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RECEIVED on 08/28/2024 **CDS23-09669**
By Contra Costa County
Department of Conservation and Development

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August 28, 2024

VIA E-MAIL

Jennifer Cruz
Principal Planner
Department of Conservation and Development
Contra Costa County
30 Muir Road
Martinez, CA 94553
E-Mail: Jennifer.Cruz@dcd.cccounty.us

Re: Response to County's Incompleteness Notice
0 Bethel Island Road, Oakley
APN: 032-112-007
County File: #CDS23-09669 and CDDP23-03040

Dear Ms. Cruz:

The purpose of this letter is to address the County's May 17, 2024 Notice of Incomplete Subdivision and Development Plan Applications 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. The three-page Notice identifies 12 items as the basis for the incompleteness determination and it attaches comments from other County agencies and various provisions of the County ordinance code but it does not identify any items on the actual application checklist that have not already been provided. Instead, the Notice requests various items that are not on the checklist, requests responses to various questions, and requests items that will be provided during the processing of the project, as part of environmental review under CEQA, or that might be appropriate conditions of approval. However, under the controlling provisions of the Permit Streamlining Act (Gov. Code § 65920 *et seq.*; "PSA")—which requires the County's incompleteness determination to be limited to items actually on the checklist—nothing in the Notice is a valid basis to consider the project application complete, and the application was thus deemed complete as a matter of law on May 20, 2024. For similar reasons, the project was also deemed consistent with the County's regulations as a matter of law on July 19, 2024, because the County did not provide a valid consistency determination by that date.

Background Facts and Law

Our client, Duong Estuary Cove, LLC, submitted a "Preliminary Application" pursuant to the provisions of Senate Bill 330 and Government Code section 65941.1

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on September 5, 2023, which the County finally recognized as complete on November 2, 2023. And Duong 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, 2024.

The land use designation for the project site in the County General Plan is Agricultural Lands (AL) and Off-Site Bonus Area (OIBA), which only allows a limited amount of residential development. And the zoning is P-1.

The Project is a Builder’s Remedy project that is protected by the Housing Accountability Act (Gov. Code § 65589.5; “HAA”), 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)).

The Project Application is Deemed Complete

As noted above, Duong filed its Formal Application on April 19. The County timely responded with its Notice on May 17 identifying 12 items it asserts must be provided before the application may be deemed complete and attaching comments from other County agencies and various provisions of the County ordinance code. Critically, however, the Notice does not identify any items in the application checklist that have not already been provided. Instead, the Notice requests various items that are not on the checklist (e.g., Item No. 2 re water supply), requests responses to various questions (e.g., Item No. 6 re parking details), and requests items that will be provided or addressed during the processing of the project (e.g., Item No. 9 re design compatibility), as part of environmental review under CEQA, or that might be appropriate conditions of approval.

The PSA, which applies to every city and county in California, provides that local agencies must respond, within 30 days after receiving an application for a development project such as this, whether the application is complete and immediately transmit the determination to the applicant for the development 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. “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.*)

Here, as you know, the County has a one-page checklist.¹ Duong's Formal Application provided all of the information required in the checklist, as demonstrated in the attached annotated version that identifies the specific locations where the relevant information actually identified in the checklist can be located. While the County's Notice declaring the project application incomplete identifies various items outside the four corners of its checklist, it does not identify any items actually on the checklist. This is inconsistent with the controlling provisions of the PSA and is not a valid basis to consider the application incomplete. Accordingly, the project application is now deemed complete, as of May 19, as a matter of law.

Please note that while the County has requested information outside its checklist, Duong will provide responses to every item in connection with the processing and environmental review of the project.

The Project is Deemed Consistent with the County's Land Use Regulations

The HAA expressly provides that if the local agency 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 or more units. (See Gov. Code § 65589.5(j)(2)(A)). Moreover, the HAA also provides that if the local agency fails to provide the required documentation then 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)).

The County has not provided Duong with anything in writing after the Formal Application was deemed complete on May 19 identifying anything in its land use regulations it thinks the project is inconsistent with and explaining why the project is inconsistent. The legal consequences of this omission are clear and strict: the project is now deemed consistent with the County's land use regulations, as of July 19, as a matter of law.

With respect to two items that are arguably project consistency comments—in particular Item No. 1 re general plan consistency and the housing comments about an inclusionary housing plan—and were provided at the time the County purported to deem the application incomplete, we have the following responses.

¹ See <https://www.contracosta.ca.gov/DocumentCenter/View/61975/Planning-Application-Form-Checklist-Fillable-PDF?bidId=>.

General Plan consistency

As relevant here, subdivision (d)(5) of the HAA prohibits a county that does not have an adopted housing element that is substantially compliant with the Housing Element Law (Gov. Code § 65580 *et seq.*) from disapproving or conditioning in a manner that renders infeasible a housing development project “for very low, low-, or moderate-income households,” even where the project is inconsistent with both the county’s zoning ordinance and general plan land use designation. (Gov. Code § 65589.5(d)(5)). The HAA defines Projects for very low, low-, or moderate-income households to include projects that provide 20 percent of the units for lower-income households. (Gov. Code § 65589.5(h)(3)).²

A county can disapprove such a project only if it makes written findings based on a preponderance of evidence in the record that (1) the city has an adopted, substantially compliant housing element and has met its RHNA requirements; (2) the project would have a specific adverse impact on health or safety that cannot be mitigated without rendering the project unaffordable or infeasible; (3) the denial or conditioning of the project is required to comply with state or federal law; (4) the project site is zoned for agriculture or resource preservation and 50 percent of the surrounding land is being used for agriculture or resource preservation; or (5) the project is inconsistent with both the county’s zoning ordinance and general plan land use designation and the county has an adopted, substantially compliant housing element. There is no evidence to support any of these findings, much less a preponderance of evidence.

Because the County did not have a substantially compliant 6th Regional Housing Needs Assessment (“RHNA”) Cycle Housing Element at the time the Preliminary Application was filed and the project is a housing development project that will provide at least 20 percent of its units for lower-income households, the project is protected by the Builder’s Remedy. Therefore, the County cannot deny or condition approval of the project in a manner that would render it infeasible, notwithstanding any inconsistency of the project with the zoning ordinance or General Plan land use designation of the project site. Nor can the County apply any planning or zoning standards that would deny the project or render it infeasible. In addition, based on the previously submitted Preliminary Application and the timely submittal of the Formal Application concurrently with this letter, the project application is vested under the County’s non-compliant Housing Element status, and the HAA’s Builder’s Remedy provision shall apply to the Project throughout the duration of the entitlement process and for 3.5 years thereafter.³

For the foregoing reasons, the County may not require the project to obtain a General Plan amendment or disapprove the project even if it is not consistent with the AL and OIBA land use designation. As you may know, the state Department of

² Lower income household is defined in Health and Safety Code § 50079.5.

³ See HCD, 3030 Nebraska Avenue, Santa Monica – Letter of Technical Assistance (Oct. 5, 2022), at 2, <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/santa-monica-TA-100522.pdf>.

Housing and Community Development, which has enforcement authority over the HAA, has recently concluded that Builder's Remedy projects such as this need not seek a general plan amendment and that disapproving a project for failing to address an inconsistency is effectively an unlawful disapproval of the project.⁴

Inclusionary Housing Plan

As we addressed in detail in a letter dated April 19, 2024, which the County has never addressed, the County may not rely on any inconsistency between the project and its inclusionary housing ordinance as a lawful basis to disapprove the project. Moreover, for the reasons explained above, the County may not rely on the provisions of the inclusionary housing ordinance to consider the project application complete given that nothing in the County's application checklist requires any information about inclusionary housing. (Gov. Code § 65943(a)). The County may not use an ordinance such as this, where there literally is nothing in its application checklist that requests any information about affordable housing, to treat the project application as incomplete. That said, Duong will negotiate and enter into an appropriate Inclusionary Housing Plan, to ensure the required affordability of the lower-income units, in connection with the County's processing and approval of the project.

We would greatly appreciate the opportunity to discuss these issues and productively resolve them.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

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Attachment: Annotated County Application Checklist

cc: Kevin Weiss

⁴ See HCD, 125-129 Linden Drive, Beverly Hills – Letter of Technical Assistance (June 26, 2024), at 2-3, <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-losta-062624.pdf>.

APPLICATION SUBMITTAL CHECKLIST

SUBMITTAL AUTHORIZATION FORMS

- [Property Owner Authorization Form \(Link\)](#)
- [Important Notice To Applicants and Property Owners \(Link\)](#)

SITE PLANS

- [C2.0](#) Site boundary and topographical survey
- [C3.4 & C6.0](#) Existing/proposed right-of-ways
- [C3.4 & C6.0](#) Existing and proposed building/structures/uses clearly labeled with setbacks
- [C4.0-4.4](#) Conceptual grading and drainage plan
- [C2.0](#) Existing natural features
- [- Pro: C6.0](#) Location and heights of existing and proposed fences & retaining walls
- [C7.0](#) Impervious area (square footage)
- Easements [Ex: C2.0 - Pro: C1.0, C3.4 & C6.0](#)
- Traffic Circulation [C8.0](#)
- Location of light fixtures [C5.0-5.4](#)
- Contiguous off-site features [C3.0-8.0](#)
- Dimensioned parking spaces [C3.4](#)
- Landscaped areas with total area [L2.0-2.5](#)

Tree information [L1.0-1.3 & Arborist Report](#)

- The site (grading and development) plan shall accurately and fully disclose the location, species, tree dripline, and trunk circumference of all trees with a trunk circumference of 20 inches (50.8 cm; approximately 6½ inches in diameter) or greater, measured 4½ feet (1.37 m) above the ground whose tree trunks lie within 50 feet (15 m) of proposed grading, trenching, or other proposed improvements. The site plan shall include any multi-stemmed tree, the sum of whose circumferences measures 40-inches or more, measured 4½ feet from ground level.
- Trees Along Property Lines - Include any qualifying trees whose trunks lie on adjoining property but whose canopy (dripline) extends onto the subject property.
- Numbering of Trees for Identification Purposes - If the proposed development is in proximity to two or more qualifying trees, then each tree shall be assigned a number for identification purposes (e.g., #3, #5, etc.). (Trees whose trunks are more than 50 feet removed from the proposed ground disturbance need be only denoted by the outline of the aggregate tree canopy.)
- Identification of Project Impact on Individual Trees -The site plan shall also specifically and clearly indicate whether individual trees are proposed to be (1) removed, or (2) altered or otherwise affected. The plan shall identify any proposed drainage ditches, sewer or water mains, drainage lines or other utility improvements which would result in trenching. [C5.0-5.4](#)
- Tally of Trees to be Removed - The site plan shall contain a tally of the total number of trees proposed to be removed, and their respective trunk circumference sizes.
- Identification of Designated Heritage Trees Any tree that has been designated by the Board of Supervisors for "heritage" status shall be so labeled on the site plan.

ARCHITECTURAL DRAWINGS

Exterior elevations

- [A35, A40-45](#) All sides of building(s)/structure(s)
- [A9, A39, A49](#) Proposed exterior materials, details, and features (i.e. shutters, planting boxes, window trim, cornices, signs, railings, wood siding, stucco, stone veneer, concrete tile roof, etc.)
- [A29, A38-39](#) Exterior dimensions (height, width, depth) of all proposed improvements. (82-4.214 "Building height" means the vertical distance measured from grade to the top of structure directly above with exceptions noted elsewhere in the code. Height may be measured from finished grade when such grade is below natural grade. Height shall be measured from natural grade when the finished grade is higher than natural grade.)
- [N/A](#) For properties on 10% slope or greater and when the maximum height proposed is within 5 feet of the maximum allowed height, a roof plan with peak elevations should be shown on a grading plan that has natural and finished grades.
- [A47-48](#) Cross section of building(s) with height labeled

Floor plans [A01, A10, A19, A28, A38](#)

- All rooms, hallways and other common areas clearly labeled with their dimensions and use (i.e. bedroom, kitchen, etc.)
- All locations of doorways, stairways and landings, windows, permanent fixtures (sinks, toilets, showers, etc.) and major mechanical equipment (hot water heaters, furnaces, etc.)

SIGNAGE PLANS

Site plan

- [L2.4](#) Table of total signage square footage
- [L2.4](#) Setback to monument signs [Could be inferred from L2.4 but not directly stated](#)

Sign Details

- [L2.4](#) Sign details and dimensions
- Dimensions of proposed letters on signs
- [L2.4](#) One colored elevation

LANDSCAPING

Preliminary landscape plans

- Plant Legend [L2.0-2.5, L5.0-5.1](#)
- Planting Plan [L2.0-2.5, L5.0-5.1](#)
- Trees to remain or be removed [L1.0-1.3 & Arborist Report](#)
- Tree Preservation Information [Arborist Report](#)
- Hardscape features [L2.0-2.5](#)
- Schematic irrigation plan [L3.0-3.4](#)
- [N/A](#) Trash area and landscape screening
- Utility transformer locations [JT-2 thru JT-13](#)