

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A PROFESSIONAL LAW CORPORATION

ATTORNEYS AT LAW

12800 CENTER COURT DRIVE SOUTH, SUITE 300  
CERRITOS, CALIFORNIA 90703-9364  
(562) 653-3200 · (714) 826-5480

FAX (562) 653-3333

WWW.AALRR.COM

FRESNO  
(559) 225-6700

IRVINE  
(949) 453-4260

MARIN  
(628) 234-6200

PASADENA  
(626) 583-8600

PLEASANTON  
(925) 227-9200

RIVERSIDE  
(951) 683-1122

SACRAMENTO  
(916) 923-1200

SAN DIEGO  
(858) 485-9526

OUR FILE NUMBER:  
005791.00260  
29553157.1

September 23, 2020

*VIA ELECTRONIC MAIL*

Patrick Munoz, Esq.  
Rutan & Tucker, LLP  
611 Anton Boulevard, Suite 1400  
Costa Mesa, CA 92626

**Re: Toll Brothers, Inc. Development Application  
26126 Victoria Blvd., Dana Point, CA 92624**

Dear Patrick:

As you know, our firm represents Capistrano Unified School District with respect to the above referenced property (“Property”). The purpose of this letter is to address the City of Dana Point’s (“City”) questions regarding Toll Brothers, Inc.’s (“TBI”) development application for the Property. Specifically, we understand the City has inquired about the Property’s prior deed restrictions, as well as the applicability of Senate Bill 166, and Assembly Bills 2135 and 1486. While TBI is responsible for processing its development application, we understand that the City wishes to know the District’s position related to each of these City inquiries.

Accordingly, and as explained in more detail below, please note that our Firm analyzed each of these issues and has determined they do not, and should not, prohibit or hinder TBI’s proposed development of the Property. Therefore, these issues should not adversely affect TBI’s entitlement application for the Property in any way.

**1. Deed Restrictions**

The Property’s Grant Deed includes the following language:

“Said property shall be used by the party of the second part herein and its successors and assigns for public school purposes only but not for a reform school”...“That no part of any of said lot shall ever at any time be leased or rented to any person other than the White or Caucasian Race.”

Patrick Munoz, Esq.  
September 23, 2020  
Page 2

Collectively, these provisions suggest the Property is subject to conveyance restrictions, prohibiting the Property from being transferred to anyone who plans to use it for anything other than school purposes, or who is not of the “White or Caucasian race.”

The Grant deed is dated September 7, 1926. Therefore, both “conveyance restrictions” are subject to the "Marketable Record Title Act" (California Civil Code 880.020, et seq.) (the "Act"). In summary, the purpose of the Act is to encourage the free transfer of Property by limiting the rights of parties to place limitations on the use of Property. Specifically, the Act declares that reverter rights are no longer valid but are instead deemed termination rights. (Civil Code section 885.020) Any termination right expires 30 years after the date the instrument reserving, transferring or otherwise evidencing the power of termination is recorded. (Civil Code section 885.030) The Grantor can also file a "Notice of Intent to Preserve" the power of termination within the 30 year period which would extend the right another 30 years. (*Severns v. Union Pacific Railroad Co.* (2002) 101 Cal. App. 4th 1209.) However, there are no records showing any such notice has been recorded. Since 1926, the Grantor would have had to record three separate notices over all these years in order to keep any, otherwise allowable, part of these restrictions valid.

The “White or Caucasian Race” restriction is also unenforceable under the Federal Fair Housing Act and California Civil Code 872.5 which generally prohibits discriminatory restrictions in deeds and specifically those related to race. Therefore, this exception can essentially be ignored, because it cannot be enforced.

## 2. Senate Bill 166

We also understand the City asked if the Property is subject to the low and moderate income housing requirements of Senate Bill 166 (SB 166) which revised California’s “No Net Loss” zoning laws. (Government Code section 65580 *et seq.*) Specifically, TBI received the following comment from the City during its application process:

For the General Plan Consistency sections of the Specific Plan, include analysis as it relates to RHNA alternative site selection, if needed. California Government Code Section 65863 (No Net Loss) – SB 166 (2017) requires the maintenance of adequate sites to accommodate its remaining unmet RHNA by each income category at all times throughout the entire planning period; and to identify additional adequate sites to accommodate the remaining RHNA. **The City’s 2013-2021 Housing Element identifies the subject site as an underutilized site to meet the remaining unmet Regional Housing Needs Assessment (RHNA) for the City’s 5th Cycle**, with a potential yield of 60 lower income, 35 moderate income, and 40 above moderate income units for a total potential unit yield of 135 dwelling units. Because the property is a RHNA site, the Specific Plan should

Patrick Munoz, Esq.  
September 23, 2020  
Page 3

identify alternative sites to accommodate the remaining need if the project does not yield the remaining unmet need for the 5th and 6th Cycle RHNA.

The No Net Loss laws address the State's Regional Housing Needs Assessment (RHNA) Program which generally establishes the process by which the State ensures cities and counties maintain lower and moderate income housing.

In sum, the RHNA Program authorizes the State's Department of Housing and Community Development ("DHCD") to establish the existing and projected need for low and moderate housing in regions throughout the State (Gov. Code section 65584). DHCD then requires cities and counties<sup>1</sup> to identify certain sites that can be developed to meet the low and moderate housing needs of the region, deemed RHNA Sites (Gov. Code section 65584.05) SB 166 prohibits local agencies from allowing RHNA Sites to be developed without low and moderate housing unless the local agency identifies other sites to replace the RHNA Site. Government Code section 65583 limits RHNA Site to "land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level."

The City's comment questions TBI's application based on the Property being identified by the City as a RHNA Site. However, as noted above, the Property was owned by the District, could not have been developed for low incoming housing as required by the RHNA Program, and, therefore, should not have been identified as a RHNA Site in the City's Housing Element. Even if the "school purposes" deed restrictions no longer apply because of the Act, as explained above, it was still owned by the District and not available for development, and therefore, was not "available for residential development" as required by the RHNA Program. Accordingly, TBI's entitlement application for the Property should proceed, and TBI and the City should continue to discuss an appropriate affordable unit count for TBI's Project.

### **3. Assembly Bill 1486**

The City also asked TBI to address Assembly Bill 1486 (AB 1486) and its lower housing requirement. TBI received the following comment from the City:

**Local Agency Surplus Land and Affordable Housing:** California Government Codes Sections 54220-54223 (Local Agency Surplus Land and Affordable Housing) – AB 2135 (2015) requires that the qualified entity (including school districts) proposing purchase or lease of the surplus land for affordable housing to agree to make available to lower income households a minimum of 25% of total

---

<sup>1</sup> Government Code section 65584.03 indicates that "at least two or more cities and a county, or counties, may form a subregional entity" for the purpose of determining their RHNA Site allocation. Thus, this letter uses the term "local agency" to reference the entity charged with establishing the RHNA Site allotment.

Patrick Munoz, Esq.  
September 23, 2020  
Page 4

units at an affordable housing cost for a period of at least 55 years; and requires any surplus property developed with 10 or more residential units to include at least 15% of the units as housing affordable to lower income households. Show compliance with statutory requirements, refer to memorandum on State of California Department of Housing and Community Development website. Provide discussion in the Specific Plan on compliance with AB 2135 and as to whether affordable housing will be provided onsite.

This comment references two distinct bills both of which relate to the “surplus property procedure” applicable to the District’s real property set forth in Government Code section 54220-54223. Assembly Bill 2315 (AB 2135) does not affect TBI’s proposed development or require the Property to include low income housing. Instead AB 2135: 1) requires public agencies to grant priority to developers who propose low income housing and 2) establishes the requirements for developments to be deemed low income housing to receive this priority. Here, TBI does not have to meet the low income housing requirements described in the City’s comment because TBI did not promise to provide low income housing before acquiring the right to develop the Property from the District.

The City’s comment also references Assembly Bill 1486 (AB 1486) by asking TBI to “show compliance with statutory compliance” and referring the Department of Housing and Community Development (DHCD) website.

AB 1486 made several changes to the public agency notice requirements for surplus property found in Government Code section 54220 et seq. (the “Notice Statutes”). In sum, the Notice Statutes require certain local agencies, including school districts, to send written offers to certain public agencies prior to selling or leasing real property. AB 1486 attempts to create more opportunities for Housing Sponsors, defined as any agency certified by the California Housing Finance Agency to develop low and moderate income housing.

AB 1486 is a complex bill that includes many changes that are not applicable to school districts and instead apply to other public agencies. With respect to school districts, AB 1486 changes the Notice Statutes in one key way. Originally, the Notice Statutes required school districts to provide written notice of any potential lease or sale of surplus property to any Housing Sponsor that provided a request to receive such notice directly to the school district. AB 1486 now requires school districts to send “Notices of Availability” to any Housing Sponsor listed by the Department of Housing and Community Development (“DHCD”) on its website.

However, AB 1486 has a specific timeline limitation. AB 1486 added Government Code section 54234(a)(1) which indicates that the DHCD notice requirement does not apply to any agreement prior to September 30, 2019 as follows:

(a) (1) If a local agency, as of September 30, 2019, has entered into an exclusive negotiating agreement or legally binding agreement to dispose of property, the

Patrick Munoz, Esq.  
September 23, 2020  
Page 5

provisions of this article as it existed on December 31, 2019, shall apply, without regard to the changes made to this article by the act adding this section, to the disposition of the property to the party that had entered into such agreement or its successors or assigns, provided the disposition is completed not later than December 31, 2022

Here, the District entered into the agreement with TBI for the Property on January 15, 2019. Therefore, the changes established by AB 1486 do not apply to the Property. Specifically, the District was not required to give notice to the Housing Sponsors established by DHCD because the list and AB 1486's requirements were not in effect.

In addition to the timeline issue, AB 1846 includes language suggesting that school district properties are not subject to any of its requirements, including the DHCD Housing Sponsor requirement. Government Code section 54221(f)(1)(I) establishes that the notice requirement established by AB 1486 is not applicable to "exempt surplus land" which includes the following:

"Land that is subject to Sections 17388, 17515, 17536, 81192, 81397, 81399, 81420, and 81422 of the Education Code and Part 14 (commencing with Section 53570) of Division 31 of the Health and Safety Code, unless compliance with this article is expressly required." (Emphasis Added)

Section 17388 requires school districts to form an Advisory Committee for surplus property. Therefore, this language suggests that any property reviewed by an Advisory Committee is exempt surplus land and therefore, exempt from AB 1486's requirement. Because AB 1486 does not definitively address school district property, some may try and argue that it could apply; however, as noted above, even if such an argument is made by the City, the Property is not subject to AB 1486 and its DHCD Housing Sponsor requirement.

#### **4. Conclusion**

As set forth above, our firm analyzed the issues brought to TBI's attention with respect to its development application, and has concluded that no such issue should delay or prohibit TBI's proposed development. In sum, the restrictions in the Grant Deed are no longer applicable to the Property's use or transfer, the Property should not be deemed RHNA Site pursuant to SB 166 because it was owned by the District and not available for residential development, the priority process under AB 2135 is not applicable, and the DHCD Housing Sponsor notice requirement established by AB 1486 does not apply to the Property given the effective date of the current District/TBI agreement, or otherwise.

Therefore, the District believes the City should proceed with the processing of TBI's development application.

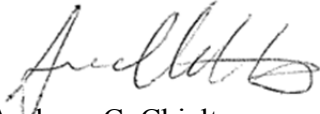
ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Patrick Munoz, Esq.  
September 23, 2020  
Page 6

Should you have any further questions, please let us know.

Sincerely,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A handwritten signature in black ink, appearing to read 'Andreas C. Chialtas', written in a cursive style.

Andreas C. Chialtas

cc: Brenda Wisneski, Director of Community Development, City of Dana Point  
Belinda Deines, Principal Planner, City of Dana Point  
Michael McCann, Regional Director, Toll Brothers Apartment Living  
Yolanda Rodriguez, Chief Transactional Counsel, Toll Brothers  
Clark Hampton, Deputy Superintendent Business, Capistrano Unified School District  
George Peterson, Project Dimensions  
Craig Hoffman, Project Dimensions  
Jon Conk, Project Dimensions  
Stephen McLoughlin, Atkinson, Andelson, Loya, Ruud & Romo