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Oak Grove developers sue Pleasanton to force housing project OK

Claim opponents failed to include development agreement in referendum aimed at overturning City Council approval

by **Jeb Bing**
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In a move that could impact voter turnout and preferences in the Nov. 2 mayoral and City Council election in Pleasanton, landowners of 562 acres in the city's southeast hills are asking the Alameda County Superior Court to rule that they can proceed with plans to develop 51 large lots on a part of their property for custom homes.

Although Pleasanton voters sided with opponents of the development last June 8 in a referendum that overturned the council's approval of the project on Nov. 2, 2007, the developers, Jennifer and Frederic Lin, argue in their suit that the referendum only concerned Ordinance No. 1961, which was a Planned Unit Development (PUD) plan for how the lots would be placed, not the project approval.

They claim that the council, as part of its action in 2007 also approved Ordinance No. 1962, which was the more important development agreement that authorized the Lins to proceed with their development. By failing to include 1962 in their referendum, the Save Pleasanton Hills citizens' group headed by former Councilwoman Kay Ayala missed its opportunity to referend the council's 4-1 vote that allowed the development.

The one council vote against Oak Grove in that Nov. 2, 2007 meeting was by Councilwoman Cindy McGovern, who is now a candidate for mayor in the upcoming municipal election in November. Mayor Jennifer Hosterman and council members Cheryl Cook-Kallio and Jerry Thorne, all candidates for re-election in November, voted to approve Oak Grove. Councilman Matt Sullivan also voted in favor, although he later sided with opponents on subsequent votes as efforts by Ayala's group moved forward.

Karla Brown, a Realtor who also is on the November ballot seeking a seat on the council, joined Ayala as co-coordinator of the citizens' group to back the referendum to reverse the council's approval of Oak Grove.

In a series of legal moves following the council's 2007 vote, Ayala's group and the Lins battled it out in Superior Court, the state Court of Appeal and the state Supreme Court, with the Lins challenging the validity of signatures on petitions Ayala and her supporters filed in early December 2007 to force a referendum. Superior Court Judge Frank Roesch ruled in favor of the Lins, but that decision was overturned by the Court of Appeal and subsequently the Supreme Court decided against hearing an appeal of that ruling. After 2-1/2 years of litigation that cost hundreds of thousands of dollars, which the Lins had to pay (although no specific amount has been given), the referendum was finally held last June 8.

Curiously, this new suit by the Lins seeking "Injunctive Relief" so that they can proceed under the Ordinance 1992 development agreement that they, the council and City Manager Nelson Fialho signed, was filed the same date although they only delivered a copy of the suit to City Atty. Jonathan Lowell late last Friday. Until then, neither the city nor the public were aware of the lawsuit.

By suing the city and the City Council, the Lins have now brought the local government into the fray—and the costs—of the Oak Grove approval issue. Up to now, a majority on the council has monitored the dispute between the Lins and Kay Ayala's group but decided against having its then-City Attorney Michael Roush from joining in the court cases, thereby avoiding any extra legal costs other than Roush's time in attending court hearings. That decision by the council angered Ayala and her supporters, who spent hours complaining about the inaction at City Council meetings during much of the last two years.

With the approval of the referendum that overturned the council's 2007 vote of approval for Oak Grove, Ayala and the Save Pleasanton's Hills coalition thanked voters and considered their efforts a success. With this new suit by the Lins, they can't be so sure.

If the courts declare the Lins' development agreement still in force, they can proceed to develop Oak Grove, which would include giving nearly 500 acres of their property to the city of Pleasanton free of charge for use as a public park. That agreement also commits the Lins to providing other amenities, including \$1 million in traffic mitigation fees, an all-terrain fire truck and an advance on fees future homeowners in their development would be assessed by the Pleasanton school district.

Further, because the development agreement was signed in November, 2007, the 30-days opponents have to file for a referendum have long since passed.

Also, while the council carefully sidestepped entangling the city in the Ayala vs. Lins court cases, thereby avoiding any cost to taxpayers, it could now be on the hook for hundreds of thousands, if not millions of dollars in legal fees if it defends itself in the Lins' new lawsuit, where it is the sole defendant. If the council decides to defend the city against the Lins, the legal battle could well extend once again to the Superior Court, Court of Appeal and state Supreme Court no matter which side prevails as the process moves forward.

At its next meeting on Aug. 17, the City Council is expected to approve a settlement agreement that will award two affordable housing coalitions \$1.9-million in (taxpayer-paid) legal fees they incurred in their successful court fight to nullify the city's 1996 housing cap, which the city has now done. In addition, the city also paid its outside counsel Tom Brown \$500,000 for his legal services in representing the city in the litigation.

Of course, the council could also vote to accept the Lins' argument that the June 8 referendum left Ordinance 1962 in place and allow the Oak Grove project to proceed. That would require a majority vote and no legal costs. The same three who voted in favor of Oak Grove—Hosterman, Cook-Kallio and Thorne—still constitute the majority on the council, at least until the Nov. 2 municipal election.

If the council decides to defend the city against the Lins' suit, it will likely argue that Ordinance 1991 and Ordinance 1992 were inseparable, that a "poison pill" provision was inserted into the language of both ordinances that in effect makes one invalid if the other is declared invalid.

But in their lawsuit, the Lins, through their attorney Andrew B. Sabey of the San Francisco law firm of Cox, Castle & Nicholson LLP, argue that the poison pill language was only included in the text of the ordinances and was not "a condition or term in the actual Development Agreement."

"The Development Agreement is an integrated contract and makes no reference to the 'poison pill' language whatsoever," Sabey states in the lawsuit.

"The city has ordered the PUD referendum petition to be placed on the ballot for the June 8, 2010 regular election," Sabey continues in his Development Agreement brief filed the same date. "The referendum, if successful, would set aside the PUD Ordinance. Setting aside the PUD Ordinance will give rise to a claim, already informally asserted by proponents of the PUD Referendum Petition, that referendum will also have the effect of setting aside the Development Agreement even though the Development Agreement itself was not referended and should remain in full force and effect regardless of the outcome of the PUD Referendum Petition."

"Thus," Sabey adds, "the pending PUD Referendum Petition presents a circumstance requiring the city to acknowledge, protect and reaffirm the Development Agreement and the vest rights it confers in favor of the Lins."

If the City Council decides to defend the city against the Lins' claim, the first hearings in Superior Court are expected to start in late spring or summer of 2011.

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