

Indian Wells  
(760) 568-2611

Irvine  
(949) 263-2600

Los Angeles  
(213) 617-8100

Manhattan Beach  
(310) 643-8448

Ontario  
(909) 989-8584



**BEST BEST & KRIEGER**  
ATTORNEYS AT LAW

2001 N. Main Street, Suite 390, Walnut Creek, CA 94596  
Phone: (925) 977-3300 | Fax: (925) 977-1870 | www.bbklaw.com

Riverside  
(951) 686-1450

Sacramento  
(916) 325-4000

San Diego  
(619) 525-1300

Walnut Creek  
(925) 977-3300

Washington, DC  
(202) 785-0600

**Malathy Subramanian**  
(925) 977-3303  
msubramanian@bbklaw.com

March 1, 2021

**VIA E-MAIL**

Harmeet K. Dhillon, Esq.  
Kristina D. West, Esq.  
Center for American Liberty  
E-Mail: KDWest@libertycenter.org

Re: Weighted Lottery Use in the City of Lafayette's General Plan Advisory  
Committee Selection

Dear Ms. Dhillon and Ms. West:

Please accept this correspondence on behalf of the City of Lafayette (the "City"), and in response to your letter dated February 10, 2021, regarding the City Council's use of a weighted lottery to select members of the General Plan Advisory Committee ("GPAC").

As an initial matter, we do not disagree with the governing authority cited in your letter. It is well-established that race-conscious policies are subject to strict scrutiny under the Constitution. As you are aware, in order to survive strict scrutiny, a race-conscious policy must: (1) be intended to remedy past purposeful or intentional discrimination; (2) be narrowly tailored to achieve that purpose; and (3) be necessary as the only, or at least the most likely, means of rectifying the resulting injury from past discrimination. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 568; see *Fisher v. University of Texas at Austin* (2016) 136 S.Ct. 2198; *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 337–338.)

Your letter asserts that "outside of the educational context, it is doubtful that the city of Lafayette's generalized goal of enhancing diversity is narrowly tailored to survive strict scrutiny — even generalized 'societal discrimination alone' is not 'sufficient to justify a racial classification.'" The characterization of Lafayette's weighted lottery policy as a "generalized goal of enhancing diversity" demonstrates a fundamental misunderstanding of the purpose behind the weighted lottery and the specific forms of historical discrimination the weighted lottery is narrowly designed to address. As detailed below, the weighted lottery is not intended to address a vague societal discrimination, but is instead crafted to remedy past segregationist policies that create systemic inequalities in land use to this day. As with most American cities, Lafayette's current

Harmeet K. Dhillon, Esq.  
March 1, 2021  
Page 2

land use have been shaped by a history of past discriminatory policies, the legacy of which cannot be meaningfully addressed without affirmative efforts by the City.

Given the long history of racial segregation in American land use policies, it would be impossible to provide a thorough history in this short letter. As such, I refer you to “Roots, Race, & Place: A History of Racially Exclusionary Policies in the San Francisco Bay Area” as one of many available publications detailing the history of such discriminatory policies. To provide a very brief summary, these areas were settled in the 1800’s, with express racial prohibitions and segregationist policies dictating housing and land use. These policies were continuously enforced and ratified well into the 1900’s as these areas were further developed and formally incorporated. Throughout the 1900’s, local municipalities adopted policies intended to further stratify residents through a combination of expressly discriminatory policies and facially-neutral policies designed to permit and reinforce private segregationist efforts. For example, municipalities failed to enact policies prohibiting neighborhoods and homeowners associations from adopting racial covenants in deeds, thereby effectively establishing white-only neighborhoods. The intended and actual result of such policies was to preserve the status quo of segregated neighborhoods by eliminating accessible housing for non-white residents. This was particularly effective given racially-discriminatory redlining and private lending practices that ensured lower-income non-white residents were priced out of these areas. The effects of such policies are still apparent in most cities to this day, and Lafayette is no exception<sup>1</sup>.

With this context in mind, the weighted lottery falls squarely within the framework for a constitutional policy. The City utilized the weighted lottery to remedy past discriminatory land use policies, including racial covenants, redlining, and other socio-economic and racial access barriers. The weighted lottery is narrowly tailored to remedy these forms of discrimination, as it helps to ensure that those who have been subject to the long-term effects of past discriminatory policies have an opportunity to voice concerns regarding such policies in the new General Plan. The City has not implemented a broad policy of utilizing weighted lotteries for any other committee. The City merely used the weighted lottery as a carefully tailored means of ensuring the General Plan is drafted taking into consideration the interests of residents who have historically been excluded from participating. Furthermore, the City currently has no plans to utilize the weighted lottery again in the future. Lastly, the weighted lottery is the most likely means of addressing past harm. At its core, the weighted lottery is simply a mechanism to ensure the City receives input from groups most likely to be affected by its policy. Courts have consistently held that race-conscious programs intended to track racially disparate impacts are constitutional and a proper means of addressing past injury. (*American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009)

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<sup>1</sup> It is worth noting that available census data reflects that approximately 50% of residents in the Bay Area at large identify as white, while nearly 85% of residents identify as white in Lafayette. These racial disparities have led to litigation against the City, including claims related to past General Plans and allegedly disproportionate development of single family housing.



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Harmeet K. Dhillon, Esq.  
March 1, 2021  
Page 3

172 Cal.App.4th 207, 220; *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 112 Cal.Rptr.2d 5.) Given that GPAC is an *advisory* committee that serves to “obtain and coalesce public input,” the City’s consideration of race to ensure it can effectively monitor the impacts of its land use policy are entirely consistent with court precedent interpreting the state and federal constitutions.

Finally, the City takes exception to your letter’s suggestion that, based on the recent referendum on Proposition 209, the use of a weighted lottery is “out-of-sync with the will of the people of California.” Proposition 209, codified in Cal. Const. Art. 1, § 31, does not concern an advisory committee such as GPAC. Instead, Proposition 209 prohibited preferential treatment in the limited context of “*public employment, public education, or public contracting.*” GPAC clearly falls outside of these categories as an advisory committee regarding the impacts of local development and land use. If it were the will of the people to enact a total prohibition on government efforts to correct inequities caused by past discriminatory policies, then Proposition 209 would have been worded quite differently to reflect that intention. Courts that have interpreted Proposition 209 subsequent to its enactment have uniformly confirmed that race can be considered in appropriate circumstances.

Based on the foregoing, the City respectfully disagrees with the conclusions expressed in your letter. Please let me know if you have any questions, or if you would like to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Malathy Subramanian', written in a cursive style.

Malathy Subramanian  
of BEST BEST & KRIEGER LLP  
City Attorney  
City of Lafayette

MS:APS