proposed Specific Plan has not been so amended or modified as is evident by the proposed Draft Specific Plan**

attached as Attachment 6.[1] (See Attachment 6, p. 18-19 [no permitted uses identified].) Staff has removed the "shalls" and the "shall nots".

The Project is not consistent with the General Plan and the proposed General Plan Amendment causes inconsistency within the General Plan. It is an abuse of discretion for this City Council to approve the Project and all the applicant's requested amendments when it is inconsistent with the General Plan. The Council and staff know this. Where the City Council fails to proceed in a manner required by law and its decision is not supported by findings or the findings are not supported by substantial evidence, an abuse of discretion is stablished. (See *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) The City's discretion is not unlimited. In particular the law recognizes a difference between General Plan or land use policies that are "amorphous in nature" and those that are "mandatory and anything but amorphous." (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341.) For example in the *Families Unafraid* case, the appellate court found inconsistency when the county's general plan limited low-density residential zoning to specific areas, and the county approved rezoning of the project site to low-density residential even though it was outside those specific areas. (See *Id.* at pp. 1338-1342.) A city abuses its discretion when it approves a project that is inconsistent with the General Plan and the courts will grant a writ where a "project…conflicts with a general plan policy that is fundamental, mandatory and clear." (*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782.)

The Housing Element establishes that the proposed use is a residential use. Specifically, the Housing Element identifies that senior housing and community care facilities including residential community facilities, are residential uses. (See General Plan, Housing Element, p. III-4 [Development Standards for Senior Housing], p. III-14 to III-15 [community care facilities].) The proposed Project claims (without commitment or mandatory condition) that it will be a "Residential Care Facility for the Elderly." Thus, it falls within the "Community Care

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[1] The City's processing of this application is confounding and defies logic. The Planning Commission could only make recommendations to the City Council to adopt a General Plan Amendment, Zoning Map and Zoning Text Amendment and Specific Plan, and certify the environmental document. Yet, before the City Council has had the opportunity to take any such action, the Planning Commission has already purported to approve a Conditional Use Permit—bereft of conditions and enforcement mechanisms—flipping the fundamentals of the process upside down. At a minimum, any processing of a Conditional Use Permit for the proposed Project by the Planning Commission should occur, if at all, only after the City Council acts on the proposed General Plan Amendment, Zoning amendments and certification of the environmental document.

Facilities" discussion in the Housing Element. Indeed, that discussion confirms that residential care homes for the elderly/assisted living facilities are considered residential uses in the Housing Element. (General Plan, Housing Element, p. III-14 to III-15.)

The General Plan Housing Element imposes requirements for such residential uses. Those requirements include, but are not limited to, maximum building heights of 35-feet and a maximum density of 35 units per acre. (General Plan, Housing Element, Table III-1, p. III-2 and III-3.) These requirements apply to the proposed Project as demonstrated by the General Plan's identification of such similar facilities in the Housing Element. These standards are "mandatory and anything but amorphous" and must be complied with. (*Families Unafraid, supra,* 62 Cal.App.4th 1341.) **The proposed Project does not comply with these General Plan requirements**. The Project proposes 159 units on the 2.81 net acre[2] project site—**a density of 56.6 units per acre**.[3] That density smashes the 35 dwelling units per acre maximum in the General Plan. The density exceeds even that permitted in the residential high density zone! The proposed Project also exceeds the 35-feet height limitation in the General Plan.

The General Plan requires and limits "the maximum building height for all residential zoning districts is 35-feet." (General Plan, Housing Element, III-3.) It acknowledges and provides some examples of exceptions to the building height limitation for mixed use and multi-family projects subject to specific plans, identifying the Seabridge, Bella Terra, Downtown and Beach and Edinger Corridors Specific Plans. Those examples, highlight the improper spot zoning that is being proposed for this Project. Each of the Specific Plan examples provided in the General Plan are where the Specific Plan is not a spot-zone of one property for a single, small, less than 3-acre site seeking massive unconstrained privileges.

- The Seabridge Specific Plan covers 60+ acres of land and has densities of 25 dwelling units per acre in Area B and 50 dwelling units per acre in Area B.
- The Bella Terra Specific Plan covers 63 acres and has a maximum density of 45 units per acre.
- The Downtown Specific Plan covers 336 acres and has a maximum density of 30-50 units per acre.

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[2] The Specific Plan, Staff Report and EIR are misleading as to the project-site acreage. All refer to a 3.1 acre project site. Yet, the Attachment 10 site plans make clear that the net acreage for the proposed project site is 2.81 acres.

[3] The proposed Specific Plan would allow for development of 160 units which would provide a density of 56.9 units per acre.

- The Beach and Edinger Corridor Specific Plan covers 459 acres.

Compare those with the proposed Specific Plan here that only covers a tiny fraction of the smallest of the others, 2.81 net acres, and proposes a density in excess of 55 units per acre. Moreover, the General Plan discusses such variances for mixed use and multi-family residential. Here, while claiming "mixed use," the proposed Project only proposes one use—the convalescent facility/elder care facility use.[4]

The General Plan Land Use Element's discussion of Specific Plans further demonstrates the impropriety of this proposed Specific Plan to spot zone the 2.81 acres. The General Plan states that the adopted specific plans are used to "focus on the characteristics unique to an area." (See General Plan, Land Use Element, p. 2-15.) As discussed above, those "areas" are not to provide preferential spot zoning for one property with one specific use such is proposed here.

Moreover, the City's Zoning Code likewise identifies this use as a residential use and provides development standards of a maximum density of 35 units per acre. (See HB Zoning Code §§ 210.04, 210.08 and 210.06.)

The City's proposed "finding" of approval claiming General Plan and Zoning Code consistency are not supported by evidence. As stated in prior letters submitted by or on behalf of Mr. Thienes objecting to this proposed Project (including prior iterations), the City's attempt to approve a General Plan Amendment for this proposed Project, and then to pretend that there is General Plan consistency for the other approvals is disingenuous. Even setting aside the General

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[4] Yet another General Plan inconsistency, the proposed Project does not comply with the "Mixed Use Designation" in the General Plan Land Use Element which states, "accommodates mixed-use development that currently occurs entirely within established specific plan areas. The designation is intended to provide for compact, pedestrian oriented developments with commercial centers that range in scale from small neighborhood-serving to large community—and regional serving centers. These developments will generally feature mixed types of commercial uses, and may include multiple-family residential housing, civic and cultural uses, and open spaces accessible to the public." As discussed herein, there are no commercial, civil, cultural uses proposed or open spaces accessible to the public. The applicant is seeking to use the "Mixed Use" designation without coming close to proposing a mixed use development in order to attempt to improperly intensify the development. Indeed, there is no parking analysis for any use beyond the 159 units proposed. (See Attachment 10, p. 1, Parking Summary.) **The proposed General Plan Amendment to change the land use designation from CG to Mixed Use when the Project does not comply with the Mixed Use Designation of the General Plan creates General Plan <u>inconsistency</u>.**

Plan Amendment proposed, as discussed above, the proposed Project is not consistent with the residential standards established in the General Plan and Zoning Code.

Not only do those documents confirm that the proposed use must comply with the residential standards in the General Plan and Zoning Code, but the City's own proposed findings concede as such. In order to assert General Plan consistency, the City asserts that the proposed use will "assist in meeting the overall housing needs of the community" and refers to the use as providing additional "senior housing stock." (Attachment 1, p. Attachment No. 1.1.) Likewise, the City admits that the "proposed project is quasi-residential"—but then it fails to analyze the Project according to the residential standards established in the General Plan and Zoning Code. (*Ibid.*)

Moreover, as discussed in prior letters submitted by or on behalf of Mr. Thienes objecting to this proposed Project (including prior iterations), the City's assertion of compatibility "in proportion, scale and character of the surrounding land uses" is contrary to the evidence. Again, there is no analysis provided by staff in the staff report or elsewhere to support such assertions/findings. The public has not been made aware of any analysis conducted by the City or staff to support the statements and findings. At a minimum, any analysis that was conducted has not been disclosed to the public for review, consideration and comment. The City's failure to analyze these proposed actions appears to be an attempt to obfuscate. It provides at least the appearance that the City is not impartial in its review of this **high-density residential project**. The City and staff appear very partial to bending or contradicting City rules in support of this spot-zoned, density level smashing, unconditional residential project. The City conduct toward this proposed Project is incredibly unseemly.

As is obvious from even a quick view of the surrounding area, there are no massive, four-story above-ground structures with subterranean levels together with minimal street setbacks. The surrounding multi-family residential developments comply with the maximum density and height standards in the General Plan and Zoning Code. The proposed Project does not.

The project-specific Specific Plan (which itself lacks specificity) establishes there is no compatibility or consistency in proportion, scale or massing to the neighborhood. The draft Specific Plan confirms that the surrounding land uses are one and two-story buildings. (Attachment 6, Draft Specific Plan, p. 7.) The Specific Plan acknowledges that the "scale and massing" of the proposed project "will differ from a standard residential apartment building of the same count." (*Ibid.*) Finally, a slight recognition of the patently obvious. However, it is a tremendous understatement. The density of this proposed project is outlandish. In comparison to the area, the density of this Project would stand out like a sore thumb. The Specific Plan confirms that the Project "requires" General Plan and Zoning amendments in order to

accommodate the increased density over the current standards: "higher intensity than currently permitted under Huntington Beach's commercial zoning". (*Id.* at p. 9.)

The City's Staff Report perpetuates the City's lack of transparency. In response to Mr. Thienes's objection that there is a lack of evidence, City Staff do not point to particular evidence to support the suggested findings. Instead, the Staff Report takes out a linguistic broom to make sweeping statements like "The administrative record for this project is substantial and every processing requirement by law has been met" and that "all findings of the Revised EIR are supported by substantial evidence contained within the administrative record." Staff's word-broom seeks to claim that there is support somewhere, but we won't tell you what that support is or where it might be found.

The City's failure to support its proposed findings, or at minimum, its refusal to inform the public of the purported support for the proposed findings, is entirely improper and requires denial of the requested approvals and denial of this project.

The Revised EIR remains inadequate. For the reasons previously identified in letters submitted by or on behalf of Mr. Thienes (and incorporated herein by reference), the Revised EIR remains defective. The Revised EIR still fails to analyze cumulative impacts. Where, as here, a project provides a "catalyst for further development," such future development cannot be ignored or deferred based on assertions that future development proposals will be subject to further environmental review at the time of development. (*City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1333, 1338.) The analysis of such impacts is required even if it may be impossible to specify or predict the precise development that will eventually occur. (*Id.* at p. 1335-1336.) Here, that analysis would have to include further **high-density residential** development. The EIR's failure to consider such cumulative impacts is improper.

The Revised EIR further continues to fail to analyze a reduced density/intensity alternative that would comply with the existing General Plan and Zoning standards including those applicable to residential uses. Here, the EIR simply deletes the prior Project-iteration and replaces it with the revised Project. However, there is still no analysis of a reduced density/intensity alternative. CEQA requires EIRs to identify and analyze a reasonable range of alternatives in order to "foster informed decisionmaking and public participation." (Pub. Res. Code, §§ 21100, subd. (b)(4); Guidelines, § 15126.6; see *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059 [EIR for new city general plan found legally inadequate because it did not consider a reduced development alternative even though it would have reduced significant impacts and met most of city's stated objectives].) Alternatives must be able to implement most project objectives, but they need not be able to implement all of them. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477.) The Guidelines explain that the analysis should focus on alternatives that can eliminate or reduce

significant environmental impacts even if it would impede attainment of project objectives to some degree or be more costly. (Guidelines, § 15126.6, subd. (a).) Analysis of such alternatives is important and required for CEQA, but is equally important in light of the many General Plan and Zoning amendments sought by the applicant to intensify the use of the property. Indeed, the prior EIR demonstrates the inadequate alternative analysis. The prior EIR was for a more dense and more intense version of the Project, yet it reached the same conclusions.

The EIR's Mitigation Monitoring and Reporting Program remains deficient. It defers analysis until the future. Analysis deferred is analysis denied and deferral of consideration and application of mitigation measures does not comply with CEQA. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.4th 918, 939, 941.) The City's failure to adopt a comprehensive MMRP to potentially take a "we may require mitigation later, maybe" approach is improper. (See *Banning Ranch Conservancy v. City of Newport Beach, supra*, 2 Cal.4th at p. 939; *Lotus v. Dept. of Transp.* (2014) 223 Cal.App.4th 645 [improper to rely on "construction techniques" rather than enforceable mitigation measures to reduce impacts]; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 81 [analysis of impacts after environmental review improperly deferred analysis]; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70 [city improperly deferred mitigation measures until after project approval].)

In addition, the EIR's project description is inadequate. Again, as discussed above, the General Plan Amendment proposes to change the land use designation of the subject Project-site to mixed use. Yet, there is no description of the "mixed uses" in any of the documents. The City's proposed Findings of Approval require the proposed Specific Plan to be amended to identify the on-site permitted uses. That has not occurred to date. And the EIR's project description does not discuss the uses that are proposed to be permitted by the new General Plan designation of "mixed use" or the yet-to-be specified on-site permitted uses. The project description does not comply with Section 15124 of the CEQA Guidelines. The inadequate project description infects the entire EIR process and renders the EIR invalid. (See *County of Inyo v. City of Los Angeles* (1977) 32 Cal.App.3d 795 [EIR rejected because project description inaccurate]; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398.)

Mr. Thienes' comments are timely submitted. The following quote from *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201, amply establishes that Mr. Thienes' comments are timely submitted:

> City appears to have thought that the public's role in the environmental review process ends when the public comment period expires. Apparently, it did not realize that if a public

> hearing is conducted on project approval, then new environmental objections could be made until close of this hearing. (*§ 21177, subd. (b)*; *Guidelines, § 15202, subd. (b)*; *Hillside, supra, 83 Cal.App.4th at p. 1263*.) If the decisionmaking body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk. If a CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised at any point prior to close of the hearing on project approval.

Based on the foregoing and incorporating any and all objections and comments in opposition to this proposed Project made by others during the processing of these various requests, Mr. Thienes requests that the City Council deny certification of the Final EIR, deny General Plan Amendment 21-004, deny Zoning Map Amendment No. 21-003, deny Zoning Text Amendment 22-005, and approve the appeals of and reverse the Planning Commission's approval of Conditional Use Permit No. 21-024.

Very truly yours,

Michael H. Leifer

MHL:ebn