



ATTORNEYS AT LAW

18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
T 949.833.7800
F 949.833.7878

John J. Flynn III
D 949.477.7634
jfflynn@nossaman.com

Refer To File #: 290396-00017

October 3, 2016

Mayor Elizabeth Patterson and
Members of the City Council
City of Benicia
250 East L Street
Benicia, CA 94510

**Re: Proposed Findings in Support of the City Council Denial of Valero's
Application for a Use Permit for Construction and Operation of a Crude-by-
Rail Unloading Facility**

Dear Mayor Patterson and Members of the Council:

As you know, our law firm represents Valero Refining Company – California ("Valero") with respect to the Valero Crude-by-Rail use permit application, which the City Council denied on September 20.

The City Council's action of September 20 violated both state and federal law, as demonstrated below. The City was required by law to adopt findings in support of the denial of Valero's permit application, findings that must comply with the requirement to sufficiently link the conclusions expressed in the findings with the evidence in the record, and must be supported by substantial evidence in the record. In addition, the City is prohibited from adopting post hoc rationalizations in support of the denial. The Staff-proposed and Adams Broadwell-proposed findings fail all the tests to which agency findings are subject.

1. Permit Streamlining Act

Your City Attorney advised you at the meeting of September 20 that you could not continue the hearing consistent with the requirements of the California Permit Streamlining Act. The City Council was therefore required to make a valid and adequately supported decision at the hearing of September 20, 2016, or Valero's permit application would be approved by operation of law. Though your City Attorney attempted strenuously to elicit from you findings in support of the denial, the only grounds specifically stated for denying Valero's application were rail-related impacts, a reliance prohibited by the federal law of rail preemption. No other grounds for denying the application were stated by the members of the Council, the result of which was a failure by the Council to make a valid decision on Valero's permit application within the time constraints imposed by the Legislature by means of the Permit Streamlining Act. The permit is therefore approved by operation of law.

2. The September 20 Adams Broadwell Letter

At the September 20 hearing, you advised the public, including Valero, that the law firm of Adams Broadwell Joseph & Cardozo submitted a letter that very day. You also noted that the letter had not been provided to the public. Of course, Valero, the applicant, had no opportunity whatever to respond to the letter. Nevertheless, you made a decision on Valero's permit application that same evening. The Council should state clearly for the record that the Adams Broadwell letter and any attachments will be excluded from the administrative record for the CBR Project. To rely in any way upon the Adams Broadwell letter and/or the attachments would deny Valero its right to due process.

3. The September 20, 2016 Surface Transportation Board ("STB") Communication

On September 20, the same day as the City's hearing, the STB declined to accept jurisdiction over the dispute, and therefore denied Valero's Petition for a Declaratory Order. The Council allowed no comment by the public on the STB's document, yet it was heavily relied upon by the Council at the hearing, and it appears to play a role in the findings proposed by staff. Due process prohibits any reference to the STB decision in the Council's written expression of its findings.

4. The Staff-Proposed Findings

First, the **only** findings even suggested by members of the Council at the September 20 hearing were rail-related. Directing staff to review some comment letters and, without any further direction, to come back with a draft of findings culled from those letters, does not constitute findings, and any attempt at this juncture to mine those letters for findings never articulated by the members of the Council at the September 20 hearing would violate the prohibition against post hoc rationalizations. Further, the Staff-proposed draft findings appear to be little more than an embellishment of those proposed by Adams Broadwell, even though the Staff proposal is dated September 27 and the Adams Broadwell proposal September 28. This, of course, raises the worrisome and possibly unlawful prospect of a coordinated effort between certain City representatives and Adams Broadwell. And, of course, the proposed written findings were not made orally at the September 20 hearing.

Second, the Council no doubt remembers that the exhaustive Final Environmental Impact Report ("FEIR") and the supporting appendices all led to the same conclusion, that is, that the project will have **no** significant unmitigated impacts. And, as for the impacts of rail operations, the City's consideration of those impacts in denying Valero's permit application are preempted, as to both off-site and on-site rail operations. The proposed findings state **no** reasons, facts, analysis or standards on which to base a rejection of the analysis set forth in the FEIR concerning the impacts of the operation of the unloading facility itself. The FEIR states both facts and reasons for concluding that any impacts of unloading operations can be mitigated to a level of insignificance. The Council **has** failed to provide any facts or reasoning in response to the FEIR analysis, or to propose **any** standards on which to base the mere **conclusions** that such impacts are unacceptable.

Third, as for the “findings” that the project does not conform to certain goals and policies set forth in the City’s General Plan, all such findings are either preempted, are unsupported by substantial evidence, or **contradict** the only evidence in the record that does exist.

5. The Adams Broadwell-Proposed Findings

As for the “findings” proposed by the Adams Broadwell firm, those findings likewise could not survive a challenge in court. The Adams Broadwell-proposed findings must be disregarded, in any event, since the Council directed Staff **only** to prepare a written expression of the Council’s findings. The Council did not solicit proposed findings from the Adams Broadwell firm or members of the public in general.

As for the substance of the Adams Broadwell-proposed findings, as is true of the Staff-proposed findings, there are no reasons, facts, standards, or analysis set forth in the findings or elsewhere in the record that would justify the conclusion that the mitigation measures set forth in the FEIR are insufficient.

Second, the alleged General Plan inconsistencies are not based on any facts, reasons, standards or analysis on which to rebut the FEIR conclusion that the CBR project posed an insignificant risk of a “catastrophic event”.

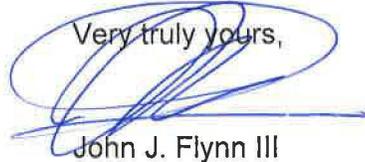
Third, the claim that the project “could negatively affect air quality and public health during project construction and operation” contradicts the evidence in the record, putting aside the fact that “crude slate changes” are legally irrelevant.

Fourth, the “finding” that the project “could exacerbate flooding conditions” again contradicts the evidence in the record, and fails to provide any facts, reasons, or analysis for rejecting the mitigation measure proposed in the FEIR. In addition, the invocation of section 15.48.050 of the Municipal Code, which relates to certification by a registered professional engineer, is likewise another “ground” stated for rejecting Valero’s permit application that was not even mentioned at the September 20 hearing (yet another post hoc rationalization), and appears to be legally irrelevant in any event since such certification would not in the normal course take place until completion of construction.

6. Conclusion

The record is clear: There are no legal grounds on which to deny Valero's permit application. The vague statements made at the hearing did not adequately link the conclusions stated therein with evidence in the record, and therefore under the Permit Streamlining Act the permit was approved by operation of law. Moreover, the proposed written findings do not adequately link the conclusions stated therein with evidence in the record, they are not supported by substantial evidence in the record, and they even contradict the evidence in the record. The transcript of the September 20 hearing will no doubt clearly establish for a Court that the only grounds invoked by the Council for denying Valero’s application were rail-related grounds, and that any other grounds invoked in the written findings proposed by staff and by Adams Broadwell are no more than baseless afterthoughts, in a desperate bid to deny Valero’s permit application, despite the lack of any legal or factual bases for such a denial.

Thank you for your consideration of our letter.

Very truly yours,

John J. Flynn III
of Nossaman LLP

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cc: Heather McLaughlin, City Attorney
Bradley R. Hogin, City Special Counsel