



March 2, 2020

Via Electronic Mail and FedEx

City Council of McFarland
Mayor Pro Tem, Stephen McFarland
Councilmember Sally Gonzalez
Councilmember Rafael Melendez
Councilmember Maria T. Perez

Council Chambers
103 West Sherwood Ave.
McFarland, CA 93250

Re: SB 29 Compliance; GEO Group, Inc.’s Appeal of Planning Commission Denial of Request to Modify Conditional Use Permit No. 01-96 and No. 02-96

Dear Members of the McFarland City Council:

These comments are submitted on behalf of the Immigrant Legal Resource Center (“ILRC”), Freedom for Immigrants (“FFI”), co-sponsors of SB 29, as well as numerous vested local and state-wide organizations. These comments regard Conditional Use Permits No. 01-96 and No.02-96, including GEO Group, Inc.’s (“GEO”) pending appeal to the City of McFarland City Council (“City Council”) titled “Appeal of planning Commission Denial of Request to Modify Condition Use Permit [No. 01-96 and 02-96].” Conditional Use Permits No. 01-96 and No. 02-96 regard GEO Group’s requests to repurpose the Golden State Modified Correctional Facility located at 611 Frontage Road as well as the Central Valley Modified Community Correctional Facility located at 254 Taylor Ave., into prisons for federal inmates and immigrant detainees (the “Project”).

For a variety of public policy reasons detailed in public and written comment at the Planning Commission hearings, we urge the City first and foremost to deny the Project. However, to the degree the City holds a vote on GEO’s appeal, we write to inform the City that Cal. Civil Code

Section 1670.9(d) is equally applicable to the City Council as to the Planning Commission. As detailed further below, this law lays out various requirements before any such permits may be approved, none of which have been fulfilled here. As such, if the City Council approves the Project at the appeal hearing this would be a violation of state law, in which case the ILRC and FFI are prepared to pursue all appropriate legal action, including challenging this unlawful agency action by a petition for a writ of administrative mandamus under Cal. Civ. Proc. Code § 1094.5 or § 1085. *Bixby v. Pierno*, 4 Cal. 3d 130 (1971); *Citizens for Amending Proposition L v. City of Pomona*, 239 Cal. Rptr. 3d 750 (2018) (The city violated its duty to comply with the ballot initiative by entering into a contract that directly violated its terms).

I. Background on the Immigrant Rights Groups

The ILRC and FFI have both a public and beneficial interest in this matter. Both organizations support or work directly with people in immigration detention across the state of California, including individuals held at the Mesa Verde Detention Facility. If this Project were granted, we would have to divert considerable organization resources to working with anyone detained at these new facilities. In addition, as we helped draft and we co-sponsored SB 29, we are uniquely committed to ensuring that agencies comply with the law.

The ILRC works in partnership with the immigrant community to advocate for policies that create a path toward abolishing the U.S. immigration detention system. Our team works at the forefront of California's statewide campaigns to dismantle immigrant detention, as well as engaging in federal advocacy in Washington, DC. The ILRC has been a lead organization on these issues for several years –co-sponsoring California's Dignity Not Detention Act (SB 29) along with FFI, as well as advocating for AB 103 and supporting the passage of AB 32. At the local level, the ILRC provides resources and support to communities and organizations working on immigration detention.

FFI is California-based national nonprofit organization working to abolish the U.S. immigration detention system through a two-pronged approach. First, we have built a network of 4,500 volunteers that is the only consistent watchdog inside this system. We started by building the first visitation program in California. Now our volunteers visit people in 69 immigrant prisons in nearly 30 states on a weekly basis offering a lifeline to the outside world and exposing abuse. Second, we have launched a community-based alternative to free over 250 people and to welcome immigrants into the social fabric of the United States. Through these windows into the system, we gather data and stories to combat injustice at the individual level and push systemic change.

The additional organizations who have signed on to this letter are just a sampling of the local and statewide organizations who have dedicated endless resources to supporting individuals held at the Mesa Verde Detention Center. These organizations have clients, members, and other ties to the Mesa Verde Detention Center and their work would be deeply impacted if two additional facilities were added to this region.

II. Issuing a Permit at This Time Would Violate California Law

As you know, Cal. Civil Code § 1670.9(d) states that a city, county, or public agency may not “approve or sign a deed, instrument, or other document related to a conveyance of land or issue a permit for the building or reuse of existing buildings by any private corporation...” unless the entity has satisfied two conditions.

The first condition requires public notice of the action at least 180 days before the execution of the conveyance or permit. The second condition, which must also be fulfilled, requires that public comment be solicited and heard on the proposed conveyance or permit action in at least two separate meetings which are open to the public. Cal. Civil Code § 1670.9(d)(1),(2). Both the Planning Commission and the City Council are bound by these requirements.

While the Project was before the Planning Commission, there had been several posted “notices”¹ related to the Planning Commission’s consideration of modification of Conditional Use Permits No. 01-96 and 02-96. Two initial notices which were undated but which we believe were posted no earlier than some day in January 2020, indicated that an initial hearing on these permits would occur on Tuesday, January 21, 2020 at 6:00PM in the McFarland Council Chambers. The notices also state they were “intended to comply with the provisions of California Civil Code Section 1670.9(d).”

Around February, two additional notices were posted to the McFarland City Website regarding these same permits (No. 01-96, 02-96) indicating that a “second public hearing” would take place on Tuesday, February 18, and that this second public hearing was “intended to comply with the provisions of California Civil Code Section 1670.9(d).” The Planning Commission did not approve the permits on this date. On February 26, GEO appealed the Commission’s denial of the Project.

We understand that this matter is now before the City Council. However, because neither condition of Cal. Civil Code Section 1670.9(d) has been satisfied, the City Council may not approve the permits. In other words, the approval of such permits may not be considered by the City Council, until both conditions of Cal. Civil Code Section 1670.9(d) are satisfied. Neither the City Council nor the Planning Commission have complied with these requirements. We understand that members of the public were not provided access to the permit application and related reports prior to the first January 21st hearing, in order to provide fully-informed comment. Nor were all community members in attendance allowed to provide testimony at the hearing or provided sufficient language access. Without adequate notice including access to the substance of GEO’s permit applications, these hearings were deficient. Furthermore, even if adequate notice had been given, 180 days has not passed since the initial notice. These deficiencies are not resolved by delaying the issuance, execution, or effectiveness of the permits, as contemplated in the Planning Commission’s February 18th agenda. Furthermore, under Cal.

¹ We use the term notice as that is how the documents are titled by the City. However, we do not believe that sufficient notice has been provided under California Civil Code Section 1670.9(d).

Civil Code Section 1670.9(a), the City Council and Planning Commission may never enter into a contract for civil immigration custody, even if these notice conditions have been satisfied.

Cal. Civil Code Section 1670.9(d) is equally applicable to the City Council as it was to the Planning Commission. Because the aforementioned conditions have not been satisfied, the City Council may not approve the permits referenced in the Project, or this will result in a violation of Cal. Civil Code Section 1670.9(d) and therefore a violation of California state law.

III. The Project is Not Exempt from the California Environmental Quality Act (“CEQA”)

California law provides that the object of a contract or permit must be lawful and not contrary to public policy. (*Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 641-642, citing Civ. Code, §§ 1607, 1608, 1667, 1596.) Courts will void any contract or permit that is contrary to public policy or otherwise illegal. (*Id.* at 642.) In enacting the California Environmental Quality Act (“CEQA”), the legislature set forth a policy that public agencies shall regulate activities “so that major consideration is given to preventing environmental damage...” (Cal. Pub. Res. Code § 21000.) Towards this end, CEQA sets forth a policy of ensuring public participation in the environmental planning process. (*See Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal. 3d 929, 949 (“CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.”).) Furthermore, CEQA (Pub. Res. Code § 21000 *et seq.*) and the State Planning and Zoning Law (Government Code § 65300 *et seq.*) both provide for judicial review of agency actions through Code of Civil Procedure sections 1094.5 and/or 1085.

This Project is not exempt from CEQA because it has the potential to cause environmental impacts. Should the City contemplate the Project after the conditions of Cal. Civil Code Section 1670.9(d) have been satisfied, the City must prepare an Environmental Impact Report (EIR) or at minimum a mitigated negative declaration. CEQA requires that a project be analyzed based on existing physical conditions on the ground, not speculative or hypothetical conditions. Therefore, it is irrelevant whether the space is currently permitted for some other use. Immigration detention facilities, as opposed to other state or federal prison uses, are more temporary. As immigration detention is a federal, civil process, federal agencies such as U.S. Immigration & Customs Enforcement (“ICE”) transfer people to other immigration detention facilities regularly. For example, according to the American Immigration Council, 60 percent of detained immigrants are transferred at least once.² At the Adelanto Detention Facility in San Bernardino, another GEO Group-run immigration detention facility, there were nearly 5,000 transfers in the most recent year for which data is available, according to TRAC.³ In addition, people in immigration detention are often transferred to their court hearings on a daily basis or

² <https://www.americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states>

³ <https://trac.syr.edu/immigration/detention/tran.shtml>

released on parole, bond, or when they win their cases. In addition, asylum seekers and other immigrants recently detained are brought into the facility often daily. This reality, combined with the increase in visits from family and the community to the facilities as well as any construction or improvements needed to make the facilities comply with federal standards for housing ICE detainees will result in increased traffic, traffic noise, and air pollution. By considering the issuance of these permits without complying with CEQA, the City is risking the public's health. The Central Valley suffers from one of the highest air pollution burdens in the country. This project will only exacerbate it.

Given the possibility that certain of our organizations will be required to pursue appropriate legal remedies in order to ensure enforcement of Cal. Civil Code Section 1670.9(d) should the City take action on the permits before complying with all conditions of the law, we would like to remind the City of its duty to maintain and preserve all documents and communications that may constitute part of the "administrative record." As you may know, the administrative record encompasses any and all documents and communications which relate to any and all actions taken by the City with respect to the Project. The administrative record further contains all correspondence, emails, and text messages sent to or received by the City's representatives or employees, which relate to the Project, including any correspondence, emails, and text messages sent between the City's representatives or employees and GEO Group's representatives or employees. Maintenance and preservation of the administrative record requires that, *inter alia*, the City (1) suspend all data destruction policies; and (2) preserve all relevant hardware unless an exact replica of each file is made.

Thank you for the opportunity to submit comments on the Project. We look forward to working to assure that the City upholds its duty to the public under California law. For a variety of public policy reasons as detailed in public and written comment at the Planning Commission hearings, we urge the City first and foremost to deny the Project. In any case, in light of the fact that the City has not satisfied either condition of Cal. Civil Code § 1670.9(d)(1),(2), the City may not approve the permit at this time. We request that the City postpone the appeal hearing until the aforementioned conditions have been satisfied, or in the alternative that processes be put in place such that the permit is not approved at the hearing. Please do not hesitate to contact the ILRC (gruiz@ilrc.org) and FFI with any questions (cfialho@freedomforimmigrants.org).

Best,

Grisel Ruiz, Supervising Attorney
Immigrant Legal Resource Center

Christina Fialho, Co-Founder/Executive Director
Freedom for Immigrants

ACLU of Southern California
Democratic Socialists of America Kern County
Dolores Huerta Foundation
Faith in the Valley
KWESI (Kern Welcoming and Extending Solidarity to Immigrants)
Rapid Response Network of Kern

United Farm Workers Foundation
Visión y Compromiso

c: Tom Schroeter, McFarland City Attorney
c: McFarland Planning Commission