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February 26, 2018

VIA U.S. MAIL AND EMAIL

Mayor Rick Bonilla and City Council Members
San Mateo City Council
330 West 20th Avenue
San Mateo, CA 94403

Re: 4 West Santa Inez / 1 Engle Road, San Mateo, CA
Unlawful Denial of Housing Development Project

Dear Mayor Bonilla and City Council Members:

This office represents the California Renters Legal Advocacy and Education Fund (“CaRLa”.) We write regarding the City of San Mateo’s denial of a permit for the proposed 10-unit housing development project at 4 West Santa Inez / 1 Engle Road (the “Project”), in an area zoned as “High Density R4.”

The Housing Accountability Act (“HAA”), Government Code § 65589.5, applies to market-rate housing development projects and compels approval of the Project. Pursuant to amendments which took effect on January 1, 2018,¹ the HAA imposes significant limitations on a city’s discretion to deny permits for housing. The HAA requires, inter alia:

When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific, adverse impact” means a significant, quantifiable, direct,

¹ See SB-167 and AB-1515.

and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

(Gov. Code § 65589.5(j))

In order to deny a housing development project, a city has the burden of either proving that the “proposed project in some manner fails to comply with ‘applicable, objective general plan and zoning standards and criteria, including design review standards. . .’”, or making the findings required by the HAA. (Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066, 1081.)

The Project complies with all objective general plan and zoning standards and criteria, including design review standards. The “Multi-Family Residential Data Form” prepared by Planning Staff verified the Project’s compliance with all objective standards (Administrative Report, August 9, 2017, Attachment 6). The Administrative Reports prepared for the Planning Commission in August and September 2017 recommended the approval of the Project.

The Planning Commission wrongly denied the Project based on subjective criteria such as neighborhood character, which is prohibited by the HAA. (Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066, 1076.) For example, the Planning Commission’s findings asserted that the Project was “not harmonious with the character of the neighborhood” and objected to the size of the building. At the appeal hearing, the City Attorney acknowledged that criteria such as neighborhood “compatibility” or “suitability,” are not objective standards that could be invoked to deny the Project. However the City Council failed to overturn the Planning Commission’s improper findings, and repeated the Planning Commission’s errors. The Council wrongly relied on a subjective guideline, and erred in finding the Project was non-compliant with that guideline.

The Multi Family Design Guidelines are not Objective Standards under the HAA

The City’s only purported justification for denying the Project was the alleged inconsistency with the Multi Family Design Guidelines (MFD Guidelines). The City focused on the “Height” guideline, which notes “If height varies by more than 1 story between buildings, a transition or step in height is necessary.” (MFD Guidelines, p. 7.) The guideline sets out the objective to “Avoid changes in building height greater than one story from adjacent structures. If changes are greater, step back upper floors to ease the transition.”

At the appeal hearing, the City Attorney opined that this is an “objective standard.” As the City Attorney noted, objective standards involve “checking the box”, as opposed to the “exercise of discretion.” Under this definition, the height guideline is not an objective standard.

There is an important distinction between *guidelines*, such as the MFD Guidelines, and *standards*. A project *must* comply with standards, whereas guidelines are discretionary. In this context, the MFD Guidelines are distinct from the City’s standards for R4-zoned multiple family dwellings (Municipal Code, Chapter 27.24). The City’s Urban Design Policy simply recommends that projects “substantially conform” to the MFD Guidelines; they are not a mandatory checklist (U.D 2.1). Similarly, the 2014 Housing Element notes that compliance with guidelines “increases a project’s chance of receiving approval” (at p. 68). The MFD Guidelines are not mandatory “standards” that can be invoked to circumvent the HAA.

Second, the height guideline is not “objective.” At the hearing, the City Attorney discussed the “step in height” element and asserted the Project is non-compliant because there is a two-story height differential between the Project and the neighboring house on Engle Road (the “Engle Road Neighbor”). This analysis is incorrect. The “Height” guideline does not specify how, or the extent to which, the upper levels of a project must be set back or stepped down. It does not explicitly require the height differential to be reduced to one story; it merely suggests *a* step down. Further, a step in height is one of two possible ways to satisfy the guideline, which requires a “transition *or* step in height” (emphasis added). No step is needed if there is a transition between neighboring buildings of disparate height. “Transition” is not defined, and there are no criteria set out to determine whether a transition complies with the guideline.

The sufficiency of a step-down or transition can only involve a discretionary and subjective judgment about the visual effect of a change in building heights. The Cannon design review dated June 28, 2017 (the “Cannon review”) confirms this. The Cannon review specifically addressed the height guideline, finding:

“The only area that I was able to identify as problematical is the Engle Road elevation which has a two-story height differential between this project and the immediately adjacent single family home. However in my judgment, the large trees proposed at the west property line and the street trees will substantially mitigate this height differential.”

Similarly, Mayor Bonilla noted during the hearing that “the house on Engle Road [is] 40 feet away from the new building,” and queried whether this distance, or the trees, made a difference. The City Attorney said the Council would need to consider this “. . . with respect to the need for transition for buildings that have more than one story height differential.” But the City Council

apparently did not consider these factors.

Assessing the height guideline ultimately involves a subjective judgment. Accordingly, the City Council's findings solely involved a subjective design issue, and the guideline relied on to find the project non-compliant was not an objective standard. In short, the Council's decision clearly violates the HAA.

The Project Complies with the Height Guideline

In any case, the Project complies with the height guideline and all other MFD Guidelines. It has a step-down, as the fourth floor is set back into the roof form. The Cannon review noted that the "building mass has been articulated to relate to the smaller scale of the adjacent single family neighborhood." There is also a "transition" provided by large trees on the property line between the Project and Engle Road Neighbor, street trees, and the 30' gap between the Project structure and the Engle Road Neighbor's garage. As noted above, the Cannon review found that the trees "substantially mitigate [the] height differential."

In the appeal hearing, Mayor Bonilla acknowledged the substantial distance between the Project and the Engle Road Neighbor, and said the Project's setbacks are "what the city calls for." The Mayor also highlighted the Project's compliance with all objective standards set out in the Multi-Family Residential Data Form, and said he "had a problem finding many objective standards . . . in the findings for denial."

The Administrative Reports prepared for the August and September 2017 Planning Commission hearings recommended approval of the Project. In their discussion of the MFD Guidelines, the Reports did *not* identify the height guideline as a problem or suggest any modifications to the building height or setbacks. The height guideline was only raised in the Administrative Report for the October 2017 meeting, after the Planning Commission instructed staff to find reasons to deny the Project. The majority of the City Council then wrongly latched onto this guideline as a possible basis for denial.

The HAA provides that a housing development project shall be:

“. . . deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity.”

(Gov. Code, § 65889.5(f)(4).)

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Further, the HAA must be construed broadly and “consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.” (Gov. Code § 65589(d).) Here, there is substantial evidence that the Project complies with all applicable objective standards. The City Council should have found the Project is compliant, and allowed the appeal.

Conclusion

San Mateo must rehear the appeal and reverse the Planning Commission’s denial. If it does not do so, our client is prepared to file suit. San Mateo will “bear the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5.” (Gov. Code § 65589.6; Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066, 1079.) If we must litigate, our client will prevail since the HAA prohibits municipalities from using subjective, discretionary standards to reject housing development projects. Our client will also be entitled to recover its attorney’s fees and costs from San Mateo (Gov. Code § 65589.5 (k)(1)(A)).

We hope that calling your attention to your obligations under the Housing Accountability Act will help resolve this dispute without the need for expensive litigation. Please feel free to contact me to discuss this matter further.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Ryan J. Patterson

CC: City Attorney, City of San Mateo