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January 19, 2024

VIA HAND DELIVERY

Jami Morritt
Chief Assistant Clerk of the Board
County of Contra Costa
1025 Escobar Street, 1st Floor
Martinez, CA 94553

John Kopchik
Director, Department of Conservation & Development
County of Contra Costa
30 Muir Road
Martinez, CA 94553

Re: Grayson Road 10-Lot Subdivision
1024 and 1026 Grayson Road, Pleasant Hill, CA 94523
APNs: 166-030-001 and 166-030-002
#CDSD20-09531

Dear Madam Clerk and Mr. Kopchik:

This firm represents Calibr Ventures ("Calibr") in connection with the above-referenced housing development project to subdivide a 3.05-acre site into 10 single-family lots ("Project") at 1024 and 1026 Grayson Road in unincorporated Pleasant Hill ("Project Site"). The Zoning Administrator approved the Project's Vesting Tentative Map, density bonus, and Mitigated Negative Declaration on October 16, 2023. Project opponents appealed the Zoning Administrator's decision on October 26, 2023. The Planning Commission heard and granted the appeal on January 10, 2024, ignoring the fully-explained requirements of controlling state housing law, thus disapproving the Project, on a 5-2 vote, in violation of the Housing Accountability Act, Density Bonus Law, and the County's own draft 6th Cycle Housing Element, which relies on the Project Site to meet its housing obligations. Pursuant to Article 26.2-24 of the ordinance code of Contra Costa County, we hereby appeal the Planning Commission's unlawful decision, without making the findings required by law, for the reasons set forth in this letter. A $250 appeal fee is filed herewith.

Project Background

As noted above, the Project is a 10-unit single-family development protected by and being processed pursuant to Senate Bill 330, the Housing Accountability Act (Gov. Code §65589.5; "HAA"), and the Density Bonus Law (Gov. Code §§ 65915-65918; "DBL") at 1024 and 1026 Grayson Road in unincorporated Pleasant Hill. The Zoning Administrator approved the Project, including its Vesting Tentative Map,

Density Bonus, and Mitigated Negative Declaration ("MND") on October 16, 2023, following County Staff's conclusion that the Project is consistent with the applicable, objective provisions of the County General Plan and ordinance code. Project opponents appealed the Zoning Administrator's decision on October 26, 2023.

The Planning Commission conducted an appeal hearing on January 10, 2024, and voted 5-2 to grant the appeal, thus disapproving the Project and its MND. The Planning Commission's decision was based on the bare-boned finding that the Project, including the lack of sidewalk, curb, and gutter along the Project frontage, would have a specific, adverse impact upon the public health and safety. And the record on this finding indicates that the Planning Commission's alleged concern was based on existing conditions in the area around Project Site—impacts that would exist even without the Project—rather than impacts any evidence shows the Project could possibly cause or be required to mitigate.

This superficial finding is not a lawful reason to disapprove a housing development project such as this and indeed is the very type of baseless decision agencies have historically used to disapprove certain housing projects in the face of noisy opposition, contributing directly and substantially to California's decades-long housing supply crisis and to the Legislature's ongoing strengthening of state housing law by reducing local control. (Gov. Code §§ 65589.5(a)(1)(A)-(D) and 65589.5(A)(2)(K) and (L)). The law in this case could hardly be more clear, but unfortunately the Planning Commission elected not to follow it, forcing either litigation or this appeal.

The Planning Commission Appeal Hearing Occurred Outside the 60 Days Allowed By Law

The County was required to conduct all allowed public hearings within 60 days of the date the Zoning Administrator approved the Project's MND. Here, because the Project requires no legislative land use approvals, the County is allowed to conduct a maximum of five public hearings. (Gov. Code § 65905.5(a)). The term "hearing" is broadly defined and includes appeal hearings. (*Id.*). Under the HAA the failure to comply with the timing requirements of the Permit Streamlining Act ("PSA") may be treated by an applicant as a disapproval of a housing project. (Gov. Code § 65589.5(h)(6)). The PSA provides that cities and counties must approve projects within 60 days from the date the agency adopted a MND. (Gov. Code § 65950(a)).

The County thus had until December 15, 2023—60 days after the Zoning Administrator's October 16, 2023 adoption of the MND—to conduct any Project appeal hearings. Although Calibr could treat the County's belated appeal hearings as an unlawful disapproval of the Project without making the findings required by the HAA and thus giving rise to the HAA's various remedies, including the payment of its attorney fees, Calibr has elected to participate in the appeal process under protest under the assumption the County, through its Board of Supervisors, will

ultimately comply with the law by granting our appeal, thus approving the Project without the need for costly and time-consuming litigation.

The Planning Commission Decision Violates the Housing Accountability Act

The HAA is a housing production statute that seeks "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects . . . . (§ 65589.5(a)(2)(K)). Moreover, the HAA expresses the state's policy that this statute "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L)).

As relevant here, subdivision (j) of the HAA directs that a decision to disapprove or reduce the density of a project that complies with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards" must be based on written findings supported by a preponderance of the evidence that (1) the project would have "a specific, adverse impact upon the public health or safety" AND (2) that there is no feasible method to satisfactorily mitigate or avoid this adverse impact without disapproving the project or requiring that it be built at a lower density. (Gov't Code § 65589.5(j)(1)). The HAA defines a "specific, adverse impact" to mean "a significant, quantifiable, direct, 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." (Gov't Code § 65589.5(j)(1)(A)). If any one of these elements is not met and supported be a preponderance of evidence then the HAA's mandatory disapproval finding cannot be made and a project may not be lawfully disapproved.

Section 65589.5(j) thus requires cities to determine whether a project complies with the applicable, objective general plan, zoning, subdivision, and design standards. The HAA defines the term "objective" to mean "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code § 65589.5(h)(8)). Cities must make this stringent two-part determination based on a "reasonable person" standard. (Gov. Code § 65589.5(f)(4)).

Accordingly, if a project complies with applicable, objective general plan, zoning, subdivision, and design standards in the eyes of a reasonable person, the project cannot be disapproved or conditioned on a lower density unless, based on a preponderance of the evidence in the record, it would have a "specific, adverse impact" upon public health or safety and there is no feasible way to mitigate that impact. If the County's disapproval or conditional approval is challenged in court, the burden is on the County to prove its decision conformed to all the conditions specified in the HAA. (Gov. Code § 65589.6).

The courts have explained that the HAA's findings constitute the "only" grounds for a lawful disapproval of a housing development project. (*North Pacifica, LLC v. City of* Pacifica, 234 F.Supp.2d 1053, 1059-60 (N.D.Cal. 2002), disapproved on other grounds in *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478 (2008); *see also Sequoyah Hills Homeowners Assn. v. City of Oakland*, 23 Cal.App.4th 704, 715-16 (1993)). Moreover, the HAA creates such a "substantial limitation" on the government's discretion to deny a permit that it amounts to a constitutionally protected property interest. (*North Pacifica, LLC v. City of Pacifica*, *supra*, 234 F.Supp.2d at 1059).

There is no possibility that the County can make the HAA's stringent public health and safety findings here and the Planning Commission didn't even try to do so. First, there is no written document in existence as of the date the Project application was deemed complete—and no one has attempted to identify one—against which there could be any showing that the Project would have a significant, quantifiable, direct, AND unavoidable impact upon public health or safety. There is no evidence in the record that the Project will have any of those impacts, much less a preponderance of evidence of all of them based on a written standard in effect as of the date the Project application was deemed complete, nor any evidence to show that there is no feasible way to satisfactorily mitigate or avoid the adverse impact 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.

Furthermore, County Public Works Staff and City of Pleasant Hill Engineering Staff (which include Licensed Civil and Traffic Engineers) have both reviewed this project and have never articulated a concern into the record, (much less determined an actual impact to health and safety) about the concession request (to forgo frontage improvements).

The Planning Commission's finding that the lack of sidewalk, curb, and gutter along the Project frontage would have a specific, adverse impact upon the public health and safety does not come close to the stringent finding required by the HAA.

The Planning Commission's Decision Violates the Constitution

Even if state housing law did not apply to and protect the Project against the sort of speculative decision made by the Planning Commission, contrary to the evidence and without making the finding required by law, basic constitutional principles protect the Project from being denied because it is not fixing existing problems that predate the Project and that would exist even if the Project had never been proposed. As the County surely knows, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) place the burden on the County to establish an "essential nexus" and "rough proportionality" between a permit condition and the adverse public impacts of a proposed project such as this. But there is no evidence in the record—not in the various staff reports for the Project, not in the MND that evaluated the Project's potential environmental

effects, and not in any testimony—that alleges, much less shows that the concerns the Planning Commission relied on to disapprove the Project have any nexus to the Project.

Conclusion

As noted above, while we are appealing the Planning Commission's improper decision to disapprove the Project based on findings it did not and could not make, we must note that we are doing so even though my client could already treat these belated appeal hearings as a disapproval of the Project in violation of the HAA. (Gov. Code § 65589.5(h)(6)). Thus, while my client could immediately choose to resolve this issue in court and obtain its attorney fees and litigation costs with successful litigation there, my client is electing to pursue a more productive and collegial outcome by appealing to the Board. That said, given that we are now well past the PSA's mandatory 60-day decision deadline and the Board's hearing on this appeal will be the fourth of five possible allowed hearings, this will be the final County hearing on this Project.

We are sorry for the need to file this appeal, but we hope it is abundantly clear why we elected to do so and why state housing law requires the Board to grant it. The Planning Commission violated both DBL and the HAA in disapproving the Project and only the Board can fix this untenable error.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW/kli

cc: Andy Byde
Billy Reed