MEMORANDUM

DATE: April 6, 2017

TO: JOSE GUZMAN, PLANNING AND ZONING DIRECTOR

FROM: GLENN GIMBUT, ASSISTANT CITY ATTORNEY

RE: LAS BRISAS TOWNHOUSE SUBDIVISION VARIANCES

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This memorandum will serve as a legal opinion regarding the propriety of the granting of variances for the lots in Las Brisas Townhouse subdivision for the proposed development of the project known as Las Brisas Sunset Apartments. On or about March 20, 2017 you brought to the attention of the legal department that the development appeared to be proceeding without full compliance with the zoning code of the City of San Luis and multiple letters from the department had been issued in error. As a result a letter was issued on March 21, 2017 rescinding approval for the issuance of building permits so that the status quo could be preserved in order to determine the best way to proceed in a legal manner. A conference occurred that afternoon with the representatives of Comite de Bien Estar, Inc. ("Comite") and the consensus of that meeting was that Comite would apply for appropriate variances and the matter would proceed before the City Council sitting as the Board of Adjustment on April 12, 2017. A legal issue has been presented as to whether this matter is legally eligible for a variance.

BACKGROUND

The townhouse subdivision development known as Las Brisas Sunset Apartments is being developed as low income housing tax credit units, and while it will be initially operated like a set of apartments, the actual development is as separate townhomes as a multiple residential townhouse subdivision under the R-3 zoning district. The lots were approved as a townhouse subdivision in 2010 in a replatted subdivision known as Las Brisas Townhouse Subdivision.

The current proposed development as a low income housing tax credit project began approximately 5 years ago, but has been the subject of intense focus for the past couple of years. In February of 2015, the present layout plus preliminary building plans were reviewed, and a letter sent by the Plans Examiner of the Building Department stated that "there were no zoning issues" but reserved the right to raise building code related matters. The Building Safety Director and Zoning Administrator was copied. (This was at least the second letter from the Plans Examiner which came to this conclusion.) In the fall of 2016 plans were submitted again, and again comments were made, including comments regarding covered parking, which were answered by the developer. This letter, comments, and the review were supervised by the Building Safety Director and Zoning Administrator. On December 8, 2016 the Building Safety

Director and Zoning Administrator issued a letter that all was approved and building permits would be issued upon proper payment of fees.

The Building Safety Director and Zoning Administrator retired, and Jose Guzman became acting Department Director. As a staff member he had mentioned to the Building Safety Director and Zoning Administrator concerns with the zoning code, but apparently his concerns were not addressed by his Department Director. The zoning code for an R-3 zoning district has required 2 covered parking places for each townhouse since April of 2012. (The current zoning code was adopted after the development of the existing townhouse units.) What is now §152.093.E.6 of the City Code requires covered parking in accordance with §§152.240 through 152.244. Table No. 15 at §152.243 provides that townhouses must have 2 parking spaces per unit. Read together, this means two covered parking spaces per unit. Again this issue was raised by Mr. Guzman but apparently never communicated to the developer by the Building Safety Director and Zoning Administrator. It is assumed that the Department Director felt that approval of the subdivision plat in 2010 grandfathered the construction of actual buildings on the remaining vacant lots. That is simply not the law. (At no time is the legality of the lots at issue, nor the right to develop townhomes on the lots at issue, just the actual design of the townhouses currently proposed to be built and whether these designs comport to the zoning code as opposed to the building code.)

Further, while the zoning code for an R-3 district allowed zero lot line development between the units of the townhouse subdivision, it required that there be a 7 foot side yard setback between the units at the end(s) of the subdivision and neighboring properties that are not part of the townhouse developments. See §152.092.G Table 5. (Please note this was referred to in the staff report in 2010 as part of the staff report for the 2010 re-plating. This is NOT a new requirement.) In the current design, no provision was made for any side yards at the end of the townhomes as required by the zoning code. It is believed that because safety issues with respect to the building codes were addressed, that the Building Safety Director and Zoning Administrator assumed that the requirements of the zoning code did not have to be dealt with.

As a result, the letter of 2015 by the Plans Examiner was in error, as there were at least two zoning code issues at that time, namely not enough covered parking and no required side yard setbacks at the ends of the townhouse developments. Comite de Bien Estar Inc. relied in good faith on the representations and approvals given by City staff which included the Department head, the Building Safety Director and Zoning Administrator. There is no dispute that Comite made multiple submittals and received multiple oral and written approvals that development was proper without covered parking and no side yard setbacks of any kind.

The designs as approved by the letter of December 8, 2016 provide for 60 townhouses, each with two parking spaces. 43 units will have a single car carport. This means for these 43 units one space will be covered, but the other space will not be covered. 17 units will not have any covered parking. It is not possible to provide two covered parking spaces for each unit without complete redesign. The uncovered parking spaces exist in the required front or back setbacks and therefore if one covered these spaces, the development would then no longer be compliant with the requirements for front or back setbacks. The only way complete compliance can be obtained is redesign of the townhomes themselves into smaller units than what is presently designed. Again all designs have proceeded to the point of approval for building permit issuance.

As to side yard setbacks, the principle public health and safety concern is the space needed between rooftops to contain a fire to keep a fire jumping from one rooftop to another on an adjoining property. If one is allowed to build to one's lot line, this means the neighbor can no longer fully enjoy building on their property, unless one wants to have a fire hazard. Each unit in the townhomes has been designed to allow zero lot lines and with special construction to meet standards. But this does not mean housing units on adjoining lands have been so designed. Hence the requirement of a side yard set back at the end units. In this case the end units have been specially designed to meet the concern that the "air space" between those units and adjoining non –townhouse units may not need the minimum required distance between rooftops. In other words all possible fire safety issues have been addressed. Stated even more simply, this one has been designed to be safe, not only for those who will be living in the townhomes, but safe for the neighbors as well.

Two types of variances are needed to allow this development to go forward. First is a variance from covered parking. 43 units will need a variance from covers for one parking space, and 17 units from covers for both parking spaces. The second is from side yard setbacks for the end units of for each of the three areas being developed.

REQUIREMENTS FOR VARIANCE

A.R.S. § 9-462.06 provides: "That board of adjustment may not:…[g]rant a variance if the special circumstances applicable to the property are self-imposed by the property owner." §152.027 of the City Code provides that to grant a variance there must be: (1) special circumstances or conditions regarding the land which do not apply generally to other land or buildings in the same zoning district; (2) that the special circumstances or conditions are preexisting and are not created or self-imposed; (3) that a variance is needed for the preservation of substantial property rights; and (4) that the granting of a variance will not be detrimental to persons residing or working in the vicinity.

Here the creation of Los Brisas Townhouse subdivision in 2010 created lots that are unique to R-3 multiple residential use development consistent with that particular zoning classification. The special circumstances to these lots regarding both requested variances is that the development as designed and approved as of December 2016 cannot be built legally without the granting of the requested variances. Only by complete redesign can compliance occur, and that the timing of development and the financial circumstances involved will not allow for a total redesign. This exact situation is unique to these lots and no others. This is a proposed ten million dollar development that will no longer take place if not granted, and therefore substantial property rights will be lost if not granted. There is no detriment to persons residing or working in the vicinity. This covers three of the four required criteria.

The remaining issue is the toughest. Normally, when it is possible to build a legal unit without a variance, just that it won't be the one the property owner wants, this is normally considered a 'self-imposed' special circumstance (i.e. a 'self-imposed' hardship) not legally eligible for a variance. As stated in Rathkopf's The Law of Zoning and Planning § 58:21 (4th ed.):

> "If the conditions affecting the property have been caused or created by the property owner…, the essential basis of a variance, that the hardship be caused solely through the manner of operation of the ordinance upon the particular property, is lacking. In such a case, a variance should not be granted because the hardship will be regarded as having been self-created thus barring relief."

RELIANCE IN GOOD FAITH NOT A SELF-IMPOSED SPECIAL CIRCUMSTANCE

Unlike most cases where someone wants to build something bigger than what can legally fit on a lot, this property owner acted in good faith. Comite complied with the rules and procedures of city ordinances, sought and received multiple governmental approvals by the City of San Luis, including multiple approvals from the city staff members charged with the duty of granting such approvals, relied upon them to seek and obtain other governmental approvals from the State of Arizona, incurred substantial expenses in reliance upon them and, indeed, took the project up to the point of issuance of building permits in the good faith belief that all was proper. Under these circumstances, Rathkopf holds that the special circumstances necessitating the need for a variance, or hardships, are not self-imposed. As stated in Rathkopf's The Law of Zoning and Planning § 58:21 (4th ed.):

> "Evidence of good faith on the part of the landowner has been sufficient to eliminate self-creation of the hardship as a bar to the requested variance. Good faith can be established in several ways: ***showing that the owner has complied with the rules and procedures of the ordinance***;

> showing that the owner has attempted to use other alternatives to relieve his hardship prior to requesting a variance; ***showing that the owner had relied on the representations of zoning authorities*** or builders; or showing that the owner had no actual or constructive knowledge of a requirement, violation, or limitation on land that he purchased." [Emphasis added.}

The following cases have held that reliance in good faith on approvals given by zoning and building officials are legally not a 'self-imposed' special circumstance. Each of these cases approved the granting of a variance under such circumstances. See *De Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978); *Jayne Estates, Inc. v. Raynor*, 22 N.Y.2d 417, 293 N.Y.S.2d 75, 239 N.E.2d 713 (1968); and *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979).

CONCLUSION

This application meets all four criteria for the grant of a variance pursuant to §152.027 of the City Code.

cc: Honorable Mayor and Members of City Council

Tadeo De La Hoya, City Manager

Kay Macuil, City Attorney