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December 23, 2024

VIA E-MAIL and HAND DELIVERY

Jennifer Cruz, Principal Planner
Department of Conservation and Development
Contra Costa County
30 Muir Road
Martinez, CA 94553
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Jami Morritt, Chief Assistant Clerk of the Board
County Administration Building
1025 Escobar Street
Martinez, CA 94553
Email: Jami.Morritt@cob.cccounty.us

Re: Notice of Appeal
0 Bethel Island Road, Oakley
APN: 032-112-007
County File: #CDSD23-09669 and CDDP23-03040

Dear Ms. Cruz and Ms. Morritt:

We hereby appeal County staff's December 11, 2024 Third Notice of Incomplete Subdivision and Development Plan Applications ("Third Notice") for the 271-unit housing development project proposed on approximately 78 acres in Oakley, where 20% of the units will be deed-restricted to lower income households. We regret the need to exercise our right to appeal this decision by staff, particularly when the decision does nothing to address our detailed explanation of the Permit Streamlining Act ("PSA") regarding this important issue, which fully demonstrates how and why the Formal Application is deemed complete as a matter of law, but it is essential that the County comply with controlling state law by timely processing and approving this project.

This Notice of Appeal will provide a brief overview of the PSA and background facts, follow with an explanation of how the County—through its staff—is violating that law, and explain the legal outcomes under the PSA that have already occurred as a result. We will also briefly explain the legal outcomes that have also now occurred under the Housing Accountability Act ("HAA") as a result of these issues. Finally, we will explain the legal remedies provided in the HAA should the County continue to refuse to consider the Formal Application complete.

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Please note that under Government Code section 65943(c), the County must make a final written determination within 60 days of this Notice of Appeal. If a final written determination is not provided within 60 days, the application shall be deemed complete.

*****

The Permit Streamlining Act Requirements

Enacted in 1977, the PSA (Gov. Code §§ 65920-65964.5) establishes the exclusive procedure for local agencies such as the County to review and process development applications for completeness. And the PSA prescribes the remedy that applies where a local agency has violated the statute's provisions.

In particular, the PSA requires local agencies such as the County to compile an application checklist that shall specify in detail the information that will be required from any applicant for a development project. (Gov. Code § 65940(a)). Copies of that information must be made available to all applicants for development projects (Gov. Code § 65940(b)).

Local agencies must respond, within 30 days after receiving an application for a development project, whether the application is complete and immediately transmit the determination to the applicant for the project. (Gov. Code § 65943(a)). If the application is determined to be incomplete, the agency must provide the applicant with an exhaustive list of items that were not complete. (*Id.*). That list shall be limited to those items *actually required* on the lead agency's submittal requirement checklist. (*Id.*). If the written determination is not made within 30 days after receipt of the application, "the application shall be deemed complete." (*Id.*).

If the application and materials are determined not to be complete, the agency shall provide a process for the applicant to appeal that decision in writing to the governing body or the planning commission, or both. (Gov. Code § 65943(c)). The agency must make a final written determination on the appeal not later than 60 calendar days after receipt of the applicant's written appeal. (*Id.*). If the final written determination on the appeal is not made within that 60-day period, the application and submitted materials shall be deemed complete. (*Id.*).

Background Facts and Law

Our client, Duong Estuary Cove LLC ("Estuary Cove"), submitted a "Preliminary Application" for a "builder's remedy" project pursuant to the provisions of Senate Bill 330 and Government Code section 65941.1 on September 25, 2023, when the County did not yet have a substantially compliant 6th Cycle Housing Element much less one that was certified by the California Department of Housing and Community Development ("HCD"). The Preliminary Application was resubmitted on October 26, 2023, when the County still did not yet have a substantially compliant or certified Housing Element. The County eventually agreed the Preliminary Application was complete, on November 2, 2023. And HCD finally certified the County's Housing Element on January 22, 2024.

Estuary Cove timely submitted a "Formal Application" pursuant to Government Code section 65941.1(d)), the provisions of the Planning and Zoning Laws generally, and in particular Government Code sections 65940, 65941, and

65941.5, on April 19, 2023. The County timely responded to the Formal Application in a May 17, 2024 Notice of Incomplete Subdivision and Development Plan Applications ("First Notice").

As explained further below and in our prior correspondence, all of which is incorporated by reference, the First Notice fails to meet the requirements of the PSA as it does not identify any items actually on the County's application checklist that were not provided with the Formal Application. The only items staff asserted to be incomplete were legislative land use approvals the project does not seek or require[1] and certain other items that will be provided with the processing of the project but that are not items *actually required* on the County's application checklist. Such items are not relevant under the PSA and do not provide a lawful basis for the County to determine that the Formal Application is incomplete.

Despite the insufficiency of the First Notice, Estuary Cove "resubmitted" the Formal Application on August 22, 2024, in an effort to work productively with the County. And on August 28, 2024 we provided a letter to the County explaining in detail the deficiencies in the First Notice and the fact that the Formal Application was already deemed complete under the PSA at the time the County provided the First Notice, because the County did not identify any items actually required on the lead agency's submittal requirement checklist (and that the project was also therefore deemed consistent with the County's land use regulations under the HAA, because the County did not provide a timely and valid consistency determination following the completeness of the Formal Application).

The County provided a Second Notice of Incomplete Subdivision and Development Plan Applications on September 20, 2024 ("Second Notice"), which attempted for the first time to label certain items actually on the checklist incomplete and on that basis continues to assert that the Formal Application is incomplete and that the project is inconsistent with the County's applicable land use regulations. We responded to the Second Notice on November 12, 2024, demonstrating again the errors in the County's First Notice—the only relevant incompleteness notice for purposes of this issue—and that the Formal Application is deemed complete under the PSA and that the Project is deemed consistent with the County's land use regulations under the HAA.

The County provided a Third Notice of Incomplete Subdivision and Development Plan Applications on December 11, 2024 ("Third Notice"), in which the County simply doubles down on its prior positions. To date, the County has done nothing to respond to the substance of our responses to the First Notice—which fails to comply with the PSA because it does not identify a single item actually on the checklist what was not provided when the Formal Application was filed—and to the Second Notice, which cannot rescue the First Notice. The bottom line is that the County did not

[1] As explained further below, local agencies cannot lawfully request applications for discretionary legislative approvals where the project at issue is protected by the builder's remedy.

provide a valid incompleteness letter when it provided the First Notice and the Formal Application is now deemed complete as a matter of law.

The Formal Application is Deemed Complete Under the Permit Streamlining Act

The County was required to make a timely and valid application completeness determination in connection with its First Notice, following the applicant's filing of a Formal Application. While the County's initial determination was timely, it was not valid, for the reasons we have already explained at length. The County attempted to use its Second Notice to rescue the First Notice by asserting inconsistencies it never identified previously, but this is not how the PSA works.

As we have already explained at length, the errors in the First Notice are as follows:

- The First Notice identified an alleged "inconsistency" with the location of certain trees on the project site.

  The County's First Notice thus plainly only addresses an alleged *inconsistency* in the location of trees and does not allege that there is anything based on the Application Submittal Checklist that was *incomplete* much less missing. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to this item.

- The First Notice identifies an alleged inconsistency in the rear yard setback for single-family detached homes and asks for "clarification" about which setback is "correct."

  The County's First Notice thus plainly only addresses an alleged *inconsistency* regarding setbacks and does not allege that there is anything based on the checklist that was *incomplete*. The County did not assert in the First Notice that the application was missing anything regarding setbacks actually required on the Application Submittal Checklist. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to this item.

- The First Notice alleges that certain parking "details" were not provided and asks for dimensions that "comply" with code.

  The County's First Notice thus plainly only addresses certain parking *details* that were allegedly not provided and does not allege that there is anything based on the Application Submittal Checklist that was *incomplete*. Moreover, the Application Submittal Checklist merely requests "dimensioned parking spaces," which were provided on sheet C3.4 in the project application. The County did not assert in the First Notice that the application was missing anything regarding parking details actually required on the Application Submittal Checklist. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to these items.

- The First Notice asked for "clarification" of certain easements shown on sheet C3.4 of the project plans.

  The County's First Notice thus plainly only addresses staff's desire for *clarification* regarding easements that were identified in the project application and does not allege that there is anything based on the checklist that was *incomplete*. Moreover, the Application Submittal Checklist merely requests "easements," which were provided on sheets C1.0, C2.0, C3.3, and C6.0 of the project application. The County did not assert in the First Notice that the application was missing anything regarding easements actually required on the Application Submittal Checklist. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to this item.

- The First Notice asked for confirmation regarding the location of monument signs shown on sheets L2.2, L2.3, and L2.4 of the project plans and reminded the applicant of the need for the signs to conform with the County code.

  The County's First Notice thus plainly only addresses the *location* of the project's signs and provides a reminder the signs need to confirm with code and does not allege that there is anything based on the checklist that was *incomplete*. The First Notice did not assert that the application was missing anything regarding setbacks actually required on the Application Submittal Checklist. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to this item.

- The First Notice stated that the project is "inconsistent" with the density range established on the AL and OIBA General Plan land use designation and that a General Plan amendment application is required and must be blessed by the Board of Supervisors in order for the project to be processed.

  The County's First Notice thus plainly only addresses an alleged *consistency* issue under the Housing Accountability Act, not a *completeness* issue based on the Application Submittal Checklist under the Permit Streamlining Act. Moreover, we note that the California Department of Housing and Community Development has already addressed this issue in its Letter of Support and Technical Assistance for the 125-129 Linden Drive, Beverly Hills project.[2] As HCD correctly concluded:

  > "Under the HAA, the City should not require applicants of projects protected by the Builder's Remedy to seek amendments to the City's general plan or zoning code. Even if such amendments could somehow be required without violating the intent of the HAA, the PSA prohibits the

[2] https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-nov-082224.pdf.

City from using the absence of the GPA/ZC application as a reason to determine a project application is incomplete, if the requirement was not on the submittal requirement checklist."

The Formal Application is not and cannot lawfully be deemed incomplete for not filing an application for approvals the project does not require. This remains a builder's remedy project with vested rights dating to a time when the County's 6th Cycle Housing Element was not in substantial compliance with state housing law, and the builder's remedy provides that a project cannot be disapproved on the basis that it is inconsistent with the agency's zoning ordinance and general plan land use designation.

- The First Notice requested the reasoning for the project's design and attached the "design objectives" requiring "design compatibility" for the surrounding area.

  The County's First Notice does not identify any information actually required on the Application Submittal Checklist that was not provided but merely alleges an *inconsistency* and says nothing regarding anything that could be *incomplete*. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to this item.

- The First Notice identifies certain agency comments regarding inclusionary housing, transportation planning, Delta agriculture, geologic issues, cultural resources, public works issues, and reclamation issues.

  The First Notice does not allege that there is anything actually required on the Application Submittal Checklist that was *incomplete*. While the information the County or other agencies desire will be provided in connection with the processing of the project, none of that information is actually on the County's checklist and thus is not a lawful basis to deem the project application incomplete. Under the Permit Streamlining Act, the project application is thus deemed complete with respect to all of these items.

We have demonstrated repeatedly that the County has failed to make a valid and timely application completeness determination under the controlling requirements of state law—indeed, the County has not identified a single item on its Application Submittal Checklist that was not provided with the Formal Application. Accordingly, the Formal Application is complete as a matter of law and has not and could not have expired.

The Project is Deemed Consistent Under the Housing Accountability Act

The HAA expressly provides that if the local agency such as the County considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy,

ordinance, standard, requirement, or other similar provision of its land use regulations, *it shall provide* the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 units or more. (See Gov. Code § 65589.5(j)(2)(A)). Under the HAA, the burden is expressly on the local agency to explain to the applicant why the agency considers the project inconsistent with its applicable land use regulations. Applicants not have the obligation to attempt to figure out much less intuit why the agency might consider the project inconsistent. Moreover, the HAA also provides that if the local agency fails to provide the required documentation—as is the case here—the housing development project *shall be deemed consistent*, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision. (See Gov. Code § 65589.5(j)(2)(B)).

As noted above and in our prior correspondence, the County has not provided us with anything in writing after the Formal Application was deemed complete—or ever—identifying anything in its land use regulations *that the County thinks the Project is inconsistent with and explaining the County's position why the Project is inconsistent*. While staff have asserted this builder's remedy project requires discretionary, legislative land use approvals—conclusions with which we and HCD strongly disagree—those assertions fall far short of meeting the County's obligation under the HAA *to affirmatively explain to us* why it thinks the project is inconsistent with applicable County regulations. Under the HAA, this is the County's burden, not ours, and the County has not timely fulfilled it.

Thus, while the County continues to assert that the project is not consistent with the General Plan and requires a General Plan amendment application to be processed, this point is moot because the Formal Application is deemed complete and the project is deemed consistent as a matter of law because the County did not make a timely, valid consistency determination after the application was deemed complete. However, even if the application were somehow not deemed consistent because the County claimed in its First Notice that the project does not comply with the density range of the AL and OIBA land use designation, these regulations are not a valid basis to disapprove or refuse to process the project under the builder's remedy, as HCD has already opined.

The HAA Provides Substantial Remedies Where Agencies Take Improper Actions That Effectively Disapprove Projects

The HAA has been amended through Assembly Bill 1893, which takes effect on January 1, 2025, and which the Legislature has provided is declaratory of existing law, to add a new definition of what it means for an agency to unlawfully disapprove a housing development project. (Gov. Code § 65589.5(h)(6)). As revised by

AB 1893, an agency unlawfully disapproves a housing project whenever it fails to cease a course of conduct undertaken for an improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of the proposed housing development project, that effectively disapproves the proposed housing development. We will provide a notice to the County under AB 1893 that details this conduct, which includes determinations that an application for a housing development project is incomplete based on items not actually required on the Application Submittal Checklist. The County will have the burden of establishing that this is not an effective disapproval of the project, and the County will be responsible for Estuary Cove's attorney's fees in the event Estuary Cove is forced to successfully address these issues in court.

Conclusion

The legal consequences here are clear and strict: the project is now deemed complete as a matter of law because County staff did not make a timely and valid completeness determination, as required by the PSA, identifying a single item on the Application Submittal Checklist that was not provided at the time the Formal Application was filed. And the project is now deemed consistent with the City's land use regulations as a matter of law because County staff did not make a timely and valid consistency determination, as required by the HAA, identifying applicable land use regulations and explaining to us why staff thinks the project is inconsistent.

We continue to hope the County will elect to productively work with us to process this housing development project, which is and remains protected by state law. We remain committed to the project and to enforcing all of the rights provided under the law.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW:kli

Attachment: Check for Appeal Fee

cc: John Kopchik, Director
Kevin Weiss