

Northwestern

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Mayor Steve Napolitano
Mayor Pro Tem Richard Montgomery
Councilmember Hildy Stern
Councilmember Joe Franklin
Councilmember Suzanne Hadley
Manhattan Beach City Council
1400 Highland Avenue
Manhattan Beach, CA 90266

Re: HighRose and US Federal Constitutional Due Process Violations

Dear Mayor Napolitano and other councilmembers of the City of Manhattan Beach:

I am writing to express my serious concerns relating to the approval of the proposed HighRose project. Such action would likely violate both substantive and procedural due process protections under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I believe I am fully qualified to advise you on this issue. I am the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University Pritzker School of Law and senior counsel to the firm of Crowell & Moring LLP. My scholarship has been cited or discussed in 22 Supreme Court opinions and I am regularly ranked among the 25 most cited legal scholars of all time. I have written numerous scholarly articles on due process and I have recently completed a book entitled "Due Process as American Democracy," to be published by Oxford University Press.

My constitutional concerns arise from my understanding that because the HighRose project is to be built adjacent to a 111-year-old active oil refinery, there exist very serious environmental dangers to the Manhattan Beach community that could result from the project's excavation and construction on land that has not been disturbed for nearly half a century (before the establishment of the U.S. Environmental Protection Agency and enactment of state or federal environmental protection laws). While the State of California has available established statutory procedures providing for a detailed inquiry into the environmental dangers of the construction of the HighRose project based on objective, quantifiable standards published by the U.S. EPA and California EPA, because of California's so-called Density Bonus Law no such inquiry is to be conducted by the

City of Manhattan Beach, despite the project's potentially dangerous environmental consequences. The City has said several times that it is concerned that its "hands are tied." In fact, your hands are not tied – indeed, you must act. Failure to conduct a full environmental review in light of the specific facts here is not only reckless; it is highly likely to violate the due process rights of the citizens of your community and therefore be enforceable in court against both the state and your town.

It is true that over the years substantive due process has played an increasingly reduced role in constitutional jurisprudence. But that does not mean that it no longer exists as a constitutional baseline check on state legislative and executive activity. At stake here are not purely economic rights or rights not traditionally protected. At stake, rather, are the health and welfare of the citizens of Manhattan Beach and the State of California. Under the liberal democratic social contract which the Due Process Clause implements, government is obligated to protect its citizens from harm whenever it is reasonably possible to do so. Where the State makes the reckless decision to disregard its own established statutory process for ascertaining the potentially serious environmental threats to its citizens arising from a governmentally authorized construction project, it has acted in an arbitrary, capricious, irrational and dangerous manner. It is for just such fortunately rare situations that substantive due process protections continue to exist. The substantive element of the Due Process Clause is designed to protect the life, liberty and property of citizens from such irrational and indefensible governmental behavior.

Moreover, because the Density Bonus Law expressly authorizes circumvention of established legal procedures for assuring the citizens' environmental safety (such as those provided for in the California Environmental Quality Act, the California Coastal Act and the Affordable Housing and High Road Jobs Act of 2022), procedural due process concerns are also implicated. The threat here is not some generic, vague concern about the welfare of the citizens of the State. Rather, the State's actions threaten very specific individuals: the citizens of Manhattan Beach. The constitutional protection of procedural due process guarantees that government may not refuse to enforce the legally authorized processes necessary to protect the life, liberty or property of its citizens.

Under the controlling procedural due process doctrine established by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), when life, liberty or property are threatened by governmental action, procedural due process analysis requires an inquiry into three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail." Under this well-established utilitarian calculus, there can be no doubt that in failing to engage in the normally required environmental inquiry, the State of California will have violated the due process rights of its citizens.

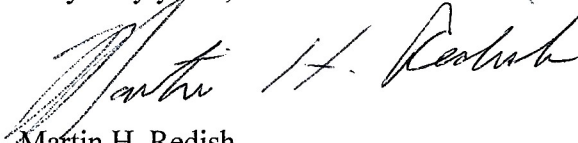
Initially, "the private interest" mentioned by the Court in *Mathews* in this instance could not be stronger, for it is the health, welfare and even lives of the citizens of Manhattan Beach.

Secondly, the “probable value” of “additional...procedural safeguards” could not be greater: Absent the statutorily authorized environmental inquiry prior to the start of the HighRose project, there is absolutely no way for anyone to know the extent of the serious environmental dangers to the populace that would result from the project. To be sure, ultimately we would all learn what those dangers were, but absent the conduct of the environmental inquiry prior to construction, it would, sadly, be too late to do anything to prevent the possibly tragic harms which would flow from construction. Finally, whatever cost the State would incur as a result of conducting the environmental inquiry pales in comparison to the potentially overwhelming environmental dangers. Indeed, the very fact that the State of California has created this environmental inquiry by statute conclusively establishes that the State itself does not deem the cost of such a procedure prohibitive. The reason the State is willing to do an end run around such a vitally important safety procedure in this instance has nothing at all to do with cost. The *Mathews* utilitarian balancing process therefore quite clearly dictates the conclusion that by failing to enforce its own procedure for assuring environmental safety, the State of California (as well as the Manhattan Beach City Council, should it approve such a project) will have unconstitutionally threatened the life, liberty and property of its citizens.

For all of these reasons, I believe that approval of the HighRose project, with all of its accompanying dangers to the local environment, without resort to the State of California’s well-established, statutorily authorized procedure for pre-construction environmental inquiry violates both the substantive and procedural guarantees of due process embodied in the Fourteenth Amendment.

I hope you find my contribution helpful.

Very truly yours,



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